R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 3564 OF 2018

Dimexon Diamonds Ltd, Mumbai .. Petitioner

Versus

Deputy Commissioner of Income Tax ,
Central Circle -1(4), Mumbai & Ors. .. Respondents

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- Mr. Satish Mody a/w Ms. Aasifa Khan for the Petitioner
- Mr. Suresh Kumar for Respondent No. 1

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : JANUARY 31, 2019.

P.C.:

1. The petitioner has challenged a notice of reopening of assessment dated 31.3.2018 issued by respondent No. 2 - Joint Commissioner of Income Tax. After the filing of this petition, the petition was amended to challenge an assessment order dated 12.12.2018 passed by respondent No. 1 - Deputy Commissioner of Income Tax.

2. Brief facts are as under:-

(a). Petitioner is a Private Limited Company. For the assessment year 2012-13, the petitioner had filed return of income declaring total income of Rs. 71.72 crore (rounded off). This return was taken in scrutiny by the Assessing Officer during which information was received by the Assessing Officer from the investigation made, conveying that the petitioner company had obtained bogus purchase bills / accommodation entries from one Shri. Bhanwarlal Jain and group entities. The Assessing Officer passed order of assessment under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 9.2.2016 in which he had added a sum of Rs. 45.14 lacs (rounded off) to the total income of the assessee arrived by applying profit ratio of 9.20% out of bogus purchases and accommodation entires was Rs. 4.90 crore (rounded off).

(b). To reopen such assessment, he issued the impugned notice which as can be seen, was done beyond the period of four years from the end of relevant assessment year. In order to do so, he had recorded following reasons:-

> " In the instant case, the assessee e-filed its ROI on 28.9.2011 declaring total income at Rs. 71,72,01,070/-. The ROI was processed u/S. 143(1) of the Act. Subsequently, the case was selected on scrutiny. During the course of assessment proceedings, an

information received from the DGIT(Inv) vide letter dated 10-3-2014, wherein it was informed that the assessee company has obtained bogus purchase bills / unsecured loan entries provided by Shri. Bhanwarlal Jain, Shri. Pravin Jain Group, Shri. Gautam Jain Group and others. As per the information, the assesee company had availed accommodation entries / fictitious bills of Rs. 4,63,36,453/- and Rs. 27,29,282/- from M/s. Little Diam and M/s. Krishna Diamonds respectively.

The assessment proceedings were completed u/S. 143(3) of the Act, on 9.2.2016, assessing total income at Rs. 72,17,15,120/-. An amount of Rs. 45,14,048/- was added to the total income on account of bogus purchase being 9.20% of total accommodation entires of Rs. 4,90,65,735/-.

The Hon'ble Supreme Court, in its recent judgment in the case of M/s. N.K. Inds. has held that in the case of bogus purchase, the entire bogus purchase is to be disallowed u/S. 69C of the Act. It is evident that by not offering the whole of the amount of bogus purchase of Rs. 4,90,65,735/- to tax, the assessee has failed to disclose fully and truly all material facts necessary for its assessment for AY 2012-13.

In view of the above, I have reason to believe that income to the tune of Rs. 4,90,65,735/- has escaped assessment and is to be brought to tax in the hands of M/s. Dimexon Diamons Ltd for A.Y. 2012-13."

(c). Upon being supplied the reasons, the petitioner raised objections to the notice of reopening of assessment under letter dated 9.10.2018. Said objections were rejected by the

Assessing Officer on 15.11.2018. Copy of this order was received by the petitioner on 21.11.2018. The Assessing Officer passed the order of assessment on 12.12.2018. The petitioner has challenged the notice of reopening of assessment. By way of amendment, he has also added a challenge to the order of assessment passed pursuant to such notice.

3. The record would suggest that the Assessing Officer passed the order of assessment without waiting for a period of four weeks from the date of communication of the order disposing of objections. This requirement flows from the judgment of this Court in case of **Asian Paints Ltd Vs. Dy CIT & Ors.**[1]. The petitioner had also brought this aspect to the notice of the Assessing Officer under letter dated 10.12.2018 despite which, the Assessing Officer passed the order of assessment without waiting for such period. We had, therefore, at the outset inquired with the learned counsel for the Revenue as to the reasons for this slip on the part of the Assessing Officer. In response to the same, Mr. Suresh Kumar tendered an additional affidavit dated

1 [2008] 296 ITR 90 (Bom)

25.1.2019 filed by the Assessing Officer. Firstly, citing the reason of high pressure of work for oversight and secondly has tendered unconditional apology. We, therefore, close this issue.

4. Nevertheless the passing of the Assessment Order dated 12.12.2018 in defiance of the order of this Court in Asain Paints (supra) cannot be accepted. This is more so as the petitioner by letter dated 10.12.2018 had informed the Assessing Officer of the decision of this Court in Asian Paints (supra) that it is in the process of challenging the impugned notice. In the above circumstances, we do not relegate the petitioner to avail of the alternate remedy available under the Act but exercise our writ jurisdiction and set aside the impugned order dated 12.12.2018 as being without jurisdiction. Therefore, we are now at the pre-assessment order stage.

5. On merits of the petitioner's challenge to the impugned notice, we may recall that the factum of the petitioner being beneficiary of bogus purchase bills and accommodation entries was within the knowledge of the Assessing Officer even during the original scrutiny assessment. He therefore, passed the order of assessment in which he added a sum of Rs. 45.14 lacs to the income of the assessee by taking profit ration of 9.20% on the total bogus purchases and accommodation entries. Through the reasons, now he wishes to add the entire amount holding a belief that such sum represents the petitioner's undisclosed income. We are not called upon to decide whether the Assessing Officer's first approach of taxing only the profit element embedded in bogus purchases was correct or that his later approach of taxing the entire bogus purchases is correct. What we are however called upon to judge is whether in facts of the present case, he can change his basis of assessing the income. In clear terms, once the Assessing Officer noticed the factum of bogus purchases and accommodation entries and in scrutiny assessment, taxed the same in the manner he thought was appropriate, he cannot be allowed to shift the stand by issuing notice of reopening of assessment. This would be based on mere change of opinion. We may stress on the point that after the assessment was completed, there was no further material available with the Assessing Officer which would enable him to form a belief that the income chargeable to tax had escaped assessment.

6. In the result, the impugned notice is also set aside.

7. The petition is allowed in the above terms.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**