

**IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA (SMC) BENCH: AGRA**

BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER

**I.T.A No. 41/Agra/2017
(ASSESSMENT YEAR-2010-11)**

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| M/s Deepraj Hospital (P) Ltd., C/o Rajesh Gautam, Shyam Press, Aligarh Road, Hathras. PAN No.AADCD2093G (Assessee) | Vs. | ITO, 3(5), Hathras. (Revenue) |
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**I.T.A No. 40/Agra/2017
(ASSESSMENT YEAR-2009-10)**

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| M/s Charan Singh Ice & Cold Storage (P) Ltd., Gambhir Patti, Bisana, Agra Road, Hathras. PAN No.AACCC4321M (Assessee) | Vs. | ITO, 3(5), Hathras. (Revenue) |
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| Assessee by | Shri Pankaj Gargh, AR. |
| Revenue by | Shri Waseem Arshad, Sr.DR. |

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| Date of Hearing | 15.05.2018 |
| Date of Pronouncement | 01.06.2018 |

ORDER

I.T.A No. 41/Agra/2017

This is assessee's appeal for assessment year 2010-11, taking the following grounds:

“1. Because the Ld. CIT(A) has wrongly, illegally and arbitrarily confirmed the action of the Assessing Officer for which specific grounds were taken before him challenging the validity of initiation of proceedings u/s 147 and the consequent issue of notice u/s 148 of the I. T. Act.

2. Because the Ld. CIT(A) has erred both in law and on facts in rejecting the appellant's submission objecting the proceedings u/s 148 on the following specific grounds taken before him:-

i) Proceedings initiated u/s 147 and the notice issued u/s 148 is wrong, bad in law, arbitrary, without jurisdiction and against the facts and circumstances of the case.

ii) No valid material and ground justifying the reason recorded. The reasons are wholly, irrelevant, general, vague and wrong.

iii) Reasons recorded based on borrowed satisfaction.

3. Because considering the facts of the case and the legal position the assessment deserves to be quashed. The Ld. CIT(A) has arbitrarily erred in confirming the Assessing Officer's action of issuing notice u/s 148 by holding the same to be in accordance with the provisions of law.

4. Because the Ld. CIT(A) has wrongly, illegally and arbitrarily confirmed the addition of Rs. 7,00,000/- made by the

Assessing Officer u/s 68 of the Income Tax Act treating the receipt of share application money to be an unexplained cash investment.

5. *Because the Ld. CIT(A) has erred both in law and on facts in rejecting the appellant's submission and the documents filed to prove the identity of the share applicant, their creditworthiness and genuineness of transaction. The Ld. CIT(A) has arbitrarily and wrongly held that genuineness of the transaction of share application money and the creditworthiness of the creditors are not proved.*

6. *Because Ld. CIT(A) has also legally erred in rejecting the appellant's specific ground that the year under consideration being the first year of incorporation, no addition u/s 68 of the I. T. Act could legally be made.*

7. *Because under the facts and circumstances of the case and the legal position the addition of Rs. 7,00,000/- confirmed by Ld. CIT(A) deserves to be deleted.*

8. *That the appellant craves to add, amend, alter, modify or delete any or all of the grounds of appeal before or at the time of hearing.”*

2. Apropos Ground Nos. 1 to 3, the AO recorded the following reasons for belief of escapement of income (APB 3-4, also at APB 14, i.e., the AO's order sheet noting):

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| <i>Reason for the belief that income has escaped assessment.</i> | <i>The assessee has invested a sum of Rs.7,00,000/- during the Assessment Year 2010-11, consideration which not been reflected by him in Income Tax Return is not disclosed on the picture of amount. Therefore, source of Rs.7,00,000/- is not disclosed before the department. Thus I have reason to believe that income of Rs.7,00,000/- has escaped A.Y. 2010-11 within the meaning of section 147 of Income Tax Act 1961.</i> |
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3. The assessee filed the following objections against the aforesaid reasons recorded by the AO:

*“Re: M/s Deepraj Hospitals Pvt. Ltd.
Palika Market, Hathras.*

Sub: Objection regarding validity/issuance of notice u/s 148 of the Act, For Assessment Year 2010-11.

Sir,

With reference to the notice dated 10.04.2013 issued u/s 148 of the Act and the subsequent receipt of copy of reason recorded for initiating proceedings u/s 147 of the Act, objecting to the validity and issuance of notice u/s 148 of the Act and the reasons recorded, it is respectfully submitted:-

1. That on receipt of the above mentioned notice dated 10.04.2013 an application dated 24.04.2013 was filed in the office of your goodself on 02.05.2013 with the request that the return for A.Y. 2010-11 has already been e-filed on 28.09.2010 vide Acknowledgement No.162872131280910 and the same may kindly be treated as return filed in response to notice u/s 148 of the Act. Filing of application, as is mentioned above, is valid in the eyes of law and the said application has to be taken as return filed in response to notice u/s 148 of the Act.

2. That the accounts of the assessee company were audited by the chartered accountant and the entire balance sheet was correctly and rightly feeded in the return e-filed. As the balance sheet was before your goodself at the time of reasons recorded and the initiation of proceedings u/s 147 of the Act.

3. That the reason recorded by your goodself for having a belief that income has escaped assessment. The assessee has invested a sum of Rs.7,00,000/- during the assessment year 2010-11, consideration which not been reflected by him in income tax return is not disclosed on the picture of amount.

Therefore, source of Rs.7,00,000/- is not disclosed before the Department.

4. That on perusal of the reason recorded, considering the balance sheet and on comparing the figures it apparently seems that the reasons have been recorded on mere surmises, incorrect presumption and wrong assumption of facts. In the reason recorded it is not even mentioned that how and on what basis/information/material whether or not in your possession, if any, your goodself is satisfied and has formed a belief that income of Rs.7,00,000/- has escaped assessment.

5. That the condition precedent for taking action u/s 147 of the Act in the case of assessee firm are wholly non-existent and cannot be said to be valid in the eyes of law because section 147 of the Act mandates that it is exclusively the satisfaction of assessing authority based on some direct, correct and relevant material which is material and which could lay the foundation for issuing notice u/s 148 of the Act.

6. The text of reason recorded styled as "reason to believe" in the present case is nothing but reason to suspect. On mere surmises and presumption that too on incorrect facts as recorded in the reasons, the proceedings u/s 147 of the Act cannot be validly initiated more so in the absence of any adverse material or information directly gathered by your goodself. If there is any adverse material or information in possession of your goodself the same may kindly be

communicated to the assessee in the interest of natural justice to enable the assessee to file further objection, if required.

7. *That without prejudice to the above mentioned submission and at the most if there is any information though neither the same has been mentioned in the reason recorded nor otherwise confronted with the assessee, the said information is clearly termed as borrowed satisfaction and until unless the belief is directly not of the officer recording reasons the initiation u/s 147 is invalid and without jurisdiction.*

8. *That even on the basis of any information, though in the present case whether there is any information or not is not clear, the proceedings u/s 147 of the Act cannot be validly initiated.*

i) *Hon'ble ITAT Delhi Bench in the case of Vinita Jain vs. ITO reported in (2007) 158 Taxman 167 (Mag) quashed the notice issued under section 148 as well as consequent assessment where assessment was reopened on the basis of report of DDI, who believed that transaction of capital gain shown by the assessee was bogus. The Hon'ble Bench while quashing the notice observed that "Whether Assessing Officer reopened assessee's assessment merely because DDIT (Inv) believed that transaction of capital gains shown by assessee was bogus and no separate reason disclosing satisfaction of Assessing Officer for formation of belief that income of assessee had escaped assessment had been recorded, notice issued u/s*

148 of the Act was to be quashed and assessment made in pursuance thereof was to be annulled".

It was submitted by the appellant that, this decision of the Hon'ble ITAT was challenged by the Revenue before the Hon'ble Delhi High Court and stands reported in (2008) 299 ITR 383 (Del). The Hon'ble High Court approved the findings as recorded by the Hon'ble ITAT.

ii) Hon'ble Allahabad High Court in the case of Indra Prastha Chemicals (P) Ltd vs. CIT reported in 271 ITR 113 wherein the facts of the case are that a notice u/s 148 of the Act was issued by the Assessing Officer on the basis of the report submitted by the Inspector of Income tax, the Hon'ble High court quashed the notice as the report submitted by the Inspector did not have any relevant material to point out that any income has escaped assessment.

9. That formation of the required belief by the Assessing Officer is a condition precedent. Without such belief, he will have no jurisdiction to initiate proceedings u/s 147 of the Act. The fulfillment of this condition is not a mere formality but it is mandatory. Any failure to fulfill that condition would vitiate the entire 148 proceedings as has been held by the Apex Court in the case of:-

- i) Johri Lal (HUF) vs. CIT reported in 88 ITR 439*
 - ii) Sheo Nath Singh vs. AAC reported in 82 ITR 147 .*
 - iii) Ganga Saran & Sons (P) Ltd vs. ITO reported in 130 ITR*
- 1.*

iv) *ITO vs. Lakhmani Mewal Das reported in 103 ITR 437.*

10. *That considering the facts and the legal position as mentioned above the initiation of proceedings u/s 147 of the Act and consequent issue of notice u/s 148 of the Act is invalid and without jurisdiction and may kindly be withdrawn.*

It is requested:-

i) *Objection as mentioned above as regards the validity/issuance of notice u/s 148 of the Act may kindly be decided first.*

ii) *The initiation of proceedings and the consequent issue of notice based on mere surmises, incorrect presumption and wrong assumption of facts for making only roving and fishing enquiries is invalid in the eyes of law specially for the proceedings initiated u/s 147 of the Act and hence the notice issued u/s 148 of the Act may kindly be withdrawn.*

4. The AO, vide order (APB 18-23) dated 17.03.2015, rejected the assessee's objections. It was held as under:

“8. Keeping in view the above position of law, the objection raised by the assessee against reopening of the assessment of Assessment Year 2010-2011 are adjudicated hereunder:-

The submission made by the assessee have duly been considered. However, the case was processed for A.Y.2010-11 u/s 143(1) of I.T. Act i.e. without calling the

assessee and without verifying the items of the income and expenditure disclosed by him in his return of income. Therefore, at the time of processing of assessee's return of income u/s 143(1) of I.T. Act, the Assessing Officer did not have the occasion to form an opinion about the genuineness of investment being made by the assessee in the year under consideration.

Since the present case, the Assessing Officer at the time of processing of return u/s 143(1) of I.T. Act did not form an opinion about the genuineness of the investment made by the assessee in the year under consideration, therefore, there does not arise any question regarding change of opinion on investment at the time of reopening of the assessee case, which was processed u/s 143(1) of I.T. Act. This view gets support from the judgment delivered by Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291ITR 500 wherein it was held that where the Assessing Officer had issued only intimation u/s 143(1) of I.T. Act, there being no assessment u/s 143(1) of I.T. Act, the principle relating to change of opinion shall not be applicable if assessment proceedings are undertaken u/s 147 of I.T. Act. Further, Hon'ble Jaipur High Court in the case of Kishore Textiles vs. ITO (1995) 82 Taxman 312 (JP) (AT) held that where original assessment was made u/s 143(1) of I.T. Act in a summary manner, and hence

where returned income was accepted in a mechanical manner without even writing a formal order, there is no question of change of opinion of the Assessing Officer and hence reopening of the assessment was valid.

As it is evident that the assessee in his return of income has not disclosed the of all the parties from whom share allotted application, invested amount, purchased have been made in the year under consideration and the mode of payment being adopted by the assessee for making payment to these purchase/invested parties. Therefore, it could not be understood as to/ how the assessee is claiming that he has disclosed all the material facts in the return of income filed by him for the year under consideration u/s 139 (1) of I.T. Act. Mere filing of return of income along with Tax Audit report u/s 44AB of I.T. Act. is not found enough to establish the facts that all purchase/invested amount/purchased/share application and allotted share made by assessee in the year under consideration are genuine until and unless the same is being confronted and verified at the time of scrutiny assessment proceedings that all the facts and figures of the purchased,/invested amounts made as discussed by the assessee, are complete and genuine.

The objection of the assessee company are carefully considered which are examined in the light of information received as well as factual and legal aspect.

In the instant case, what was to be seen was on the prime-facie material, the sufficiency or correctness of the material was not a thing to be considered at this stage. Moreover, section 147 authorised and permits the Assessing Officer to assess or re-assess income chargeable to tax if he has reason to believe that the income for any assessment year has escaped assessment. The word "reason" in the phrase reason to believe would be cause or justification. If the A.O. has cause or justification to know or suppose that the income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the A.O. should have finally ascertained the fact by legal evidence or conclusion. The scope and effect of section 147 as substituted with effect from 01.04.1989 are substantially different from the provision as they stood prior to such substitution.

Since the Assessing Officer had reason to believe on the basis of information received from JCIT Range -3, Etah that the assessee failed to explain the source of invested a sum of Rs. 7,00,000/- and not disclosed before the department in his return of income.

After examining the factual and legal aspect as discussed in the foregoing paras and since the notice u/s 148 of I.T. Act is based on the satisfaction that there was

escapement of income in the form of investment of Rs. 7,00,000/- regarding accommodation entries which were not offered in the hand of the assessee company as taxable income in its return of income .The ground nos. 1, 2, 3, 4, 5, and 6 as narrated above, raised by assessee are not found tenable . Accordingly the request to drop the proceedings initiated u/s 147/148 of I.T. Act, is hereby rejected.”

Sd/-

(KALIM AHMAD)

Income Tax Officer

Ward-3(5), Hathras.

5. The assessee filed written submissions (APB 24-39, relevant portion at APB 25, para 2 to page 27, para 10, as also reproduced in the impugned order at page 5 para 2 to page 7 para 10), contending, inter alia, that:

“2. That on receipt of reason recorded objection regarding validly/issuance of notice u/s 148 of the Income Tax Act was filed. The Assessing Officer has summarily rejected the objection filed by passing a separate order mainly giving emphasis on section 147 of the Income Tax Act whereas section 147 of the Income Tax Act itself says "if the Assessing Officer has reason to believe". In the present case this basic requirement of

section 147 of the Income Tax Act is absent as there is no own reason to believe of the Assessing Officer.

3. *That in the assessment framed u/s 147 read with section 143(3) of the Income Tax Act, the Assessing Officer has mentioned at page 2 that search and survey action was conducted by the Income Tax Department in the case of Shri Surendra Kumar Jain and Shri Virendra Kumar Jain and incriminating documents were seized and impounded. During the proceedings it was revealed that Shri Surendra Kumar Jain and Shri Virendra Kumar Jain are engaged in the business of providing accommodation entries. The assessee has obtained accommodation entries amounting to Rs. 7,00,000/- from Shri Surendra Jain Group as advance during the relevant financial year under consideration.*

4. *That neither in the reason recorded nor during the course of assessment proceedings, the Assessing Officer has never provided any documents etc. nor shown any documents nor has ever confronted the assessee with any documents etc. whether or not in his possession which can be said to form a reason to believe by the Assessing Officer that the assessee has taken accommodation entry from Shri Surendra Kumar Jain Group. In the objection filed before the Assessing Officer it was specifically submitted “if there is any adverse material or information in possession of your goodsself the same may*

kindly be communicated to the assessee in the interest of natural justice to enable the assessee to file further objection, if required”.

5. *That in the order passed by the Assessing Officer deciding the objection filed it is mentioned "information received by this ward from Commissioner of Income Tax, Aligarh vide his letter dated 21.03.2013 through Joint Commissioner of Income Tax, Range-3, Etah providing the list of parties to whom the bogus purchases/accommodation entries provided by Shri Surendra Kumar Jain and Shri Virendra Jain Group, Delhi"*

6. *That from the above mentioned facts it is very much clear that the reason to believe of the Assessing Officer is only an information received by him without there being any corroborative material or evidence in his possession to form a valid reason to believe that particular income has escaped assessment. At the time of recording the reason there was no material with the Assessing Officer except the information received by him to form his own belief. Thus it is simply a borrowed satisfaction which according to the provision of section 147 of the Income Tax Act is not valid for issuing notice u/s 148 of the Income Tax Act.*

7. *That the submission as mentioned above also finds support from the fact that even at the time of recording*

reason and forming a belief the Assessing Officer was not sure about the nature of transaction as in the reason recorded the Assessing Officer has mentioned "the assessee has invested a sum of Rs. 7,00,000/-" whereas the addition has been made treating the receipt of share application money to be bogus and unexplained.

8. *That as no investment as per reason recorded has been made by the assessee company it can very fairly be said that reason recorded does not exist in the Assessment Order and hence the assessment framed u/s 147 read with section 143(3) of the Income Tax Act deserves to be quashed. Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (I) Ltd reported in 331 ITR 236 has held that "Power to assess such other income only if income referred to in notice of reassessment has been assessed".*

9. *That reason recorded and consequent issue of notice u/s 148 of the Income Tax Act is also wrong and bad in law as it is not the own belief of the Assessing Officer but it is based on the information received from Commissioner of Income Tax, Aligarh. Under these facts as mentioned above the assessee company presume that even the Assessing Officer has not verified and examined the information received by him perhaps in the absence of any material with him as the same was not*

shown/supplied to the assessee though specific request was made. Thus it is clearly a borrowed satisfaction based on the information received from some other authorities which is legally wrong and does not fulfill the conditions as laid down in section 147 of the I. T. Act.

10 That the condition precedent for taking action u/s 147 of the Act in the case of assessee firm are wholly non-existent and cannot be said to be valid in the eyes of law because section 147 of the Act mandates that it is exclusively the satisfaction of assessing authority based on some direct, correct and relevant material which is material and which could lay the foundation for issuing notice u/s 148 of the Act.”

6. The Id. CIT(A) remanded the matter to the AO, asking for a remand report.

7. In the remand proceedings, the AO issued notice (APB 62-63) dated 09.06.2016 to the assessee. This notice (relevant portion) reads as follows:

“Subject:- Notice u/s 250(4) of Income Tax Act, 1961 and Rule 46A of Income Tax Rules, 1962 in connection with enquiries at the appellate stage for AY 2010-11 regarding -

Please refer to the above mentioned subject.

On above context following photocopies of scanned documents seized from the residence of Shri Surendra

Kumar Jain during the search/survey on 14.09.2010 are furnished to you for confrontation.

- 1. Photocopy of annexure-A containing the list of the names of the assessee and the names of entry providing company.*
- 2. Photocopies of page no 28 of annexure A-13 of seized documents containing name of middleman Shri Vivek Bansal against the entry of Hum Tum Marketing Pvt. Ltd. In this page there are details of cheques/RTGS/P.O./DD issued by S.K. Jain Group company and other details of such type of transactions to (he beneficiary companies on a particular date.*
- 3. Photocopies of the cash book page no.1 of seized annexure A-13 containing details of receiving the cash by Shri S.K. Jain Group for the purpose of accommodation entry. There is also name of Shri Vivek Bansal in it.*
- 4. Photocopies of page no 36 and back side of page no.36 of annexure A-24 of seized documents containing details of transferring the entry through such type of companies and name of Shri Vijay Gupta as middleman.*

You are once again requested to furnish counter comments on the above documents. You may also furnish any other material which you want to furnish in addition to documents required by this office in earlier letters or

any witness to whom you want to produce on 14.06.2016.”

8. The assessee filed written submissions (APB 68 to 70, i.e., impugned order, pages 19 to 20) dated 16.06.2016, is as under:

“Re: Appeal of M/s Deepraj Hospital (P) Ltd, C/o Shyam Press, Aligarh Road, Hathras.

Sub: Notice u/s 250(4) of the Income Tax Act, 1961 and Rule 46A of the Income Tax Rules, 1962 In connection with enquiries at the appellate stage for A.Y. 2010-11 - regarding -

Sir,

With reference to the papers attached alongwith the above mentioned notice dated 09.06.2015, the parawise submission per serial number of the notice is as under:-

1. (i) That during the course of entire assessment proceedings the assessee asked for the material to be provided which has been used against the assessee as mentioned in the Assessment Order while making the impugned addition u/s 68 of the Income Tax Act for so called bogus share application money received. In the objection filed before the Assessing Officer it was specifically submitted "if there is any adverse material or information in possession of your goodself the same may kindly be communicated to the assessee in the interest of natural justice to enable the assessee to file further objection, if

required". The assessee was never confronted with these papers.

(ii) That all the documents which are filed before Ld. CIT(A) alongwith the written submission were filed before the Assessing Officer. Neither any fresh documents nor any material which is not on the file of Assessing Officer has been filed before Ld. CIT(A). Thus question of Rule 46A does not apply to the facts of the present case. Rather the papers now attached with the notice u/s 250(4) are given to the assessee for the first time.

(iii) On perusal of Annexure 'A' it seems that this paper has been prepared by the Department and hence it cannot be said that this paper has been seized from the residence of Shri Surendra Kumar Jain as mentioned in the notice and hence no adverse inference can be drawn from this Annexure 'A'. Moreover the assessee, as already earlier submitted, neither know Shri Surendra Kumar Jain nor has any sort of connection or transaction with Shri Surendra Kumar Jain and hence the papers found from the residence of Shri Surendra Kumar Jain does not in any way can be co-related with the assessee company.

2. The noting mentioned on Page no. 28 as mentioned in the notice cannot in any way be co-related with any transaction of the assessee company as on the entire, page no. 28 nowhere the name of assessee company is noted. Moreover, as already

earlier submitted, we do not know who is Mr. Vivek Bansal, neither we have any relation nor any sort of transaction with Shri Vivek Bansal. What sort of work Mr. Vivek Bansal is doing, we are not at all concerned with that as we have no connection with him. Moreover the Department has never given any opportunity to get Mr. Vivek Bansal confronted with the assessee. In the absence of all these facts the name of Mr. Vivek Bansal written on any paper cannot be co-related with assessee company .

3. *Similarly the transaction as noted on cash book page no. 1 of seized annexure A-13, as mentioned in the notice, does not in any way can be co-related with any transaction of the assessee as on the entire page no where the name of assessee company is noted and hence from this paper it cannot be presumed that the assessee company as given any cash. As regards the name of Mr. Vivek Bansal as mentioned on the impugned annexure, the submission of the assessee is same as mentioned in para 2. No adverse inference can be drawn against the assessee from this paper.*

4. *Similarly the transaction as noted on page no. 36 and back side of page no. 36 of Annexure A-24, as mentioned in the notice, does not in any way can be co-related with any transaction of the assessee as on the entire page no where the name of assessee company is noted and hence no adverse inference can be drawn against the assessee from this paper.*

Considering the facts of the case and the submission as mentioned above not a single paper as attached with the notice u/s 250(4) can be used as an evidence against the assessee for making the impugned addition.

That though already submitted during the course of assessment proceedings and before Ld. CIT(A) the assessee further wish to submit as under:-

i) Reason recorded for initiating proceedings are totally wrong and against the facts of the case.

ii) The assessee fully discharge their onus of proving the share application money received, share allotted to be genuine.

iii) All the transaction/receipt of share application money was duly got confirmed by the investor in direct enquiry made by the Assessing Officer u/s 133(6) of the I. T. Act.

iv) Without prejudice to all the submission, this is the first year of incorporation of company and hence by no stretch of imagination it can be presumed that there is any unexplained income or accumulation.

If any detail or information is further required kindly let us know so that the same can be filed.”

9. The AO furnished the following remand report (relevant portion at page 20 of the impugned order):

“There was a clear basis in the possession of AO on the basis of which AO formed an opinion about the assessee that he has taken a accommodation entry of share application money of Rs. Seven lacs from M/s Hum Turn Marketing Pvt. Ltd. in lieu of cash. The objection raised by the assessee on the issuance of notice u/s 148 was also replied vide this office order dated 17.03.2015. In the photocopies of seized documents placed on record furnished to assessee on page no 28 of annexure A-13 there is the name of M/s Hum Turn, Marketing Pvt. Ltd. which clearly reflects that this company was involved in providing share application money in lieu of cash. In this page there is also the details of cheques/RTGS/P.O./DD issued by Shri S.K. Jain Group to such beneficiary companies. There is also the name of the assessee in the list of such companies which have taken such type of accommodation entry. In the page no. 1 of annexure A-13 there are details of receiving the cash by Shri S.K. Jain Group for the purpose of accommodation entry. These all documents clearly establish that the assessee company received the share application of Rs. Seven Lacs in lieu of cash. These documents were furnished to the assessee for confrontation. On his reply assessee submitted that assessee's name is not on these pages and transactions noted on these pages cannot be co-related to his transaction as mentioned above. Assessee's name is the

annexure A furnished to the assessee and the name of the company providing accommodation entry is also in the seized documents on page no. 28 of annexure A-13. There is details of cash received by this company. On the basis of these documents it is clearly established that assessee has taken accommodation entry in the guise of share application money in lieu of cash.”

10. The assessee filed a rejoinder (impugned order, pages 21-22) to the remand report, reiterating the aforesaid submissions made before the AO vide reply dated 16.06.2016. It was stated in the rejoinder that:

“i. Annexure "A" is not a seized document. Seems to be prepared by the department itself and hence cannot be relied upon.

ii. So called Cash Book Page No. 1 Annexure “A-13” cannot be relied upon as on the entire paper name of assessee is not mentioned and hence there cannot be any theory of the department that the assessee has given any cash.

iii. Page 36 of Annexure "A-24" cannot be relied upon as on the entire paper name of assessee not mentioned.

iv. No relation or any transaction either with Mr. Surendra Kumar Jain or with Mr. Vivek Bansal or with Mr. Vijay Gupta. It was specifically mentioned in the

written submission filed during remand proceeding that department has not given any opportunity to get Mr. Vivek Bansal / Mr. Vijay Gupta confronted with the assessee. Even in the remand proceeding the Assessing Officer has not given any opportunity. In the absence of the same the name of these persons cannot be used against the assessee.

5. That in the remand report the Assessing Officer has given his comments only on the so called documents which were given to the assessee for the first time in the course of remand proceedings. All these documents were duly explained and once again the assessee respectfully submits that from these papers in cannot be perused that the assessee has received any accommodation entry in lieu of cash. It is also important to mention here that there is no evidence whatsoever that the assessee has given any cash for the share capital received during the year.

6. That the Assessing Officer has not given any comment on the written submission earlier filed before your goodself challenging the Assessment framed u/s 147 of the Income Tax Act and the addition made which goes to show that the Assessing Office has not been able to distinguish the facts of the case laws relied upon in the

appellate proceeding from that of the appellant case and on merits also.”

11. The Id. CIT(A) decided the matter, holding as follows:

“7.2 Decision

In its written submission, the appellants has alleged that the AO had issued notice u/s 148 merely on the basis of borrowed satisfaction based on the information received from some other authorities without there being any corroborating material or evidence in his possession to form a valid reason to believe that certain income has escaped assessment. It has been submitted that the conditions precedent for taking action u/s 147 of the Act are wholly non- existent. It has been explained that section 147 of the Act mandates that exclusively the satisfaction of the assessing authority based on some direct and relevant material could lay the foundation for issuing notice u/s 148 of the Act. According to the appellant, the AO has not applied his own mind and hence the assessment is not justified.

I have considered all the facts and circumstances of the case and also perused the appellant's written submission. It is a well known fact that certain unscrupulous persons have been indulging in the "business" of providing entries by channelizing

unaccounted money of people through a maze of artificial entities to give it a colour of loans or share application money so that the money can be utilised in business without the risk of detection of the underlying unaccounted income. This has indeed become a menace and needs to be checked. Not only that this causes, the abetment of tax avoidance but it also results in money laundering which is a crime. In order to check this menace of 'Entry business' the Investigation Wing has been carrying out search and seizure operations on various entry operators from time to time. Apparently this case is also of a similar kind.

The requirement u/s 147 is that the AO should have "reasons to believe" that any income chargeable to tax has escaped assessment. Therefore, we have to decide whether the material in possession of the AO was sufficient to form a reason to believe. Without doubt, the AO had received a report from the Investigation Wing of the Department which had comprehensively detailed the relevant facts. These facts were obtained by carrying out search and seizure operation and subsequent investigation. The provisions of search and seizure are ultimate tools in the hands of the Department and the facts gathered as a result of a search, provide a comprehensive picture of the modus operandi of the related entities. This comprehensive picture cannot be

obtained by investigating a particular entity in isolation. The authorities in the inventing wing are statutory authorities who have been vested with specific powers under various provisions of the Act. A report compiled by such statutory authorities by carrying out search operation and investigation in accordance with the provisions of law, is good enough material to form a reasonable opinion in respect of an object which is covered under such report.

The only reason why the requirement of "reasons to believe" has been provided in the law is because legislature intended that the power to reopen the cases should be exercised with due care and without any prejudice. The intention is that the power should not be misused for any vested interest. In this case, there is no allegation of any vested interest on part of the AO. The AO has merely acted on the basis of the material available before him. He has given due consideration to the facts narrated in the report of the Investigation Wing. It is not the intention of the legislature that the AO has to carry out independent investigation and establish the facts before he can issue notice u/s 148. This is not necessary because the facts are ultimately established during the course of the assessment proceedings and while issuing notice u/s 148 only a prima facie satisfaction is required. That satisfaction is to be based

on the material available before the AO. He is not required to proactively investigate the veracity of facts narrated in the material that he possesses. In this case, the facts had already been investigated by the Investigation Wing and a report detailing the modus operandi and other relevant information was made available to the AO. Considering that the report was prepared in accordance with the law and forwarded by a statutory authority, the AO could not reasonably doubt the contents thereof. There is nothing to show that this opinion of the AO is not a genuine opinion but arising from extraneous considerations.

Existence of "reasons to believe" is a question of fact which is determined in the given facts and circumstances of the case. None of the case laws relied by the appellant have applicability to the facts of the present case. In determining whether commencement of assessment proceedings is valid, the court has only to see whether there is prima facie some material on the basis of which the Department opened the case. The sufficiency or correctness of the material is not a thing to be considered at this stage as held by the Supreme Court in the case of Raymond Woollen Mills Ltd. Vs. ITO [1999] 236 ITR 34 (SC), and also as held in the case of Great Arts Pvt. Ltd Vs ITO [2002] 257 ITR 639 (Delhi). The assessee cannot challenge sufficiency of belief - ITO Vs.

Lakhmani Mewal Das [1976] 103 ITR (SC). In another case Hon'ble SC in case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd (2007) 291 ITR 500 has held that at the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at that stage. This is so because formation of the belief is within the realm of the subjective satisfaction of the Assessing Officer.

In view of the above, I am of the firm opinion that AO's action of issuing notice u/s 148 is based on bonafide belief and his action is in accordance with the provisions to law.

In view of the above, appellant's grounds challenging the AO's action of assuming jurisdiction u/s 148 are not accepted. These grounds of appeal are dismissed accordingly."

12. Thus, in short, the Id. CIT(A) observed that the report of the Investigation Wing, a statutory Authority, is good material for the AO to form reason of escapement of income and the AO is not required to investigate the veracity of the facts narrated in the material received by him from the Investigation Wing, where such facts were already investigated by the Investigation Wing and a report was

made available to the AO. The Id. CIT(A) observed that there is no allegation of any vested interest of the AO and that there is nothing on record to show that the AO's opinion is an opinion which is based on extraneous considerations and it is not a genuine opinion, that what is to be seen is the existence of, prima facie, some material which could form the basis of the reasons of belief of escapement of income and not the sufficiency thereof to conclusively prove escapement of income, the AO's satisfaction for formation of such a belief being his subjective satisfaction.

13. The Id. Counsel for the assessee has contended that the Id. CIT(A) has erred in confirming the AO's action of issuance of notice u/s 148 of the Act, by holding such action to be in accordance with law. Relying on 'PCIT vs. Meenakshi Overseas (P) Ltd.', 154 DTR 100 (Del.), the Id. Counsel has contended that mere reliance on the information received, without having acted thereon before recording the reasons, showing non-application of mind on the part of the AO, is unsustainable in law. The Id. Counsel has also placed on reliance on 'Sabh Infrastructure Ltd. Vs. ACIT', order dated 25.9.2017, passed by the Hon'ble Delhi High Court in Writ Petition (C) 1357/2016.

14. The Id. DR, on the other hand, has relied on the following decisions to contend that information received from the Investigation Wing of the Department, is information on the basis of which, the AO can initiate reassessment proceedings:

1. 'Mitsui and Company India Pvt. Vs. ITO and Another', WP(C) 1121/2012 & CM No.2447/2012 (Delhi High Court).
 2. 'Brij Mohan Agarwal vs. Asstt. Commissioner of Income Tax', 268 ITR 400 (Allahabad High Court).
 3. 'Hosang R. Debra vs. ITO-1(2)', ITA No.331/Agr/2012, ITAT, Agra.
 4. 'CIT vs. Active Traders (P.) Ltd.', 214 ITR 583 (Calcutta High Court).
 5. 'M/s Pragati Financial Management Pvt. Ltd. Vs. The CIT-II', ITA 178 of 2016, GA 997 of 2016 (Calcutta High Court).
 6. 'Anil Kumar Singhal vs. ITO', IT Appeal Nos. 408 & 413/Agr/2012, ITAT Agra.
 7. 'Acorus Unitech Wireless Pvt. Ltd. Vs. ACIT', Judgment dated 28.02.2014, passed by the Hon'ble Delhi High Court in WP (C) 1957/2013.
15. Heard. A bare perusal of the ld. CIT(A)'s order, as extracted hereinabove, shows that the ld. CIT(A) has gone by the mere factum of receipt of material by the AO from the Investigation Wing of the Department. In 'Meenakshi Overseas' (supra), under similar facts and circumstances, relying on 'Signature Hotels (P) Ltd. Vs. ITO', 338 ITR 51 (Del), it has been held that the reasons must be self-

evident and they must speak for themselves; that the tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons; and that where the link between the information made available to the AO and the formation of belief is absent, the reasons are not sustainable. It has further been held that where there is no independent application of mind by the AO to the tangible material which forms the basis of the reasons and the reasons fail to demonstrate the link between the tangible material and the formation of the reasons to believe escapement of income, the reasons are unsustainable.

16. In the present case, like in 'Meenakshi Overseas' (supra), the link between the information available with the AO and the formation of belief by the AO is missing. No independent application of mind by the AO to the material forming the basis of the reasons recorded is evincible from the reasons. The AO, in the reasons, has just stated the information received and his conclusion about the alleged escapement of income. As to what the AO did with the information made available to him, is not discernible from the reasons. As such, 'Meenakshi Overseas' (supra), is squarely applicable.

17. 'Meenakshi Overseas' (supra) is by the Hon'ble Delhi High Court, whereas the decisions cited by the Id. DR are from other different High Courts. Of all these, 'Brij Mohan Agarwal' (supra) is by the Hon'ble Allahabad High Court, i.e., the

jurisdictional High Court qua the assessee. However, that decision is essentially fact-specific. It does not lay down any proposition of law, as such. The Civil Writ Petition filed by the assessee was decided by the Hon'ble High Court on merits, having taken into consideration the investigation report of the Investigation Wing of the Department, as conveyed to the AO, the assessee's record, the Department's counter-affidavit (alongwith its annexures) to the Writ Petition and the rejoinder affidavit filed by the assessee. It was held that from the findings of the Investigation Wing and as per the record, the AO of the assessee (Respondent No.1 in the Writ Petition) had reason to believe that the assessee had diverted and, thus, concealed his income by disclosing it to be sale proceeds of shares, which was not correct, as no real transaction of shares had ever taken place. It was held that in view of the investigation made by the Investigation Wing, relevant and very material facts had come before the AO that the assessee was concealing his income by indulging in bogus transactions. It was, accordingly, held that the belief of the AO was an honest and reasonable belief based on the material which he had received from the Investigation Wing. The Hon'ble High Court refused to accept the assessee's contention that it was a case of a mere change of opinion. The Writ Petition was dismissed as having no merit.

18. In the case at hand, however, the issue raised is altogether different. Here, the challenge of the assessee is that since in the reasons recorded, the AO has not

spelt out as to what he did with the information received by him from the Investigation Wing, the reasons are hit by the vice of non-application of mind to the information so received.

19. From the above, it is evident that there is no parity whatsoever between ‘Brij Mohan Agarwal’ (supra) and the present case. Accordingly, ‘Brij Mohan Agarwal’ (supra) is of no help to the Department.

20. Now, in a situation like the present one, as is trite, where there is a cleavage of opinion between different High Courts on an issue and none of the decisions has been rendered by the jurisdictional High Court, the view in favour of the assessee needs to be followed. Hence, in deferential keeping with ‘Meenakshi Overseas’ (supra), the reasons recorded by the AO to form belief of escapement of income are found to be no reasons in the eye of the law.

21. Then, in “Sabh Infrastructure Limited” (supra), the Hon’ble Delhi High Court has, vide para 19 of the report, laid down the guidelines as follows, in the matters of re-opening of assessment:

(i). while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the Assessee. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided;

(ii). the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment – especially in those cases where the first proviso to Section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AO on the same and if so, the conclusions thereof;

(iii). where the reasons make a reference to another document, whether as a letter or report, such document and/or relevant portions of such report should be enclosed along with the reasons;

(iv) the exercise of considering the Assessee’s objections to the reopening of assessment is not a mechanical ritual. It is a quasi judicial function. The order disposing of the objections should deal with each objection and give proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed.”

22. Thus, in deference to “Sabh Infrastructure Limited” (supra), it is incumbent on the AO, while communicating the reasons for the reopening of the assessment, to provide the standard form, used for obtaining approval of the superior officers. Merely stating the reasons in a letter addressed by the AO, is not enough. Then, the reasons to believe escapement of income need to spell out all the reasons and grounds available with the AO for reopening the assessment. The reasons must also paraphrase any investigation report, which may form the basis of the reasons and any enquiry conducted by the AO thereon, as also the conclusions thereof. Further, and this is most relevant for the case at hand, where the reasons make a

reference to any document, such document and / or relevant portion thereof must be enclosed along with the reasons. The Hon'ble High Court has underlined that consideration of the assessee's objections to the reopening of assessment is not a mechanical ritual, but it is a quasi judicial function. It has been mandated that the order disposing of the objections should deal with each objection, giving proper reasons for the conclusion and no attempt should be made to improve or add to the reasons, as recorded and disclosed.

23. In the case of the present assessee, it remains undisputed that though the reasons recorded by the AO for belief of escapement of income contain reference to material forming the basis thereof, such material, despite written request by the assessee to the AO in this regard, was never supplied by the AO to the assessee. This is in direct contravention of the principle of natural justice, as reiterated in "Sabh Infrastructure Limited" (supra). As noted, in the present case, the alleged material was only supplied to the assessee in the remand proceedings, where too, the objections of the assessee were not met. The Id. CIT(A) also did not deal with these objections of the AO.

24. Therefore, the reasons recorded by the AO are found to be not in accordance with law. Accordingly, they are cancelled. Too, in view of "Sabh Infrastructure Limited" (supra), none of the other decisions cited by the Department are of any aid to it. Consequently, the reassessment proceedings,

culminating in the order under appeal, are also not sustainable in the eye of law and they too are cancelled. Nothing further survives for adjudication.

25. In the result, the appeal is allowed.

I.T.A No. 40/Agra/2017

26. This is assessee's appeal for assessment year 2009-10, taking the following grounds:

- “1. Because the Ld. CIT(A) has wrongly, illegally and arbitrarily confirmed the action of the Assessing Officer for which specific grounds were taken before him challenging the validity of initiation of proceedings u/s 147 and the consequent issue of notice u/s 148 of the I. T. Act.*
- 2. Because the Ld. CIT(A) has erred both in law and on facts in rejecting the appellant's submission objecting the proceedings u/s 148 on the following specific grounds taken before him:-*
 - i) Proceedings initiated u/s 147 and the notice issued u/s 148 is wrong, bad in law, arbitrary, without jurisdiction and against the facts and circumstances of the case.*

ii) *No valid material and ground justifying the reason recorded. The reasons are wholly, irrelevant, general, vague and wrong.*

iii) *Reasons recorded based on borrowed satisfaction.*

3. *Because considering the facts of the case and the legal position the assessment deserves to be quashed. The Ld. CIT(A) has arbitrarily erred in confirming the Assessing Officer's action of issuing notice u/s 148 by holding the same to be in accordance with the provisions of law.*
4. *Because the Ld. CIT(A) has wrongly, illegally and arbitrarily confirmed the addition of Rs. 15,00,000/- made by the Assessing Officer u/s 68 of the Income Tax Act treating the receipt of share application money to be an unexplained cash investment.*
5. *Because the Ld. CIT(A) has erred both in law and on facts in rejecting the appellant's submission and the documents filed to prove the identity of the share applicant, their creditworthiness and genuineness of transaction. The Ld. CIT(A) has arbitrarily and wrongly held that genuineness of the transaction of share application money and the creditworthiness of the creditors are not proved.*

6. *Because under the facts and circumstances of the case and the legal position the addition of Rs. 15,00,000/- confirmed by Ld. CIT(A) deserves to be deleted.”*

27. The facts of the present case are, mutatis mutandis, exactly similar to those in ITA No.41/Agra/2017, the case of Deepraj Hospital Pvt. Ltd. For the detailed discussion recorded therein, the notice issued u/s 148 of the I.T. Act in the present case, and all proceedings pursuant thereto, culminating in the impugned order, are cancelled. Nothing further survives for adjudication. Therefore, the appeal is allowed.

28. In the result, both the appeals are allowed.

Order pronounced in the open court on 01/06/2018.

Sd/-

**(A.D. JAIN)
JUDICIAL MEMBER**

Dated 01/06/2018

AKV

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR