

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A. No.3189Del/2015
Assessment Year: 2006-07**

**DCIT, Circle –23(2),
New Delhi.
(PAN: AAJCS6446E)**

vs

**Second Realtors Pvt. Ltd.,
C-62, Basement,
South Extension, Part-I,
New Delhi**

(Appellant)

(Respondent)

Appellant by: Ms Ashima Neb, Sr. DR
Respondent by: Shri Manoj Gupta, CA
Shri Kundanwahi, FCA

ORDER

**Date of hearing: 19.11.2018
Date of Pronouncement: 20 .11.2018**

PER K. NARASIMHA CHARY, JM

Challenging the order dated 12/03/2015 in appeal No. 370/14-15 passed by the principal Commissioner of income tax (OSD) (appeals)-8, New Delhi (“Ld. CIT(A)”) Revenue preferred this appeal and on the following grounds:-

1. The Ld. CIT(A) has added in law and on facts in ignoring the fact that necessary enquiries about the escapement of income were already conducted by the investigation wing from which information was received for initiating proceedings u/s 148 of the IT act.
2. The Ld. CIT(A) has added in law and on facts in declaring the notice issued u/s invalid.
3. The CIT has added in law and on facts in holding that the assessment made by the AO under section 143(3) r.w.s. 147 as ab initio wide and holding addition made by the ever as unjustified.
4. The appellant craves to amend, modify, alter, and are forgo any ground(s) of appeal at any time before or during the hearing of this appeal.

2. Brief facts of the case relevant for the disposal of this appeal are that M/s Second Realtors private limited (assessee) is a company incorporated to carry on the business of purchase, sale, own, develop, improve, let, build, take on lease etc of all kinds of immovable properties, land etc. For the assessment year 2006-07 the assessee filed return of income declaring nil income on 31/10/2006 and the assessment was complete on section 143(3) of the Act on 25/11/2008.

3. Subsequently by way of letter dated 12/03/2013, DIT (Inv.)-II, New Delhi informed that the search and seizure operations carried out at the residential and business premises of Sh. SK Jain and Sh. VKJ in on 14 and 2010 resulted in the department noticing that a number of companies were being managed from the residential as well as business addresses relating to Sh. SK Jain and VK Jain though all the books of accounts and other relevant papers of those companies were found from the residence of Mr HK Jain and VK Jain itself and nothing was found at the other addresses. In the particulars furnished by DDIT (Inv.), the name of the assessee also found place. On a perusal of the documents/information supplied by the

investigation wing, learned Assessing Officer formed an opinion that the material reveals that the assessee has also been providing accommodation entries regularly, and although the assessee company furnished various details relating to share capital at the time of the assessment under section 143(3) of the Act, but it was not disclosed anywhere that those were accommodation entries. Basing on the same the learned AO recorded that he has reason to believe that income of Rs. 1,00,00,000/-which should have been charged to tax has escaped assessment for the assessment year 2006-07.

4. Learned AO issued notice under section 148 of the Act after obtaining approval as required by section 151 of the Act and concluded the reassessment by making an addition of rupees one crore to the income of the assessee.

5. When the assessee preferred appeal, Ld. CIT(A), by way of impugned order, held that the notice issued under section 148 of the Act is not valid and the assessment made by the learned Assessing Officer under section 143(3) of the Act read with section 147 of the Act is void ab initio and consequently the addition made by the learned Assessing Officer under section 68 of the Act was not justified. Ld. CIT(A), accordingly, deleted the addition made under section 68 of the Act and allowed the appeal. Hence the revenue preferred this appeal.

6. It is the argument of the Ld. DR that the Ld. CIT(A) wrongly held that the learned Assessing Officer heavily relied upon the letter of the investigation wing and instead of making any enquiry learned Assessing Officer reopened the matter. According to Ld. DR the reasons recorded by the learned Assessing Officer clearly indicate the independent application of mind of the learned Assessing Officer to the documents/information along with the relevant seized documents/annexures etc for reaching a

prima facie conclusion that the assessee has taken the accommodation entries. Vide paragraph No. 4a of the reasons recorded, learned Assessing Officer recorded that various other seized material including A-46, A -40, A -24 etc also clearly indicate the fact that the assessee has been providing accommodation entries regularly. All these things would clearly show that though the DIT(inv) suggested that the Assessing Officer “may consider the matter and issue notice under section 148, if required”, learned Assessing Officer after perusing the documents/information supplied by the investigation wing found the involvement of the assessee in taking and providing the accommodation entries regularly, and inasmuch as the assessee has not furnished the various details truthfully at the time of original assessment under section 143 (3) of the Act, Ld. Assessing Officer is justified in holding that there is reason to believe that income of rupees one crore which have been charged to tax has escaped assessment for the assessment year 2006-07.

7. It is further submitted by Ld. DR that no statements wererecorded by the learned Assessing Officer during the assessment proceedings and the assessee never sought the cross-examination of the Jain brothers before the investigation wing. She further submitted that as could be seen from the letter dated 18/10/2013 address by the assessee to the learner Assessing Office, that learned Assessing Officer on 08/10/2013 made the order sheet entry to the effect that the assessee company had already been provided the letter through which the satisfaction of the CIT was conveyed.

8. Further insofar as the observations of the Ld. CIT(A) about the availability of the documents to form the reason to believe that income escaped for an assessment, Ld. DR submitted that the learned Assessing Officer in unequivocal terms, vide paragraph No. 3 of the reasons for reopening the case of the assessee, stated that the detailed information

along with relevant disease documents/annexure etc have been supplied to his office through letter of director of income tax (Inv.)-II, New Delhi wide F.No DIT(Inv.) u/s 148/2013-14/196 dated 12/03/2013 and the specific information regarding the assessee company have been flagged at "A", perusal of which information/documents supplied by the investigation wing reveals that the assessee had taken the accommodation entries as enumerated therein. It was further recorded by the learned Assessing Officer that various other seized material including A-46, A-40, A-24 etc also clearly indicated to the fact that the assessee was providing accommodation entries regularly. She, therefore, submitted that there was enough material before the learned Assessing Officer to form satisfaction that it is a fit case to reopen and issue notice under section 148 of the Act.

9. Placing reliance on the decision of the Hon'ble jurisdictional High Court in the case of Consolidated Photo and Fininvest Ltd vs. ACIT reported in (2006) 151 taxman 41 (Delhi), Ld. DR submitted that the action under section 147 is permissible even if Assessing Officer gathered his reasons to believe from very same record as it had been subject matter of completed assessment proceedings and the principle that a mere change of opinion and cannot be a basis for reopening completed assessments would have no application where order of assessment does not address itself to aspect which is basis for reopening of assessment. Basing on the above factual matrix more particularly to an annexure A-52 incorporated at page No. 5 of the assessment order, Ld. DR submitted that certain factual incorrectness has crept into the impugned order and, therefore, the impugned order is liable to be set-aside and the order of the learned Assessing Officer has to be restored.

10. Per contra, it is the argument of the learned Authorised Representative that the Ld. CIT(A) is justified in his observations that

without making any further enquiries and without having the documents in his custody learned Assessing Officer issued notice under section 148 of the Act and this fact is evident from the letter dated 10/10/2013 written by the learned Assessing Officer subsequent to the issuance of the notice under section 148 of the Act requesting for certain documents like photo copy of annexure A-52 page 38, copies of bank statement of the relevant period from which accommodation entries/checks/PO have been issued to the persons, and copies of statement of Sh. SK Jain, Sh. PK Jain etc wherein it was stated that certain persons have taken accommodation entries from them. It is, therefore, clear that as on the date of issuance of notice under section 148 of the Act, learned Assessing Officer is not in possession of these documents and that is the reason why by letter dated 10/10/2013 the learned Assessing Officer requested for these documents.

11. It is contended that when the assessment was sought to be reopened after 4 years from the end of the relevant assessment year, it is incumbent upon the learned Assessing Officer to say in the order that any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year; and that for want of this requirement also the reopening is bad. He further submitted that though he requested for the copy of the proforma for recording reasons and obtaining approval of the CIT, the same was rejected, thereby depriving the assessee of an opportunity to challenge the correctness of the approval obtained by the learned Assessing Officer.

12. Ld. AR placing reliance on the decisions reported in PCIT vs. G & G Pharma India Ltd (ITA 545/2015 on the file of the Hon'ble Delhi High Court) and PCIT vs. Meenakshi Overseas Private Limited (ITA 692/2016 on the file of the Hon'ble Delhi High Court) for the principle that the

reasons recorded have to be based on some tangible material and that should be evident from the reading the reasons, it cannot be supplied subsequently either during the proceedings and objections to the reopening are considered or even during the assessment proceedings that follow and this is the bare minimum mandatory requirement of the 1st part of section 147 (1) of the Act.

13. Further reliance is placed on the decisions reported in Titanor Components Ltd vs. ACIT and others (writ petition No. 71 of 2005 on the file of the Hon'ble Bombay at Goa) and Subh Infrastructure Ltd vs. ACIT (WP (C) 1357/2016 on the file of the Hon'ble Delhi High Court) for the principle that the powers under section 147 of the Act have to be exercised after a period of 4 years only if there is a failure to disclose fully and truly all material facts and information by the assessee. In support of his contention that in the approving authority under section 151 of the Act records that "yes, I am satisfied", that would not be sufficient compliance with the requirement of section 151 of the act, Ld. AR placed reliance on the decision of a coordinate bench of this Tribunal in Pioneer town planners private limited vs. DCIT (ITA No. 132/del/2018, dated 06/08/2018).

14. We have gone through the record including the impugned order as well as the assessment order in the light of the submissions made on either side. Learned Assessing Officer sought to reopen the concluded assessment basing on the documents/information supplied by the investigation wing. Ld. CIT(A) held that such reopening is bad for the reason that the Assessing Officer heavily relied upon the letter of the investigation wing and the Assessing Officer did not make the enquiries which he was supposed to make to form the belief and to record the reasons that income was escaped assessment. Ld. CIT(A) further held that certain documents

were not in the possession of the Assessing Officer when the notice under section 148 was issued and it is the reason why the learner Assessing Officer had to request further documents by his letter dated 10/10/2013. Further Ld. CIT(A) recorded that regarding the satisfaction obtained by the learned Assessing Officer under section 151 (1) of the Act that the learner Assessing Officer has not forwarded the relevant case record. By noticing that in the assessment order it was mentioned that the approval from the Commissioner of income tax was obtained, CIT did not make any adverse comments, on this point.

15. Now the questions that arise for our adjudication are whether the Assessing Officer merely relied upon the information furnished by the investigation wing, without making the enquiries which is supposed to do and because of such “borrowed satisfaction” the notice under section 148 of the Act is bad under law?, and whether the learned Assessing Officer recorded the reasons without having the possession of the requisite documents and he got possession of such documents only subsequently?

16. When we perused the assessment order, we found that Ld. Assessing Officer extracted the letter dated 12/03/2013 from the investigation wing and also the reasons recorded by him. Letter dated 12/03/2013 reads that while furnishing the details of the accommodation entries relatable to Jain brothers, learned AO was requested to consider the matter and to issue the notice/s 148 of the Act, if required. We do not find any direction given by the Investigation Wing to the learned AO. The Investigation Wing seems to have furnished certain documents, more particularly, Annexure “A-52 P-38” which the learned AO incorporated at page 5 of his order. When we come to the reasons for reopening of the same, it is very clear that at the first paragraph itself learned AO referred to the documents that were unearthed during the search and seizure operations at various premises of

Jain brothers and while referring to the documents flagged at “A”, which according to the learned AO is the specific information regarding the assessee in this case, learned AO felt that it reveals the involvement of the assessee in taking the four accommodation entries enumerated thereunder.

17. Further vide paragraph no.4(a) while referring to certain documents and other seized annexure like A-46, A-40, A-24 etc. learned AO recorded that such documents revealed that the assessee has been providing accommodation entries. The letter of Investigation Wing does not contain the discussion which the reasons for reopening contain. Learned AO translated the suggestion “considered the matter and issue notice u/s 148, if required” of the Investigation Wing into action by applying his mind to the specific information contained in Annexure “A-52 P-38” vide S.No.2 to 5 and also the other seized annexure including A-46, A-40, A-24 etc. Learned AO recorded that the assessee is involved in both taking and giving accommodation entries.

18. Then the learned AO referred to the completed assessment u/s 143(3) vide order 25.11.2008 and the details furnished by the assessee at that time relating to the share capital observed that at that time the assessee did not disclose that such entries were accommodation entries. In other words, the reasons recorded by the learned AO clearly show the application of mind not only to the seized material that was forwarded to him but also it contains a recital to the effect that the assessee was guilty of not furnishing the details truthfully.

19. On a careful appraisal of the letter of the Investigation Wing and the reasons recorded for the reopening of the case, we are of the considered opinion that there is no strength in the saying that the learned AO did not independently apply his mind to the information furnished by the Investigation Wing or that he did not record that the escapement of income

was due to the non-furnishing of the details fully and truly. We shall have to keep in mind that at this stage law does not empower the learned AO to make roving enquiries by issuing process to the persons or for production of documents without assuming jurisdiction by issuance of notice u/s 148 of the Act. At this stage the independent application of mind by the learned AO is limited to the area of the available material on record. Learned AO very succinctly referred to the information and documents furnished to him by the Investigation Wing. He evaluated the same, culled out the requisite information that was tabled in the reason for reopening of the case and it is only after apprising the contents of the seized material in the light of the truthfulness of the details that were furnished at the time of the original assessment u/s 143(3) of the Act. He reached a conclusion that there are reasons to believe that income that should have been charged to tax had escaped assessment. According to us absolutely there are no reasons to interfere with the reopening of the matter.

20. Nextly, coming to the question of possession of documents, record reveals that during assessment proceedings the assessing officer by letter dated 10.10.2013 requested for certain documents seized at the time of search. When the learned AO was conducting an elaborate enquiry u/s 147 of the Act, he felt the need of certain documents. It is not as though the learned AO had to have these documents also for forming the opinion there is prima facie reason to believe that income escaped assessment. Let there not be any confusion with the sufficiency of material at each of these two stages. There were documents before the learned AO while recording the reasons to believe that income escaped assessment but such document may not be good enough to conclude the assessment and for such purpose learned AO must have felt the need to secure the other material also. Merely because some other material was sought at a latter point of time to conclude the assessment, it cannot be inferred that there were no

documents before the learned AO when he recorded the reasons to believe the escapement of income from assessment. On this aspect also, we find it difficult to sustain the findings of the learned CIT(A).

21. Coming to the non furnishing of the proforma for approval u/s 151 of the Act, learned CIT(A) observed that it was mentioned in the assessment order that the approval of CIT was obtained. Though the learned CIT(A) stated that the relevant case was not forwarded to him by the AO, it is pertinent to note that the learned CIT(A) did not draw any adverse inference on this aspect. When the letter through which sanction of the CIT was conveyed was furnished to the assessee, the assessee could have obtained other requisite information from the CIT himself. Assessee is not sure as to what was the endorsement of the learned CIT(A) in the proforma. Often times it is possible that the application of mind of the CIT to the proposal in elaboration would be there on the note file but it would have simply been mentioned in the proforma at the column meant for such purpose as "Yes, I am satisfied". Unless and until we look into the file in its entirety, it is not possible for us to say whether there is sufficient compliance with section 151 in this case or not. The assessee cannot ask us to draw an adverse inference on that point without discharging his onus.

22. For these reasons, we are of the considered opinion that the reasons recorded by the learned CIT(A) to hold that the notice u/s 148 is invalid and the assessment u/s 143(3) read with Section 147 of the Act is void ab initio. We, therefore, agree with the revenue that the learned AO rightly and properly recorded the reasons by independent application of mind and his assumption of jurisdiction by issuing notice u/s 148 of the Act is valid. We find from the impugned order that in respect of Ground No.2 learned CIT(A) did not appreciate the evidence on record for recording the issue on merits in the way in which he is expected to do because vide para 4 of his

order he was swept by his findings that for want of validity of notice u/s 148, assessment u/s 147 was void ab initio. We are of the considered opinion that the matter requires the consideration of the first appellate authority on merits afresh after affording an opportunity to the assessee of being heard. We, therefore, while allowing the grounds of appeal, set aside the impugned order and remand the matter to the file of the learned CIT(A) for fresh disposal on merits.

23. In the result, appeal of the revenue is allowed for statistical purposes.

Order pronounced in the open court on 20th November, 2018.

Sd/-

(O.P. KANT)
ACCOUNTANT MEMEBR

sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated 20th November, 2018

VJ'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By order

Asstt. Registrar

Draft dictated	19.9.2018	
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Date on which file goes to the Head Clerk.		
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