

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM

आयकरअपीलसं/ I.T.A. No.4722/Mum/2017
(निर्धारणवर्ष / Assessment Year: 2007-08)

M/s Navkar Enterprises Block No. 2A, Jai Hind, Bldg. No. 1, Dr. A.M. Road, Bhuleshwar, Mumbai-400 002	बनाम/ Vs.	Assistant Commissioner of Income Tax, Circle-3, Room No.2, 6 th Flr. B- Wing, Ashar IT Park, Thane (W) Mumbai- 400 604
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :A AFFN6721J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Ms. Ritika Agarwal
Revenue by:	Shri.Mahender Ahuja

सुनवाईकीतारीख / Date of Hearing: 23/11/2022
घोषणाकीतारीख /Date of Pronouncement: 16/12/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the learned Commissioner of Income Tax (Appeals)-2, Thane [hereinafter referred to as "CIT(A)] dated 21/05/2017 for assessment year 2007-08.

2. The grounds of appeal preferred by the assessee are as under:

1. Because, the Id. CIT(A) has erred in upholding the reopening of assessment u/s 148 although the reopening was beyond the prescribed time and mandatory approval u/s. 151 of the Act was not shown to exist.

2. Because, the Id. CIT(A) has erred in upholding the validity of the reassessment order u/s. 148 which has been passed without fulfilling necessary conditions in this regard.

3. Because, the Id. CIT(A) has erred in holding the impugned purchases to be bogus, in spite of voluminous evidences on record simply on the basis that the current addresses of vendors were not provided and the vendors were not produced before the Respondent.

4. Because, the Id. CIT(A) has erred in upholding the validity of the reassessment order ignoring the fact that the statement of third party relied upon by the Respondent stood retracted through affidavit.

5. Because, the Id. CIT(A) has erred in upholding the addition of Rs.37,56,525/ made by the Respondent on the wrongly premise that the quantitative stock details were not provided.

6. Because, the Id. CIT(A) has erred in upholding the addition of Rs.37.56,525/ made by the Respondent by making comparison with notional Income and notional brokerage expenses.

3. At the outset the learned Authorized Representative (AR) of the assessee does not want to press ground no. 1, so, it stands dismissed. Ground No. 2 is against the action of the Assessing Officer (AO) to have reopened the assessment u/s 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") which is a legal issue, which will be decided first.

4. Brief facts of the case is that the assessee had filed return of income for AY 2007-08 on 12/10/2007 showing total income of Rs.6,66,800/-. The AO notes that he received information from the DGIT(Inv.) Mumbai, that assessee has taken

bogus entries (accommodation entry) from Entry Operator Shri Pravin Kumar Jain. Accordingly, he issued notice u/s 148 of the Act on 28/03/2014; and the AO after hearing the assessee was of the opinion that, since, the assessee has proved that he was actually in possession of goods which was purchased and sold, he concluded that assessee might have procured the goods from the Grey Market and must have taken bogus bills from the accommodation entry provider Shri Pravin Kumar Jain and therefore, the AO has made *ad hoc* addition of 12.5% of Rs.3,00,52,199/- which comes to Rs.37,56,525/- (profit embedded in the sales). Aggrieved the assessee preferred an appeal before the learned CIT(A), who was pleased to confirm the action of the AO. Aggrieved by the aforesaid decision of the learned CIT(A), the assessee has filed this appeal before the Tribunal. It has been brought to my notice by the learned Departmental Representative (DR) that in the first round of appeal this Tribunal (SMC) was pleased to dismiss the appeal of the assessee, vide order dated 05/02/2018. Thereafter the assessee had preferred a Miscellaneous Application No.456/MUM/2018 arising out of ITA No.4722/MUM/2017 wherein, the Tribunal vide order dated 18/01/2019 was pleased to recall the order for fresh adjudication. Thus, the appeal of the assessee needs to be adjudicated afresh.

5. Having heard both parties and after perusal of the record, it is noted that the assessee by raising ground no.2 has challenged the action of the AO to have reopened the assessment u/s 147 of the Act, without satisfying the condition precedents ie, The AO ought to have recorded reason to believe escapement of

income. For adjudicating this legal issue let us have a look at the reasons recorded by the AO to reopen the assessment which is reproduced as under:

"The assessee has filed return of Income for AY 2007-08 on 12/10/2007 showing total Income of Rs6,66,800.

A search & seizure action u/s 132 of the IT Act, 1961 was carried out by Investigation wing of Mumbai on 01/10/2013 in the case of Praveen Kumar Jain. The group provided accommodation entries of bogus sales through various benami concerns operated & managed by Praveen Kumar Jain. The entire bogus nature of transactions has also admitted by Praveen Kumar Jain In his statement recorded u/s 132(4) of IT Act, 196.

Based on the documents found during the search & seizure action and statement of Praveen Kumar Jain, Information has been received that Navkar Enterprises, PAN AAFFN6721J, is one of the beneficiary who has got accommodation entry for A.Y 2007-08 from Praveen Kumar Jain. As per Information received, the assessee i.e. Navkar Enterprises, PAN AAFFN6721J, has obtained accommodation entry in the form of bogus sales amounting to Rs3,00,52,199/- during A.Y. 2007-08.

In view of the above I've reason to believe that Income of the assessee for A.Y. 2007-08 to the tune of Rs3,00,52,199/- has escaped assessment the meaning of provisions of Sec 147 of the IT Act, 1961."

6. From a perusal of the aforesaid reasons recorded by the AO justifying the reasons for reopening, it is noted that the AO has taken note of the search operation

carried out by the Investigation Wing of Mumbai on 01/10/2013 in the case of Shri Pravin Kumar Jain. According to the AO the ibid Group **(Shri Pravin Kumar Jain)** was providing accommodation entries of bogus sales through various benami concerns run by him. According to the AO, the entry operator Shri Pravin Kumar Jain has admitted of doing such activities in his statement which was recorded u/s 132 (4) of the Act. According to the AO from the documents/statement of Shri Pravin Kumar Jain, he got information that assessee is one of the beneficiary who has availed accommodation entry from Shri Pravin Kumar Jain in the relevant assessment year i.e, AY 2007-08. Thus, according to the AO as per the information he received, the assessee has obtained accommodation entry in the form of **Bogus Sales** amounting to Rs.3,00,52,199/-. Therefore, according to the AO he has reason to believe that income of the assessee to the tune of Rs.3,00,52,199/- has escaped assessment.

7. On the aforesaid reasons recorded, the AO has reopened the assessment of the assessee. This action of the AO has been challenged by the assessee on the ground that the AO did not had met in the reasons recorded, the essential condition precedent i.e, "*reasons to believe, escapement of income*" which is necessary for usurping the jurisdiction u/s 147 of the Act. The essential jurisdictional fact/law or condition precedent for reopening the assessment of an assessee is that AO should have '*Reason to believe, escapement of income*'. It is settled that '*Reason to believe*', postulates foundation based on information and belief based on reason. It has to be kept in mind that even if there is a foundation based on information, still, there must be reason warrant holding of a belief that

income chargeable to tax has escaped assessment. It has also to be kept in mind that when an AO receives adverse information, it triggers *'Reason to suspect'* and not *'Reason to believe'* which is the requirement of law. And further one should appreciate the fine distinction between *'Right to suspect'* and *'Right to believe'*. And the condition precedent for invoking the jurisdiction of reopening is *'Right to believe'* and not *'Right to suspect'*. When the AO receives an adverse information against an assessee, the AO should make preliminary enquiries and collect material which would enable him to form an opinion that income chargeable to tax has escaped assessment and thereafter record his reason for the reopening.

8. Keeping the aforesaid well settled principle of law for invoking the jurisdiction of reopening of assessment let us examine as to whether the AO has met in the reasons recorded the requirement of law i.e, *"Reasons to believe, escapement of income."* From a perusal of the reasons recorded (supra), it is noted that the AO based on the report from the Investigation Wing, was of the view that the assessee has booked bogus sales of Rs. 3,00,52,199/- with a concern/entity of Shri Pravin Kumar Jain (Entry Operator). On the basis of this information, the AO was of the opinion that Rs.3,00,52,199/- has escaped assessment. However, we note from the assessment order passed pursuant to the reopening itself has accepted that assessee has purchased the goods as well as he made the sale; and therefore, AO was of the opinion that assessee might have purchased goods from the Grey Market and has availed the services of the Shri Pravin Kumar Jain entities for bogus bills. So, he taxed the profit embedded in the turnover of

Rs.3,00,52,199/- at the rate of 12.5%. The observation of the AO is reproduced as under:

"11.1 The explanation offered by the AR of the assessee is carefully considered and perused. However, the explanation is not acceptable. It is seen from details on record that baring the ledger account and cheque payments, no other documents such as delivery challans, lorry receipts, transportation details etc. Were produced during the course of assessment proceeding. Moreover, the fact remains that these parties have admitted that they have not made any sales or purchase transaction. This proves that the purchase shown to have been made by the assessee from these parties are bogus. Since the assessee has provided entries of the said purchase, the only inevitable conclusion to be drawn is that the assessee must have made these purchase from open markets from some parties best known to him.

11.2 Considering the above facts and circumstances and comparative position of trading results, the only fair conclusion that can be reached is that the assessee was a beneficiary of the accommodation bills issued by the party mentioned wherein, there wasn't actual delivery / physical delivery of the goods. An accommodation bill is obtained for introducing unaccounted goods into the accounted stream. Since the sales are claimed to be genuine by the assessee, it is proved that the assessee has actually in possession of goods. This is based on the fooling that there cannot be any sales without purchase. At the same time, it did purchase goods from other suppliers, may be without bills, which is commonly known as Grey market and this be so, the assessee has been benefited by providing margin of grey market."

9. In the light of the aforesaid action of the AO (after reopening) it is noted that the information on the basis of which the AO formed the opinion of escapement of income to the tune of Rs.3,00,52,199 i.e. bogus sales was not correct and instead, the AO after investigation has accepted the purchases as well as sales of goods shown by the assessee in the assessee's book. In the light of this crucial fact, it is discerned that AO's *reasons recorded* for reopening the assessment was based on information from the Investigation Wing, which can at best be termed as '*Reason to suspect*' and not '*Reasons to believe.*' When there was adverse information, the AO ought to have made preliminary enquiries and collected material which could make him form belief that there is in fact escapement of income, which in the facts discussed the AO failed to do. Therefore, I hold that the jurisdictional requirement that is '*Reason to believe, escapement of income*' as occurring in section 147 of the Act has not been met by the AO in the reasons recorded in the instant facts of the case. Therefore, I am inclined to quash the notice issued u/s 148 of the Act itself. Consequently, the reassessment framed also pursuant to the ibid notice also is null in the eyes of law.

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

Order pronounced in the open court on this 16/12/2022.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai;
दिनांक Dated : 16/12/2022.
Mahesh R. Sonavane

प्रतिलिपि अग्रेषितCopy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्तCIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt.Registrar)/
Sr.Private SecretaryITAT, Mumbai