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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 1681/MUM/2018
Assessment Year: 2009-10

Shri Simrathmal Nemchand Shah, 40, GF, Shriniwas, Bldg, 2nd floor Carpenter Street, Near C.P. Tank, Mumbai-400004 **PAN No. AAYPS3585J**	Vs.	ITO, Ward 19(3)(3), Matru Mandir, 2nd floor, Tardeo Road, Mumbai-400007
Appellant		**Respondent**

Assessee by : Mr. V.K. Tulsiyan, AR
Revenue by : Mr. S.K. Mitra, DR

Date of Hearing : 13/12/2018
Date of pronouncement: 11/03/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-52, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. (a) Whether the Ld. CIT(A) was justified in law and facts by holding that the jurisdiction u/s 147/148 has rightly been exercised by the Assessing Officer after recording the reasons and proper approval obtained as per section 151(2).

(b) Whether the Ld. CIT(A) was justified by holding that section147/148, was not wrongly invoked, and it is based on complete information and the reasons were recorded and approval obtained as per the law as well as by holding that the exercise of jurisdiction are not for roving and fishing enquiry.

(c) Whether the Ld. CIT(A) was jus ified by upholding an impugned assessment order is justified and valid because the assumption of jurisdiction is not based upon the piece of information and no requirement of any tangible ma erial to be brought upon record.

2. Whether the Ld. CIT(A) was justified by upholding the order of AO for estimation of additional profit which have been scaled down to @ 9% even without appreciating the written submission, ground wise discussion in the light of paper book filed on 19.01.2018 as well as various citation.

3. Whether the Ld. CIT(A) was justified by upholding the order of AO without appreciating the justification filed by the appellant, towards notice u/s 133(6) if not served by any reasons, no occasion to estimates the charging of profit the facts no dispute on the evidences filed inclusive stock register in P.B. No. 64-81.

3. Briefly stated, the facts are that the assessee filed his return of income for the assessment year (AY) 2009-10 on 17.08.2009 declaring total income at Rs.2,23,380/-. The return was processed u/s 143(1) of

the Act. Then the Assessing Officer (AO) reopened the assessment u/s 147 by issuing notice u/s 148 dated 26.03.2014. The materials referred to by the AO for reopening the assessment were the information received from the Director General of Income Tax (Investigation), Mumbai (in short 'DGIT') that as per the Sales Tax Department, Government of Maharashtra, the following concerns were issuing bogus sales/purchase bills and the assessee was a beneficiary of transactions from them:

Sr. No.	Name of hawala parties	FY	Amount
1.	Paras Steel India	2008-09	26,97,567
2.	Nimesh Steels Pvt. Ltd.	2008-09	1,46,628
3.	Aniket Steel Pvt. Ltd.	2008-09	50,47,148
		Total	78,91,343

After recording the reasons, the AO provided a copy of it to the assessee. During the course of reassessment proceedings, the AO asked the assessee to file the details such as correct and complete address of the said parties, purchase details, invoices/bills, copies of ledger account, detai s of transportation of goods i.e. lorry receipts, documentary evidence reflecting the relevant entries of having received such goods in the premises of the assessee and having consumed such goods, details of payment made to these parties etc. In response to it, the assessee filed *inter-alia* address of the abovementioned parties. In order to verify the genuineness of the transaction, the AO issued notice u/s 133(6) by registered post to the said parties at the address given by the assessee. However, the notices could not be served and were returned back by the postal authorities with the remarks 'not known' or 'not such

address' or 'left' etc. However, during the course of assessment proceedings, as recorded by the AO, the assessee filed a copy of (i) ledger accounts along with copies of purchase invoices of the specified parties, (ii) bank statements evidencing payments made through proper banking channels by issuing account payee cheques in respect of all the parties, highlighting the relevant entries, (iii) chart showing the details of purchases from the alleged parties and (iv) quantitative tally in respect of entire purchases from the above named parties and the corresponding sales.

However, the AO was not convinced with the above details filed by the assessee for the reason that when asked to produce the said parties for examination, the assessee failed to do so. Also as per the AO, the assessee failed to file important documents such as delivery challans, transport receipts, octroi receipts, receipt of weighbridge, excise gate pass, goods inwards register etc. Also holding that mere filing of evidence in support of purchases and payment through account payee cheques cannot be conclusive in a case where genuineness of transaction is in doubt and then following the judgment of the Hon'ble Gujarat High Court in *CIT v. Simit P. Sheth* (2013) 356 ITR 451 (Guj), the AO estimated the profit @ 12.5% on such non-genuine purchases of Rs.78,91,343/-. Thus the AO brought to tax an amount of Rs.9,86,418/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). Following the decision by the Hon'ble Supreme Court in *Raymond Woollen Mills* 236 ITR 34 and *Rajesh Jhaveri Stock*

Brokers 161 Taxman 316, the Ld. CIT(A) upheld the reopening done by the AO by issuing notice u/s 148 of the Act.

On merits, the Ld. CIT(A), observed that (i) the assessee could not file vital documents like delivery challan, transport receipt, octroi receipts, weighbridge slip etc., (ii) the assessee could neither provide the latest address of the parties nor produce then before the AO, (iii) the assessee was in a position to reconcile the purchases from the alleged hawala suppliers with corresponding sales, (iv) the rate adopted by the AO of 12.5% after considering the decision of the ITAT Ahmedabad in the case of *Simit P. Sheth* (supra) is on higher side, considering that the sales tax, then prevalent at Gujarat was of 10% as against sales tax of 4% in Maharashtra.

Considering the above, the Ld. CIT(A) scaled down the rate of 12.5% adopted by the AO to 9%.

5. Before us, the Ld. counsel of the assessee files a Paper Book containing (i) written submission before CIT(A) dt. 19.01.2018, (ii) audited financial statement and report Form No. 3CB/3CD, (iii) copy of reasons, (iv) copy of submission filed on 30.05.2014, (v) copy of submissions dt. 18.02.2015, 17.02.2015, (vi) copy of purchases from Alkint sales with ledger account and relevant bank statements to show payments made, (vii) copy of purchases from Paras Steel with ledger account and relevant bank statements to show payments made, (viii) copy of purchases from Nimesh Steel with ledger account and relevant bank statements to show payments made, (ix) copy of bank statements and (x) copy of purchase and sales in tabular form.

The Ld. counsel also relies on the order of the ITAT 'F' Bench, Mumbai in the case of *Prabhat Gupta v. ITO* (ITA No. 277/M/2017 for AY 2009-10 and 797/M/2017 for AY 2010-11).

Further, it is stated by him that in the order dated 29.01.2018, the Ld. CIT(A) has mentioned the wrong name of the authorized representative of the assessee.

6. On the other hand, the Ld. DR submits that the wrong name of the authorized representative at para 4 of the impugned order is an inadvertent mistake, the correct name has been mentioned at page 1 of the order.

It is further submitted by him that the Ld. CIT(A) having considered the facts and circumstances of the case has rightly scaled down the estimation of profit made by the AO at 12.5% to 9% on the basis of variation in sales tax between Gujarat and Maharashtra. Thus the Ld. DR supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the case of *Prabhat Gupta* (supra), observing that the sales were not disputed and the books of account were also not rejected and as the assessee had adduced sufficient evidence, the Tribunal held that non-service of notice is not a ground to raise the addition of bogus purchase to the income of the assessee in view of the decision in *CIT v. M/s Nikunj Eximp Enterprises P. Ltd.* 2016 taxmann.com 171 (Bom). Also observing that the AO received the information from the Sales Tax Department

vide letter dated 26.02.2013, however, notice u/s 148 was issued to the assessee on 15.02.2013, the Tribunal set aside the notice u/s 147/148 issued by the AO. However, we find that such difference in date is not there in the instant case. Now we decide the issue ground of appeal wise.

Re: the 1st ground of appeal

In the instant case the return filed by the assessee was processed u/s 143(1) of the Act. On the basis of information provided by the Sales Tax Department, Government of Maharashtra which indicated that the assessee was a beneficiary of purchases involving accommodation entries, the AO reopened the assessment by issuing notice u/s 148 dated 26.03.2014. In the case of *Rajesh Jhaveri Stock Brokers (P) Ltd*. (supra), the Hon'ble Supreme Court held that intimation u/s 143(1)(a) is not an assessment and held valid the notice issued u/s 148. Their Lordships clarified the matter as under:

> **"17.** The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (*a*) and (*b*) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(*a*) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (*i*) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(*a*). But under the substituted section 147 existence of only the first condition

> suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."

In the case of *Kone Elevator India P. Ltd. v. ITO* 340 ITR 454 (Mad), *CIT v. Ideal Garden Complex P. Ltd.* 340 ITR 609 (Mad), it is held that in the case of return of income processed u/s 143(1), the only condition to be satisfied for reopening is taxable income has escaped assessment and the assessee's plea that no fresh material before the AO warranting reopening, is not relevant.

In view of the above position of law the Ld. CIT(A) has rightly confirmed the reopening done by the AO by issuing notice u/s 148 of the Act. Thus the 1st ground of appeal is dismissed.

Re: the 2nd & 3rd ground of appeal

The fact remains that the assessee filed before the AO a copy of (i) ledger accounts along with copies of purchase invoices of the specified parties, (ii) bank statements evidencing payments made through proper banking channels by issuing account payee cheques in respect of all the parties, highlighting the relevant entries, (iii) chart showing the details of purchases from the alleged parties and (iv) quantitative tally in respect of entire purchases from the above named parties and the corresponding sales.

However, the assessee failed to file certain relevant documents like delivery challans, transport receipts, octroi receipts, receipts of weighbridge, excise gate pass etc. before the AO.

We find that the notices issued by the AO u/s 133(6) and dispatched through registered post in the address given by the assessee could not be served and were returned unserved by the postal authorities with the remarks 'not known' or 'no such address', 'left' etc. As recorded by the AO at para 5.5 (iii) of his order dated 20.02.2015, when asked to produce the said 'dealers' for examination, the assessee failed to do so.

A survey of the above facts clearly indicates that there are differences between this case and the decision of the Tribunal in *Prabhat Gupta* (supra) relied on by the Ld. counsel.

The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs M. Pirai Choodi* (2012) 20 taxmann.com 733 (SC), the Hon'ble Supreme Court has held that "Order of assessment passed without granting an opportunity to assessee to cross-examine, should not have been set aside by High Court; at most, High Court should have directed Assessing Officer to grant an opportunity to assessee to cross-examine concerned witness."

In the facts and circumstances of the case, we are of the considered view that the ratio laid down in the above decisions are quite

relevant to the present case. Therefore, we set aside the order of the Ld. CIT(A) on the above issue and restore the matter to the file of the AO to examine the above parties and allow the assessee opportunity to cross examine them. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the assessment order. Thus the 2nd & 3rd grounds of appeal are allowed for statistical purposes.

8. In the result, the appeal is partly allowed

Order pronounced in the open Court on 11/03/2019.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 11/03/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai