

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6093/Del/2010
Assessment Year: 2002-03

And

ITA No.4304/Del./2011
Assessment Year: 2003-04

| | | |
|--|------------|-----------------------------------|
| M/s. Mohan Clothing Co. Pvt. Ltd, 2E/22, Jhandewalan Extn., New Delhi | Vs. | ACIT, Circle-5(1) New Delhi |
| PAN :AAACM1374L | | |
| (Appellant) | | (Respondent) |

| | |
|---------------|--|
| Appellant by | Shri K. Sampath, Adv. Shri Raja Kumar, Adv. |
| Respondent by | Ms. Rakhi Vimal, Sr. DR |

| | |
|-----------------------|------------|
| Date of hearing | 21.01.2020 |
| Date of pronouncement | 17.03.2020 |

ORDER

PER O.P. KANT, AM:

Out of the above two appeals, the appeal bearing ITA No. 6093/Del./2010 for assessment year 2002-03 has arisen due to remission back by the Hon'ble Delhi High Court vide decision dated 29/08/2012 for deciding on merit. The appeal bearing ITA No. 4304/Del./2011 for assessment year 2003-04 has been preferred by the assessee against the order dated 09/08/2011

passed by the Learned CIT(Appeals)-VIII, New Delhi [in short 'the Ld. CIT(A)']. In both these appeals of same assessee, identical issues are involved, therefore, both were heard together and disposed off by the of this consolidated order for convenience.

ITA No.6093/Del/2010
Assessment Year: 2002-03

2. First we take up the appeal of the assessee bearing ITA No. ITA No.6093/Del./2010 for assessment year 2002-03. The grounds raised by the assessee are reproduced as under:

"That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming the following actions of the Assessing Officer:-

(i) initiating proceedings u/s 147 of the Income Tax Act and completing the assessment u/s 147/143(3) of the Act on income of Rs.43,68,472/-;

(ii) making an addition of Rs.38,99,527/- on account of alleged undisclosed purchase on surmises and conjectures; and

(iii) making an addition of Rs.38,995/- as unexplained expenditure allegedly by way of commission paid even though there was no material in support of such allegations.

2.1 This appeal was earlier decided by the Tribunal vide order dated 14/10/2011 wherein the first ground of appeal was decided in favour of the assessee and it was held that issuance of notice u/s 148 and the communication and furnishing of the reasons would go hand-in-hand. It was further held that the reasons were to be supplied to the assessee before the expiry of the period of the six years. The Tribunal quashed the reassessment on the ground that reasons were not supplied before the expiry of the

six years from the end of the relevant assessment year. The Tribunal did not adjudicate the ground Nos. (ii) & (iii) of the appeal. On further appeal by the Revenue, the Hon'ble Delhi High Court vide decision dated 29/08/2012, after considering various precedents on the issue in dispute, set aside the order of the Tribunal and remanded the matter back to the Tribunal for deciding on merit, observing as under:

"7. This Court has considered the arguments of the parties. The decisions cited by the learned counsel for the revenue are exactly on the issue that arises in this case. The relevant provisions to the extent they are material, are reproduced below:

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

**

"148. Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period...

***"

149 (1) No notice under section 148 shall be issued for the relevant assessment year,--

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the

income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

The Supreme Court emphasized the need to issue notice, within the prescribed period, in R.K. Upadhyaya v. Shanabhai P. Patel [1987] 166 ITR 163 (SC), in the following terms:

"Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitations, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of Section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly, the notice was issued within the prescribed period of limitation as March 31, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction in the Income-tax Officer to deal with the matter but it is a condition precedent to making of the order of assessment. The High Court in our opinion lost sight of the distinction and under a wrong basis felt bound by the judgment in [1964]53ITR100(SC)."

In G.K.N. Driveshafts (supra), it was held that:

"[W]e clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order."

A.G.Holdings (supra) held that:

"There is no requirement in Section 147 or Section 148 or Section 149 ITA 317/2012 Page 5 that the reasons recorded should also accompany the notice issued under Section 148. The requirement in Section 149(1) is only that the notice under Section 148 shall be issued. There is no requirement that it should also be served on the assessee before the period of limitation. There is also no requirement in Section 148(2) that the reasons recorded shall be served along with

the notice of reopening the assessment. The requirement, which is mandatory, is only that before issuing the notice to reopen the assessment, the Assessing Officer shall record his reasons for doing so. After the decision of the Supreme Court in GKN Driveshafts (India) Ltd. (supra) the Assessing Officer is duty bound to supply the reasons recorded for reopening the assessment to the assessee, after the assessee files the return in response to the notice issued under Section 148 and on his making a request to the Assessing Officer to that effect."

8. *The decisions cited above point out the fallacy in the impugned order. R.K. Upadhyaya clarifies that serving of the notice is a pre-condition to making the assessment order under section 148. It is not the service of notice upon the assessee that confers jurisdiction in the Assessing Officer to reopen assessment; instead, his jurisdiction is derived from the conditions specified in section 147, viz. the existence of reasons to believe that income has escaped assessment. Thus, since the notice was issued within the six year limit prescribed under Section 149, i.e., on 27.3.2009, there is no infirmity with the assumption of jurisdiction by the AO even though the service of the notice was after the expiry of the six year period.*

9. *Secondly, A.G. Holdings, a decision of an earlier Division Bench of this Court, elucidates that there is no requirement under the Act, or under even the judicially laid down procedure to furnish the assessee with the "reasons to believe" on the basis of which reassessment proceedings under section 147 are intimated. The contentions of the assessee, in this regard, have no merit and are thus rejected. The decision in Haryana Acrylic (supra), ITA 317/2012 Page 6 being consistent with that in G.K.N. Driveshafts (supra), merely held that when reasons are sought, they should be supplied within reasonable time. In Haryana Acrylic the reasons were supplied more than three and a half years after they were sought. In the present case, however, the assessee filed his response to the notice under Section 148 on 10.4.2009. The record further reveals that the reasons recorded for reopening were made available to the assessee company on 31.9.2009. The reassessment order was made on 15.12.2009, and it is clear from the same that the assessee had adequate notice of the "reasons recorded", and had presented objections against it. It is clear that the opportunity that was conceived in G.K.N. Driveshafts to be given to assessee before reassessment was satisfactorily accorded to the assessee in the present case. Hence, there was no shortcomings in the reassessment proceedings.*

10. *For the above reasons this Court is of the opinion that the Tribunal's order cannot be sustained. The same is accordingly set*

aside. The matter is remanded back to the Tribunal, which shall consider assessee's appeal on its merits and decide in accordance with law."

2.2 In view of the above decision of the Hon'ble Delhi High Court, we are required to adjudicate the ground No. (ii) and (iii) of the appeal only.

3. In ground No. 2, the assessee has challenged addition of ₹ 38,99,527/- made by the Assessing Officer on account of undisclosed purchases which has been confirmed by the Ld. CIT(A). The ground No. 3 is in relation to addition of ₹ 38,995/- as unexplained expenditure by way of commission paid for arranging the accommodation entries bills of purchase amounting to ₹ 38,99,527/-.

3.1 The briefly stated facts qua the issue in dispute are that the Assessing Officer received information from the Additional Commissioner of Income tax, Range-14, Mumbai. As per the information, the assessee had obtained accommodation purchase bills of ₹ 38,99 527/- from three parties, namely, Shri Rakesh Kumar M Gupta, Prop. of M/s. Manoj Mills (Rs.22,11,176/-); Smt Hema R Gupta Prop. of M/s Aastha Silk Industries (Rs.5,00,013/-) and Shri Mohit Gupta Prop. of M/s. Shree Ram sales and synthetics (Rs. 11,88,338/-), who were running their activities of issuing accommodation entries bills from the premises of shop No. 4, Ram Gally, Pankaj Market ,Champa Gally X-Lane, Kalba Devi, Mumbai-400002. Sh. Rakesh Kumar Gupta, who was responsible for managing and controlling all the aforesaid concerns, in his statement recorded on oath admitted that he was engaged in the activity of providing accommodation

entries bills for the past nine years and earning commission at the rate of 1% on amount of sale bills issued. He admitted the *modus operandi* of issuing sale bills on the requirement of the parties after receipt of cheque for the amount as per the bills, which was deposited in the bank account and same amount of cash was returned to the party concerned after reducing his commission charges. He admitted that to correlate the sales, the purchase bills were prepared by himself by getting the bill book printed in the name of the various firms. During the course of the assessment proceeding the assessee was asked to justify the above referred purchases of ₹ 38.99 lakhs from the concerned parties. The assessee explained that these purchases were genuine in view of the copy of the bills, goods received notes (GRN), orders placed on the brokers for supply of goods, payments made by account payee cheque. The assessee further submitted that during the course of Income-tax survey at the premises of the assessee on 03/12/2002, unexplained stock of ₹ 1.36 crore was found and the assessee already paid advance tax of Rs. 50 lakhs against that additional stock and thus no addition should be made on account of unexplained or bogus purchases.

3.2 Above contention of the assessee was not accepted by the Assessing Officer mainly on the ground that the goods were allegedly purchased from the above three parties at Mumbai, but the assessee failed to file any evidence and proof of transportation of those goods from Mumbai to Gorgon, where the assessee's factory is located and also failed to file evidence of transport expenses incurred against those purchases. The Assessing Officer noted that the assessee had filed copy of 17 sales bills of the

parties but in none of the bills mode of transport, LR number, Packing challan number, name of the agent, document to which sales made etc. had been mentioned. He also observed that bill number was also not printed and number was written in hand. The Assessing Officer asked the assessee to file confirmation of its account from the above three parties, however the assessee failed to file said confirmation. In view of above facts, the learned Assessing Officer held the purchase of ₹ 38.99 lakhs as unexplained and also added commission of Rs.38,995/- at the rate of the 1% of unexplained purchases for getting the accommodation entries bills from Sri Rakesh Kumar Gupta.

3.4 During first appellate proceedings, the assessee was also provided copy of statement of Shri Rakesh Kumar Gupta. Before the Ld. CIT(A) also, the assessee failed to produce any documentary evidence in support of the transfer of goods from Mumbai to Gurgaon, loading and unloading expenses etc. After considering the arguments of the learned Counsel of the assessee, the Ld. CIT(A) upheld the addition in dispute observing as under:

“4.3 Further, in the course of appellate proceedings, the learned counsel for the appellant was required to produce the necessary records and prove the payment of freight, cartage and loading and unloading expenses, if any, incurred by the appellant in connection with the purchases allegedly made from the aforesaid concerns controlled by Sh. Rakesh Kumar Gupta. However, the ld. counsel has fairly conceded that it was not possible to correlate any such expenditure with specific purchases. Thus, there is no independent proof which may support the purchases from the aforesaid concerns.

As said earlier, the accommodation purchase bills are normally obtained by an assessee either to utilize them for undisclosed manufacturing/production or inflate the cost of production. Therefore, in the course of appellate proceedings, the appellant was required to submit a note on the manufacturing process, specifically

explaining the stages where shortages/leakages/wastages take place. However, on a careful examination of the note submitted by the appellant company it was found that there was no systematic/scientific method to record the aforesaid items of shortages nor there was any plausible explanation for such shortages. The Id. Counsel as well as Sh. Nikhil Mohan, the director could not give any specific reply rather a vague and indirect and unspecific explanation was given by them to the effect that in some cases shortage is on account of defective raw material received from the suppliers or the shrinkages and defects pointed out by the job workers. It was also explained that defective pieces and cuttings etc are disposed of in bulk/ by holding local sales etc. Therefore, in my view, the appellant is not properly recording the details of production activities, perhaps, deliberately, and the same is providing required space to adjust the accounts by way of obtaining accommodation purchase bills.

4.4 In view of the aforesaid discussion, I hold that the AO was fully justified in bringing to tax the amounts of Rs 3899527 and Rs 38995 representing value of accommodation purchase bills and payment of commission thereon respectively. Accordingly, both the additions are being sustained.”

3.5 Before us, the learned Counsel of the assessee has filed a paper-book containing pages 1 to 34 and relied on the submission made before the lower authorities. The learned Counsel has submitted that addition has been sustained merely on the statement of the third-party and no other corroborative evidence has been found to support the contention of the third-party.

3.6 On the contrary, the Learned DR relied on the order of the lower authorities and submitted that the assessee has neither filed any confirmation from third parties in support of the alleged purchases nor filed any proof of transport of the goods from Mumbai to Gurgaon and thus assessee failed to discharge its onus. The learned DR submitted that excess stock found cannot be adjusted against the bogus purchases as the assessee has

failed to co-relate the excess stock with the accommodation entries bills. According to the learned DR, the learned Assessing Officer has not made addition only on the basis of the statement of the third parties but in view of the failure on the part of the assessee to substantiate the alleged purchases and, therefore, providing of cross examination of those parties was not *sine qua non* for making the addition. She relied on following decisions in support of her claim:

1. *N K Proteins Ltd. Vs. CIT (2017-TIOL-23-SC IT)*
N K Proteins Ltd. Vs. CIT (2016-TIOL-3165-HC-AHM-IT)
2. *N.K. Industries Ltd. Vs. DCIT [2016] 72 taxmann.com 289 (Gujarat)/[2017] 292 CTR 354 (Gujarat)*
3. *CIT Vs. Arun Malhotra, 47 taxmann.com 385 (Delhi)/[2014] 363 ITR 195*
4. *CIT Vs. La Medica [2001] 117 Taxman 628 (Delhi)/[2001] 250 ITR 575 (Delhi)/[2001] 168 CTR 314 (Delhi)*
5. *Vijay Proteins Ltd. Vs. ACIT, [2015] 58 taxmann.com 44 (Gujarat)*

3.7 In support of the contention that entire undisclosed income generated out of bogus transaction deserve to be added, the learned DR relied on following decisions:

1. *ITO Vs. M Pirai Choodi [2012] 20 taxmann.com 733 (SC)/[2011] 334 ITR 262 (SC)/[2011] 245 CTR 233 (SC) (Supreme Court).*
2. *M/s. Pebble Investment and Finance Ltd. Vs. ITO [2017-TIOL-238-SC-IT] (Supreme Court)*
3. *CIT Vs. Kuwer Fibers (P.) Ltd. [2017] 77 taxmann.com 345 (Delhi)*
4. *CIT Vs. Sonal Construction [2012-TIOL-851-HC-DEL-IT] (Delhi)*
5. *Nokia India (P.) Ltd. Vs. DCIT [2015] 59 taxmann.com 2012 (Delhi - Trib.)*
6. *GTC Industries Ltd. Vs. ACIT [1998] 65 ITD 380 (BOM)*

3.7 We have heard the rival submission of the parties and perused the relevant material on record. In the instant case, the

assessee in its books of accounts, have shown purchases from the above-mentioned three parties amounting to ₹ 38.99 lakhs. In view of the information in the possession of the Assessing Officer, that the assessee has obtained only accommodation entries bills in the form of the purchases without any actual purchase of the goods, the Assessing Officer asked the assessee to substantiate the purchases. From the orders of the lower authorities, we find that the assessee not only failed to produce confirmation from those parties but also failed to substantiate transport of goods mentioned in those bills from Mumbai i.e. the place of purchase to the factory located at Gurgaon i.e. the place of consumption of goods. Even before us, the assessee has not filed any such evidence to rebut the finding of the Assessing Officer as well as the Learned CIT(Appeals). Mere filing of copy of purchase bills, goods received notes or payment by cheque was not sufficient to establish the purchases. The assessee was required to discharge its onus of substantiating the purchases with deliveries of goods. The responsibility of the assessee to substantiate purchases was further increased in view of the statement of Shri Rakesh Kumar Gupta that he had provided accommodation entry bills without supplying the goods physically. But in view of the failure on the part of the assessee in discharging its onus, we do not find any infirmity in the order of the lower authorities on the issue in dispute and accordingly we uphold the same. The ground No. 2 and 3 of the appeal of the assessee are accordingly dismissed.

ITA No. 4304/Del./2011
Assessment year: 2003-04

4. In ITA No. 4304/del/2011 for assessment at 2003-04, the assessee has raised following grounds of the appeal:

“That on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred confirming the following actions of the Assessing Officer:-

(i) initiating proceedings u/s 147 of the Income Tax Act and completing the assessment u/s 147/143(3) of the Act on income of Rs.1,19,20,170/-

(ii) making an addition of Rs.22,63,222/- on account of alleged undisclosed purchase on surmises and conjectures; and

(iii) making an addition of Rs.22,632/- as unexplained expenditure allegedly by way of commission paid even though there was no material in support of such allegations.

5. The ground No. 1 of the appeal being identical to the ground No. 1 of the appeal for assessment year 2002-03 and, therefore, it is squarely covered by the decision of the Hon'ble Delhi High Court in the case of the assessee for assessment year 2002-03. The assessee also did not press this ground before us. Accordingly, this ground of the appeal is dismissed.

6. In ground Nos. 2 and 3, the issue of undisclosed purchases and commission thereon is involved. Identical issue has been adjudicated by us in assessment year 2002-03. In the instant year, the Ld. CIT(A) has also upheld the addition following his finding in assessment year 2002-03. In the present appeal, the assessee has also filed paper-book containing pages 1-35, comprising of copy of the bills issued by the accommodation entries providers. On perusal of the bills, it is apparent that there

is no mention of mode of transport on those bills, and thus assessee has failed to substantiate its purchases. To have consistency of our decision, we uphold additions made by the Assessing Officer and confirmed by the Ld. CIT(A). The ground No. 2 and 3 of the instant appeal are also dismissed accordingly.

8. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the open court on 17th March, 2020.

**Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER**

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

Dated: 17th March, 2020.

RK/-(D T D S)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi