

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "B": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA Nos.:-5395,5397/Del/2018  
Assessment Years: 2009-10

M/s. Sri Dudheshwarnath Steels (P) Ltd. 1101, Lily Regency Garden, Plot No.10, Sector 06, Kharghar, Navi Mumbai – 410210	Vs.	DCIT Circle – 24(1), New Delhi.
<b>(Appellant)</b>		<b>(Respondent)</b>

**Stay application Nos.621,603/DEL/2018  
Arising out of ITA Nos.:- 5397, 5395/Del /2018  
Assessment years : 2009-10, 2009-10**

Dudheshwarnath Steels P. Ltd. 1101 Lily, Regency Garden, Plot No. 10, Sector-6, Kharghar, Mumbai Maharashtra Pin 410210	Vs.	DCIT , Circle 24(1), New Delhi. PAN AAICS0289G
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by:	Shri Pavan Ved, Adv.
Department by :	Ms. Ashima Neb, Sr DR.
Date of Hearing	12/09/2018
Date of pronouncement	10/12/2018

## **ORDER**

**PER AMIT SHUKLA, J.M.**

The aforesaid appeals have been filed by the assessee against impugned order of even date 16.7.2018, passed by Ld. CIT(Appeals) 28 New Delhi, for the quantum of assessment passed u/s 144/147 and penalty proceedings u/s 271(1)© for the assessment year 2009-10.

2. We will first take up the quantum appeal, wherein assessee in various grounds of appeal has challenged the validity of notice u/s 148 and reopening u/s 147 on various counts; and following additions:-

- i) Rs. 8,55,376/- on account of Hawala transactions;
- ii) Rs. 3,62,28,315/- on account of addition u/s 41(1) on the closing balance of sundry creditors;
- iii) Rs. 2,70,50,000/- on account of closing balance of all unsecured loan;
- iv) Rs. 10,47,322/- on account of disallowance of expenses;
- v) Rs. 1,88,94,725/- being credit in the 26AS not explained;

3. The facts in brief are that Assessee Company was earlier carrying on the business of manufacturing of M.S. Ingots. The company was closed down due to heavy loss and was actually sold in the year 2012. It had filed its return of income for the assessment year 2009-10 on 30.9.2009, which was processed u/s 143(1) on the return loss of Rs. 1,33,96,351/-. Later, on the basis of certain information received from Investigation wing of Mumbai that assessee was engaged in some Hawala transaction of purchase of Rs. 8,55,376/- by one party, M/s. Sidhi Vinayak Steels Mumbai. Based on this information

assessee's case was reopened u/s 147 and notice u/s. 148 was issued on 27.3.2014 on the following reasons:-

*“Information / documents alongwith relevant details have been received from the office of Director General of Income Tax (Investigation), Mumbai vide their letter F.No. DIT(Inv.)-1/MV AT/Del/2012-13/71 dated 26.2.2013 and through CIT, Delhi-III, New Delhi vide their letter F.No. CIT-III/HQjNon-Genuine Bill/2012-13/2866 dated 28.02.2013 that the above assessee, M/s Sri Dudheshwarnath Steels Pvt. Ltd. has done transaction through Hawala. The Hawala name in this case is Sidhivinayak Steels and the Hawala TIN is 27050389521 V. M/s Sri Dudheshwarnath Steels Pvt. Ltd. is the beneficiary in this case having PAN-AAICS0289G and Tin is 27560299564V.*

*I have gone through the material furnished by Investigation Wing. The assessee was asked to give reply on the above vide letter F.No. DCIT/Clrcle-9 (1)/2013- 14/311 dated 31.07.2013. However, no reply was submitted by assessee. There is prima facie material that income has escaped assessment.*

*In view of the above discussed factual matrix, additional information/documents received from the Investigation Wing of the Income Tax Department and perusal of the same, I am satisfied and I have reason to believe that income of Rs. 855376/- chargeable to tax has escaped assessment for A. Y. 2009-10, within the meaning of section 147 of the Income-tax Act, 1961.”*

4. As culled out from the record, no notice u/s 148 was served upon the assessee or assessee did not received any notice or did not comply; and accordingly, the AO made an *ex parte* assessment order after making following additions :-

*“3.2 Even on receipts of the above reasons, the assessee has not filed any reply in this regard. In view of the above discussed factual matrix, additional information / documents received from the Investigation Wing of the Income Tax Department and perusal of the same, I am satisfied and I have reason to believe that income of Rs. 8,55,376/- chargeable to tax has escaped assessment for AY. 09-10, within the meaning of section 147 of the Income-tax Act, 1961. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately.*

*(Addition of Rs. 8,55,376/-)*

*4. From the balance sheet and profit & loss account available on the ITD system it is seen that the assessee has claimed sundry creditors and unsecured loan amounting to Rs. 3,62,28,315/- and Rs. 2,70,50,000/- respectively. The assessee has also claimed expenses Rs. 10,47,322/- under the head P&L account. Assessee has not filed any details/documentary evidences in support of claiming the sundry creditors, unsecured loan and expenses. In the absence of any documentary evidences or details/proof, the genuineness of expenses cannot be proved. Therefore, an amount of Rs. 6,43,25,637/- (Rs. 3,62,28,315 + Rs. 2,70,50,000/- + Rs. 10,47,322/-) is disallowed and added back to the total income of the assessee. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately.*

*5. As per the details of AIR/CIB/26AS the assessee has credits of amount of Rs. 1,88,94,725/- against the 26AS. The source of the income is not established. Hence, an amount of Rs. 1,88,94,725/- is added back as income of the assessee. Since I*

*am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately.*

*(Addition of Rs. 1,88,94,725/-)”*

5. In the first appeal, Ld. CIT (A) has observed that notice u/s 148 was duly served upon the assessee but it did not care to file the return of income in response to said notice or submit any reply in this regard and all notices sent by the AO were also not complied with; and therefore, the objections raised by the assessee that the notice u/s 148 was not issued or served cannot be sustained. However such observation is without any evidence on record that notice was actually served upon the assessee. On the other objections of reopening also, he has upheld the validity of reopening as per the discussion appearing from pages 9 to 16 of this appellate order. In so far as additions made by the AO are concerned, he confirmed the entire addition without even taking into cognizance the material placed by the assessee, objections raised and submission made.

6. Before us, Ld. Counsel for the assessee, Shri Paven Ved raised various objections regarding the validity of reopening on several counts. In sum and substance, his submissions can be summarised in the following manner:-

1.	Notice u/s 148 was invalid for various reasons as reproduced by ld. CIT(A) in his order his order as submissions of assessee.	Submissions of assessee in the order of ld. CIT (A) be considered: he did not consider the points properly as per page 70 to 81 of PB despite mentioning them in his order.
2.	There was no service of notice u/s 148	The assessee could not find any evidence in the records of LAO of acknowledgement of service of

		<p>notice.</p> <p>2. Copy of notice at page 58 of PB is at Factory address of Mumbai which was already sold by the assessee vide pages 22-25 of PB. This service was at wrong address.</p> <p>3. Registered office at Delhi was lying closed and there was nobody to receive the notices.</p> <p>4. In penalty order page 2, there was admission by LAO that service of notices could not be made. Vide penalty appeal.</p> <p>5. Assessment order is dated 27-06-14 and Copy of order was taken on 02-03-17 by erstwhile director after receipt of notice u/s 179. Appeal was filed on 14-03-17. The delay was on the ground that the assessee had not received assessment order. LAO did not object this delay. This proves that assessment order was not served. Hence on that address, earlier notices were also not served.</p> <p>6. Even the CIT(A) himself could not make service of his order on the given address vide page 111.114, and 115 of PB. Still the CIT (A) held service by LAO as valid.</p>
3.	There was no service of notice prior to issue of notice u/s 148 for verifying information received from DGIT	In the reasons recorded the LAO has mentioned that notice was issued u/s 133 on the assessee. The assessee could not find in the records of LAO that any such notice was issued. Even if issued, the assessee had not received it. There is no

		<p>acknowledgment in the records of LAO. Asharam Ashram page 76 of Paper book (copy enclosed).</p> <p>Issuance of this notice is clear proof that the LAO was not satisfied with the information of DGIT. If he was not satisfied, he should have first done verification of Information. If notice was not served or replied, he should have got survey done, or should have sent inspector for verification.</p>
4.	<p>There was clear non application of mind by LAO on information received from DGIT</p>	<ol style="list-style-type: none"> <li>1. The LAO simply referred to letter of LAO and did not even noted in the reasons the contents of information. This is directly against the SC decision in the case of Chuggamal Rajpal Vs. S P Chaliha)</li> <li>2. He did not see the Return of Income and did not verify from TAR whether quantity accounts were maintained and payments were by account payee cheques.</li> <li>3. He did not verify whether original Return of Income was filed or not. He did not verify, whether there was 143(1) or 143(3).</li> <li>4. He simply wrote that there was some hawala transaction without specifying as to what type of hawala it was that is whether of purchase or of sale or of loan.</li> <li>5. LAO did not verify the information. Non-reply of 133 notice (though there was no such notice) does not justify</li> </ol>

		<p>satisfaction for reopening.</p> <p>6. The reasons are also silent regarding verifying information with reference to Return of Income filed by the assessee. Without seeing the return, the LAO cannot form an opinion of income escaping assessment. Page 74 of PB CIT Vs. Indo Arab Air Services 283 CTR 92 Delhi.</p>
5.	Reopening without arriving at proper satisfaction for issue of notice, based on irrelevant information and without there being any tangible information.	<p>Simply writing that there was hawala transaction is vague material (Chuggamal rajpal Vs. SP Chaliha SC) and reopening is not justified. Decisions relied</p> <p>(i) Pioneer Town Planners (P) Ltd. Vs. DCIT ITAT delhi dated 06-08-18</p> <p>(ii) CITVs. Pradeep Gupta 303 ITR 95 Delhi</p> <p>[iii] Meenakshi Overseas vs. PCIT 82 taxmann.com 300 Delhi Most important and direct decision refer para 6, 12, 17 to 23, 28.1 to 28.4, 29, 30.</p> <p>(iv) Sunbarg Tradelink (P) Ltd. Vs. ITO 72 taxmann. corn 16 Gujarat. (refer para 10 and head notes)</p> <p>(v) Sabh Infrastructure Vs. ACIT WP 1357/ 2016 Delhi. Refer: Para 17 and 19(iii)of order</p>

6.	The approval of Id. JCIT for reopening was without application of mind.	<p>1. The JCIT did see only the reasons recorded and not the material received from DGIT.</p> <p>2. He approved despite there being no verification of information.</p> <p>3. He did not try to even know as to what type of hawala transaction it was.</p> <p>4. Approval was within short time.</p> <p>5. He did not see the Return of Income and audit report and factum of payments by account payee cheques.</p> <p>6. He did not see whether originally there was summary or scrutiny.</p> <p>7. Approval given is u/s explanation 2(C) (i) while applicable explanation is 2(b). In view of Hon'ble Bombay HC decision in the case of Kalpana shantilal Haria (Copy enclosed) approval is without application of mind.</p>
7.	The reopening was based on vague information received from DGIT; and was based on borrowed satisfaction without even pointing out nature of transaction and how there was escapement of income.	It is a case of borrowed satisfaction because there is no material other than the information received from DGIT. (that too was not shown to the assessee and the information was denied even under RTI.)
8.	Reopening was based on reason to suspect and not reason to believe	The information can at most be reason to suspect and cannot be 'reason to believe' <b>SP Chalilha 79 ITR 603 Supreme Court</b> hence reopening is invalid.

6. Regarding various additions made by the AO, he has made his detail submissions, the summary of his argument are as under:-

9.	<p>Re. Addition of Rs. 8,55,376/- for hawala transaction without any material justifying addition simply on the basis of vague information from investigation wing and without even knowing as to what exactly the Information was. Neither the LAO nor the CIT(A) were aware as to what exactly the information was.</p>	<ol style="list-style-type: none"> <li>1. The LAO must have mentioned the contents of letter of DGIT before making the addition.</li> <li>2. There is no material with AO to justify this addition nor was it confronted to the assessee.</li> <li>3. Information if any was never shown to the assessee for to Ld. CIT(A)</li> <li>4. There could not be any purpose of bogus hawala entry when the assessee was having huge losses.</li> <li>5. There is pucca invoice of purchase.</li> <li>6. There is evidence of transport of goods.</li> <li>7. Cenvat credit has been taken.</li> <li>8. The goods are part of stock register.</li> <li>9. Payments were made by account payee cheque.</li> <li>10. Thus transaction is fully verifiable. Refer PB pages from 6 to 19.</li> <li>11. CIT(A) appeal did not give opportunity despite specific request vide page 86 of PB.</li> <li>12. In any case, entire amount cannot be income, only profit percentage that is 2% can be added when quantity accounts</li> </ol>
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7. On the other hand, Ld. DR strongly relied upon the order of the AO and CIT(A) , and further submitted that only factory was closed and not the company and none of the notices have returned back unserved and if the assessee does not cooperate then AO has no option but to pass an ex parte assessment. On merits, he submitted that there is clear cut information of Hawala transaction and all the documents filed by the assessee were additional evidence filed before the Ld. CIT (A) and before the Tribunal should not be accept the same, because assessee has filed to cooperate before the authorities below. As regards various submissions made by the Ld. Counsel he submitted that matter should be restored back to the AO for proper verification and examination.

8. We have heard the rival submissions and also perused the relevant finding given in the impugned order. We will first like to deal with the merits of addition which we find that it is not only the high pitch but is without application of mind by the AO and also by Ld. CIT(A) despite all the document in support were submitted before the Ld. CIT(A). In so far as addition of Rs. 8,55,376/- on account of Hawala transaction, it is seen that same is purely based on certain information received from Investigation Wing without actually looking to the fact that whether there is any material with the AO to justify such an addition and or any such information was ever confronted to the assessee. The assessee before us has shown from the paper book, Pucca invoice of purchase made from the parties, evidence of transport of goods, Cenvat credit has been taken on such purchase, the goods are part of stock register, payments were made by account payee cheque, the copies of all the evidences are appearing from pages

8 to 19. All the figures are tallying from the trading account available from the records. In any case if the purchases are debited in the books of accounts and sales and trading account has not been disturbed then in the worst scenario, only gross profit on such purchases could have been added when all the details and accounts are maintained. Thus, in such a situation, addition as made by the AO cannot be sustained. However, in the interest of justice, we feel that the AO should consider these documents and if purchases are otherwise verifiable from the records then no addition should be made and in any case alternatively, if such purchases are based on actual material based on information of Hawala transaction is found, then at best, only GP rate as shown by the assessee could only be applied on such purchases.

9. In so far as addition regarding closing balance of sundry creditors of Rs. 3,62,28,315/-, it has been pointed out from the audited balance sheet that the correct figure is Rs. 1,10,01,443/- which is quite evident from the balance sheet appearing at page 45 of the paper book. Otherwise also, there is no material on record to hold that these are bogus sundry creditors or assessee has not made genuine purchases. In any case, in view of the judgment of Hon'ble Delhi High Court in the case of Shri Vardhman Overseas Ltd., wherein it has been held that even if sundry creditors have not given the confirmation the same cannot be confirmed either u/s 68 and if they are not written off by the assessee during the year then the provision of section 41(1) cannot be attracted. Thus, not only the figure taken by the AO of the closing balance of the sundry creditor is incorrect but otherwise also such an addition cannot be made u/s 41(1) in view of the judgment of the Hon'ble Jurisdictional High Court and hence same is directed to be deleted.

10. So far as addition of Rs. 2,70,50,000/- is concerned, it is seen that correct amount as shown in balance sheet is only Rs. 51,00,000/- and how the figure of Rs. 2,70,50,000/- has been taken by the AO is neither borne out from the records nor from the audited balance sheet. Regarding Rs. 51,00,000/- also, the confirmation has been filed by the AO. In the interest of justice, we are of the opinion that only with regard to sum of Rs. 51,00,000/- AO should verify the confirmation filed and if it is found to be in order then the same should be deleted.

11. Regarding disallowance of expenses, it is seen that it is made on adhoc basis without following the principles of best judgment assessment and why such adhocism has been resorted to when there is no adverse material, therefore such adhoc disallowance is directed to be deleted.

12. Lastly, in so far as addition of Rs. 1,88,94,725/- on the basis of form No. 26AS is concerned, first of all it is seen that correct income as per this form is Rs. 33,69,153/- which is evident from pages 50 of the paper book. Thus, only an amount of Rs. 33,69,153/- needs to be verified by the AO after getting explanation from the assessee. In view of the aforesaid observation and direction, the AO is directed to give effect of this order.

13. In so far as coming to the various legal issues, first of all, we find that there is challenge with regard to service of notice u/s 148 itself and admittedly such notice has not been proved to be served upon the assessee by the department. If such a service of notice is not proved then consequently the entire proceedings initiated by such a notice becomes *void ab initio*. Accordingly, we direct the AO to examine this aspect and if service of notice is not proved from the record then entire assessment will become null and void. In so far as other aspects

of reopening is concerned, we are of the opinion since AO has passed exparte order, therefore, the Ld. AO should examine all the objections of the assessee afresh and consider the assessee's explanation and decide in accordance with law and if such a reopening based on settled legal principles is found to be bad in law, then, the proceedings itself has to be quashed and no assessment for making any kind of addition can be framed. With this the appeal of the assessee is treated as partly allowed for statistical purposes.

14. In so far as levy of penalty u/s 271(1(c) is concerned, since we have already either deleted the addition or matter has been sent back to the AO for verification, therefore, the penalty levied on such addition has no legs to stand and same is directed to be deleted.

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

12. Since the appeals preferred by the assessee have been disposed off, the present stay applications have become infructuous and are dismissed as such.

Order pronounced in the open court on 10<sup>th</sup> December, 2018.

sd/-

**(O.P. KANT)**  
**ACCOUNTANT MEMBER**

Dated: 10/12/2018

***Veena***

Copy forwarded to

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

sd/-

**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT, New Delhi