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

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA No.684/Mum/2025
(Assessment year : 2012-13)

ACIT-19(1), Mumbai 506, 5th Floor, Piramal Chambers, Parel, Mumbai-400 012	**vs**	**M Nalin & Co** 805,8th Floor, Prasad Chambers, Tata Road No.02, Opera House Mumbai-400 004 **PAN: AAAFM3223H**
APPELLANT		**RESPONDENT**

C.O. No.74/Mum/2025
(Arising out of ITA No.684/Mum/2025)
(Assessment year: 2012-13)

M Nalin & Co 805,8th Floor, Prasad Chambers, Tata Road No.02, Opera House Mumbai-400 004 **PAN : AAAFM3223H**	**vs**	**ACIT-19(1), Mumbai** 506, 5th Floor, Piramal Chambers, Parel, Mumbai-400 012
CROSS OBJECTOR		**RESPONDENT**

Assessee by	:	Shri Dharan Gandhi
Respondent by	:	Shri. R.R Makwana, Addl.CIT
Date of hearing	:	26/03/2025
Date of pronouncement	:	28/03/2025

O R D E R

Per Anikesh Banerjee (JM):

Instant appeal by the revenue and the cross objection by the assessee were filed against the order of the Learned Commissioner of Income-tax (Appeals)-51, Mumbai [for brevity the "Ld. CIT(A)"], order passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), date of order 26-11-2024 for A.Y. 2012-13. The impugned orderis emanatedfrom the order of the Learned Assistant Commissioner of Income-tax- 19(3), Mumbai (for brevity the "Ld. AO"), passed under section 143(3) read with section 147 of the Act, date of order 15/12/2019.

2. Brief facts of the case are that the assessee filed its return of income on 20/09/2012, declaring a total income of Rs. 63,13,543/-. The return was processed under Section 143(1) of the Act. Subsequently, information was received from the Investigation Wing, Mumbai, regarding a search and survey action conducted on 03/10/2013 in the case of the Bhanwarlal Jain Group. The investigation led to the collection of substantial evidence and findings, conclusively establishing that the said group, through a network of benami concerns operated by it, was engaged in providing accommodation entries in the form of bogus purchases, unsecured loans, and advances to various beneficiaries. Pursuant to necessary inquiries and verification of the assessee's records for the relevant assessment year, it was found that the assessee had received accommodation bills from the following entities:

Sr. No.	Name of the Hawala Parties	Bill Amount (Rs.)
1	Kothari & Co.	1,33,78,106/-
2	Surya Diam	1,20,42,926/-
	Total	2,54,21,032/-

In view of the above findings, the case was reopened under Section 147 of the Act, with prior approval from the Ld. Principal Commissioner of Income Tax-19 (PCIT), Mumbai, and a notice under Section 148 was issued to the assessee on 15/03/2019. In response, the assessee duly attended proceedings, furnished the requisite details, and participated in discussions. The reasons for reopening the assessment were duly communicated to the assessee, who filed objections challenging the reopening. These objections were considered, rebutted, and disposed of vide order dated 08/11/2019.

During the reassessment proceedings, multiple notices under Sections 143(2) and 142(1) of the Act were issued, to which the assessee submitted responses and supporting documents from time to time. The Ld. AO extensively deliberated on the modus operandi prevalent in the diamond industry for issuance of fake bills, as detailed in paragraphs 5 to 5.3.4 of the assessment order. Based on these findings, during the course of assessment proceedings, the AO issued a show cause notice dated 31/10/2019, requiring the assessee to explain why the impugned transactions should not be treated as bogus. In response, the assessee submitted a reply vide letter dated 05/11/2019, which was duly considered but found unsatisfactory for reasons set forth in paragraphs 6.1 to 6.5 of the assessment order.

Considering the factual findings as discussed above the Ld. AO concluded that the assessee's books of accounts were manipulated and unreliable. Accordingly, the claim of the assessee was rejected, and the impugned purchases amounting to Rs.2,54,21,032/- were treated as entirely bogus, leading to an addition to the net profit declared by the assessee. Aggrieved by the assessment order, the assessee filed an appeal before the CIT(A). The Ld. CIT(A) partly allowed the appeal by restricting the addition to Gross Profit (GP) at 3% on the alleged purchases, which amounted to Rs. 7,62,631/-.

Dissatisfied with the relief granted by the Ld. CIT(A), the revenue has preferred an appeal before the Tribunal, whereas the assessee has filed a cross-objection, challenging the legal validity of the reassessment proceedings before the Tribunal.

3. The Ld.AR argued and filed a paper book containing pages 1 to 341. The Ld.AR first initiated argument related to Cross Objection and the Ld.AR has taken the legal grounds, by challenging the jurisdiction for issuance of notice under section 148 of the Act. The notice under section 148 was issued and the assessee asked for recorded reasons, which were duly provided to the assessee. The said reasons are annexed in APB pages 5 & 6, which is reproduced as below:-

> *"Subject: Reg:* ***REASONS FOR RE-OPENING ASSESSMENT FOR AY 2012-13 IN YOUR CASE***
>
> *1. In this case, the assessee has not filed its return of income for A.Y. 2012-13.*
> *2. Information was received that a Search & seizure action has been carried out by the DGIT (Inv.), Mumbai in the case of Shri Bhanwarlal Jain and their Group Concerns. During the course of search/survey action, it was revealed that these group concerns were merely providing accommodation entries through various*

benami concerns operated and managed by them. It was also found that these concerns are indulged into fraudulent transactions of issuing accommodation/hawala entries which purportedly shows transaction of purchase and sale of materials and bogus unsecured loans and advances.
3. On the basis of information received and also on perusal of the records of the assesse, it is noticed that the above mentioned assesse has availed accommodation entries from the said Group Concerns during the year under consideration.

4. Details of the hawala entities from whom the assessee has obtained accommodation entries for the year under consideration are given as under: -

Sr.No.	Name of the hawala entities	PAN	Amount involved
1	Kothari & Co.	ABQPK7967H	13378106
2.	Surya Diam	ABMFS0062K	12042926

5. Shri Bhanwarlal Jain in his statement recorded on oath has accepted that he and his group concerns are indulged in providing accommodation entries to various beneficiaries.

6. In view of the facts narrated in aforesaid paragraphs, it is opined that the assessee has obtained accommodation entries during the year. Thus, after applying my mind I have reason to believe that the income of the assessee chargeable to tax for the A.Y. 2012-13 amounting to Rs. 2,54,21,032/- or any other income chargeable to tax which comes to my notice subsequently in the course of proceedings for re-assessment has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts in the return of income, in terms of provisions of section 147 of the Income Tax Act."

7. In this case, return of income was not filed for the year under consideration and no scrutiny assessment u/s 143(3) of the Act was made. Accordingly, in this case, the only requirement to initiate proceedings u/s 147 is reason to believe as mentioned above. It is pertinent to mention here that in this case the assessee has chosen not to file return of income for the year under consideration although the total income of the assessee had exceeded the maximum amount which is not chargeable to tax as discussed in above paragraphs and the assessee was assessable under the Act. In view of the above, provisions of clause (a) of

explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

8. In this case more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction from the Pr. CIT-19, Mumbai to issue notice u/s 148 of the I.T. Act, 1961 is hereby sought as per the provisions of section 151 of the Act."

The Ld.AR submitted that the Ld.AO observed in the recorded reasons that the assessee is a non-filer of income-tax return and in several points, the Ld.AO has taken note that assessee has not filed the return of income. But the Ld.AO has erred in observing the fact related to the return status of the assessee. The Ld.AR invited our attention in APB page 61 where the assesee annexed the copy of ITRwhich was filed to department on 29/09/2012. The Ld.AR challenged the ground related to wrong observation of the Ld. AO related issuance notice under section 147 for status on filing of return. It is argued that wrong observation during recording of reason is vitiated the entire proceeding U/s 148 of the Act.

4. The Ld.AR respectfully relied on the order of Hon'ble Gujarat High Court in the case of **Sagar Enterprises vs ACIT (2002) 124 Taxman 641 (Guj)**. The relevant observations in paras 4 to 6 are reproduced below:-

"*4. On going through the entire reasons recorded, it can be seen that in the penultimate paragraph, the respondent has further recorded as under:*

"Further, the assessee was required to file the return of the income for assessment year 1991-92 which the assessee has failed. Moreover, it was the duty of the assessee to declare this transaction and to file the return of income for assessment year 1991-92. The assessee has failed on both these counts. Therefore, the escapement of assessment of income is solely attributable to the assessee."

Therefore, it is apparent that the factor of non-filing of the return for the assessment year 1991-92 has overbearingly weighed with the respondent for arriving at the satisfaction about the failure on the part of the assessee and escapement of assessment of income. On the basis of the same, even for the sake of argument, if the contention raised by Mr. Joshi is taken into consideration, the settled legal position is that in such circumstances, it would not be possible to say with certainty as to which factor would have weighed with the officer concerned and once it is shown that an irrelevant fact has been taken into consideration, to what extent the decision is vitiated would be difficult to say. On this count alone, the petition requires to be accepted.

5. However, there is one more aspect of the matter which requires to be taken into consideration. In the affidavit-in-reply, it is the say of the respondent himself that the said payment which is stated to be undisclosed income relevant for the assessment year 1991-92 could have been made during the financial year 1990-91 relevant to the assessment year 1991-92 and hence to cover up that probability, protective addition was made in the assessment year 1992-93". Thereafter, in the affidavit-in-reply, the respondent has further stated thus:

> *"Hence, in the relevant case, addition of Rs. 17,98,500 was made in the assessment year 1992-93 on protective basis and substantial addition was required to be made in the assessment year 1991-92 and for that reopening under section 147 of the IT Act was initiated after recording reasons which are annexed hereto and marked Annexure 1".*

6. From the facts that have come on record, protective assessment for the assessment year 1992-93 was carried in appeal by the assessee and on the assessee succeeding before the Commissioner (Appeals), the revenue has filed second appeal before the Tribunal which is stated to be pending. It is pertinent to note that the first appellate authority decided the appeal for the assessment year 1992-93 on 26-1-1996 (sic) and the reasons have been recorded thereafter on 18-8-1997.

Therefore, taking into consideration the totality of the circumstances and the facts which have come on record, it is apparent that the respondent himself is not sure as to the year of taxability and whether the said item requires to be taxed in the assessment year 1991-92 or the assessment year 1992-93. In such a situation, it is not possible to agree with the stand of the revenue that any income could be stated to have escaped the assessment for the assessment year 1991-92 as a consequence of any failure or omission on the part of the assessee.

The petition is, therefore, allowed. The impugned notice dated 3-10-1997 (Annexure R) is quashed and set aside. Rule is made absolute with no order as to costs."

5. The Ld.AR respectfully, relied on the order of Hon'ble Gujarat High Court in the case of **Vijay Harishchandra Patel vs. ITO (2018) 400 ITR 167 (Guj)**. The observations of the Hon'ble Court is reproduced as below:-

"10. As is apparent on a plain reading of the reasons recorded, the very basis for reopening the assessment is that the petitioner had not filed any return of income disclosing such sale of the immovable property valued at Rs. 40,00,000. The record of the case shows that earlier, pursuant to a notice under s. 148 of the Act, the petitioner had, in fact, filed return of income disclosing the sale of such immovable property, and the AO after duly applying his mind to the issue had accepted the return of income. Considering the fact that a returnof income had been filed disclosing sale of the immovable property, the very foundation on which the reopening is based in the reasons recorded by the AO for reopening the assessment, collapses. Therefore, on the reasons recorded, the AO could not have formed the belief that income had escaped assessment, inasmuch as such belief had been formed on a factually incorrect premise. It is settled legal position, that the reopening of the assessment has to be maintainable on the reasons recorded for reopening the same, and that such reasons cannot be substituted. In the facts of the present case, when the original ground for reopening the assessment does not survive, the AO seeks to proceed further with the assessment on totally different grounds, which is impermissible in law. Moreover, what the AO now seeks to do is to sit in judgment over the assessment framed by his predecessor AO, which again, is not permissible in law.

11. In the light of the fact that very basis for reopening no longer survives, the assumption of jurisdiction under s. 147 of the Act by the AO by issuing notice under s. 148 of the Act is without authority of law and cannot be sustained."

5. The Ld.DR supported the impugned assessment order and prayed for upholding the addition made by the Ld.AO.

6. We have heard the rival submissions and examined the documents on record. It is observed that the Ld. AO, in the recorded reasons, noted that the assessee is a non-filer of the income tax return. Consequently, a notice under Section 148 of the Act was issued on 15/03/2019, which is beyond four years from the impugned assessment year. However, the Ld. AO's observation regarding the assessee's filing status is factually incorrect.A careful review of the recorded reasons reveals that the Ld. AO could not have formed a valid belief that income had escaped assessment, as such belief was based on an erroneous factual premise. The Ld. AO's belief does not align with the actual facts of the case, as the assessee had duly filed a return under Section 139 of the Act on 29/09/2012. Furthermore, while framing the assessment order, the Ld. AO has, in fact, acknowledged that the assessee had filed its income tax return. This contradiction between the recorded reasons and the assessment order creates a material inconsistency in the Ld. AO's findings.

Additionally, the issuance of notice under Section 148 beyond four years for the relevant assessment year raises a significant legal distinction between cases where such notice is issued within four years and those where it is issued beyond the prescribed time limit. The recorded reasons incorrectly imply that the assessee had not filed a return, which materially impacts the validity of the reassessment proceedings.In light of the Hon'ble Gujarat High Court's decisions in **Vijay Harishchandra Patel** (supra) and **Sagar Enterprises**(supra), we hold that the Ld. AO's defective observations render the assessment order void ab initio and,

therefore, liable to be quashed. The Ld. DR unable to refute the issue by placing any contrary judgment. We adhere to the same reasoning and accordingly, the recorded reasons themselves are vitiated.

7. Since the legal grounds of the appeal have been decided in favor of the assessee, the factual aspects of the case remain relevant only for academic discussion.

8. In the result, the assessee's cross objection **No.74/Mum/2025** is allowed and revenue's appeal in **ITA No.684/Mum/2025** is dismissed.

Order pronounced in the open court on 28th day of March 2025.

Sd/- sd/-

(B.R. BASKARAN) (ANIKESH BANERJEE)
ACCOUNTANT MEMBER JUDICIAL MEMBER
Mumbai,दिनांक/Dated: 28/03/2025
Pavanan

Copy of the Order forwarded to:

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

BY ORDER,

//True Copy//

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