

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : "C" NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA No: 3407/Del/2013
AY : - 2003-04

G.S. Control
F-3/8A, Krishna Nagar
New Delhi – 110 051
PAN AACCG0368G
(Appellant)

vs. ACIT
Circle-12 (1)
New Delhi.

(Respondent)

Appellant by : Dr. Ram Samujh, Advocate

Respondent by : Shri T. Vasanthan, Sr.DR

Date of Hearing : 14.03.2016

Date of pronouncement :

ORDER

PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals) V, New Delhi dated 24.9.2013 for the assessment year 2003-04 on the following grounds :-

- 1. "That the Ld. CIT (A) erred in law and facts by upholding the validity of reopening of assessment and the issuance of notice u/s 148 of the I.T. Act, 1961, though said notice was merely and exclusively on the direction of investigation wing of the IT Department without recoding own satisfaction by the Ld. AO*
- 2. That the Ld. CIT(A) erred in law and in facts in not appreciating the legal position, since the reopening of the assessment and issuance of notice u/s 148 was not valid, the order passed in response to said notice was bad in law and was liable to be annulled.*

2. Facts in brief :- The assessee derives its income in the form of commission from all kinds of electrical goods. It filed its return of income on 2.12.2003 declaring income of Rs. 36,950/-. The case was processed u/s 143 (1). Later on as information was received from the investigation wing, the assessment was reopened u/s 147 of the Income Tax Act 1961 (The Act) by issuance of notice u/s 148 of the Act. The AO completed the assessment and determined the total income at Rs. 21,61,950/-, interalia making an addition of Rs. 21,25,000/- u/s 68 of the Income Tax Act.

3. Aggrieved the assessee carried the matter in appeal. The first appellate authority confirmed the order of the AO.

4. Aggrieved the assessee is in appeal before us.

5. We have heard Dr. Ram Samujh, Ld. Counsel for the assessee and Shri T Vasanthan, Sr. DR on behalf of the revenue. Dr. Ram Samujh challenged the reopening of assessment and submitted that the reopening is bad in law for the following reasons :-

- a) The AO issued the notice u/s 148 reopening of assessment based on information received from the investigation wing of the department without application of mind.
- b) That the issuance of notice u/s 148 on the direction of the investigation wing, without carrying out independent inquiry is bad in law.
- c) That the assessee objected to the reopening and asked for the copy of the statement recorded by the investigation wing, inquiry report as well as

the list of entry operators provided by the investigation wing to the AO and that no material was given to the assessee in response to such report.

- d) No opportunity of cross examination of witnesses of the revenue was provided to the assessee.
- e) Non production of the directors of the Company which have made application for investment in share capital company of the assessee company, before the AO, cannot be a reason for confirming the addition, as such directors are not in control of the assessee company
- f) That the observation of the Ld. CIT(A) that the assessee has not complied with the notices is not factually correct and that Ld. AO passed the order within 10 days from the date of issuance of notice, without mentioning the date of service of notice and this was violation of principles of natural justice.

6. On merits of the addition of Rs. 16,25,000/-, the Ld. Counsel of the assessee made detailed submissions, which we would be referring to, as and when required.

7. Ld. DR Shri Vasanthan on the other hand relied on the order of the CIT(A) and submitted that the reopening is valid. He relied on the proposition of law laid down in the judgment of Hon'ble Delhi High Court in the case of CIT vs. M/s. Navodaya Castles Pvt. Ltd. 367 ITR 306 and submitted that this decision was upheld by the Supreme Court. He also relied on the case reported in 56 taxmann.com 18 (SC) (2015). He pointed out that the Tribunal, in the assessee's own case, for the

asstt. year 2006-07, in ITA No. 1520/Del/2010, has upheld the order of the Ld. CIT(A), which was in favour of the assessee and submitted that the facts in the present case are different and hence the issue is not covered by this order of the ITAT. He relied on the judgments of the Hon'ble Supreme Court in the case of M/s. Deepak Agro Foods vs. State of Rajasthan & Ors. 2008-TIOL-134-SC-CT in Civil Appeal No. 4327-28 of 2008 and 4329 of 2008 judgment dated 11th July, 2008 and submitted that there is a distinction between orders which are null and void and orders which are illegal. He submitted that when an authority makes an order without having any inherent jurisdiction, the orders are null and void, non est or void ab initio. He further submitted that when the authority has inherent jurisdiction but exercises of jurisdiction is in a wrongful manner, it would result in the illegality being capable of being cured in a duly constituted legal proceedings and that the order cannot result in nullity. He also relied on the decision of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Empire Builtech Pvt. Ltd. On merits he relied on the order of the Ld. CIT(A) and submitted that the assessee has not discharged the onus that lay out.

8. After hearing rival contentions we hold as follows.

9. Reasons based on which the reopening of assessment was done are at page 28 of the paper book. These are reproduced for your ready reference :-

"Assessee has filed return of income declaring an income of Rs. 36950/- on 2.12.2003. The return was processed u/s 143(1) on 22.1.2004.

An information regarding entry operators and their beneficiaries was received from DIT(Inv)-1, New Delhi vide D. No. 1399 dated 2.3.2006 and No. DIT(Inv.) – 1/2006-07AE/1536 dated 5.2.2007 that the assessee company is one of the beneficiaries and took entry from the entry operator as detailed below :-

Assessee Bank a/c	Value of Entry taken	Instrument No. By which entry taken	Date on which entry taken	Name of account holder of entry giving account	Bank a/c from which entry given
44899	1,000,000	24864	13-Mar-2003	PERFORMANCE TRADING & INV. P. LTD.	STATE BANK OF BIKANER & JAIPUR
44900	500,000	6583	27-Mar-2003	RAHUL FINLEASE P. LTD.	STATE BANK OF BIKANER & JAIPUR
18123 SB	150000	4795	27-Dec-2002	GEETA VERMA	DENA BANK
18059 SB	225000	751481	27-Dec-2002	DIVESH KUMAR	DENA BANK
10273	250000	163108	31-Dec-2002	RAJEEV KUMAR AGARWAL	BOR

As a result of above, I am convinced that assessee has evaded income chargeable to tax and has not declared proper source of income or expenditure for which accommodation has been taken as referred to above. The assessment for A.Y. 2003-04 was not made. The return has only been processed u/s 143(1) and no action u/s 143(3) has been taken in this case. As a result of above income chargeable to tax has escaped assessment. Hence a notice u/s 147 read with section 148 for reopening for assessment is required to be sent in this case."

In the result reopening is bad in law. "

10. We have perused the judgment of the Hon'ble Supreme Court in the case of M/s. Deepak Agro Foods vs. State of Rajasthan & Ors. (supra). In the case on hand, the AO does not acquire jurisdiction over the case, unless a valid notice u/s 148 is issued and served after following the procedure laid down in the Act for reopening of assessment. When the action of reopening assessment is held to be

bad in law for any reason, then the AO does not acquire jurisdiction. Under the circumstances an order passed without jurisdiction would be null and void order.

11. We now consider the argument of the assessee that the AO had simply relied on the information received from the investigation wing and has not applied his mind while recording reasons that income subject to tax has escaped assessment.

12. In the decision of the Jurisdictional High Court in the case of Principal Commissioner of Income Tax vs. G&G Pharma India Ltd. in ITA no. 545/2015 vide order dt. 8.10.2015 at paras 12 and 13 it was held as follows.

"12. In the present case, after setting out four entries, stated to have been received by the Assessee on a single date i.e. 10 February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated: "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has, introduced its own unaccounted money in its bank account by way of above accommodation entries." The above conclusion is unhelpful in understanding whether the AO applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the Assessee, which must have been tendered along with the return, which was filed on 14th November 2004 and was processed under Section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the AO to have simply concluded: "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO must apply his mind to the materials in order to have reasons to believe that the income of the Assessee escaped assessment is missing in the present case.

Mr. Sawhney took the Court through the order of the CIT(A) to show how the CIT (A) discussed the materials produced during the hearing of the appeal. The Court would like to observe that this is in the nature of a post mortem exercise after the event of reopening of the assessment has taken place. While the CIT may have

proceeded on the basis that the reopening of the assessment was valid, this does not satisfy the requirement of law that prior to the reopening of the assessment, the AO has to, applying his mind to the materials, conclude that he has reason to believe that income of the Assessee has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analysing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity .”

13. A perusal of the reasons recorded demonstrates total non application of mind by the AO. Thus applying the proposition of law laid down by the Jurisdictional High Court in the case of G & G Pharma India (supra) we hold that the re-opening of assessment is bad in law.

14. Hence we quash the re-assessment proceedings and allow the appeal of the assessee.

Order pronounced in the open court on 20/5/2016.

sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

sd/-

(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 20th May, 2016

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Copy of the Order forwarded to:

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

By order

Asstt. Registrar