

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचंद, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ ITA No. 995 & 996/JP/2016
निर्धारण वर्ष / Assessment Year : 2007-08 & 2008-09

Nirmala Agarwal, A-11, Janta Colony, Jaipur.	बनाम Vs.	A.C.I.T., Circle-5, Jaipur
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: ABPPA 5989 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)
राजस्व की ओर से / Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख / Date of Hearing : 09/04/2018
उद्घोषणा की तारीख / Date of Pronouncement : 11/04/2018

आदेश / ORDER

PER: BHAGCHAND, A M.

Both these appeals filed by the assessee emanates from the two separate orders of the Id. CIT(A)-II, Jaipur both dated 25/08/2016 for the A.Y. 2007-08 & 2008-09 respectively. The grounds of appeal in both the appeals are common except the difference in the amount of addition. Grounds of appeal are as under:

- "1. The learned CIT (Appeals) erred in upholding the "reassessment" based on (i) alleged information obtained from a person (i.e. the supplier) by way of statements u/s 132(4) of the Income Tax Act, 1961, without bringing on records the corroborative evidences to support the said statements, (the said statements were later on*

retracted by duly sworn affidavit) and (ii) without providing any opportunity to the assessee to cross examine the said person and also to cross verify the accounting records of supplier firms with which the said person was associated to elicit the authenticity of the contents of the statements, (iii) without giving complete copies of the statements of said person for rebuttal by the assessee and (iv) without giving complete copies of the statements of other persons referred to in the statements of said person for rebuttal by the assessee.

2. *The learned CIT (Appeals) further erred in holding purchases of diamonds aggregating Rs.22576041/= as bogus and sustaining addition of Rs. 3386406/- in the A.Y. 2007-08 and Rs.200783361/= as verified and sustaining addition of Rs. 3011750/- by applying profit rate of 15.00% on said purchases from concerns in which the aforesaid person stated to be associated.*
3. *Without prejudice to above, the learned CIT (Appeals) has further erred in applying profit rate of goods which are different in nature and value and also not giving any consideration to the CBDT circular applicable to profit rate in "Diamond" trade.*

2. Since the common issue is involved in both these appeals, therefore, the same are heard together and for the sake of convenience and brevity, a common order is being passed.

3. In the ground No. 1 of both these appeals, the issue involved is against upholding the reassessment. While pleading on behalf of the assessee, the Id AR has submitted that the assessee is individual and proprietor of M/s Neer Gems, which is engaged in trading and export of precious and semi precious gems and stones (rough and polished) including diamonds. For the A.Y. 2007-08, the return of income was

filed on 27/10/2007 declaring total income of Rs. 19,73,760/- and the assessment was completed U/s 143(3) of the Income Tax Act, 1961 (in short the Act) determining total income of Rs. 25,36,830/- after invoking the provisions of Section 145(3) of the Act and applying the G.P. rate of 20% in respect of trading of semi precious stones. However, in the case of diamonds, the G.P. rate declared was accepted @ 4.35%. The Id. CIT(A) has reduced the G.P. @ 16% by following the decision of Hon'ble ITAT in A.Y. 2005-06 in assessee's own case and the G.P. rate in the diamond trading remained accepted. Thereafter on the basis of an information received from Investigation Wing, Mumbai, a notice U/s 148 of the Act was issued wherein it was alleged that the assessee has obtained accommodation entries in respect of diamond from five parties. The assessee filed objection and requested to drop the proceeding and also requested to provide copies of documents and statements relied upon for reopening the assessment. The assessee also requested to cross examine Shri Rajendra Kumar Jain and other persons. The Assessing Officer made addition of Rs. 56,44,010/- being 25% of such purchases of Rs. 2,25,76,241/-. The Id CIT(A) reduced it to 15%. The Id AR further submitted that the assessment U/s 143(3) was completed after invoking the provisions of Section 145(3) of the Act and this reopening is solely based on information of Investigation

Wing, Mumbai. He also pleaded that the Assessing Officer has not arrived at any objective conclusion by properly examining the information/evidences which has been made basis for forming the belief for reopening the assessment. The Id AR has further submitted as under:

It is submitted that the Ld. AO ought to have considered the issue objectively and not on the so called information received from some other official, therefore, the action of the Id. AO in reopening the completed assessment without independent application of mind deserves to be held bad in law. The Hon'ble Gujrat High Court in the case of Seth Brothers Vs. CIT reported in 169 CTR 519 has laid down following principles for the reopening of the assessment u/s 148 of the Income Tax Act, 1961: (APB 1-10)

- "11
- (a) There must be material for belief
 - (b) Circumstances must exist and cannot be deemed to exist for arriving at an opinion.
 - (c) Reason to believe must be honest and not based on suspicion, gossip, rumour or conjuncture.
 - (d) Reasons referred must disclose the process of reasoning by which he holds 'reasons to believe' and change of opinion does not confer jurisdiction to reassess.
 - (e) There must be nexus between material and belief.
 - (f) The reasons referred must show application of mind by the assessing officer. The validity of initiation of reassessment proceedings has to be judged with regard to the material available with the officer at the point of time of issue of notice u/s 148 and cannot be sought to be substantiated by reference to material that may have come to light subsequently in the course of reassessment proceedings.

In the light of what is stated above, we hold that there was no material with the AO for having reasons to believe that the income as chargeable

to tax, has escaped assessment. We are unable to hold that the jurisdiction assumed u/s 147/148 was legal and valid.”

During the course of assessment proceedings when the reopening was objected by the assessee (APB 4-13), Id. AO miserably failed to bring on record any corroborative evidence or material except the part of so called statements of one Sh. Rajendra Kumar Jain, stated to have been recorded by Investigation Wing, Mumbai during the course of search conducted in his case on 03.10.2013 for supporting the allegation that the purchases made by assessee from five parties (as above) were in fact bogus and the request for cross examination of the persons was also not allowed though in the statements relied upon by the department there was no any whisper of appellant's name as beneficiary (APB 179-185). Further not allowing the cross examination of the witness of the department to the assessee is gross violation of the principle of natural justice and for this reliance is placed on the decision of Hon'ble Supreme court in the case of Andman Timber Products vs. CCE reported in 127 DTR 241 / 281 CTR 241 wherein it has been held as under: (case law paper book pages 11-13)

Assessment - Natural justice - Denial of opportunity to cross-examine witnesses — Denial of opportunity to the assessee to cross-examine the witnesses whose statements were made the sole basis of the assessment is a serious flaw rendering the order a nullity in as much as it amounted to violation of principles of natural justice - Impugned order as passed by the Tribunal is set aside.

Further the validity of initiation of reassessment proceedings has to be judged with regard to material available with the assessing officer and that too by framing the opinion strictly based on the documents and information in possession, that certain income has escaped assessment and not in the mechanical manner as has been done in the case in hand. The re-opening of the case based on the borrowed satisfaction on the information supplied by some other official without in any manner coming to his own independent

satisfaction deserves to be held illegal. In this regard reliance is placed on the decision of Hon'ble Delhi High court in case of Sarthak Securities Co. Pvt. Ltd. Vs. ITO reported in 329 ITR 110 wherein it has been held as under: (case law paper book pages 14-24)

Reassessment - Notice - Condition precedent - Formation of belief that income escaped assessment - Assessing Officer treating share application money as bogus accommodation entries - Payments through banking channel and companies investing money genuine - No independent application of mind by Assessing Officer but acting under information from investigation wing - Notice to be quashed - Income Tax Act, 1961, ss. 147, 148.

It is also a matter of fact that no search was taken place in case of assessee and documents under reference were not found and seized from the possession of the assessee thus the presumption u/s 132(4) is rebuttable and cannot be applied against the assessee, as has been done blindly by the Id. AO.

In the circumstances it is submitted that since no independent application of mind was applied by Ld. AO while issuing notice u/s 148 and he simply proceeded on borrowed satisfaction reached by some other officials on the basis of statements recorded in the case of third party which stood retracted by the person who made those statements thus the same has no evidentiary value, therefore, the entire proceedings initiated u/s 148 deserves to be hold bad in law.

It is further submitted that during the course of assessment proceedings u/s 143(3), after proper verification of the books of account and other records the assessment was completed and provisions of section 145(3) were invoked and GP rate was applied meaning thereby that all the items of the trading account including "Purchases" stood merged in that estimation of income and any further action u/s 148 alleging one of the item of that trading account i.e. "Purchases" is mere change of opinion which cannot be

permitted under the eyes of law. Assessee had made trading of diamond on lot-to-lot basis and such purchases and sale of diamonds were fully accepted by Id. AO in the assessment order completed u/s 143(3). In other words, no new material was brought on record for reopening the case, rather merely relying upon the information from investigation wing, Mumbai that too on the basis of search conducted in case of a third party reopening of completed assessment was made. Thus, reopening amounts to mere change of opinion. Recently under the similar circumstances this Hon'ble bench in the case of M/s Dwarka Gems Ltd. in ITA No. 71/JP/2017 (APB 93-96) vide orders dt. 27/3/2018 has quashed the notice issued u/s 148 of the Act when the purchases have already been examined in first round.

It is thus submitted that even the information by way of retracted statements as stated to have been supplied from the investigation wing, Mumbai could not be held as sufficient material for reopening the assessment more particularly when the Id. AO at the time of completion of the assessment u/s 143(3) has already been applied his mind on the entire purchases claimed, thus again doubting the same is nothing but mere change of opinion for which provisions of section 148 could not be resorted to.

In the circumstances, it is humbly prayed that the re-opening u/s 148 of completed assessment is bad in law hence the re-assessment so framed deserves to be quashed and the assessee prays accordingly.

Further reliance is also placed on the following case laws:

ACIT Vs. ICICI Securities Primary Dealership [348 ITR 299 SC]

Held that, where the assessee has disclosed full details in the return of income in the matter of its dealing in stock and shares, the objection of the revenue that loss

incurred was a speculative loss is clearly a change of opinion and the order of reopening the assessment was not maintainable.

34 DTR 49 CIT Vs. Kelvinator of India Ltd. (SC)

Reassessment - Reason to believe - Change of opinion - After 1st April, 1989, power to reopen is much wider - However, mere "change of opinion" cannot per se be reason to reopen - AO has power to reassess but no power to review - If the concept of "change of opinion" is removed, as contended on behalf of the Department review would take place in the grab of reopening of assessment - Concept of "change of opinion" is an in-built test to check abuse of power by the AO - Hence, after 1st April, 1989 AO has power to reopen the assessment under section 147 provided there is tangible material to come to the conclusion that there is escapement of income from assessment reasons must have a live link with the formation of the belief

Jai Hotels Co. Limited Vs. Asst. DIT, (2009) 24 DTR 37 (Del):

The Delhi High Court has held that there being no new material in the hands of the Revenue leading to view that there was reason to believe that income had escaped assessment, the case is a classic instance of a change of opinion. The High Court further observed that when copies of statement of income, trading account, profit and loss account, audit report etc., were appended to the return filed by the assessee, taking resort to Section 147/148 was unwarranted as it constituted a change of opinion, since the material acted upon had been made available along with return of income.

314 ITR 275 Cartini India Ltd. Vs. Addl. CIT (Bom.)

S. 143(3) - Reassessment - Notice - Validity - Deduction allowed in assessment order - Reassessment on basis of material considered during original assessment - Mere change of opinion - reassessment invalid.

4. On the other hand, the Id DR has relied on the orders of the authorities below.

5. We have heard both the sides on this issue. We have also gone through the case laws relied upon. It is a trite law that for reopening the assessment U/s 148 of the Act, there must be material for belief,

circumstances must exist and cannot be deemed to exist for arriving at an opinion, reason to believe must be honest and not based on suspicion, gossip, rumour or conjecture, reasons referred must disclose the process of reasoning by which he holds 'reasons to believe' and change of opinion does not confer jurisdiction to reassess, there must be nexus between material and belief, the reasons referred must show application of mind by the Assessing Officer. The validity of initiation of reassessment proceedings has to be judged with regard to the material available with the office at the point of time of issue of notice U/s 148 and cannot be sought to be substantiated by reference to material that may have come to light subsequently in the course of reassessment proceedings. Further it is also pertinent to note that except the statement of Rajendra Kumar Jain recorded by the Investigation Wing, Mumbai during the course of search, there is no other corroborative evidence or material with the Assessing Officer to reopen the assessment. Further it is also noted that the revenue has not provided the cross examination of the witnesses which is a violation of principles of natural justice and in such a situation the Hon'ble Supreme Court in the case of Andman Timber Products Vs CCE (supra) has held that denial of opportunity to cross examine witnesses, whose statements were made the sole basis of the assessment is a serious flaw rendering

the order a nullity inasmuch as it amounted to violation of provisions principles of natural justice. In such a situation, the impugned order was set aside. We would also like to note that the validity of reassessment proceedings has to be judged with the material available with the Assessing Officer and opinion are strictly based on documents and information in possession of the Assessing Officer. No reopening can be made in mechanical manner. It is also pertinent to note that reopening cannot be based on borrowed satisfaction. The independent satisfaction of the Assessing Officer is basic necessity. The Hon'ble Delhi High Court in the case of Sarthak Securities Co. Pvt. Ltd. Vs. ITO (supra) has quashed the notice where no independent application of mind by the Assessing Officer was available and Assessing Officer's action was on the basis of information from Investigation Wing only. In assessee's case, there was no search operation. Statement recorded in other searched cannot be applied on the assessee blindly and without providing cross examination. From the above facts and circumstances of the case suggest that the Assessing Officer proceeded for reopening on borrowed satisfaction rather than his own satisfaction. Once the assessment was completed by rejecting the books of account and G.P. rate was estimated then trading accounts including the purchases stood merged in that estimation of the income and any further action U/s 148

of the Act for the reason that certain purchases were not verifiable shall amount to change in opinion which is not permitted by law. Such view is also supported by the following decisions:

- (i) ACIT Vs. ICICI Securities Primary Dealership [348 ITR 299 SC]
- (ii) 34 DTR 49 CIT Vs. Kelvinator of India Ltd. (SC)
- (iii) Jai Hotels Co. Limited Vs. Asst. DIT, (2009) 24 DTR 37 (Del):

In a recent decision of Coordinate Bench of ITAT, Jaipur in the case of M/s Dwarka Gems Ltd. Vs DCIT in ITA No. 71/JP/2017 order dated 27/03/2018, has held as under:

“4. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the original assessment was completed under section 143(3) on 27th December, 2010 after an addition on account of unverifiable/bogus purchases was made by the AO. Thus it is manifest from the record that the AO while completing the original assessment under section 143(3) has conducted an enquiry in respect of the purchases made by the assessee and finally concluded that the purchases made by the assessee from the 12 parties were not verifiable and accordingly an addition of 25% of such purchases were made by the AO. Therefore, the issue of genuineness of purchases was duly examined by the AO while completing the scrutiny assessment under section 143(3). The AO, thereafter, issued a notice under section 148 on 21.11.2014 which is after four years

from the end of the assessment year under consideration. The reasons recorded for reopening of the assessment are as under :-

“As per information it had been established that bogus sales entries were made in favour of M/s Dwarka Gems on various dated during F.Y. 2007-08 i.e. A.Y. 2008-09 total amounting to Rs. 31,40,818/-. These entries were provided by M/s Meridian Gems & M/s Millenium Stars which are some of the bogus concerns of Bhanwar Lal Jain & Group.”

Thus it is clear that the reopening of the assessment is based on the information received and to assess the income in respect of the purchases made by the assessee which was examined by the AO during the original scrutiny assessment under section 143(3). The AO after an enquiry and investigation during the original assessment proceedings held that the purchases made from 12 parties are not verifiable/genuine. Thus except the purchases made from those 12 parties, the AO has accepted the genuineness of the purchases including the two parties, namely M/s. Maridian Gems and M/s. Millennium Star. Even if the subsequent information received from the DIT Investigat on Wing Mumbai renders the assessment order passed under section 143(3) defective and erroneous for want of proper verification and investigation, the same would not turn the case in the category that the assessee has failed to disclose fully and truly all the particulars necessary for assessment. It is not the case of the AO that the assessee has not furnished the requisite documents and details of purchase rather the AO conducted a detailed enquiry during the original assessment on the issue of genuineness of purchases. Thus the information received by the AO from Investigation Wing Mumbai would not amount to non disclosure of particulars by the assessee, rather it was the subject matter of enquiry by the AO in the original assessment. Therefore, if the AO failed to conduct proper enquiry regarding the genuineness of the purchases, the same would not give jurisdiction to the AO to review the order or

remove the defect based on subsequent information. The statute has provided segregation of powers and jurisdiction between the hierarchy of the taxing authorities and, therefore, the power and jurisdiction vested with one authority cannot be assumed by the other authority. Section 263 is a provision of check and balances and, therefore, in case of failure on the part of the AO to conduct a proper enquiry as revealed by a subsequent material and information came to the knowledge of the Commissioner, the provisions of section 263 can be invoked by the revisionary authority. Therefore, the remedy for any defect or default in the order of the AO is provided under section 263 of the Act and not under section 147. The reopening after four years from the end of the assessment year completed under section 143(3) is not permissible without satisfying the condition precedent as provided under the provisions of section 147 of the Act. The subsequent information received by the AO cannot remove or relax the said condition provided under the provisions of section 147 that the assessee failed to disclose fully and truly all the material necessary for assessment. In the case in hand, when the AO has already conducted an enquiry on the issue and the assessee is not expected to furnish more than what was already furnished during the assessment proceedings, then the reopening based on the information from the Investigation Wing on the same issue is nothing but change of opinion and to review the order passed by the AO under section 143(3) which is not permissible under law. Accordingly, in the facts and circumstances of the case, we hold that the reopening is not valid and, therefore, the reassessment framed by the AO is without jurisdiction and consequently the reassessment order passed is quashed.

Respectfully following the ratio laid down by the Hon'ble Supreme Court as well as Hon'ble High Court in the decisions cited (supra) and the

decision of the Coordinate Bench, we quash the reassessment order passed by the Assessing Officer and confirmed by the Id. CIT(A). Hence, ground No 1 of both these appeals are allowed.

6. Since we have allowed the ground No. 1 of the appeals where reopening has been quashed, therefore, the other grounds remained unacademic and the same is not required to be adjudicated.

7. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 11/04/2018.

Sd/- (कुल भारत) (Kul Bharat) न्यायिक सदस्य / Judicial Member	Sd/- (भागचंद) (BHAGCHAND) लेखा सदस्य / Accountant Member
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जयपुर / Jaipur
दिनांक / Dated:- 11th April, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Smt. Nirmala Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Circle-5, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 995 & 996/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar