

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER)**

Smt. Sunita Jain, 30, Prarthna Vihar Bunglows, Nr. Ambawadi Post Vistar, Ambawadi, Ahmedabad PAN No.ABFPJ5435N &	V/S	Income Tax Officer, Ward-10 (3), Ahmedabad
Smt. Rachna Sachin Jain 30, Prarthna Vihar Bunglows, Nr. Ambawadi Post Vistar, Ambawadi, Ahmedabad PAN No.AEJPJ8706R		
(Appellant)		(Respondent)

(आदेश)/ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

1. ITA Nos. 501 & 502/Ahd/2016 are appeals by two different appellants preferred against two separate orders of the Ld. CIT(A)-5, Ahmedabad dated 11.12.2015 pertaining to A.Y. 2008-09.
2. Since the facts involved in both the appeals are identical, therefore, they were heard together and are disposed of by this common order for the sake of convenience and brevity.
3. Both the appeals are late by 12 days. The appellants have filed affidavit stating the facts causing the delay in filing of the appeal. After giving a thoughtful consideration to the facts mentioned in the respective affidavits, we are of the opinion that the appellants were prevented by reasonable and sufficient cause for not filing the appeals on time. The delay is condoned.
4. As mentioned elsewhere, since the facts are identical, we heard the representatives of both sides on the facts of ITA No. 501/Ahd/2016. With ground no. 1, the assessee has challenged the jurisdiction of the A.O. for re-opening the assessment u/s. 147 of the Act. The other grounds are on merits of the case which relate to the treatment of gains arising out of the sale of shares as income from undisclosed sources.
5. Briefly stated, on the basis of the information received by the A.O. in respect of some search operation conducted in the case of M/s Mahasagar Securities Pvt. Ltd. The A.O. came to know that the assessee has purchased

certain shares from Mahasagar Securities group which was engaged in issue of bogus purchase bills for accommodation. The A.O. accordingly re-opened the assessment u/s. 147 of the Act by issuing notice u/s. 148 of the Act after recording the reasons and opening the necessary approval u/s. 151 of the Act.

6. The reasons recorded by the A.O. read as under:-

"As per the information received from investigation wing, Mumbai, the assessee has involved purchase of certain shares amounting to Rs.2,30,059/- from M/s. Mahasagar Securities Group Co. which was revealed that Mahasagar Group is engaged in issue of bogus purchase bills for accommodation. Therefore, I have reason to believe that the income chargeable to tax has escaped assessment to the extent of bogus purchases exceeding Rs.one lac for the period relevant to A.Y. 2008-09."

3. You are, therefore, requested to co-operate in the proceedings and produce or cause to be produced before me at my office at above mentioned address on 11/11/2013 the accounts and/or documents as that may be necessary to produce in support of your explanation.

7. A careful reading of the afore-stated reasons for reopening of the assessment shows that the assessment has been reopened merely on the information received from Investigation Wing.

8. The Hon'ble Jurisdictional High Court of Gujarat had the occasion to consider an identical issue in the case of Harikishan Sunderlal Virmani vs. Deputy Commissioner of Income Tax-Circle-2(1) in Special Civil Application

No. 16204 of 2016. The similarity of the facts can be seen from the following:-

"2. Reasons for reopening of the assessment - A.Y. 2009 reg.

Assessee had e-filed his return of income for the Asstt. Year 2009-2010 on 30.09.2010 declaring therein total income of Rs. 2,09,39,600/-. Subsequently, the case was selected in CASS within the meaning of section 143(3) of the act. Assessment proceedings was completed u/s. 143(3) of the Act on 30/11/2010 determining the assessed income at Rs. 2, 09,60,910/-.

2. Thereafter, information has been received from the Principal Director of Income Tax (Investigation), Ahmedabad vide confidential letter No.PDIT (Inv)/AHD/CCM/Dissemination/15-16 dated 08.03.2016.

On perusal fo the data supplied by the office of the Pr. Director of Income Tax (Investigation), Ahmedabad it is noticed that assessee carried out share trading through the broker, Guinness securities Limited. And as per the guidelines of the SEBI the client code of the assessee with the aforesaid broker was WW/2647. In order to verify the genuineness of the modification of client code in the case of the assessee, by applying Lavenshtein Distance Analysis or digit edit analysis utility, in those cases where the assessee is original client and transactions were carried out from assessee's client code then subsequently client code was modified to other client the details of such case are as under :-

OC	OCC	MC	MCC	Distance as per Lavenshtein Distance Analysis	Net reduction in income due to CCM
Harikishan Sunderlal Virmani	WW/2647	Binay R. Chaturvedi	WW/2108	3	Rs. 1,19,848/-

In order to verify the genuineness of the error, the Lavenshtein Distance analysis or digit edit analysis utility is also provided by the investigation Wing. This utility gives a clear indication as to whether the code is wrongly typed or is completely replaced. If the number of digits changed from original code to

modified code is 1, then it can be reasonably argued that the OCC (Original Client Code) may have been typed wrongly by mistake. Similarly, if the number of digits changed is more say 4 or 5, it cannot be genuine mistake but a deliberate change. To this extent, Levenshtein Distance Analysis or digit edit analysis act as a clear indicator for genuineness in client code modification. In short, the longer the distance (i.e. number of digits changed), the lesser the chance of genuineness.

Hence, the editing of client code above it is termed as deliberate change and establishes the non-genuineness and contrived nature of the code change.

4. In view of the above facts, I have reason to believe that the income to the extent of Rs.1,19,848/- has escaped assessment, which required to brought under tax. Therefore, this case is a fit the proceeding u/s. 147 of the Act."

9. And on the aforementioned reasons, the Hon'ble High Court observed as under:-

5.03. Thus from the reasons recorded, the reopening of the assessment is on the information / data supplied by the office of the Principal Director of Income Tax (Investigation), Ahmedabad and the information received from the Principal Director of Income Tax (Investigation), Ahmedabad vide his confidential letter dated 8/3/2016. From the information received, it appears that though the client code of the assessee with the broker - Guinness Securities Limited was WW/2647, modified client code was found to be WW/2108 and therefore, to verify the genuineness of the modification of the client code, by applying Lavenshtein Distance Analysis or digit edit analysis utility, distance was found to be 3 and therefore, it is believed that the code is not wrongly typed and it is termed as deliberate change and establishing non-genuineness and contrived nature of the code change. From the reasons recorded, it does not appear that verification of the material on record there is independent formation of opinion by the A.O. and that any income has escaped assessment due to any failure on the part of the assessee in not disclosing truly and correct facts/material necessary for assessment. From the reasons recorded, it appears that the impugned reopening proceedings are on the borrowed satisfaction. No independent opinion is formed. On the plain reading of the reasons recorded what emerges is that the A.O. on considering the information received from the Principal Director of Income Tax

(Investigation), Ahmedabad, reassessment proceedings have been initiated on the ground that the income escaped assessment. However, there is no assertion regarding the basis on which material on record, he has come to such conclusion. Therefore, the material on the basis of which the A.O. seeks to assume the jurisdiction under section 147 if the Act is the information received from the external source viz. the Principal Director of Income Tax (Investigation), Ahmedabad. It cannot be disputed that on the basis of the information received from another agency, there cannot be any reassessment proceedings. However, after considering the information / material received from other source, A.O. is required to consider the material on record in case of the assessee and thereafter is required to form an independent opinion on the basis of the material on record that the income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment for the verification.

10. Considering the similarity of the facts of the case in hand, the assumption of the jurisdiction to reopen the assessment in exercise of power u/s. 147 of the Act is bad in law and contrary to the provisions of Section 147 of the Act. The impugned re-assessment proceedings deserve to be quashed and set aside. Accordingly, the impugned notice issued u/s. 148 of the Act and reopening of the proceedings for A.Y. 2008-09 cannot sustain and the same deserve to be quashed and set aside and are hereby quashed and set aside. Ground no. 1 is accordingly allowed.

11. For the sake of completeness of the adjudication, even on merits of the case, the additions do not survive. A perusal of the orders of the authorities below shows that the claim of capital gains was denied by the revenue authorities on the strength of the statement of Shri Mukesh M. Choksi and the materials found from the third party i.e. books etc. in the case of M/s. Mahasagar Securities group and Mukesh M. Choksi. The revenue

authorities were of the strong belief Shri Mukesh M. Choksi was providing accommodations entries by issuing bogus bills of share purchases of companies which were not listed on the stock exchanges and, therefore, the capital gains discussed by the assessee are the outcome of fraudulent transactions and cannot be accepted as such. Accordingly, the gains were treated as undisclosed income of the assessee.

12.The Id. Counsel for the assessee(s) vehemently stated that denial of cross-examination and relying on a third party's statement without affording any opportunity to the assessee(s) and also by not providing the copy of the statement has vitiated the entire assessment order. It is the say of the Counsel that denial of natural justice cannot be considered in framing the assessment order. The Counsel for the assessee continued by stating that the shares were purchased through brokers and the same were also sold through brokers. If the brokers turned out to be scamster, the assessee cannot be held responsible for the same.

13.Per contra, the DR strongly supported the findings of the Revenue Authorities. It is the say of the DR that the assessment is not merely based upon the statement of Shri Mukesh Choksi, but also on the fact that the entire transactions of the assessee were bogus.

14.The entire assessment is based upon the statement of Shri Mukesh Choksi. It is an undisputed fact that neither a copy of the statement was supplied to the assessee nor any opportunity of cross-examination was given by the

Assessing Officer/CIT(A). The Hon'ble Supreme Court in the case of Andaman Timber Industries in Civil Appeal No. 4228 of 2006 was seized with the following action of the Tribunal:-

"6. The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static. Since we are not upholding and applying the ex factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."

15.The Hon'ble Apex Court held as under:-

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose

as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”

16. On the strength of the aforementioned decision of the Hon'ble Supreme Court, the assessment order has to be quashed.

17. Even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee. On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account. Shri Mukesh Choksi may have been

providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn.

18. In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account.

19. Accordingly, we direct the A.O. to treat the gains arising out of the sale of shares under the head capital gains- "Short Term" or "Long Term" as the case may be. The other grievance of the assessee becomes infructuous.

20. In the result, the appeals filed by the Assessee are allowed.

Order pronounced in Open Court on 09 - 03- 2017
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Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER True Copy
Ahmedabad: Dated 09 /03/2017

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.