आयकर अपीलीय अधिकरण "एक-सदस्य मामला" **न्यायपीठ मुंबई में।**

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

श्री शमीम याहया, लेखा सदस्य के समक्ष ।

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 3872/Mum/2017

(**निर्धारण वर्ष /** Assessment Year: 2010-11)

M/s. Sejal Gems Pvt. Ltd. 301, Panchratna, Opera House, Mumbai – 400 004	**बनाम**/ Vs.	Dy. CIT, Central Circle -1 (2) Room No. 906 9th Floor, Old CGO Building Annexe, M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No AADCS 2096 Q		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	None
प्रत्यर्थी की ओर से/**Respondent by**	:	Ms. N. Hemalatha

सुनवाई की तारीख / **Date of Hearing**	:	08.11.2017
घोषणा की तारीख / **Date of Pronouncement**	:	05.01.2018

आदेश / O R D E R

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against order of the ld. Commissioner of Income Tax (Appeals)-47, Mumbai dated 31.03.2017 and pertains to assessment year 2010-11.

2. The issue raised is that ld. Commissioner of Income Tax (Appeals) erred in upholding the validity of reopening and sustaining disallowance of 2% of bogus purchase.

3. In this case the Assessing Officer received information from the DGIT(Inv.), Mumbai that the assessee had obtained bogus accommodation entries from various concerns floated by Shri Bhanwarlal Jain, an alleged bogus biller. The Assessing Officer thus reopened the assessment after recording rea ons for re-opening of the same which are reproduced in Para 2 on pages 2 and 3 of the impugned order. It was noticed that the assessee had availed accommodation/fictitious bills from the following parties to the extent of amount mentioned against their names:-

S.No.	Name of the Party	Amount (Rs.)
1.	Aastha Impex	10,13,041/-
2.	Navkar Diamonds	57,39,581/-
3.	Pankaj Exports	98,02,433/-
	Total	1,65,85,055/-

4. It was also noticed that the entire bogus nature of the transactions had been admitted by Shri Bhanwarlal Jain in his statement recorded u/s. 132(4) of the Act. Since the assessee had not physically purchased any goods from the above bogus sellers, it was believed that the expenditure to that extent had been inflated by the assessee. Since there was inflation of expenditure which ultimately resulted into underassessment of income, the Assessing Officer had reason to believe that income to the extent of Rs.1,65,85,055/- chargeable to tax had escaped assessment for

assessment year 2010-11. In this regard, the Assessing Officer placed reliance on the judgment of Hon'ble Bombay High Court in the case of *Nikunj Eximp Enterprises P. Ltd. v. ACIT* (Writ Petition No.2860 of 2012) wherein the action of the Assessing Officer in re-opening the assessment had been upheld.

5. During the course of re-assessment proceedings, the Assessing Officer took into information received from the DGIT(Inv.), Mumbai that the assessee had obtained bogus accommodation bills from various entities/concerns floated by Shri Bhanwarlal Jain, an alleged bogus biller as observed by the Assessing Officer in Para-2 of the assessment order. However, the said notices were returned unserved by the postal authorities with the remark "not known". Subsequently, summons u/s.131 of the Act was also issued to the said parties which were returned back undelivered with the remark "not known". Thereafter, the Assessing Officer deputed his Inspector to serve notices u/s.133(6) on the said parties but as per his report, he was unable to locate the aforesaid parties.

6. After considering the issue, the Assessing Officer was of the view that the goods had been received from other sources known to the assessee which had not been disclosed to the department even after enquiry. Considering full facts of the case and in light of the facts and evidences gathered by the DGIT(Inv), Mumbai through independent enquiries, the Assessing Officer concluded that the entire amount covered under such purchases could not be taxed but the profit element embedded

therein would be subject to tax. Therefore, it was held that the addition on account of non-genuine purchases from the above-mentioned parties aggregating to Rs.1,65,85,055/- would be made on the basis of profit embedded therein. It was noted that during the year, the assessee had shown Gross Profit ratio at 11.03%. Accordingly, it was held that GP addition would be made @ 11.03% of Rs.1,65,85,055/- being Rs.18,29,332/- to the total income of the assessee.

7. Against the above order, the assessee appealed before the ld. Commissioner of Income Tax (Appeals). The ld. Commissioner of Income Tax (Appeals) confirmed the action of the assessing officer in reopening but sustained addition of only 2% of the bogus purchase.

8. As regards the reopening, the ld. Commissioner of Income Tax (Appeals) held as under:

> 4.3.1 I have considered the submissions of the appellant and perused the materials available on record including copies of the judicial decisions relied upon by the appellant. The issue for adjudication is whether the A.O. was justified in reopening the assessment u/s.147 of the Act and whether, while doing so, there was tangible material to show that income chargeable to tax had escaped assessment. It is a matter of record that the assessment of the appellant was reopened on the basis of the information received from the DGIT(Inv.), Mumbai vide letter dated 13.03,2014 that the appellant had obtained fictitious purchase bills or accommodation entries to the tune of Rs. 1,65,85,0557- from aforesaid 3 parties and thereby suppressed its true profit for the relevant period. This information is found to have been unearthed in the course of search and seizure action carried out by the Department in the case of Shri Bhanwarlal Jain Group. This shows that the reopening of assessment was based not on subjective opinion or suspicion of the AO but on concrete and credible information received from the Investigation Wing. It is well-settled that the

sufficiency or correctness of the material is not a thing to be considered at this stage. It has only to be seen whether there was *prima facie* some material on the basis of which the Department could reopen the case *[Raymond Woollen Mills Ltd. v. ITO 236 ITR 34 (SC)]*. Therefore, having received the said information from the Investigation Wing of the Department, no independent enquiry or verification was required to be undertaken by the AO before arriving at the prima facie conclusion that income chargeable to tax had escaped assessment in the hands of the appellant.

4.3.2 It appears that in the absence of this information, the issue of verification of genuineness of purchases made from the said 3 parties escaped the attention of the AO while making the earlier assessments u/s.143(3) of the Act on 28.02.2011. There is nothing to indicate that any query was raised or any information was sought by the then AOs in regard to the purchases made from said 3 parties during the course of assessment. In other words, the issue was not under consideration at all in the course of said assessment. When the matter was not examined by the AO in such assessment, the appellant cannot say that reopening is an attempt to review or reinvestigate the same or that it amounts to change of opinion. In this connection, reliance is placed on judicial precedents in the cases of *EMA India Ltd. v. ACIT 226 CTR (All) 659* and *Consolidated Photo & Finvest Ltd. v. ACIT 281 ITR 394 (Del.)* wherein it has been held that the principle that a mere change of opinion cannot be a basis for reopening completed assessment would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on particular matter in issue and not where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment. Following the same l gal principle, it cannot be said even in the instant case that there was any application of mind on part of the AO on this issue at the time of previous assessments and, therefore, the reopening of said assessment in these circumstances cannot be said to be based on change of opinion.

4.3.3 As regards the appellant's objections to the reopening of its assessment, it is found that the AO had disposed of the same vide a speaking order passed on 16.03.2015. The reasons recorded by the AO are found to be having a live link with the formation of his belief. The belief entertained by the AO was that of an honest and reasonable person based upon reasonable grounds rather than on gossip, rumour or suspicion. Thus, there is no hesitation in holding that the requirements of section 147 were fully satisfied in the present case. In view of the above discussion, I do not find any error or infirmity in the action of the AO in reopening the assessment of the appellant for the A.Y. under consideration based on the above information received from

the Investigation Wing and proceeding to reassess the income escaping assessment on this count.

9. On merits, the ld. Commissioner of Income Tax (Appeals) noted that:

> It is noticed from the record that the A.O. treated the aforesaid purchases from 3 parties as bogus or non genuine not merely on the basis of information received from the Investigation Wing but also because the appellant failed to furnish the purchase orders, delivery challans/angadia receipts etc. in respect of the said purchases of cut and polished diamonds. The absence of these supporting evidences lent credence to the A.O.'s finding that the purchases shown to have been made by the appellant from aforesaid 3 concerns were nothing but accommodation entries without any actual movement or delivery of goods.

10. However, the ld. Commissioner of Income Tax (Appeals) sustained only 2% of the bogus purchase as addition.

11. Against the above order of ld. Commissioner of Income Tax (Appeals), the assessee is in appeal before the ITAT.

12. I have heard both the counsel and perused the records. As regards the reopening of the assessee, on a careful consideration, I note that in this case information was received by the Assessing Officer from DGIT Investigation (Mumbai) there are some parties who are engaged in the hawala transactions and are also involved in issuing bogus purchase bills for sale of material without delivery of goods, which information was based on information received by Revenue from Maharashtra Sales Tax Authority. Information was received that the assessee was beneficiary of hawala accommodation entries from entry providers by way of bogus purchase. The

accommodation entry provider has deposed and admitted before the Maharashtra Sales Tax Authority vide statement/ affidavit that they were engaged in providing bogus accommodation entries wherein bogus sale bills were issued without delivery of goods, in consideration for commission. These, accommodation entry providers, on receipt of cheques from parties against bogus bills for sale of material, later on withdrew cash from their bank accounts, which was returned to beneficiaries of bogus bills after deduction of their agreed commission. The Assessee was stated to be one of the beneficiaries of these bogus entries of sale of material from hawala entry operators in favour of the assessee wherein the assessee made alleged bogus purchases through these bogus bills issued by hawala entry providers in favour of the assessee. These dealers were surveyed by the Sales Tax Investigation Department whereby the directors of these dealers have admitted in a deposition vide statements/affidavit made before the Sales Tax Department that they were involved in. issuing bogus purchase bills without delivery of any material. There is a list of such parties wherein the assessee is stated to be beneficiary of bogus purchase bills.

13. From the above, I find that tangible and cogent incriminating material were received by the AO which clearly showed that the assessee was beneficiary of bogus purchase entries from bogus entry providers which formed the reason to believe by the AO that income has escaped assessment. The information so received by the AO has live link with reason to believe that income has escaped assessment. On these

incriminating tangible material information, assessment was reopened. At this stage there has to be prima facie belief based on some tangible and material information about escapement of income and the same is not required to be proved to the guilt. In this regard, I refer to the decision of the Hon'ble Apex Court in the case of CIT(A) Vs. Rajesh Jhaveri Stock Brokers P. Ltd, 291 ITR 500:-

> "Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to lax if he has reason to believe that income for any assessment year has escaped assessment. The wo d "reason" in the phrase "reason to believe" would mean cause or justification If the AO has cause or justification to know or suppose (hat income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Managnese Ore Co, ltd. v ITO(1991) 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was r levant material on which a reasonable person could have formed a requisite belief Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co, (P.) Ltd. (1996) 217 ITR 597 (Supreme Court): Raymond Woollen Mills Ltd. v. ITO (1999) 236 ITR 34 (Supreme Court)."

14. The above discussion and precedent from Apex Court fully justify the validity of reopening in this case. Further I find that the Ld. CIT(A) has carefully examined the issue and has properly appreciated the issue. Hence, I do not find any infirmity in the same. Accordingly, I uphold the order of the Ld. CIT(A) on the issue of reopening. Since, the issue has been decided on the basis of the Hon'ble Apex Court

decision, the other case laws referred by assessee are not supporting the assessee's case.

15. As regards the merits, I find that credible and cogent information was received in this case by the assessing officer that certain accommodation entry provider/bogus suppliers were being used by certain parties to obtained bogus bills. The assessee was found to have taken accommodation entry/bogus purchase bills during the concerned assessment year from different parties. Based upon this information assessment was reopened. The credibility of information relating to reopening remains un-assailed. In such factual scenario, the assessing officer has made the necessary enquiry. The issue of notice to all the parties have returned unserved. Assessee has not been able to provide any confirmation from any of the party. Assessee has also not been able to produce any of the parties. Necessary evidence relating to transportation of the goods was also not on record. In this factual scenario, it is amply clear that the assessee has obtained bogus purchase bills. Mere preparation of documents for purchases cannot controvert overwhelming evidence that the provider of these bills is bogus and non-existent.

16. The Sales Tax Department in its enquiry has found the parties to be providing bogus accommodation entries. The assessing officer also issued notices to these parties at the addresses provided by the assessee. All these notices have returned unserved. Assessee has not been able to produce any of the parties. Neither the

assessee has been able to produce any confirmation from these parties. In such circumstances, there is no doubt that these parties are non-existent. I find it further strange that assessee wants the Revenue to produce assessee's own vendors, whom the assessee could not produce. The purchase bills from these non-existent/bogus parties cannot be taken as cogent evidence of purchases. In light of the overwhelming evidence, the Revenue authorities cannot put upon blinkers and accept these purchases as genuine. This proposition is duly supported by Hon'ble Apex Court decision in the case of *Sumati Dayal vs. CIT* [1995] 214 ITR 801 (SC) and *CIT vs. Durga Prasad More* [1971] 82 ITR 540 (SC). In the present case, the assessee wants that the unassailable fact that the suppliers are non-existent and, thus, bogus should be ignored and only the documents being produc d should be considered. This proposition is totally unsustainable in light of Hon ble Apex Court decisions.

17. I further find that Hon'ble jurisdictional High Court in the case of *Nikunj Eximp Enterprises* (in Writ petition no 2860, order dt. 18.6.2014) has upheld 100% allowance for the purchases said to be bogus when the sales have not been doubted. However, the facts of that case were different. Furthermore, the sales in that case were basically to government departments. Hence, the ratio from this decision is not applicable on the facts of the case.

18. In these circumstances, the learned Departmental Representative has referred to Hon'ble Gujarat High Court decision in the case of Tax Appeal No. 240 of 2003 in

the case of *N K Industries vs. Dy. CIT* vide order dated 20.06.2016, wherein 100% of the bogus purchases was held to be added in the hands of the assessee and tribunals restriction of the addition to 25% of the bogus purchases was set aside. It was expounded that when purchase bills have been found to be bogus, 100% disallowance was required. The special leave petition against this order along with others has been dismissed by the Hon'ble Apex Court vide order dated 16.1.2017.

19. I further note that Hon'ble Rajasthan high court has similarly taken note of decisions of the apex court on the issue of bogus purchases in the case of CIT Jaipur vs Shruti Gems in ITA No. 658 of 2009. The Hon'ble High Court has referred to the decision of CIT Jaipur vs. Aditya Gems, D. B. in ITA No. 234 of 2008 dated 02.11.2016, wherein the Hon'ble Court had *inter alia* held as under:

> "Considering the law declared by the Supreme Court in the case of Vijay Proteins Ltd. Vs. Commissioner of Income Tax, Special Leave to Appeal (C) No.8956/2015 d cided on 06.04.2015 whereby the Supreme Court has dismissed the SLP confirmed the order dated 09.12.2014 passed by the Gujarat High Court and other decisions of the High Court of Gujarat in the case of Sanjay Oilcake Industries Vs. Commissioner of Income Tax (2009) 316 ITR 274 (Guj) and N.K. Industries Ltd. Vs. Dy. C.I.T., Tax Appeal No.240/2003 decided on 20.06.2016, the parties are bound by the principle of law pronounced in the aforesaid three judgments.

20. However, I note that this is not an appeal by the Revenue. Hence, it will not be appropriate to take away the relief already granted by the Revenue to the assessee. Hence, I confirm the order of ld. Commissioner of Income Tax (Appeals).

21. In the result, this appeal filed by the assessee stands dismissed.

Order pronounced in the open court on 05.01.2018

Sd/-
(Shamim Yahya)
लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :05.01.2018
व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**