INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE SHRI I.C.SUDHIR, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2833/Del/2016
(Assessment Year: 2007-08)

Smt Taruna Verma, A-340, Shastri Nagar, Delhi PAN:AKFPV1950P	Vs.	ITO, Ward-19(3), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Wadhwa, Adv
Revenue by:	Shri Anshu Prakash, Sr. DR
Date of Hearing	05/09/2017
Date of pronouncement	19/09/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the ld CIT(A)-12, New Delhi dated 28.03.2016 for the Assessment Year 2007-08.

2. The assessee has raised the following grounds of appeal:-

"1. The order of assessment under section 148/ 143(3) of the Act dated 28.03.2014 is erroneous both on facts as well as in law.

2. The Ld. Assessing officer has erred in law in making the assessment under section 148 of the Act.

3. The Ld. Assessing officer has erred in law in making the assessment without recording any failure on part of the appellant to disclose fully and truly all material facts necessary for assessment as per the first proviso to section 147 of the Act.

4. The Ld. Assessing officer has erred in law on reopening the assessment based on information received from Investigation Wing of Delhi which constitutes an opinion and not material which is necessary for reopening.

5. The Ld. Assessing officer has erred in law in issuing twice reasons to believe with a letter dated 22.04.2013 and letter dated 20.03.2014 by simply saying that some typographically mistakes have crept in therefore letter dated 22.04.2013 is withdrawn. Reasons to believe cannot be altered, changed or supplemented.

6. The Ld. Assessing officer has erred in law in disposed off the objections of the appellant on the very same day vide letter dated

24.03.2014 without application of mind which is totally unjustified and unwarranted.

7. The Ld. Assessing officer has no reasons to believe within the section of 147/148 of the I. T. Act, 1961 that the amount of Rs. 78,58,980/- was paid as booking amount by the appellant to M/s. AEZ Group (part of Aerens Group) for booking space at SF - 117 and G.F commercial.

8. The Ld. Commissioner of Income Tax (Appeals), has erred in law in sustaining the addition of Rs. 67,21,980/- under section 69A of the Income Tax Act, 1961."

3. The brief facts of the case is that the assessee is an individual who purchased one commercial property at SF 117, and GF Commercial in FY 2006-07 and information was received from the investigation wing vide letter dated 03.05.2012 informing that during search operation on AEZ Group on 17.08.2011 and subsequent survey operation on 10.02.2012 on investors group comprising of 23 investors that substantial amount of cash payments over and above payment through banking channels was made which tallied as per annexure A-27 seized from that particular company. Therefore, the ld Assessing Officer noted that booking amount of the assessee is Rs. 7858980/- and the cash payment is Rs. 6721980/- and the payment through banking channel is only Rs. 1137000/-. Therefore, the ld Assessing Officer formed a belief that assessee has made a cash payment of Rs. 6721980/- from undisclosed sources. Therefore, a notice u/s 148 was issued on 22.03.2013 recording following reasons which were communicated to the assessee vide letter dated 22.04.2013:-

> "Information has been received from ADIT (Investigation) Unit-III(3), New Delhi that you have booked Unit No. FF-117, Ground Floor, Commercial Indirapuram Habitat Centre Project, Ghaziabd of AEZ Group and made a total payment of Rs. 7858980/- during the Financial Year 2006-07 relevant to Assessment Year 2007-08. Out of this amount of Rs. 1137000/- was paid by cheque and balance amount of Rs. 6721980/- was paid in cash. The same was also accepted by you during the course of post search enquiries conducted by the Investigation Wing. Thereafter, in response to query letter dated 05.02.2013 of the undersigned vide you letter dated 27.02.2013

you have accepted investment of Rs. 11.37 lacks only for the above property.

In view of the above fact and circumstances I have reasons to that the income to the extent of Rs. 6721980/- paid by you in cash for booking/ purchase of the above property with AEZ Group in FY 2006-07 is chargeable to tax for the Assessment Year 2007-08 and has escaped assessment."

4. Consequent to that the notice u/s 142(1) was issued on 18.02.2014 stating the same facts. The Assessing Officer also provided the copy of statement of two investors which were recorded on 10.02.2012 who have confirmed having paid "on Money" payment to AEZ Group. In response to this assessee submitted on 27.02.2014 stating that assessee has not paid the impugned amounts as stated in the reasons, however, assessee has paid on 21.04.2006 Rs. 1137000/- and on 21.06.2011 Rs. 20.63 lacs. Therefore, the assessee has paid total sum of Rs. 32 lacs. The assessee further explained by submitting the copy of agreement between the assessee and the builder. On 19.03.2014 assessee was issued a summon and on 20.03.2014 the assessee was further provided an altogether different reasons stating that there was typographical error in the original returns recorded. Such reasons are as under:-

"Information has been received from ADIT (Investigation) Unit-III(3), New Delhi that a search and seizure operation was conducted on 17.08.2011 on AEZ group (part of Arerens Group). On the basis of material seized/ impounded during the course of search and survey operation and post survey conducted on several investors groups comprising of 23 investors to verify payment of such unaccounted money on booking. During the course of search/ survey operation it has been accepted by the investors that they have made cash payment for booking/ purchase of property in the above said project. The amount accepted by them to have been paid exactly matched with the amounts mentioned in the extracted sheets of the hard Disk seized from the Corporate Office of the AEZ Group.

Ms. Taruna Verma is one of the investors of the AEZ Group, who has booked purchase Unit No. FF117, Ground Floor Commercial, Indirapuram habitat Centre Project, Ghaziabad project of AEZ Group. As per information received M/s. Taruna Verma has made a total payment of Rs. 7858980/- for booking / purchase of this property Rs.

1137000/- was made by the cheque on 19.04.2006 and payment of Rs. 6721980/- was made in cash.

Letter was issued to Mr. Taruna Verma regarding payments made by her to M/s. AEZ Group in connection with booking/ purchase of property. The assessee has only admitted of having paid Rs. 1137000/- out of her saving bank account maintained with Canara Bank, Shastri Nagar, new Delhi.

In view of the facts and circumstances I have reasons to believe that income to the extent of Rs. 6721980/- paid by M/s. Taruna Verma in cash for booking / purchase of property with AEZ Group in the FY 2006-07 is chargeable to tax for the assessment year 2007-08 and has escaped assessment."

5. On 24.03.2014, the assessee raised objection to the revised reasons recorded by the Assessing Officer stating that assessee has not made any cash payment. The assessee also objected to the reopening. On the same day, the objections of the assessee were rejected without adverting on any of the objections. Consequent to that the assessment was framed u/s 143(3) read with section 148 on 28.03.2017 making an addition of Rs. 6721980/- to the total income of the assessee as return on 18.04.2013. Consequently the total income assessed at Rs. 6830236/-. The assessee aggrieved with the order of the ld Assessing Officer preferred appeal before the ld CIT(A) who dismissed the appeal. Now the assessee is before us.

6. The ld AR submitted a written synopsis which are as under:-

"*Brief facts of the case:*

1) *Ld. A0 on the basis of information from Investigation wing vide letter dated 03.05.2012 issued notice u/s 148 on 22.03.2013 to the assessee. (Refer pg no-1 of PB)*

2) *In response thereto, assessee filed the return of income of Rs. 1,08,256/- as income from other sources. (Refer pg. no-2 to 6 of PB)*

3) *Thereafter, assessee made a request to the ld. AO vide letter dated 18.04.2013 to supply "Reasons to Believe". (Refer page no-2 of PB)*

4) *"Reasons to Believe" was provided to the assessee vide letter dated 22.04.2013. (Refer page no-9 of PB). It was stated in this letter that Information was received from ADIT(Inv) Unit -11(3) that assessee had booked FF117, GF, Commercial Indirapuram Habitat Centre Project, Ghaziabad of AEZ Group(thereafter referred as "Indirapuram property"). Assessee made total payment of Rs. 78,58,980/- during financial year 2006-07. Out of this, Rs. 11,37,000/- was paid by cheque and Rs.*

67,21,980/- was paid in cash. It was also specified in the letter that assessee had accepted the same.

5) *Then, just before 8 days of passing of the assessment order, the Id. AO issued another "Reasons to Believe" vide letter dated 20.03.2014 citing the reason that while sending "Reasons to Believe" vide letter dated 22.04.2013, some typographically mistakes had been crept in. Therefore letter dated 22.04.2013 was withdrawn. (Refer pg. no-55 of PB)*

6) *In second letter of "Reasons to Believe", reasons of reopening were completely different. (Refer page no-56 of PB)*

7) *Assessee filed the objections against the said "Reasons to Believe" on 24.03.2014 which were disposed off by the Id. AO on the same date. (Refer pg. no-59 to 62 of PB)*

8) *Ld. AO passed the assessment order u/s 143(3)/148 of I.T Act on 28.03.2014 assessing the total income of Rs.68,30,236/- as against thereturned income of Rs.*

1,08,256/- after making addition of Rs. 67,21,980/- as deemed income u/s 69A of I.T Act.

Synopsis

1. *Reasons to believe cannot be altered, changed and supplemented.*

Ground No. 5 of Assessee's appeal

1.1 *Ld. AO firstly issued reasons to believe vide letter dated 22.04.2013 at page no. 9 of PB. In said reasons to believe, Id. AO relied upon the information received from Investigation Wing that the assessee booked the Indirapuram property for alleged consideration of Rs.78,58,980/-. Out of this Rs. 11,37,000/- was paid in cheque and balance Rs. 67,21,980/- paid in cash.*

1.2 *The ld. AO maintained the same reasons to believe during almost entire assessment proceedings and gathered some more inputs from the assesse during the assessment and from the external sources which were subsequently utilized to amend the original reasons to believe and to issue another reasons to believe.*

1.3 *Your Honour, the Id. AO while issuing the another reasons to believe vide letter dated 20.03.2014 had taken the excuse that some typographically mistakes crept in in the letter of original reasons to believe dated 22.04.2013. (Refer page no- 55 of PB).*

1.4 *The typographical mistakes relates to misprinting/ typing error whereas in another reasons to believe issued vide letter dated 20.03.2014, Ld. AO made the addition as well as deletion of some facts mentioned in the reasons provided on 22.04.2013 which were the original reasons on the basis of which he had issued notice u/s 148 of Income Tax Act, 1961.*

1.5 *It is a trite law that for making the assessment u/s 147 of I.T Act, the reasons recorded should be clear and unambiguous and should not suffer from any vagueness.*

1.6 *Therefore the action of ld. AO is not tenable in law. He is not allowed to make any addition or deletion or substitution in the original reasons to be recorded.*

1.7 *For this proposition, reliance is placed on the following judgments*

a. Prashant S. Joshi v. ITO [2010] 324ITR 154 (Bombay HC)

"9 The reasons which are recorded by the Assessing Officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well-settled that the question as to whether there was reason to believe, within the meaning of section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under section 148." (EMPHASIS SUPPLIED)

b. The above case has been followed by the Delhi High Court in the case of Signature Hotels (P.) Ltd. v. ITO [2011] 338 ITR 51.

c. Reliance has been placed on the decision of the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. v. R.B. Wadkar [2004] 190 CTR 166 (Bombay) whereby following has been held:

> "20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. *It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded....*" (EMPHASIS SUPPLIED)

d. Further reliance has been placed on a very recent judgement of the Hon'ble High Court of Bombay in the case of Godrej Industries Ltd. v. B.B. Singh DCIT & others (2015) 377 ITR 1 (Bom.) which held as under:

> "10. Therefore, the reasons recorded at the time of issuing notice is the only evidence of the Assessing Officer's reason to believe that income chargeable to tax has escaped assessment. These reasons cannot be added to, deleted from or supplemented...."

e. CIT v. S.R. Construction (2002) 257 ITR 502(M.P)

"14. Thus, the attempt of the counsel for the revenue, in the instant case, to justify reassessment on the basis of subsequent material collected by the Valuation Officer cannot justify the reopening of the assessment "

f. S.Sree Ramchandra Murthy and ORS v. DCIT & ORS [2000] 243 ITR 427 (A.P.)

"6....It is well settled that the court cannot go beyond the recorded reason, nor can it take into account any supplementary reasons which didn't enter into the mind of the assessing authority at the time of issuing the reassessment notice."

g) Kakarla Krishna Murthy v. CIT [1995] 216 ITR 206

"15 In Mohender Singh Gill v. Chief Election Comm., AIR 1978 SC 51, 858, it is held that "when a statutory functionary makes an order based on certain ground, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to the court on account of a challenge, get validated by additional grounds later brought out""

2. *No Reasons to believe within the meaning of section 147 of Income Tax Act. 1961.*

Ground No: 7 of Assessee's appeal

2.1 *In original reasons to believe, ld. A0 did not provide any direct link or specific information about the material or evidence of total payment of Rs. 78,58,980/- which was the booking amount of Unit No. FF-117, GF, Commercial Indirapuram Habitat Centre Project.*

2.2 *In the same reasons, ld. AO made two contradictory statements. The last four lines of the 2nd para of original reasons are reproduced as under:*

"The same was also accepted by you during the course of post search enquiries conducted by the Investigation Wing. Thereafter, in responses to query letter dated 05/02/2013 of the undersigned, vide your letter dated 27/02/2013 you have accepted investment of Rs. 11.37 lakh only for the above property."

2.3 *In the first line, ld. AO stated that the assessee accepted the total payment of Rs. 78,58,980/- made to the Aerens Group for Indirapuram property during post search enquiries which is not true because* there was no search u/s 132 or survey u/s 133A was conducted on the assessee. Even assessee was never questioned during search/survey.

2.3 In the very next line, ld. AO stated that assessee admitted only for the payment of Rs.11.37 lakh to the Aerens Group. This shows that ld. AO recorded the reasons for reopening of case u/s 147 without application of his mind.

2.4 Further ld. AO recorded new reasons for reopening of case of the assessee u/s 147 which were furnished to the assessee vide letter dated 20.03.2014 at page no-55 to 56 of PB.

2.5 On perusal of the new reasons to believe, it comes clear that reasons were nothing but AO's presumption that since some investors admitted payment in cash which tallied with the seized material found during the course of search conducted on third party, therefore assesee, Taruna Verma would have made the payment in cash ofRs. 67,21,980/-for booking the Indirapuram property.

2.6 Your Honour, the investigation carried out was restricted to the 7 out of 23 investors which was incomplete in itself. Further, Investigation did not express to the assessee. There was no evidence in the information supplied by the ACIT regarding the factum of the assessee having paid cash for the purchase of the Indirapuram property.

2.7 Therefore information received throws only doubt or suspicion. Suspicion however strong cannot take the place of evidence as laid down by the Hon'ble Apex Court in the case of Dhakeswari Cotton Mills Ltd. Vs. CIT (1955) AIR 65 (1955 SCR *011941).*

2.8 There is catena of judicial pronouncements on this issue which clearly supports the assessee's case on the lack of jurisdiction with the Ld. Assessing Officer who had merely adopted reasons to believe on the basis of the report from the ACIT Investigation and that there is total non application of mind in recording to reasons for assumption of jurisdiction. Reliance is placed on the following judgements:

a) *Pr. Commissioner Of Income Tax vs. G & G Pharma India Ltd- ITA 545/2015 (Delhi HC)-08.10.2015*

> "12 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 here- in-before, 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."

b) *Commissioner of Income-tax - II v. Multiplex Trading & Industrial Co. Ltd- [2015] 63 taxmann.com 170 (Delhi-HC) 22.09.2015*

> "10 The first and foremost issue to be addressed is whether the Assessing Officer could assume jurisdiction to reopen the assessment based on the information received from the Investigation Wing of the department. It is now well settled that the Assessing Officer can reopen the assessment if he has reason to believe the assessee's income has escaped assessment. However, his reasons to believe must not be based on

surmises, conjectures or occasioned by change in opinion but must be based on some tangible and credible material on the basis of which a reasonable belief could be formed that income of an assessee has escaped assessment

c) *CIT vs. SFIL Stock Broking Ltd. [2010] 325 ITR 285 (DHC)*

"Held that, in the present case, the first sentence of the so-called reasons recorded by the Assessing Officer was mere information received from the Deputy Director of Income-tax (Inv.). The second sentence was a direction given by the very same Deputy Director of Income-tax (Inv.) to issue a notice under section 148 and the third sentence again comprised a direction given by the Additional Commissioner of Income-tax to initiate proceedings under section 148 in respect of cases pertaining to the relevant ward.

It was clear that the Assessing Officer referred to the information and the two directions as 'reasons' on the basis of which he was proceeding to issue notice under section 148. These could not be the reasons for proceeding under section 147/148. From the so-called reasons, it was not at all discernible as to whether the Assessing Officer had applied his mind to the information and independently arrived at a belief that, on the basis of the material which he had before him, income had escaped assessment. Therefore, the reassessment was not valid."

d) *Signature Hotels Pvt. Ltd. vs. ITO & Anr. [2011] 338ITR 51 (DHC)*

"15. The aforesaid reasons do not satisfy the requirements of section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except the annexure, which has been quoted above. The annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. The annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the information received from the Director of Income-tax (Investigation) and arrive at a belief whether or not any income had escaped assessment."

e) *Sarthak Securities Pvt. Ltd. vs. ITO [2010] 329 ITR 110 (DHC)*

"23. The Assessing Officer was aware of the existence of four companies with whom the assessee had entered into transaction. Both the orders clearly exposit that the Assessing Officer was made aware of the situation by the investigation wing and there is no mention that these companies are fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicate independent application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income, but what is necessary is that there is relevant material on which a reasonable person could have formed

the requisite belief. To elaborate, the conclusive proof is not germane at this stage but the formation of believe must be on the base or foundation or platform of prudence which a reasonable person is required to apply. As is manifest from the perusal of the supply of reasons and the order of rejection of objections, the names of the companies were available with the authority. Their existence is not disputed. What is mentioned is that these companies were used as conduits. In that view of the matter, the principle laid down in Lovely Exports [P.] Ltd. 's case (supra) gets squarely attracted. The same has not been referred to while passing the order of rejection. The assessee in his objections had clearly stated that the companies had bank accounts and payments were made to the assessee-company through banking channel. The identity of the companies was not disputed. Under these circumstances, it would not be appropriate to require the assessee to go through the entire gamut of proceedings. It is totally unwarranted."

3. *Material/Evidence that assessee made cash payments had never been confronted.*

3.1 *The Ld. Assessing officer had issued a notice dated 18.02.2014 enclosed at page no- 11of PB the relevant portion of which is as follows:*

> "During the course of search and seizure operations in 'Aerens Group' Annexure A-27 was seized from the corporate office at Bakshi House, Nehru Place, New Delhi. Print out of the same has been received from the A.C.I.T., Central Circle - 9, New Delhi, which shows cash received which has been coded as 'Incentive to sale
>
> As per noting therein, you have paid cash amounting to Rs. 67,21,980/- besides cheque for Rs. 11,37,000/-."
>
> *This shows that the Ld. Assessing officer relied upon "Annexure A-27" while making the impugned addition of Rs. 67,21,980/-. However the same had never been confronted to the assessee. By merely stating anything in the notice, the Ld. Assessing officer had not discharged his duty without furnishing any documentary proof on which he relied and alleged that the cash payment was made by the assessee. The onus is upon Ld. Assessing Officer to substantiate the claim.*

3.2 *The Ld. Assessing officer in his new reasons to believe dated 20.03.2014 had also talked about the seized material which shows that assessee made the payment in cash. The relevant portion of the new reasons recorded is as under:*

> "During the course of search/ survey operation it has been accepted by the investors that they have made cash payment for booking/ purchase of property in the above said project. The amount accepted by them to have been exactly matched with the amounts mentioned in the extracted sheets of the Hard Disk seized from the Corporate office of the AEZ Group."

The Ld. Assessing officer recorded the reasons for reopening the case of assessee u/s 147 relying upon the extract of sheets of the hard disk seized from the corporate office of the AEZ Group. The said extract sheets of hard disk was never confronted before the assessee.

3.3 *Ld. AO also did not consider the need of recording the statement of the person with whom the asseessee had entered into the agreement of purchase and had paid the sum of Rs. 11,37,000/- on 21.04.2006 and Rs. 20,63,000/- on 21.06.2011 by account payee cheques.*

3.4 *It is well settled law that without confronting the material, on which the reliance has been placed by the assessing officer, no adverse inference can be drawn against the assessee. For above proposition, reliance has been placed on the following judgements:*

a) *Hon'ble ITAT Delhi in the case of Babcock Power (Overseas Projects) Ltd. v. DCIT reported in 131 Taxman 86 in 2013 has held that*

> *"7* We have considered the rival submissions and have perused the relevant material on which our attentions were drawn. After perusing all these material, we find that assessee deserves to succeed in both of these years, on the ground alone that the material found during the course of search from a third party was not confronted to the assessee. The relevant records could not be produced even before the Tribunal in spite of affording so many opportunities to the department...."

b) *It is well-settled legal position after the judgment of Hon'ble Supreme Court in the case of Kishinchand Chellaram v. CIT (1980)125 ITR that any material collected by the Assessing Officer behind the back of the assessee cannot be used against him unless the assessee has been allowed a chance to rebut the same.*

4. *Objections disposed off on the very same date.*

Ground no. 6 of assessee's appeal

Ld. AO disposed off the objections of the assessee on the very same day vide letter dated 24.03.2014 without considering the objections filed by the assessee. This shows that ld. AO had already made up his mind to make the impugned addition of Rs. 67,21,980/-.

5. *If action under sec. 153C is permitted on the basis of material found in the course of search of third party, then the provisions of sec. 147 would be redundant. The Ld. Assessing officer issued notice under section 148 to assess such undisclosed income is void ab initio.*

> *The ld. AO initiated the assessment proceedings u/s 147 on the basis of material/information found during the course of search and seizure operation carried out on AEZ group (part of Arena Group). However the ld. AO completed the assessment u/s 147 of the Act in spite of sec 153C.*

Reliance is placed on the following judgements:

a) *Rajat Shubra Chatterji v. ACIT (ITA No. 2430/Del/2015 dated 20.05.2016) ITAT, Delhi*

> *"7.* On having gone through the decisions cited above especially the decision of Amritsar Bench in the case of ITO *vs.* Arun Kumar Kapoor 140 TTJ 249 (Amritsar) reassessment was initiated on the basis of

incriminating material found in search of third party and the validity of the same was challenged by the assessee before the Learned CIT vitiated the proceedings. The same was questioned by the Revenue before the ITAT and the ITAT after discussing the cases of the parties and the relevant provisions in details has come to the conclusion that in the above situation, provisions of sec. 153C were applicable which excludes the application of sections 147 and 148 of the Act. The ITAT held the notice issued under sec. 148 and proceedings under sec. 147 as illegal and void abinitio. It was held that Assessing Officer having not followed procedure under sec. 153C, reassessment order was rightly quashed by the Learned CIT evident from the reasons recorded and the assessment order that the initiation of reopening proceedings was made by the Assessing Officer on the basis of information received from the Directorate of Income-tax on the basis of search & seizure operation conducted at the premises of Rock Land Group of Cases and the documents related to the assessee found during the course of search were made available to the Assessing Officer of the present assessee. We thus respectfully following the decision of Coordinate Bench of the ITAT in the case of ACIT vs. Arun Kapur - 140 TTJ 249 the present case for framing the assessment, if any, which excludes the application of sec. 147 of the Act, hence, notice issued under sec. 148 of the Act and assessment framed in furtherance thereto under sec. 147 read with section 143 accordingly quashed. The ground No.l is accordingly allowed."

G. Koteswara Rao vs DCIT [2015] 64 taxmann.com 159 (Visakhapatnam - Trib.)

During the course of search carried out in case of a developer, certain incriminating documents were seized from which indicated that the assessee along with others had invested an amount of Rs. 230 lakhs for purchase of lands. The assessee admitted before the DDIT (Inv) that he had source for investments to the extent ofRs. 206 lakhs and the balance amount of Rs. 24 lakhs was declared as unexplained investment. The Assessing Officer, based on the assessee's statement, issued notice under section 148 to reopen the assessment and completed the assessment under section 143(3), read with section 147, making certain addition. Tribunal relying on the decision of Mumbai Tribunal in the case of State Bank of India v. Dy CIT [2013] 22 ITR (Trib.) 609 held as follow:

"17. Considering the facts and circumstances of the case and also applying the ratios of the above mentioned decisions, we are of the considered opinion that the Assessing Officer, has no jurisdiction to issue notice u/s 148 of the Act to reopen the assessments in respect of those six assessment years immediately preceding the assessment year in which search is conducted or requisition is made. The period under consideration falls within the exclusive domain of section 153A. In the instant case, since the assessment is made consequent to search in another case, the Assessing Officer is bound to issue notice u/s 153C and thereafter proceed to assess or reassess total income under section 153A of the Act. The Assessing Officer, instead of complying with the provisions of section 153C, proceeded with the reassessment under section 147/148 which is not applicable to search cases.

Therefore, the impugned assessment order passed u/s 143(3), r.w.s. 147 of the Income tax Act, 1961 is illegal, arbitrary and without any

jurisdiction. Hence, the assessment order dated 31-12-2010 passed u/s 143(3) r.w.s. 147 is quashed."

6. *Addition cannot be made on the basis of admission/statement of third party.*

The assessee since inception of the assessment had been denying the payment in cash for the investment in Indirapuram property and notwithstanding that other parties statements had been recorded who had admitted to have paid cash, the same cannot be presumed to have taken place in the case of the assessee. The Ld. Assessing Officer made addition on the basis of admission by seven investors out of 23 investors. Admission or statement by third party cannot be the basis for making an assessment/reassessment.

7. *When assessee disclosed and explained the total investment with necessary evidences, then addition of Rs. 67.21.980/- u/s 69A of the Income Tax Act. 1961 is not valid.*

Ground no. 8 of assessee's appeal

7.1 *Ld. AO made the addition of Rs. 67,21,980/- as deemed income u/s 69A of I.T Act. The impugned addition was made in spite of the fact that assesee completely explained the investment made in FF117, GF, Commercial Indirapuram Habitet Centre vide letter dated 27/02/2014 (Refer pg. no-37 of PB).*

7.2 *Assessee also furnished the copy of bank statement of relevant period and statement of affairs disclosing the impugned investment. (Refer pg. No- 104-106 and 110 of PB).*

7.3 *Copy of agreement between Indirapuram Habitat Centre Private Limited and assessee, Smt. Taruna Verma was also provided vide letter dated 10/02/2016 to substantiate the total investment made by the assessee. (Refer pg. no 75 to 100 of PB)*

7.4 *Assessee also vide letter dated 24/03/2014 explained before ld. AO that she had paid an amount of Rs. 11,37,000/- by cheque on 19.04.2006. However she was never allotted her share in the property at the time of booking of the space and, therefore, the question of making full payment at the time of booking of the space does not arise.*

7.5 *Furthermore, AEZ group assured the assessee at the time of booking of the space that considerable return can be received by the asessee. Keeping in view of this fact, the assessee obtained loans from various persons for making the payment of Rs. 20,63,000/- through account payee cheque on 21.06.2011. And after this payment booking space was allotted to the assessee.*

7.6 *Therefore assesee provided sufficient explanations supported with documentary evidence before ld. AO that she did not utilize her unaccounted income for investment in booking FF117, GF, Commercial Indirapuram Habitet Centre Project, Ghaziabad of AEZ Group. There was nothing which was unexplained before ld. AO. Therefore addition made u/s 69A as*

unexplained money is not valid.

8. *Addition of Rs. 67,21,980/- u/s 69A cannot be valid when AEZ Group refunded the entire amount invested i.e. Rs. 32,00,000/- to the assessee.*

8.1 *The alleged property in question was taken bv M/s. AEZ Group and leased out to*

M/s. Presidium Educational Institute (P) Ltd. In the terms of agreement M/s. Presidium Educational Institute Pvt. Ltd. was to pay monthly rent of Rs. 88 /- per sq. ft. for the total area allotted to the assessee measuring 1027 sq. ft. However, the said arrangement did not work amicable and the matter was referred to the sole arbitrator with the consent of the parties, an arbitration award was given in favour of the assessee. (Refer pg. no. 38-49 of PB)

8.2 *M/s. AEZ Group refunded the entire amount i.e. Rs. 32.00.000/- to the assessee and also refunded Rs. 6.40.314 on which an amount of Rs. 64.031/- has been deducted as TPS by M/s Indirapuram Habitate Centre (Pvt.) Limited proving thereby the fact that the assessee had made no payment in cash and assessee had also come out of the terms of the agreement bv a legal arbitration and the result was that the agreement was terminated.*

8.3 *In view of the above fact, it is proven that the assessee did not pay any cash towards the investment in the property.*

9. *The contention of the ld. AO on non recording of her statement u/s 131 of I.T Act, 1961 that since assessee has refused to give statement, therefore she has no evidence to adduce in support of her claim was clearly unjustified because assessee had provided sufficient documentary evidences in support of her claim.*

10. *Now, the onus shifted to the ld. AO to justify the impugned addition made by him. Simply non recording of statement cannot be made basis of making addition as unexplained investment.*

11. *Considering all the above facts and explanations, the impugned addition made by the ld. AO and affirmed by the ld. CIT(A) was totally invalid and deserves to be deleted."*

7. The ld Departmental Representative relied upon the order of the lower authorities.

8. We have carefully considered the rival contentions. The issue before us is twin fold: one with respect to the reopening of the assessment challenged by the assessee vide ground No. 1 to 6 of the appeal of the assessee and ground No. 7 and 8 are related to the merits of the case of the assessee. In the present case the original reasons recorded by the ld Assessing Officer on 22.04.2013 shows that information was received that assessee has made total payment of Rs. 7858980/- and out of this sum of Rs. 1137000/- was paid by cheque and balance amount of Rs. 6721980/- was paid in cash. It

was stated in the reason that the assessee has accepted it during the course of post search enquiries conducted by the Investigation Wing. The reasons also stated that AO had issued a query letter on 5.02.2013, which was replied by the assessee on 27.02.2013, wherein the assessee has accepted investment of Rs. 11.37 lacs only. Therefore, the ld AO had reason to believe that sum of Rs. 6721980/- is paid by the assessee in cash.

9. In response to above reasons assessee submitted that it has paid on 21.04.2006 Rs. 1137000/- vide cheque No. 874025 of Canara Bank and Rs. 20.63 lakhs on 21.06.2011 therefore, assessee has paid a sum of Rs. 32 lakhs by cheque. Therefore, the reason recorded by the Assessing Officer of payment Rs. 11.37 lacs by cheque is incorrect. Furthermore, the assessee was never examined during the post search enquiries and hence, it is an incorrect statement. The Assessing Officer has given the statement of two different persons vide letter dated 18.02.2014 but nowhere the statement of the assessee was given. Apparently, assessee was not examined. The Revenue also could not produce any such communication which are also referred to in letter dated 22.04.2013.

10. Further suddenly on 20/03/2014 the Ld. assessing officer wrote a letter to the assessee stating that by sending the letter dated 22/04/2013 wherein the original reasons recorded were communicated, some typographical mistake have crept in. Therefore, the said letter dated 22/04/2013 is withdrawn. It was further stated that 22/03/2013 under section 147 of even date is enclosed. Suddenly the new reasons, which are placed at page No. 56 of the paper book, were supplied to the assessee. As per the new reasons the total payment of Rs. 7 858980/-, the sum paid by cheque of Rs. 11.37 Lacs, and the balance amount of Rs. 6721980/-paid in cash also remains unchanged. This was provided to the assessee when only 10 days time was left with the assessing officer for completion of the assessment. The assessee filed objection to this new reasons on 24/03/2014, which was disposed of on the same date without adverting to the any of the objection of the assessee. In the present case the figure stated by the Ld. assessing officer in reasons recorded as well as the actual fact of details of payment made by the assessee to the builder did not match. Assessee has already

paid a sum of Rs. 32 Lacs whereas the reasons mentioned by the assessing officer states that assessee has only paid Rs. 11.37 Lacs. Therefore, it is apparent that Ld. assessing officer has initiated reassessment proceedings without application of mind to the facts of the case to the information supplied by the investigation wing. The issue is squarely covered by the decision of the Hon'ble Delhi High Court in case of principle Commissioner of income tax versus G & G Pharma Ltd 384 ITR 147 (Delhi) wherein it has been held that:-

> 10. In Asst. CIT v. Dhariya Construction Co. [2010] 328 ITR 515 (SC), the Supreme Court in a short order held as under :
>
> "Having examined the record, we find that in this case, the Depart ment sought reopening of the assessment based on the opinion given by the District Valuation Officer, the opinion of the District Valuation Officer per se is not an information for the purposes of reopening assessment under section 147 of the Income-tax Act, 1961. The Assessing Officer has to apply his mind to the information, if any, col lected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment."
>
> 11. The above basic requirement of sections 147/148 has been reiterated in numerous decisions of the Supreme Court and this court. Recently, this court rendered a decision dated September 22, 2015 in I. T. A. No. 356 of 2013 (CIT v. Multiplex Trading and Industrial Co. Ltd. [2015] 378 ITR 351 (Delhi)) where the assessment was sought to be reopened beyond the period of four years. This court considered the decision of the Supreme
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> Page No : 0152
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> Court in Phool Chand Bajrang Lal v. ITO (supra) as well as the decision of this court in Haryana Acrylic Manufacturing Co. (P.) Ltd. v. CIT [2009] 308 ITR 38 (Delhi) The court noted that a material change had been brought about to section 147 of the Act with effect from April 1, 1989 and observed (page 368 of 378 ITR) :
>
> "It is at once seen that the amendment in section 147 of the Act brought about a material change in law with effect from April 1, 1989. Section 147(a) as it stood prior to April 1, 1989, required the Assess ing Officer to have a reason to believe that (a) the income of the assessee has escaped assessment and (b) that such escapement is by reason of omission or failure on the part of the assessee to file a return or to disclose fully and truly all material facts necessary for his assessment for that year. After the amendment, only one singular requirement is to be fulfilled under section 147(a) and that is, that the Assessing Officer has reason to believe that income of an assessee has escaped assessment. However, the proviso to section 147 of the Act provides a complete bar for reopening an assessment, which has been made under section 143(3) of the Act, after the expiry of four years. However, this proscription is not applicable where the income of an assessee has escaped assessment on account of failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. Thus, in order to reopen an

assess ment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the assessee to truly and fully disclose all material facts must be concluded with certain level of certainty. It is in the aforesaid context that this court in Haryana Acrylic Manufacturing Co. (P.) Ltd. (supra) explained that the ratio of the decision in Phool Chand Bajrang Lal (supra) may not be entirely applicable since the same was in respect of section 147(a) as it existed prior to the amendment."

12. In the present case, after setting out four entries, stated to have been received by the assessee on a single date, i.e., February 10, 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the Assessing Officer 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 Assessing Officer 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 Assessing Officer, 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 November 14, 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 Assessing Officer 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 Assessing Officer 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.

13. Mr. Sawhney took the court through the order of the Commissioner of Income-tax (Appeals) to show how the Commissioner of Income-tax (Appeals) 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 Commissioner of Income-tax 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 Assessing Officer 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.

14. In the circumstances, the conclusion reached by the Income-tax Appellate Tribunal cannot be said to be erroneous. No substantial question of law arises."

11. In the present case, it is apparent that Ld. assessing officer has not applied his mind to the information provided by the investigation wing to the extent that even the amount of payment made by the assessee to the builder was not even verified. Furthermore it was also not verified that were the investors purchasing the property were examined. The Ld. assessing officer even did not care to provide the correct reasons recorded by the revenue instead of that he provided the reasons incorporating them in the letter dated 22/04/2013. In view of this on the solitary ground itself, the appeal of the assessee deserves to be allowed.

12. In fact, in this present case the Ld. assessing officer has grossly ignored the direction of the Hon'ble Supreme Court in case of GKN driveshaft India Ltd versus ITO. 259 ITR 19 wherein it has been held that:-

> "We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income-tax Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.
>
> In so far as the appeals filed against the order of assessment before the Commissioner (Appeals), we direct the appellate authority to dispose of the same, expeditiously."

13. In the present case the assessee has filed the return of income on 18/04/2013 in response to the notice under section 148 of the income tax act dated 22/03/2013. On the date of filing of the return of income, the assessee requested for the reasons recorded. However, the correct reasons recorded were provided to the assessee only on 20/03/2014 i.e. Just before 10 days of the completion of the assessment. The Hon'ble Supreme Court has provided guidelines that reasons must be provided within reasonable time. We are of the opinion that Ld. assessing officer has not provided the reasons to the assessee within reasonable time but only at the fag end of the

assessment proceedings. Furthermore, the Hon'ble Supreme Court has further guided that only after disposing of the objections of the assessee with respect to the reopening of the assessment, the assessing officer shall proceed for reassessment. In the present case, the assessment proceedings were already completed before providing the correct reasons to the assessee. In view of this, we do not have any hesitation in holding that reassessment proceedings are invalid.

14. In view of this without going into the merits of the addition made by the Ld. assessing officer we quash the reassessment proceedings and allow ground No. 1 to 6 of the appeal of the assessee.

15. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 19/09/2017.

-Sd/-	-Sd/-
(I.C.SUDHIR)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated:19/09/2017
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi