

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : D : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2364/Del/2013
Assessment Year: 2004-05

Topchem (India) Pvt. Ltd.,
39/2068, Naiwala,
315, Dakha Chamber,
Karol Bagh,
New Delhi.

Vs. ITO,
Ward-16(3),
New Delhi.

PAN: AA ACT5718R

(Appellant)

(Respondent)

Assessee by	:	Shri Deepak Ostwal, CA
Revenue by	:	Smt. Naina Sain Kapil, Sr. DR
Date of Hearing	:	03.10.2018
Date of Pronouncement	:	19.12.2018

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 11th March, 2013 of the CIT(A)-19, New Delhi, relating to Assessment Year 2004-05.

2. The facts of the case, in brief, are that the assessee is a company and is engaged in the business of dealing in organic and inorganic chemicals and provide services in various fields. It filed original return of income on 29th October, 2004 declaring total

income of Rs.1,520/-. The return was processed u/s 143(1) on 29th February, 2005.

Subsequently, the Assessing Officer issued notices u/s 148 of the IT Act for reopening the assessment, after recording the following reasons:-

“Reasons for belief that income has escaped assessment in the case of M/s Top Chem India Pvt. Ltd for assessment year 2004-2005

M/s Top Chem India Pvt.Ltd. is assessed to tax with Ward 16(3). New Delhi . Enquiries of Investigation Wing , Delhi of the Department have unearthed huge accommodation entry racket being operated by various groups of operators. The investigation wing has compiled a report & data of the beneficiaries of such entries . I have gone through the report and data sent by the investigation wing. The report clearly indicates that accommodation entries have been taken to plough back unaccounted black money for the purpose of business or for personal needs such as purchase of assets etc., in the form of gifts, share application money, loans etc and even describes the modus operandi of this scam.

The investigation Wing’s list of Beneficiaries (of such accommodation entries), gives comprehensive details of Beneficiary’s Name, Beneficiary Bank Name, Beneficiary's Bank Branch, Account No. of Beneficiary in which entry is received (in most of the cases), Value of entry taken , instrument No, by which entry is taken, date on which entry taken, name of account holder of entry giving account, bank, from which entry given, branch of entry giving bank and account No. of entry giving account.

This list contains the name of M/s. Top Chem India Pvt.Ltd which has taken entries in its account in Standard Chartered Bank from M/s. Pararm Enterprises, M/s.Arpit Sales, M/s. Keshavi Sehkari & M/s. P.K.Investments. All the entries amounting to Rs.63.50 Lakh have been taken on various dates.

The assessee has shown such income from unknown sources as a capital receipt. Thus, the assessee has ploughed back unaccounted money of Rs.63.50 lakh in its business through the channel of accommodation entry. It is failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, for the assessment year 2004-05 and has not paid tax on such amount. The unaccounted money which should have been charged to tax are being ploughed back to business without paying due tax on it. In view of the above facts, I have reasons to believe that income to the tune of Rs.63.50 lakh, of the assessee company for AY 2004-05 has escaped assessment.

In accordance with the provisions of section 151 of IT Act, sanction for issue of Notice u/s 148 of the IT Act is being sought from the Addl.CIT, Range-16 New Delhi.

Sd/-
(R.K. GUPTA)
Income tax Officer,
Ward 16(3),N.Delhi”

3. In response to notice u/s 148 issued to the assessee on 25th March, 2011, the assessee, vide letter dated 13th October, 2011, requested the Assessing Officer to treat the original return filed on 29th October, 2004 as the return filed in response to notice u/s 148 of the IT Act. The assessee also requested for a copy of the reasons which was duly handed over by the Assessing Officer to the AR of the assessee. The Assessing Officer issued notice u/s 143(2) of the IT Act which was duly served on the assessee. During the course of assessment proceedings, the assessee filed confirmation of the parties, copies of their accounts, etc. The Assessing Officer asked the assessee to produce the four parties, namely, M/s. Pararm Enterprises, M/s.Arpit Sales, M/s. Keshavi Sehkar & M/s. P.K.Investments for his examination for verifying the genuineness of the transactions against which the assessee appeared before the Assessing Officer. However, none of the parties were produced for his examination. He, therefore, asked the assessee to explain as to why a sum of Rs.58.50 lakhs received by the assessee from these four parties should not be treated as income of the assessee. However, none appeared before the Assessing Officer nor any reply was filed. The Assessing Officer, therefore, held that the assessee miserably failed to adduce evidence regarding the genuineness of the transactions and credit worthiness of the parties concerned. He, therefore, made addition of Rs.58.50 lakhs to the total income of the assessee u/s 68 of the IT Act, 1961.

4. Before CIT(A), the assessee challenged the validity of jurisdiction and the addition on merit. It was argued that the notice u/s 148 was issued in a mechanical manner. Further, the notice was not properly served on the assessee since it was sent to a wrong address. Relying on various decisions, it was submitted that reopening of the assessment by the Assessing Officer is *void ab initio*. So far as the merit of the case is concerned, it was submitted that the assessee has filed confirmation of the parties, copies of their accounts, etc. Therefore, the Assessing Officer was not justified in making the addition. Various decisions were also brought to the notice of the CIT(A). Various details were also filed before the CIT(A) to the proposition that the addition is not justified and the reassessment proceedings are *void ab initio*.

5. Based on the arguments advanced by the assessee and the details filed before him the Id.CIT(A) called for a remand report from the Assessing Officer. After considering the report of the Assessing Officer and the comments of the assessee to such remand report, the Id.CIT(A) upheld the addition made by the Assessing Officer u/s 68 of the IT Act and also upheld the validity of the reassessment proceedings.

5.1. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

“1. On the facts and in the circumstances of the case Ld. CIT (A)-XIX, New Delhi has erred both on facts and in law in upholding the impugned order passed by the respondent illegally, without jurisdiction, violative of natural justices without fair and objective application of mind to the facts of the case and the law applicable and without being guided by the binding decisions of courts and tribunals and hence liable to be set aside and quashed and declared non est in law.

2. Ld. CIT (A)-XIX has erred both on facts and in law in holding the Notice u/s 148 as valid which was not issued / served by the respondent to the assessee company therefore entire proceedings of reassessment is *void ab initio*, illegal and unauthorized by law apart from being barred by limitation.

3. That having regard to the facts and circumstances of the case, Ld. A.O. has erred in framing impugned assessment order without assuming jurisdiction as per law and without complying with the mandatory conditions of section 147 to 153 of the Income Tax Act, 1961 and reopening of the case is bad in law and beyond the jurisdiction of the Ld. A.O and Ld. CIT (A)-XIX erred in upholding the validity of jurisdiction.

4. That having regard to the facts and circumstances of the case, Ld. A.O. has erred in framing impugned assessment order without removing the objection raised by the appellant regarding illegal assumption of jurisdiction by Ld. A.O. without passing a speaking order and Ld. CIT (A) ought to have been set aside and failure to do so has vitiated the impugned order, therefore impugned order is liable to be set aside and quashed.

5. AO has erred in passing the impugned order by obtaining behind the back of the appellant some alleged statements /information for which no opportunity provided to rebut the same and there was not even a show cause notice specifically proposing to make any addition nor any effective opportunity of hearing and Ld. CIT (A) has erred in upholding the unlawful action of the AO and hence, the impugned order passed in violation of natural justice is liable to be quashed.

6. The respondent has not discharged its onus of proof in any manner and has chosen to make illegal addition perversely and all the additions should therefore be set aside and quashed.

7. On the facts and in the circumstances of the case Ld. CIT (A) has erred both on facts and in law in upholding the impugned order passed by the respondent by making illegal additions to the tune of Rs. 58,50,000/- by treating income on account of unexplained cash credit u/s. 68 is totally unsustainable and liable to be deleted.

8. The respondent is also wrong in raising illegal demands of tax, interest and penalties mechanically and perversely and all the demands as well as penalty notice be quashed.

9. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.

It is prayed accordingly.”

6. The ld. counsel for the assessee strongly challenged the order of the CIT(A). He submitted that the notice u/s 148 was issued at incomplete address and was never served upon the assessee. Referring to the notice u/s 142(1) for assessment year 2003-04 dated 03.11.2010 and to subsequent communications evidencing the fact that the correct and complete address was available on the records of the Department, he submitted that the notice u/s 148 issued for the impugned assessment year at wrong address makes the entire proceedings illegal. Referring to various decisions, he submitted that the law does not allow the presumption of service of notice issued at incomplete address. He submitted that the assessee had raised the objection of non-service of notice, vide letter dated 26th September, 2011 immediately in reply to notice u/s 142(1) dated 1st September, 2011, copy of which is placed at page 46 of the paper book. He submitted that for the reassessment proceedings to be legal, two conditions, namely, issue of valid notice u/s 148 and proper service thereof are mandatory. Notice cannot be regarded as mere procedural requirement. He submitted that the ld.CIT(A) has wrongly upheld the validity of the notice on the ground that the assessee participated in assessment proceedings and was aware of issue of notice and had opportunity of being heard. However, he ignored the fact that non-service of proper notice within limitation period is a jurisdictional defect which cannot be cured even by section 292B of the IT Act.

7. Referring to the reasons recorded by the Assessing Officer, copy of which is placed at page 8 of the paper book, he submitted that the Assessing Officer had recorded reasons without application of mind and without having any tangible

material. The alleged reasons recorded in writing is an annexure to some inter-Departmental communication even without date and without application of mind by the Assessing Officer. Referring to the last para of the reasons recorded, he submitted that the Assessing Officer has jumped to the conclusion without any enquiry or without any application of mind. He inferred that the receipt was capital receipt in nature without even verifying the income-tax return and balance sheet of the assessee as accepted in form for recording of the alleged reasons. Referring to clause (8) of the annexure, he submitted that the Assessing Officer has mentioned the assessment status 'not known' as record is not traceable. Therefore, without going through the returns and balance sheet of the assessee, the conclusion reached by the Assessing Officer that the assessee has failed to disclose fully and truly all material facts can by no stretch of imagination be recorded as reasons to believe. Relying on the decision of the coordinate Bench of the Tribunal in the case of *G & G Pharma India Ltd. vs. ITO, ITA No.3149/Del/2013, order dated 09.01.2015 (ITAT, Delhi)* which has since been upheld by the Hon'ble jurisdictional High Court, he submitted that the reassessment proceedings initiated on the basis of the report of the Investigation Wing is not justified. Further, the approval of the CIT was not sought in the instant case and the approval from the Addl. CIT was obtained and the Addl. CIT had not applied his mind and in a mechanical manner has given his approval. Therefore, the proceedings are void on this ground also as the recording of the satisfaction by the Addl. CIT in Point No.12 of the form is in a mechanical manner and not as per law. Nothing is coming out on how and on what basis he reached the conclusion that reassessment is required

by the Assessing Officer. For the above proposition, he relied on various decisions. He submitted that the objections raised by the assessee regarding non-service of notice and validity of jurisdiction was first raised, vide letter dated 25th October, 2011, which was replied by the Assessing Officer, vide letter dated 23.11.2011, copies of which are placed on pages 63-66 and 142. He submitted that the claim of the Assessing Officer was misleading as in the form of recording reasons he himself has noted that the record is not traceable. At the same time, the Assessing Officer, in his remand report, has stated that before reaching the conclusion he has referred to the records available and correlated the information so received. It is, thus, contradictory and, therefore, on this count itself, the reassessment proceedings should be quashed. Further, the Assessing Officer has not disposed of the objections properly. He accordingly, submitted that the reassessment proceedings should be quashed.

8. So far as the merit of the case is concerned, the Id. counsel for the assessee submitted that the assessee has discharged the onus cast on it by submitting all the requisite details such as confirmations of the parties, copies of income-tax returns and copies of PAN nos. of the parties, copies of the ledger accounts of the parties in the books of assessee, etc. Copy of the confirmatory statements filed by the parties before the Assessing Officer and copy of the affidavit/statement affirming the transactions were also filed. Not a single document has been proved to be false or untrue. Since the transaction was duly explained and recorded in the books of the assessee, therefore, without any independent enquiry made by the Assessing Officer, the

documents/evidences could not have been rejected for mere non-production of the creditors. He accordingly submitted that the addition made by the Assessing Officer and upheld by the CIT(A) should be deleted.

9. The Id. DR, on the other hand, heavily relied on the order of the Assessing Officer and CIT(A). So far as the grounds relating to validity of the reassessment proceedings are concerned, she submitted that the notice was served by speed post on 20th March, 2011, the evidence of which is placed on page 2 of the paper book filed by the assessee. Since service by post is a valid mode of service as per the provisions of section 282 of the Income-tax Act, therefore, the assessee cannot claim that there was no service of notice. Referring to para 4 of the order of the CIT(A), she submitted that the Id.CIT(A) has given justifiable reasons for upholding the validity of service. Therefore, the same should be upheld. So far as wrong mention of address is concerned, she submitted that this is a minor typographical error since the notice u/s 142(1) was issued on the same address which has been replied by the assessee, therefore, assessee cannot claim that the notice u/s 148 was issued on a wrong address. Even otherwise, the minor typographical error in the notice cannot constitute an error big enough to invalidate the notice and provisions of section 292B and 292BB of the Act will come to the rescue of the Department and the assessee cannot take advantage of the same. So far as the argument of the Id. counsel for the assessee that the reassessment proceedings are barred by limitation is concerned, she submitted that the Assessing Officer in the remand report and the CIT(A) in the body of the order has dealt with this issue very elaborately and in a speaking manner and the CIT(A) has

upheld that necessary approvals in consonance with the provisions of section 151 was also taken properly. She accordingly submitted that the reassessment proceedings have been rightly held to be valid by the CIT(A). So far as the addition on merit is concerned, she submitted that the assessee has not discharged the primary onus of proving the identity and credit worthiness of the loan creditors and the genuineness of the transaction. The directors of the creditor companies were neither produced during assessment proceedings nor during remand proceedings despite specific directions by the CIT(A). Since a specific information from the Investigation Wing was received about these companies being engaged in the activity of providing accommodation entries and the assessee having taken these bogus accommodation entries and since the assessee could not discharge its primary onus by producing the directors of the companies for the examination of the Assessing Officer, therefore, the addition made by the Assessing Officer and sustained by the CIT(A) should be upheld. She accordingly, submitted that the grounds raised by the assessee should be dismissed.

10. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. It is an admitted fact that the information was received by the Assessing Officer from the Investigation Wing of the Department that the assessee has received income from unknown sources as capital receipt and, thus, the assessee has ploughed back unaccounted money of Rs.63.50 lac in its business through the channel of accommodation entries. A perusal of the form for recording the reasons for initiating proceedings u/s 148 and for obtaining the approval of Addl. CIT, copy of

which is placed at page 7 of the paper book shows that at clause 8 of the column it is mentioned as under:-

“8. Whether the Assessment is proposed to be made for first time. If the reply is in affirmative, please state:	Not known as record is not traceable”
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10.1 Similarly, clause 12 of the form reads as under:-

“12. Whether the Addl.CIT is satisfied on the reasons recorded by the ITO that it is a fit case for issue of notice u/s 148.	Yes, I am satisfied on the reasons recorded by the A.O. that it is a fit case for the issue of notice u/s 148 of the IT Act, 1961.”
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11. A perusal of the above shows that the Assessing Officer has not verified the assessment records of the assessee as it was not traceable. Therefore, before coming to the conclusion on the basis of the report of the Investigation Wing, it cannot be said that he has applied his mind independently especially when the assessment records of the assessee were not traceable. When it is clearly mentioned in the form that assessment records are not traceable, we also fail to understand as to how the approving authority i.e., the Addl. CIT in the instant case, was satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of notice u/s 148. We find the Hon'ble Delhi High Court in the case of G & G Pharma India Ltd. (supra) has held as under:-

“9. The Court at the outset proposes to recapitulate the jurisdictional requirement for reopening of the assessment under Section 147/148 of the Act by referring to two decisions of the Supreme Court. In Chhugamal Rajpal v. SP Chaliha (1971) 79 ITR 603, the Supreme Court was dealing with a case where the AO had

received certain communications from the Commissioner of Income Tax showing that the alleged creditors of the Assessee were “name-lenders and the transactions are bogus.” The AO came to the conclusion that there were reasons to believe that income of the Assessee had escaped assessment. The Supreme Court disagreed and observed that the AO “had not even come to a prima facie conclusion that the transactions to which he referred were not genuine transactions. He appeared to have had only a vague felling that they may be “bogus transactions’.” It was further explained by the Supreme Court that:

“Before issuing a notice under S. 148, the ITO must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under S. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of cl. (a) or cl. (b) of S. 147 are satisfied, the ITO has no jurisdiction to issue a notice under S. 148.”

The Supreme Court concluded that it was not satisfied that the ITO had any material before him which could satisfy the requirements under Section 147 and therefore could not have issued notice under Section 148.

10. In ACIT v. Dhariya Construction Co.(2010)328 ITR 515 the Supreme Court in a short order held as under:

“Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the DVO. Opinion of the DVO per se is not an information for the purposes of reopening assessment under s. 147 of the IT Act, 1961. The AO has to apply his mind to the information, if any, collected 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 22nd September 2015 in ITA No. 356 of 2013 (Commissioner of Income Tax II v. Multiplex Trading and Industrial Co. Ltd.) where the assessment was sought to be reopened beyond the period of four years. This Court considered the decision of the Supreme Court in Phool Chand Bajrang Lal v. Income-tax Officer (supra) as well as the decision of this Court in M/s Haryana Acrylic Manufacturing Co. (P) Ltd. v. CIT 308 ITR 38 (Del). The Court noted that a material change had been brought about to Section 147 of the Act with effect from 1st April 1989 and observed:

“29. It is at once seen that the Amendment in Section 147 of the Act brought about a material change in law w.e.f. 1st April, 1989. Section 147(a) as it stood prior to 1st April 1989 required the AO 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 AO 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 assessment 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 *M/s 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. 10th February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated: “I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has introduced its own unaccounted money in its bank account by way of above accommodation entries.” The above conclusion is unhelpful in understanding whether the AO applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the Assessee, which must have been tendered along with the return, which was filed on 14th November 2004 and was processed under Section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the AO to have simply concluded: “it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries”. In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO

must apply his mind to the materials in order to have reasons to believe that the income of the Assessee escaped assessment is missing in the present case.

13. Mr. Sawhney took the Court through the order of the CIT(A) to show how the CIT (A) discussed the materials produced during the hearing of the appeal. The Court would like to observe that this is in the nature of a post mortem exercise after the event of reopening of the assessment has taken place. While the CIT may have proceeded on the basis that the reopening of the assessment was valid, this does not satisfy the requirement of law that prior to the reopening of the assessment, the AO has to, applying his mind to the materials, conclude that he has reason to believe that income of the Assessee has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analysing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity .

14. In the circumstances, the conclusion reached by the ITAT cannot be said to be erroneous. No substantial question of law arises. 15.

The appeal is dismissed.”

12. We further find, under similar reasons recorded by the Assessing Officer for assessment year 2002-03, the Tribunal, vide ITA No.6048/Del/2012, Order dated 24th October, 2016, has quashed the reassessment proceedings. Similarly, the submission of the ld. counsel for the assessee that for assessment year 2003-04 although the case was reopened on the basis of the report of the Investigation Wing, no addition was made could not be controverted by the ld. DR. Since, in the instant case, the Assessing Officer has reopened the assessment merely on the basis of the report of the Investigation Wing without independent application of his mind as he is not aware as to whether the assessment is proposed to be made for the first time since the records are not traceable and since the additional CIT in a mechanical manner has given approval, therefore, we are of the considered opinion that the assumption of jurisdiction u/s 147/148 in the instant case is not as per law. We, therefore, quash the

reassessment proceedings initiated by the Assessing Officer merely on the basis of report of the Investigation Wing and due to non-application of mind. The legal ground raised by the assessee is accordingly, allowed. Since the assessee succeeds on this legal ground, therefore, the grounds relating to the merit of the case become academic in nature and, therefore, are not being adjudicated.

13. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 19.12.2018.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 19th December, 2018

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi