

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 8761/DEL/2019
[Assessment Year: 2011-12]

M/s A.K. Lumbers Ltd
92/4, WHS Block - 2
Kirti Nagar, New Delhi

Vs.

The A.C.I.T
Circle 1(1)
New Delhi

PAN: AACCA 6546 N

[Appellant]

[Respondent]

Date of Hearing : 08.07.2020
Date of Pronouncement : 10.07.2020

Assessee by : Shri Ajay Wadhwa, Adv
Revenue by : Shri Jagdish Singh Dahiya, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal the assessee has challenged the validity of the assessment order framed u/s 143(3) r.w.s 147 of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] and addition of Rs. 93,34,926/- being bogus sales and Rs. 93,349/- being commission paid on the alleged accommodation entries.

2. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

3. Facts on record show that original return of income was E-filed on 26.09.2011 declaring income of Rs. 46,11,710/- which was revised on 23.08.2012. The turnover returned was Rs. 37.58 crores. Subsequently, assessment was reopened pursuant to the information received from the Deputy Director of Income Tax [Inv.]-III, Gurgaon, who, in his information, brought to the notice of the Assessing Officer that a search action u/s 132 of the Act was conducted in the case of Spaze Group of cases on 17.02.2016 and it was informed that this group was indulging in providing purchase accommodation entries through various non-genuine proprietorship/partnership concerns.

4. Pursuant to this information, the Assessing Officer recorded reasons for reopening the assessment which reads as under:

"In this case, the return of income was filed by the assessee on 26.09.2011 vide e-filing acknowledgement no. 292682331260911 at Income of Rs. 46,11,710/-. The assessee filed a revised return of income on 20.03.2012 vide e-filing acknowledgement no. 356514221200312 at income of Rs. 46,11,710/-. The return was processed u/s 143(1) of the I.T. Act on 23.08.2012. The assessee has not declared its type of business in the ITR but declared turnover of Rs. 37,58,71,947/-.

2. An information has been received from the Dy. Director of Income Tax (Inv.) III, Gurgaon vide letter no. DDIT(Inv.)-III/GGN/2017-18 dated 11.09.2017 that a search action u/s 132 of the I. T. Act, 1961 was conducted in Spaze Group of cases on 17.02.2016. The main allegation against the assessee group was that this group was indulging in providing purchase accommodation entries through various non-genuine proprietorship/ partnership concerns. During the course of search/ post-search proceedings, statements of various proprietors/ partners of the concerns through which the group was allegedly providing accommodation entries, was recorded u/s 131(1A) of the I.T. Act, 1961. Most of the persons whose statements were recorded, stated that they were made proprietor / partner in the said concern by one Shri Kishori Sharan Goyal. The statement of Shri Kishori Sharan Goyal was recorded u/s 131 of the I.T. Act, 1961,

during the course of search proceeding on 17.02.2016. His statement was again recorded on oath on 28.03.2016 and 16.06.2016. Shri Kishori Sharan Goyal admitted in his statement that these firms were controlled and managed by him only and these firms were not doing any real business and were mere paper concerns.

3. I have studied statements of Shri Kishori Sharan Goyal recorded on oath on 17.02.2016, 28.03.2016 and 16.06.2016. Shri Kishori Sharan Goyal has admitted in his statement recorded on 17.02.2016 u/s 131 of the I.T. Act that he used to earn commission from "bogus billing". He explained "bogus billing" business as operating various firms which are not doing any real business but are indulging in providing accommodation entries for bogus purchases and bogus sales. He stated that he used to take cheques from the interested businessmen (who were interested in booking bogus purchases) which would be deposited in the firms controlled by him and after that it would be routed through 2-3 firms and finally transferred to interested business men who were interested in booking bogus sales. He also admitted that he used to take unaccounted cash from the parties who were interested in booking bogus sales and this cash was given to the parties which had given cheques for booking bogus purchases. This way, no unaccounted cash was deposited in the bank accounts as per his statement. He also admitted that he used to charge

commission @ 1% from parties who were taking accommodation entries for bogus sales and commission @ 0.5% from all other parties. He also admitted that no goods were physically delivered for any purchase or sales.

4. Shri Kishori Sharan Goyal, in his statement recorded on 17.02.2016, also provided a list of bogus concerns used by him for the purpose of providing accommodation entries for bogus purchases and sales. The list of such bogus entities include M/s Sai Kirpa Enterprises. Plot No. 803, Village Mundka, Delhi-110041 ,and M/s Balaji Enterprises, G-239 A, Lajpat Nagar, Sahibabad, Ghaziabad and Plot No. 803, Mundka, New Delhi. The DDIT (Inv.), Unit-III, Gurgaon, also provided a list of beneficiaries who obtained bogus purchase/sale entries from the concerns controlled by Shri Kishori Sharan Goyal. One of such beneficiaries is the assessee M/s A K. Lumbers Ltd. which received following amounts from the concerns controlled by Shri Kishori Sharan Goyal during the FY 2010-11

Name of the concern	Bank Account No. concern	Bank & Branch	Date of receipt	Amount Received
Sai Kripa Enterprises	8761131004535	Oriental Bank of Commerce, Pitampura, Delhi	05.03.2011	Rs. 10,00,000/-
Balaji Enterprises	08761131004511	Oriental Bank of Commerce, Overseas Branch, Gurgaon	05.03.2011	Rs. 10,00,000/-
Total				Rs, 20,00,000/-

5. The DDIT (Inv.) Unit-3 Gurgaon has also sent copies of bank statements of bogus concerns controlled by Shri Kishori Sharan Goyal including the aforesaid bank statements. I have perused these bank statements. Although Shri Kishori Sharan Goyal has stated in his *j* statement that no cash was deposited in the bank accounts, the statements of both the above accounts show heavy cash deposits. Both these statements show debit entries of Rs. 10,00,000/- each on 05.03.2011 for transfer of funds to "A K". The statement of Sai Kripa Enterprises with OBC, Pitampura Delhi shows transfer of Rs. 10,00,000/- on 05.03.2011 to the assessee through cheque no. 770656. The statement of Balaji Enterprises with OBC Gurgaon shows transfer of Rs. 10,00,000/- on 05.03.2011 to the assessee through cheque no. 771654. It shows that a total amount of Rs. 20,00,000/- was transferred to the account of M/s A K Lumbers Ltd. for bogus sales against which M/s A K Lumbers Ltd. provided unaccounted cash to Shri Kishori Sharan Goyal. Apart from this M/s A K Lumbers Ltd. would also have paid commission @ 1% to Shri Kishori Sharan Goyal for taking entry of bogus sales which amounts to Rs. 20,000/-. Thus, M/s A K Lumbers Ltd. provided total unaccounted cash of Rs. 20,20,000/- to Shri Kishore Sharan Goyal during the F.Y. F.Y. 2010-11.

6. In view of above facts, I have reason to believe that income chargeable to tax amounting to Rs. 20,20,000/- for the A.Y. 2011-12 has escaped assessment on account of failure of the assessee to disclose all material facts fully and truly.

1/2/2012

Dy. Commissioner of Income Tax,
Circle 1(1), New Delhi"

5. The challenge before us is that while recording reasons for reassessment, the Assessing Officer has not at all applied his mind.

6. A perusal of the aforesaid reasons would show that statement of one Shri Kishori Sharan Goyal was recorded u/s 131 of the Act during the course of search proceedings conducted in Spaze group of cases on 17.02.2016. Shri K.S. Goyal was once again examined and his statement was recorded on oath on 28.03.2016 and 16.06.2016, who in his statement, admitted that these concerns/firms were controlled and managed by him only and were engaged in providing accommodation entries for bogus purchases and sales. Had the Assessing Officer applied his mind, he would have known that Shri K.S. Goyal never mentioned the name of the appellant.

7. A perusal of the information received from the Inv. Wing shows that the assessee has sold goods to Sai Kripa Enterprises and Balaji Enterprises amounting to Rs. 10 lakhs each. It is claimed that the bank statements of these two enterprises were made available which contained transactions in cash. Had the Assessing Officer applied his mind before reopening assessment and had he examined the bank statement, he would have known that the transaction with Sai Kripa Enterprises amounted to Rs. 27,41,837 and the transactions with Balaji Enterprises amounted to Rs. 65,93,089/-.

8. It appears that the Assessing Officer has simply relied upon the information from the INV Wing and without applying his mind reopened the assessment by giving the aforesaid reasons for reopening. Had the Assessing Officer applied his mind to the nature of the business of the assessee, he would have known that before selling the log woods, the assessee had to take permission from the Forest Department. We find that such certificates are placed in the paper books which contain the names of the aforementioned two parties, alongwith transporters names and truck numbers.

9. A perusal of the record shows that the Assessing Officer has not examined such documents and reopened the assessment solely on the half-baked information received from the INV Wing.

10. The entire additions revolve around the enquiries made through an Inspector who, in his report, stated that the transporters were not available on the given address. Transactions took place in the year 2011 and the enquiries were made by the Inspector in the year 2018. If after a lapse of 7 years the parties are not available at the given address, in our view, the assessee cannot be found faulted with.

11. Had the Assessing Officer applied his mind, then he would have not believed the theory of the Investigation Wing that the appellant is engaged in providing accommodation entries as the total turnover of the appellant is Rs. 37.58 crores and the quarrel is only in respect of sales made to the two parties totalling to Rs. 94.28 lakhs.

12. At this point, it would be pertinent to mention that sales made to these two parties were duly recorded in the books of account under the head "Sales" and the Assessing Officer has made same addition once again u/s 68 of the Act. Once the assessee has himself included

the amount as its income, the action of the Assessing Officer is nothing but double addition of the same amount. At the most, the Assessing Officer should have disregarded the sales and increased the stock in trade of the appellant by that amount.

13. Had the Assessing Officer applied his mind before issuing notice u/s 148 of the Act, he would have known that this is not a case of some unsecured loan/cash credits taken by the assessee. The information was that the assessee has provided accommodation bills to two parties namely, Sai Kripa Enterprises and Balaji Enterprises and, that too, information was only in respect of sales made of Rs. 10 lakhs each. As mentioned elsewhere, total sales to these two parties was around Rs. 94.28 lakhs.

14. On several occasions, the assessee asked the Assessing Officer to give opportunity to cross examine Shri Kishore Sharan Goyal but that was denied by the Assessing Officer who relied upon some decisions of the Hon'ble Allahabad High Court in the case of Prem Casting Ltd and Moti Lal Padampat Udyog Limited. Both these decisions of the Hon'ble High Court are totally on different set of facts and do not lay down any ratio in so far as the opportunity of cross examination is concerned.

15. The Hon'ble Supreme Court in the case of Andaman Timber Vs. CIT in Civil Appeal No. 4228 of 2006 has categorically laid down the ratio that denial of natural justice would make an assessment void.

16. The Hon'ble Delhi High Court in the case of Pradeep Kumar Gupta 203 ITR 95 had the occasion to consider the situation where assessment was framed on statement of a third party and the assessee requested for cross examination which was denied. The Hon'ble High Court observed as under:

"4. Having heard learned Counsel for the parties at great length, we are of the view that the Order of the ITAT is unassailable. In this case, the assessment had not been completed under [Section 143\(3\)](#) of the IT Act. There are banking transactions between the assesseds and Shri Anand Prakash and, therefore, initiation of reassessment Proceedings under [Sections 147/148](#) may be impregnable even to the charge of legitimacy of invocation of [Sections 147/148](#). In other words, since there were banking transactions between these persons, and Shri Anand Prakash had, in fact, deposed that he had provided bogus transactions to the Assesses that would constitute reasons for the AO to believe that income chargeable to tax had escaped assessment justifying action under [Sections 147/148](#). Shri Anand Prakash

cannot be seen as a busybody or an informer or a stock witness wholly unconnected with the assessed concerned. Learned Counsel for the Revenue had drawn our attention to [Phool Chand Bajrang Lal v. Income-Tax Officer](#) where the ITO had learnt that the party from whom that assessed had allegedly borrowed Rs. 50,000/- in cash had not actually done so. Information pertaining to the false nature of these transactions was exchanged between the respective Income-Tax Officers. Their Lordships opined that - "Acquiring fresh information, specific in nature and reliable in character, relating to a concluded assessment which went to expose the falsity of the statement made by the assessed at the time of the original assessment was different from drawing a fresh inference from the same facts and material available with the Income-tax Officer at the time of the original assessment proceedings". This decision, however, does not empower the AO to rely only on the deposition of a third party in order to upset the Return filed by an assessed.

5. This is where the failure of the Revenue to produce Shri Anand Prakash for cross-examination by the assesseds, assumes fatal consequences. Reassessment proceedings have been initiated after several years of the acceptance of the Return under [Section 143\(1\)](#) of the IT Act. The assesseds have themselves relied on the banking transactions between themselves and Shri Anand Prakash; secondly on bills issued

by them to Shri Anand Prakash, and on the unassailed payment of rent to Shri Mool Chand. It is true that the assesseds failure to produce Shri Kishan Chand had the consequence of not proving that the said person was tilling the land on their behalf. This failure cannot inexorably lead to the conclusion that no agricultural income had been generated by the assesseds. Such an inference can only be drawn from the statement of Shri Anand Prakash to the effect that the transactions between him and the Assesses were bogus. Therefore, it was mandatory for the Revenue to produce Shri Anand Prakash for cross-examination by the assesseds on their specific demand in this regard. The facts on which the decision to invoke [Sections 147/148](#) are predicated may in some cases be sufficient both for decision to carry out a reassessment as well to justify or sustain the fresh assessment. However, there may well be instances where the former said reopening may pass muster in the light of some facts, but those facts by themselves may turn out to be insufficient to preserve the assessment itself. Once [Sections 147/148](#) are resorted to, the AO must first discharge the burden of showing that income has escaped assessment. It is only thereafter that the assessed has to provide all the answers. We find no reason why the initial burden of proof should not rest on the AO even where the Assessment has gone through under [Section 143\(1\)](#) of the Act. The Tribunal has, therefore, arrived at the correct conclusion.

17. On identical set of facts, the Tribunal had the occasion to decide the appeal in ITA No. 4271/DEL/2019 wherein also the reopening of assessment was challenged which was made pursuant to the information received from the INV Wing when search was conducted in the Spaze group of cases and statement of Shri Kishore Sharan Goyal was recorded on oath. The relevant findings of the co-ordinate bench read as under:

"11. We have considered the rival submissions. We find that the issue is same as have been considered in the case of M/s. KLF Food (India) Ltd., (supra) except that in this case there is no assessment under [section 143\(3\)](#) of the Income- Tax Act, 1961. The Hon'ble Bombay High Court in the case of [Siemens Information System Ltd., vs. ACIT & Others](#) (2007) ITA.No.4271/Del./2019 Shri Devki Nandan Bindal, Delhi. 293 ITR 548 (Bom.) held that "when notice for reassessment basing on non-existing reasons and provisions inapplicable at relevant time - Not constituting reasons to believe. Notice invalid." The Hon'ble Punjab and Haryana High Court in the case of [CIT vs., Atlas Cycle industries](#) (1989) 180 ITR 319 (P&H) held as under :

"Held, (i) that the Tribunal was right in cancelling the reassessment as both the grounds on which the reassessment notice was issued were not found to exist, and, therefore, the

Income-tax Officer did not get jurisdiction to make a reassessment."

11.1. The Hon'ble Bombay High Court in the case of [Ankita A. Choksey vs. Income Tax Officer And Others](#) (2019) 411 ITR 207 (Bon.) held that "Condition precedent for issue of notice for reassessment is that the reason to believe that income has escaped assessment must be based on correct facts. Notice based on wrong facts is without jurisdiction and is to be quashed."

11.2. In the instant case, the Assessing Officer has recorded vague reasons based on wrong facts. The escapement of income based on accommodation entry as informed by Investigation Wing have been mentioned at Rs.3.20 crores which in fact was Rs 2.20 crores. Such fact is mentioned in the balance sheet of the assessee, copy of which is, filed at Page-10 of the paper book, which is also supported by the list of Investors filed at Page-21 of the paper book. The Assessing Officer in the reasons for reopening has also mentioned incorrect F.Y. 2007-2008 instead of F.Y. 2006-2007. Therefore, the reasons are based on wrong facts, which clearly show that there was no application of mind on the part of the Assessing Officer while recording reasons for reopening of the assessment. We, therefore, considering the above discussion and following the reasons for decision in the case of *M/s. KLF Food (India) Ltd., (supra)*, hold that

assumption of jurisdiction by the Assessing Officer for reopening of the assessment is illegal and bad in Law. We, accordingly, set aside the ITA.No.4271/Del./2019 Shri Devki Nandan Bindal, Delhi. orders of the authorities below and quash the reopening of assessment in the matter. Resultantly, all additions stand deleted. In view of the above, there is no need to decide the Departmental Appeal on merit in which Ld. CIT(A) has already deleted the addition.

12. In the result Appeal of the Department is dismissed and the cross-objection of the Assessee is allowed.

13. To sum-up, both Cross-Objections of different Assesseees are allowed and both Departmental Appeals are dismissed."

18. The Id. DR, in his written submissions, has placed reliance on several judicial decisions to buttress his view that information received from INV Wing was good enough to reopen the assessment order.

19. We are not into the information received from the INV Wing, but, on application of mind of the Assessing Officer before issuing such notice. As explained elsewhere, the entire assessment based upon the information received is devoid of any application of mind. At this juncture, it is pertinent to mention that neither Shri Kishore Sharan

Goyal nor Sai Kripa Enterprises and Balaji Enterprises are related to the assessee.

20. At the cost of repetition, the transaction is not of unsecured loan/cash credits where the assessee has introduced its own unaccounted cash in the form of sales. Sales are supported by C Forms, VAT Nos and Sales Tax numbers of the parties, further supported by the certificates from the forest department. All these have not been examined by the Assessing Officer and had he examined these documents/evidences or made necessary enquiries, he may not have issued notice u/s 148 of the Act but for non-application of mind, the assessment was reopened.

21. The Hon'ble High Court of Delhi in the case of RMG Polyvinyl Ltd 396 ITR 5 had the occasion to consider the issue whether notice issued by the Assessing Officer to reopen assessment on the basis of information received from INV Wing could be said to be tangible material, the Hon'ble High Court held that information received from INV Wing could not be said to be tangible material per se without a further enquiry being undertaken by the Assessing Officer to establish

link between tangible material and formation of reason to believe that income has escaped assessment.

22. Considering the underlying facts in issues, we are of the considered opinion that the assessee succeeds on both the counts - reopening is devoid of any application of mind and additions are solely based upon assumptions, conjectures and surmises. Therefore, the assessee succeeds on both the counts.

23. In the result, the appeal of the assessee in ITA No. 8761/DEL/2019 is allowed.

The order is pronounced in the open court on 10.07.2020.

**Sd/-/-
[KULDIP SINGH]
JUDICIAL MEMBER**

**Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 10th July, 2020.

VL/

Copy forwarded to:

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

Asst. Registrar
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	