

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

BEFORE SHRI ANIKESH BANERJEE (JUDICIAL MEMBER) AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)

ITA No.3280/Mum/2024 - 2010-11
ITA No.3281/Mum/2024 - 2009-10

Jaiprakash Jindal 3 rd Lane, Darukhana, Mumbai-400 010 PAN: AAAPJ6514A	vs	The Commissioner of Income-tax (Appeals), NFAC./ ITO Ward- 20(2)(1), Mumbai Piramal Chamber, Mumbai
APPELLANT		RESPONDENT

Assessee represented by	Shri C.V. Jain
Department represented by	Shri Rajeshwari Menon SR DR

Date of hearing	10/09/2024
Date of pronouncement	12/09/2024

ORDER

PER BENCH:

Both the appeals filed by the assessee are directed against the separate orders of the Learned National Faceless Appeal Centre (NFAC), Delhi (hereinafter, 'Ld.CIT(A)') passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for the assessment years 2009-10 & 2010-11 both dated 10/05/2024. The impugned orders are emanated from the orders of the Ld. Income-tax Officer 20(2)(1), Mumbai (in short, 'the Ld.AO'), order passed U/s 143(3) r.w.s. 147 of the Act, date of order 16/12/2016 for both the orders.

2. Both the appeals are of the same nature of facts and have common issue, so **ITA No.3281/Mum/2024** for A.Y. 2009-10 is taken as the lead case.

ITA 3281/Mum/2024

2.1 The assessee has raised the following grounds of appeal: -

“1. On the facts, in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) [Ld. CIT(A)] has erred in upholding the re-opening proceedings and re-assessment order without considering the fact that the Learned Assessing Officer (Ld. A.O.) erred in issuing any valid notice u/s 148 of the Income Tax Act for invoking the provisions of sec. 147. Therefore, entire proceedings carried out u/s 147 and order passed u/s 143(3) r.w.s 147 was illegal, invalid and void-abinitio.

2. On the facts, in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the impugned assessment order passed u/s 143(3) r.w.s. 147 without considering the fact that there was no return filed in pursuance of alleged notice issued u/s 148.

3. The Ld. CIT(A) has erred in upholding the disallowance of Rs. 1,48,136/- being 1.6 per cent of the alleged bogus purchases without considering the fact that the Ld. A.O. had made the disallowance without considering the relevant facts on record and without bringing on record any adverse evidence. Therefore, the impugned order is arbitrary and perverse, and the disallowance upheld by the Ld. CIT(A)

4. The appellant therefore prays your honour to be kind enough to:

- i. Admit the appeal and grant stay against the recovery of demand,*
- ii. Set aside the order of A.O.,*
- iii. Delete all illegal additions and disallowances upheld by the CIT(A),*
- iv. Grant justice.*

5. The appellant craves leave to add, amend, alter, delete, change or modify all or any of the above grounds of appeal which are independent & without prejudice to each other.”

3. The brief facts of the case are that in pursuance of notice U/s 148 of the Act and assessment was framed under section 143(3) read with section 147 of the act

with addition amount to Rs.92,58,505/- related to addition of bogus purchases made from M/s Shyam Corporation. The assessee has undertaken a hawala transaction and as per information of the DGIT(Inv), the case was reopened and after a detailed verification, the amount was added back for bogus purchases. The assessee raised the defect in the notice issued under section 148 and filed objection before the Id.AO. But without considering the same, the order was passed. Being aggrieved on the assessment order, the assessee challenged both on the legal and merit before the Id. CIT(A). The Id.CIT(A) upheld the assessment order. Being aggrieved, assessee filed an appeal before us.

4. The Ld.AR filed a written submission which is kept in the record (APB). The Ld.AR first argued the legal issue related to notice under section 148 of the Act. The Ld.AR drew our attention in **APB page 2** where the copy of notice issued to the assessee is annexed. It is apparent from the notice that inadvertently, the notice is issued in the name of "Shri Mukesh Babulal Jain". The notice dated 29/03/2016 was duly challenged before the Id.AO by a letter dated 06/04/2016 annexed in **APB page 3**. Finally, the Id.AO issued the notice under section 143(2) without rectifying the defect or without considering the objection of the assessee. The copy of the notice under section 143(2) dated 29/09/2016 is annexed in APB page 4. Here, the notice under section 148 dated 29/03/2016 is reproduced below:-

Notice under Section 148 of the Income - Tax Act, 1961

(2)

Office of the WARD 20(2)(1), MUMBAI

PAN : AAAPJ6514A

Dated : 29/03/2016

To

SHRI JAIPRAKASH JINDAL
D-1003, LAKE CASTLE,
HTRANANDANI GARDEN, POWAI,
MUMBAI- 400 076

कार्यालय
आयकर अधिकारी, 20 (2) (1)
पुणेरी मजिस्ट्रेट, विराटल चौक, पुणे.
सायबाना, पुणे. मुंबई-40 012.
Office of the
Income Tax Officer, 20 (2) (1)
4th Floor, Virat Chemb. Bldg.,
Lalbagh, Parel, Mumbai-40 012.

Sir/Madam,

Whereas I have reasons to believe that the income of SHRI MUKESH BABULAL JAIN in respect of which you are assessable chargeable to tax for the assessment year 2009-10 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

2. I, therefore, propose to assess/re-assess the income for the said assessment year and I hereby require you to deliver to me within 30 days from the service of this notice, a return in the prescribed form of the income of SHRI MUKESH BABULAL JAIN in respect of which you are assessable for the said assessment year.

3. This notice is being issued after obtaining the necessary satisfaction of the Pr. Commissioner of Income Tax-20, Mumbai



Seal.

(Handwritten Signature)

(Signature of Officer)

Name: मेधा प्रसाद तारे

MEDHA PRASAD TARE

Designation: अधिकारी-20 (2) (1), मुंबई
Officer-20(2)(1), Mumbai

The assessee challenged the issue before the Id. CIT(A). But the Id.CIT(A) passed the order and recorded the observation in para 4.4 which is reproduced as below:-

“4.4. Interestingly, I find that in the regular assessment, for the assessee, u/s. 143(3) for AY 2010-11, exactly same issue arose. In that year, in the regular assessment u/s. 143(3), the AO found that there had been similar bogus purchase from three alleged bogus suppliers for a total sum of Rs. 2,76,12,725/-. The assessee challenged this addition before the CIT(Appeals), who restricted such disallowance to Rs. 4,39,506/-, being 1.6 per cent of the alleged bogus purchase, by holding that, as the AO has not rejected the sale figure of the assessee, there cannot be any sale without its corresponding purchase, in case of a trader. He found that the sum of Rs. 2,76,12,725/- constituted 53 per cent of the total purchase, declared by the assessee for AY 2010-11. The CIT(Appeal) was of the view that the disallowance of 53 percent of the total purchase was unreasonable and restricted the disallowance to the GP Ratio of such bogus purchase and restricted the disallowance to Rs. 4,39,506/-. The Department challenged the order of the CIT(Appeal), but the Hon’ble Tribunal in order, in ITA No. 3202/M/2016, dated 13/10/2017 confirmed the order of the CIT(Appeal) and dismissed the Departmental appeal. It is also seen that against such order of the Tribunal, the Department filed appeal before the High Court at Bombay, u/s. 260A and in ITA No. 2297 of 2018, dated 07/04/2022. The Hon’ble High Court dismissed Departmental appeal. Therefore, the disallowance of 1.6 per cent of the total bogus purchase got confirmed in AY 2010-11. Under the above stated circumstances, I am of the considered view that the reason of reopening, that the assessee had made bogus purchase through accommodation bills, is an accepted fact. However, considering the decision which has reached finality through the order of the Hon’ble High Court, I agree that the entire amount of bogus purchase of Rs. 92,58,505/-, should not be considered as income of the assessee and the disallowance/addition should be restricted to Rs. 1,48,136/-, being 1.6 per cent of such bogus purchase. I need to mention here that the AO should have been more careful in issue of the notice u/s. 148 to the assessee, but do not declare it as a completely invalid notice, considering the facts of the case and hold such mistake in the notice, as a typographical error.”

The Id.AR relied on the order of the co-ordinate bench of ITAT, Mumbai Bench “A” in assessee’s own case where in the assessment year 2010-11, the bogus purchase was duly considered, and it was restricted to 12.5% to 15%. But the Id.AR never argued on the merit. The argument is only focused on the legal issue for defective notice under section 148.

5. The Id.DR vehemently argued and fully relied on the orders of the revenue authorities.

6. We heard the rival submission and considered the documents available in the record. In our considered view, we see that the notice issued to the assessee but the name is mentioned in the name of a different person “Shri Mukesh Babulal Jain”. The assessee denied any relation to this unknown person. The vague reason is mentioned in notice under section 148. The objection was raised by the assessee before the Id. Assessing Officer, but without considering the same, the order was passed U/s 143(3) r.w.s. 147 of the Act. The assessee promptly raised the issue before the Id.CIT(A), but the Id.CIT(A) without considering the same in an unjustified manner passed the impugned appeal order. We relied on the order of Hon’ble **Supreme Court** in the case of **ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC)**.

“The powers of the Income-tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or

close nexus which should be there between the material before the Income-tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material fact was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned judges in the High Court, in our opinion, were not in error in holding that the said material could not have led escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs."

With respectful observation of the apex court that the vague reason should not be accepted.

We respectfully follow the observation of Hon'ble **High Court of Gujarat, Balvantbhai Devabhai Umrigarv. ACIT[2023] 156 taxmann.com 224 (Gujarat).**

Held that

Assistant Commissioner of Income-tax"**4.1** *Inviting the Court's attention to the objections filed by the petitioner, especially objection No. 3, Mr. Shah, learned counsel, would submit that there was infact no material available and there was justifiable reason to indicate on the basis of the long term capital gain statement, copies of the documents of the land in question, copies of the ledger account of Bhumi Corporation etc., to suggest that the loan was advanced to M/s. Bhumi Corporation and that the transaction was genuine. He would also invite the Court's attention to the Statement of Accounts to indicate the worth of the petitioner.*

5. *Mr. Nikunt Raval, learned counsel appearing for Mrs. Kalpana Raval, learned counsel for the respondent - revenue, would vehemently oppose the petition and justify the fact that there were enough reasons available to suggest that there was no sufficient evidence to prove the genuineness of the transaction.*

6. *Having considered the submissions made by the learned counsels appearing for the respective parties and having considered the objections so raised by the petitioner and which have been set out herein, and in light of the decision of the Division Bench of this Court in the case of Jayesh Govindbhai Balar v. ITO [2016] 71 taxmann.com 221/240 Taxman 703, rendered in Special Civil Application No. 994 of 2016, in absence of any evidence and fresh material on*

record, we find that the reasons indicated by the author of the notice are vague and presumptuous. On this ground alone, the impugned notice is quashed and set aside. The petition is allowed, accordingly. Rule is made absolute.

The Id. AO had issued notice under section 148 mentioning the wrong recording reasons, same was not a mere case of clerical error but a case wherein substantial condition for valid issue of reopening notice had not been fulfilled and such a defect could not be cured by invoking provisions of section 292BB of the Act. Accordingly, the impugned assessment order itself is dismissed.

We set aside the impugned appeal order and the appeal of the assessee succeeds. As the legal issue is adjudicated in favour of the assessee so the ground related to merit of the case remains only for academic purposes.

Accordingly, ITA No.3280/Mum/2024 is decided in favour of the assessee which is *mutatis mutandis* applicable to ITA No.3281/Mum/2024 and followed accordingly.

5. In the result, appeals of the assessee bearing **ITA Nos.3280 & 3281 /Mum/2024** are allowed.

Pronounced in the open court on 12th September 2024.

Sd/-

sd/-

(GAGAN GOYAL)	(ANIKESH BANERJEE)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 12 September, 2024
Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar), **ITAT, Mumbai**