R.M. AMBERKAR
(Private Secretary)

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

WRIT PETITION NO. 3568 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 2011-12, the petitioner had filed return of income declaring total income of Rs. 58.82 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 23.3.2015 in which he had added a sum of Rs. 84.70 lacs (rounded off) to the total income of the assessee arrived by applying profit ratio of 8.56% out of bogus purchases and accommodation entires was Rs. 9.89 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. 28,82,21,589/-. Further, in this case, in information was received from DGIT Inv.) Mumbai, on 2-3-2014, wherein it was informed that the assessee company has obtained

accommodation entries / fictitious bills of Rs. 1,40,27,017 and Rs. 6,32,01,012/- from M/s. Millenium Stars and M/s. Little Diam respectively which are concealed to Shri. Pravin Jain and Shri. Bhanwarlal Jain. Further, it was informed that the assesee company had obtained accommodation entries for purchase from M/s. Mayank Impex. Prop. Sanjay Choudhary (HUF) (AAAQS5732R) amonting to Rs. 2,17,30,500/-.

The assessment proceedings were completed and the order u/S. 143(3) of the Act, was passed on 23.3.2015, assessing total income of the assessee at Rs. 60,24,88,070/- an amount of Rs. 3,72,850/- was added to the total income on account of bogus purchase being 8.56% of total accommodation entries of Rs. 9,89,58,529/- (1,40,27,012 + 6,32,01,012 + 17,30,500). As the assessee in its ROI had shown a GP of Rs. 8.56% therefore, the AO worked out the addition on GP at the same rate being the profit embedded in the amount of accommodation entires.

Subsequently, an another information was received from the DCIT, CC-4, Surat informing that the assessee has taken accommodation entires in the form of bogus purchase from M/s. Krishna Diam, amounting to Rs. 7,47,293/- during the FY 2010-11. The case was reopened and the reassessment proceedings u/S. 143(3) r.w.s. 147 of the Act, were completed on 2.3.2016 re-assessing the total income on the case at Rs. 60,25,52,540/- an addition of Rs. 63,968/- was made being 8.56% Rs. 7,47,293/-.

In view of the decision of the Hon. Supreme Court, in the case of M/s. N.K. Inds. wherein, the Hon'ble Apex Court, upheld the entire amount of Bogus purchase on the ground that there is no incumbent to restrict the disallowance u/S. 68/69 in the case of bonus purchase and entire bogus purchase is to be disallowed u/S 69C of the Act.

In view of the above, it is evident that by no offering to tax, a amount of Rs. 9,97,05,822/- (1,40,27,017 + 6,32,01,012 + 2,17,30,500 + 7,47,293) the assessee has failed to disclose fully truly all material facts necessary for its assessment for AY 2011-12.

In view of the above, I have reasons to believe that income to the tune of Rs. 9,97,05,822/- has escaped assessment and is to be brought to tax in the hands of M/s. Dimexon Diamons Ltd for A.Y. 2011-12.

(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. 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 dated 12.12.2018 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 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 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

1 [2008] 296 ITR 90 (Bom)

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. 84.70 lacs to the income of the assessee by taking profit ration of 8.56% 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]**