

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER  
ITA No. 980/AHD/2016 (AY 2007-08)  
(Hearing in Virtual Court)

M/s Shree Gurjari Industries Ltd., AM-4, Prsident Plaza, Nr. RTO, Ring Road, Surat-395 002 <b>PAN : ABJFS2664J</b>	Vs	The Deputy Commissioner of Income Tax, Circle-2(1)(2), Room No. 323, Aaykar Bhavan, Majura Gate, Surat
Appellant / assessee		Respondent / Revenue

Assessee by	Shri P.M.Jagasheth, C.A
Revenue by	Shri Deependra Kumar – Sr-DR
Date of hearing	28.10.2021
Date of pronouncement	02.12.2021

**Order under section 254(1) of Income Tax Act**

**PERPAWAN SINGH, JUDICIAL MEMBER:**

1. This appeal by assessee is directed against the order of Id. Commissioner of Income tax (Appeals)-II, Surat dated 03.02.2016 for assessment year (AY) 2007-08. The assessee has raised the following grounds of appeal:-

*“1. On the circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the assessing officer in issuing notice u/s 148 of the Income Tax Act and re-opening the assessment.*

*2. On the facts and in the circumstances of the case as well as law on the subject, the learned Commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in making addition of Rs.1,68,69,977/- on account of alleged unexplained expenditure u/s 69 of the Act, 1961.”*

2. Brief facts of the case are that during the course of proceedings under section 263 for assessment year (AY) 2005-06, it was revealed that the assessee company has made purchases for non-existing parties for the assessment year under consideration (AY 2007-08). On the basis of such

information the AO recorded the reasons for reopening for this assessment year. The AO recorded the following reasons;

*“During the course of proceedings u/s 263 of the I.T.Act, 1961 for the AY 2005-06 on field inquiry, it is found that the assessee-company has made purchases from non-existing parties;’ namely-*

- i) Engineering Corporation*
- ii) Kailash Corporation*
- iii) Abhishek Roadlines*
- iv) Forward Builders & Contractors*

*2. Details of purchases made from the above parties during the A.Y 2007-08 are as under:-*

<i>i) Engineering Corporation</i>	<i>Rs.19,65,900/-</i>
<i>ii) Kailash Corportion</i>	<i>Rs.43,08,329/-</i>
<i>iii) Abhishek Roadlines</i>	<i>Rs.8,25,703/-</i>
<i>iv) Forward Builders &amp; Contractors</i>	<i>Rs.17,70,045/-</i>

*Total Rs.1,68,69,677/-*

*In these circumstances, the transactions made with the above parties are non-genuine. It is failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. Total income of the assessee company which has escaped assessment is to the extent of Rs.1,68,69,977/- .”*

3. Notice under section 148 dated 29.03.2014 was served upon the assessee.

The assessee filed acknowledgment of return of income in response to notice under section 148 of the Act on 01.01.2015. The AO furnished reasons recorded vide his letter dated 07.01.2015, which was served on the assessee on 13.01.2015 and proceeded for reassessment. During re-assessment the assessee was asked to furnish the details of parties i.e. addresses of parties, PAN No., amount of purchases payment, details and outstanding payment. The Assessing Officer recorded that in response to show cause notice no information was furnished by the assessee. The assessee was given one more opportunity to furnish such details. The Assessing Officer recorded that no details were furnished therefore, the

assessee was proceeded *ex parte* and the Assessing Officer made disallowance of entire purchases of Rs.1.68 crores in his order dated 25.02.2015 passed under section 144 r.w.s. 147.

4. On appeal before Ld. CIT(A), the assessee challenged the validity of re-opening under section 147 r.w.s. 148 of the Act as well as disallowance of purchases. The Ld. CIT(A) upheld both the action of Assessing Officer i.e. action in re-opening as well as addition on account of merit. The ld CIT(A) while confirming the validity of re-opening held that the assessee has not filed objection against reopening. The objection is raised for the first time. The assessee failed to full fill his obligation in filing return in time, in response to notice under section 148. On the additions, the ld CIT(A) concluded that during the field enquiry conducted in the proceedings under section 263 for AY 2005-06, wherein it was found that all four parties were non-existent/ untreatable on the address provided by the assessee. The AO made additions on the basis of such finding of field inquiry. The assessee was given opportunity to discharge his onus, but no details were provided by the assessee. Thus, further aggrieved the assessee has filed present appeal before this Tribunal.
5. We have heard the submissions of Ld. Authorized Representative (AR) for the assessee and Ld. Sr. Departmental Representative (DR) and have gone through the orders of authorities below. The Ld. AR of the assessee submits that action under section 263 of the Act was initiated in assessment year 2005-06. The order of Ld. PCIT dated 30.03.2014 was challenged by the

assessee before Tribunal. The order passed by ld PCIT passed under section 263 dated 30.03.2014, has been quashed by Tribunal in ITA No.236/AHD/2014 dated 08.03.2021. The Ld. AR of the assessee submits that order of Tribunal is placed on record. The Ld. AR of the assessee further submits that there is no direction in the order of Ld. PCIT under section 263 of the Act for re-opening of assessment for 2007-08. The Ld. AR of the assessee submits that order under section 263 dated 30.03.2014 for assessment year 2005-06 is also placed on record. As there was no direction while making inquiry in the proceedings under section 263 for AY 2005-06, therefore, the reopening made by the AO is without any authority.

6. It was submitted that reopening of assessment under section 147 was based on the order passed by ld PCIT under section 263, for A.Y. 2005-06, which has been set aside/ quashed by Tribunal, therefore, the reopening which is in question for the year under consideration is also not justified. To support his submissions the ld AR for the assessee relied on the decision of Delhi High Court in CIT Vs International Tractors Ltd. [2017] 84 taxmann.com 132(Delhi).
7. In alternative submissions the ld. AR for the assessee submits that the AO made reopening on the basis of borrowed satisfaction. No independent investigation was made or carried out by the AO, before making reopening. The assessee while filing return under section 139(1) furnished all the details fully and truly. There is no failure on the part of the assessee. The ld AR for the assessee by referring the reasons of reopening submits that the

details of the reasons recorded clearly shows that all information with regards to expenses of purchases from four parties with all details were already available on record. Hence, there was no failure on the part of the assessee to disclose all material facts truly and fully necessary for assessment. As the notice under section 148 was issued after the expiry of four year from the end of relevant assessment year, hence, no action can be taken when there was no failure on the part of assessee. All necessary information was available with the AO, therefore reopening on the same set of facts is not permissible being change of opinion. It is settled law that no reopening is permissible on mere change of opinion.

8. On other alternative submissions the ld AR for the assessee submits that 'reason to believe' for the purpose of section 147 does not mean 'reason to suspect' and there should be something more than mere suspicion for reopening. If the AO did not have sufficient material for forming a bona fide belief that the income of the assessee has escape assessment, the reopening is not valid. To support his all submissions on the validity of reopening, the ld AR for the assessee relied on the following decisions;

- Arun Kumar VS Union of India ( 286 ITR 89 SC),
- Rajath Leasing & Finance Ltd Vs ACIT (1996) 85 taxmann.com 175 (Guj),
- CIT Vs DN Dosani (2006) 197 TAXMAN 13(GUJ),
- ACIT Vs Dhariya Construction Co. (2011) 197 TAXMAN 202-SC,
- Adani Export Vs DCIT (1999) 240 ITR 224 (Guj),
- Kantibhai Dharmshibhai Narola Vs ACIT 125 taxmann.com 348 (Guj),
- PCIT VS Royal Western India Turf Club (2019) 103 taxmann.com 13 Bom,
- Hotel Apollo Vs ITO (1995) 93 TAXMAN 391 Guj,

- CIT Vs Roadmaster Industries of India (2009) 2 taxmann.com 73 (P&H),
- CIT Vs Kelvinator India (2010) TAXMAN 312-SC,
- Shree ChalthanVibhagKhand Vs DCIT (2015) taxmann.com 450(Guj),
- General Motors India (P) ltd Vs DCIT (2014) 46 taxmann.com 399(Guj),
- DCIT Vs Narender Mohan Bagroy (2004) 90 ITD 90 (Patna)(TM).

9. On merit the ld. AR for the assessee submits that the assessee furnished complete details alongwith return of income filed under section 139(1). All the record of expenses of purchases was available with the AO. The AO has not rejected the books of the assessee. No comment was made by the AO on various documentary evidence, which were available before him. No disallowances of purchases can be made without rejecting the books of account. The AO observed that the parties were not available at the given address. No independent investigation was carried out by the A.O. The A.O. solely relied on the alleged report of inspector in the proceedings under section 263 for A.Y. 2005-06. The ld. AR submits that the inspector allegedly visited after a gap 8-10 years, if the parties are not found at the given address, the purchases of assessee cannot be doubted as the parties may have shifted from their business place. There is no allegation of A.O. that the parties from whom the assessee has made purchases were indulging for providing accommodation entry. The ld AR for the assessee further submits that the assessee has declared better gross profit (GP) for the year under consideration. In A.Y. 2005-06 the assessee declared GP @ 4.78%, in A.Y. 2006-07 @ 4.77% and in the year under consideration @ 5.19%.The assessee has filed following documents on record;

- ❖ Copy of order under section 263 dated 30.03.2014 for AY 2005-06,
- ❖ Copy of reasons recorded for reopening under section 147 for AY 2007-08,
- ❖ Copy of notice under section 148 dated 29.03.2014,
- ❖ Confirmation of accounts with bills of the impugned parties for AY 2007-08,
- ❖ Copy of assessment order under section 153C rws 143(3) dated 30.12.2011 for AY 2007-08 and
- ❖ Order of Tribunal for AY 2005-06 in ITA No. 236/AHD/2014 dated 08.03.2021.

10. On the other hand the ld. Sr DR for the revenue supported the order of lower authorities. The Ld. DR for the revenue on the objection of borrowed satisfaction submits that the A.O. while recording the reasons of reopening has clearly recorded that the assessee has not disclosed all facts fully and truly. In the proceedings under section 263 a field enquiry was conducted and none of the parties, from whom the assessee has shown purchases were not found at their addresses. The assessee was provided opportunity to substantiate the purchases. The Ld. DR for the revenue submits that the A.O. has sufficient reason to make a belief that the income of the assessee escape assessment. On merit the Ld. DR submits that entire purchases are liable to be sustained and the appeal of the assessee is liable to be dismissed.

11. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. Ground No. 1 relates to the validity of reopening under section 147/148 of the Act. The AO made reopening under section 147 on the basis field inquiry during the course of

proceedings under section 263 for assessment year (AY) 2005-06, wherein it was revealed that the assessee company has made purchases for non-existing parties. We find that the basis of reopening under section 147 was the order passed by ld. PCIT under section 263 dated 30.03.2014. Admittedly the order passed by ld. PCIT under section 263 dated 30.03.2014 has been quashed by the Tribunal in order dated 08.03.2021 in ITA No.236/AHD/2014.

12. The Hon'ble Delhi High Court in CIT Vs International Tractor Ltd (supra) held the reopening of the assessment under section 147 was only on account of the orders passed by Commissioner under section 263 and on other reasons and the High Court held that there was no justification for Commissioner to have invoked section 263, the reopening under section 147, was not justified.
13. We also find reasonable force in the submissions of the ld. AR for the assessee that while recording the reasons for reopening the AO recorded clearly shows that all information with regards to expenses of purchases was already available on record. We find that the AO recorded the exact aggregate amount of the purchases shown from all the four parties, which clearly established that the assessee has already filed all the details of expenses, which were already on record, therefore, no fresh material has come to the notice of the AO, thus, it was amounts to change of opinion on same evidence available on record. We further find that admittedly notice under section 148 was issued after expiry of four year from the end of

relevant assessment year, therefore the Proviso to section 147 will come into effect. And as per said Proviso, no action can be taken after expiry of four year unless any income chargeable to tax has escape assessment by the reasons on the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. As the assessee has already disclosed all the facts fully and truly all necessary for assessment in the form of expenses of purchases shown purchases. Hence, we are of the view that notice under section 148 is issued on the basis of material available on record on the file of AO, thus, it is also a case of change of opinion, which is not permissible under law and has been held by Hon'ble Apex Court in CIT Vs Kelvinator of India Ltd (supra). In view of the aforesaid factual and legal discussion, we are of the view that the reopening under section 147 and issuance of notice under section 148 is not in accordance with law and the same is set aside, resultantly the assessment order dated 25.02.2015 is quashed. Considering the facts that we have accepted two primary submissions of the Ld. AR for the assessee, therefore discussions on other submissions has become academic. In the result, ground No. 1 of the appeal is allowed.

14. Even on merit, we find that the AO has not rejected the books of the assessee, no comment was made by the AO on various documentary evidence, which were available before him. The ld AR for the assessee further submits that the assessee has declared better gross profit (GP) for the year under consideration @ 5.19%, which is more than the earlier

years. Therefore, we find that the assessee has good case on merit as well. However, considering the facts that we have allowed ground No. 1 and set aside the assessment order, therefore, the adjudication on merit/ ground No.2, has become academic.

15. In the result, the appeal of the assessee is allowed

Order pronounced on 02/12/2021 by placing the result on the Notice Board.

Sd/-  
**(Dr ARJUN LAL SAINI)**  
**ACCOUNTANT MEMBER**

Surat, Dated: 02/12/2021  
*Dkp. Outsourcing P.S*

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

By order

// True Copy //

Assistant Registrar, ITAT, Surat