

ACIT V NBCC Limited ITA NO 939/ Del/2012  
NBCC Limited V ACIT CO No 164/Del /2012  
A Y 2002-03

**INCOME TAX APPELLATE TRIBUNAL**

**DELHI BENCH "E"**

**NEW DELHI**

**BEFORE  
SHRI H.S.SIDHU, JUDICIAL MEMBER**

**AND**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No. 939/Del/2012  
(Assessment Year: 2002-03)

ACIT,  
Circle-13(1),  
Room No.406,  
C.R.Building, I.P. Estate,  
New Delhi

NBCC Ltd.,  
NBCC House,  
Lodhi Road,  
New Delhi  
PAN:AAACN3053B

**(Appellant)**

**(Respondent)**

C.O. No.164/Del/2012  
(in ITA No. 939/Del/2012)  
(Assessment Year: 2002-03)

NBCC Ltd.,  
NBCC House,  
Lodhi Road,  
New Delhi  
PAN:AAACN3053B  
**(Appellant)**

ACIT,  
Circle-13(1),  
Room No.406,  
C.R.Building, I.P. Estate,  
New Delhi  
**(Respondent)**

Revenue By : - Sh. Balwan Choudhary, CIT DR  
Assessee by : Sh. Suresh Gupta, CA  
Sh. Somil Aggarwal, Adv

Date of Hearing	26.11.2015
Date of pronouncement	04.12.2015

**ORDER**

**PER PRASHANT MAHARISHI, A. M.**

1. The present appeals filed by the revenue and Cross Objection filed by the assessee is directed against the order of learned CIT(A)-V, dated 23.02.2012

passed for the assessment year 2002-03. The revenue raised the following grounds of appeal:

“1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in allowing relief of Rs.2,73,18,000/- on account of bad debts written off. The learned CIT(A) has allowed the assessee's claim on the premises that these amount must have been offered for taxation in earlier years and the conditions of 36(1)(vii) were satisfied.

2. On the facts and circumstances of the case, the Ld. CIT(A) has erred in admitting the fact that as per explanation to Sec.36(1)(vii) of the IT Act, any bad debt or part thereof written off as irrecoverable in the accounts of the assessee shall not include any provision for bad and doubtful debts made in the accounts of the assessee and only the debts which have already been offered by the assessee as income in earlier years can be written off if the same are not recovered by the assessee after making efforts. In the instant case whether these amounts have been offered for taxation earlier or not is not clear from the accounts and hence the learned CIT(A) has erred in granting relief to the assessee.”

2. In cross objection the assessee has raised the following grounds:-

1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in reopening the impugned assessment that too without, assuming jurisdiction as per law and without recording valid reasons and without complying with the mandatory conditions of provisions of sections 147 to 153 of the Income: Tax Act, 1961 and reopening is barred by limitation in view of provisions to section 147.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in, confirming the action of Ld. AO in reopening; the impugned case and in framing the impugned assessment u/s 147/143(3) which is bad in law, unjustified, against the principles of natural justice and void ab initio more so reasons, recorded are invalid in the eyes of law and no valid satisfaction- u/s 151 has been, obtained before issuance of notice u/s 148.”

3. The facts in brief of the case are that the assessee company was engaged in the business of civil construction and erection of civil works undertaken from various Government Departments, Public Sector Undertakings and statutory bodies. The assessee company filed return of income declaring income of

Rs.40,53,440/- on 18.10.2002. The assessee was completed u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act') on 18.03.2005 at total income of Rs.14,01,03,507/-. The assessment was re-opened u/s 147 of the Act and notice u/s 148 was issued on 30.03.2009. In compliance to the notice assessee filed its return of income on 01.05.2009 declaring income of Rs.13,51,64,403/- from business and profession which was set off against brought forward business losses and income from house property for Rs.40,53,421/-. The assessee vide letter dated 27.04.2009 copy of the reasons which were provided to the assessee vide letter dated 12.05.2009. The objection filed by the assessee vide letter dated 08.06.2009 were disposed off by an order dated 30.11.2009 and were rejected. Notice u/s 143(2) and 142(1) dated 03.12.2009 were issued to the assessee for compliance on 10.12.2009.

4. The Assessing Officer noted that the assessee debited Rs.2,73,18,000/- as uncertified value of work done written off under the head 'Other expenses and write offs' in its P&L account. However, as per schedule 22- Accounting policies (1)(a) value of work done and sundry debtors were shown in the accounts after deductions for likely rejections identified and evaluated at best estimates by the Management. The Assessing Officer further observed that in the notes to accounts, the auditors have clearly mentioned that the value of work done and sundry debtors were shown in the accounts after deduction for likely rejections identified and evaluated at best estimates by the management, accordingly the amount of Rs.2,73,18,000/- has already been accounted for by the assessee in its accounts. Moreover, the submission of the assessee that the amount of Rs.2,73,18,000/- represents unrecoverable sundry debtors is also not verifiable from the annual accounts of the assessee. Since the assessee has been following double entry system in its accounts, the corresponding entry should have been in the balance sheet. In schedule-7 of balance sheet under the head "Sundry Debtors" there is no corresponding entry of write off of the sundry debtors. In view of the above facts of the case, the claim of the assessee is not verifiable from its

accounts, hence, the amount of Rs.2,73,18,000/- is disallowed and added back to the income of the assessee. Aggrieved the assessee filed an appeal before the learned Commissioner of Income-tax (Appeals), challenging the action of reopening u/s 148 of the act along with the other disallowance and additions on merits. Ld CIT (A) rejected the contention of assessee against reopening of the assessment and allowed the claim of the assessee on merits. Therefore revenue has preferred appeal against the deletion of additions/ disallowance son merits and assessee has preferred cross objection against the rejection of ground on reopening of assessment.

5. As the cross objection of the assessee is on jurisdictional issue, we decide the cross objection of the assessee first which is against the action of reopening of assessment by the Id AO. For AY 2002-03 original assessment u/s 143(3) of the act was framed on 18.3.2005. Notice u/s 147 of the act dated 30.03.2009. Therefore the notice for reopening is issued beyond four years from the end of the assessment year. Against this backdrop the issue requires consideration.
6. Ld AR of the appellant submitted that assessment has been reopened beyond four years from the end of the assessment year on the reappraisal of the existing material only and no new tangible material coming in to the possession of the AO on which reopening is based. Therefore he submitted that reopening is invalid. For this he relied up on the reason recorded by Id AO for reopening which are reproduced at page no 3 of the order of CIT (A). he submitted that CIT (A) is not correct in upholding validity of reopening of assessment.
7. Ld DR relied on the order of AO as well as CIT (A) and precisely Para no 2.2 of the order of CIT (A) where in Ld CIT (A) has given reason for upholding reopening as valid.

8. We have carefully perused the orders of lower authorities as well as the submission of the rival parties. On perusal of reasons recorded by the Ld AO it is apparent that there is no reference of any new tangible material coming in to possession of AO after assessment is framed u/s 143(3) of the act . The first item of reason is that assessee has debited an amount of Rs 2,73,18,000/- as uncertified value of work done written off in other expense and write off caption. Ld AO has noted that there is certain incoherence in notes to accounts in schedule 22 of the balance sheet as well as the profit and loss account. This does not indicate that there is some new material came in to the possession of the assessee. Secondly AO has noted that while working out the book profit u/s 115JB of the act where lower of business loss carried forward or unabsorbed depreciation is to be reduced. Assessee has deducted book profit by brought forward business losses of Rs 51,81,55,000/- instead of Rs 4,91,27,891/- being unabsorbed depreciation. This fact is also available on record during the original assessment proceedings as same is derived from the profit and loss account as well as form no 29B submitted before AO. Therefore this reason also does not support that any new material has come to the notice of AO for justifying reopening of assessment. Thirdly AO has noted that an amount of Rs 69,64,000/- pertaining to loans and advances written off which should have been disallowed. In this also there is no reference of the new material coming to the possession of AO. Before us Ld AR has cited judgments of Honourable Delhi high court in case of CIT V Orient Craft Limited 354 ITR 546 and Madhukar Kholsa V ACIT 90 CCH 0013 to buttress the claim that in absence of new tangible material reopening cannot be initiated. Honourable Supreme court in 320 ITR 261 in CIT V Kelvinator of India limited has held as under:-

"6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped

assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows :

" 7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.—A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion' . Other provisions of the new section 147, however, remain the same."

9. Therefore it is amply clear that if there are no reason to believe based on new, tangible material then the reopening amounts to an impermissible review. In this case we could not find that after completion of assessment proceedings u/s 143(3) of the act what new material has come in to possession of the AO which prompted AO to reopen the proceedings u/s 147 of the Act. According to us there is none and only reappraisal of the existing material which is available to AO at the time of making original assessment u/s 143(3) of the act. Therefore we are unable to uphold the view of the CIT (A) upholding the validity of reopening of assessment. Hence we reverse the finding of CIT (A) and hold that there is no new tangible material and in

that circumstances reopening initiated by AO is invalid. Therefore we allow the cross objection filed by assessee.

10. As we have allowed the cross objection of the assessee quashing reopening of assessment all the grounds raised in appeal no ITA 939/Del/2012 filed by the revenue becomes infructuous and therefore is dismissed.
11. In the result CO 164/Del /2012 of the assessee is allowed and appeal of the revenue in ITA no 939/Del/2012 is dismissed.

**Order pronounced in the open court on 04.12.2015.**

**-Sd/-**

**(H.S.SIDHU)  
JUDICIAL MEMBER**

**-Sd/-**

**(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

Dated:04/12/2015  
*A K Keot*

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

**ASSISTANT REGISTRAR  
ITAT, New Delhi**