

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'SMC', NEW DELHI)**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
ITA No:-1273/Del/2018
(Assessment Year: 2009-10)**

Ratan Pal Kein Akhilesh Kumar, Advocate, Chamber No. 206-207, Ansal Satyam, RDC Raj Nagar, Ghaziabad PAN No. AKRPP4393G	Vs.	Income Tax Officer Ward 2 (2) Ghaziabad
APPELLANT		RESPONDENT

Assessee by : Sh. Akhilesh Kumar, Advocate
Sh. Mohit Aggarwal, CA

Revenue by : Sh. S. L. Anuragi, Sr. DR

Date of Hearing : 20.05.2019

Date of Pronouncement : 22 .05.2019

ORDER

PER: N. K. BILLAIYA, AM

This appeal by the assessee is directed against the order of the Commissioner of Income Tax [Appeals] Ghaziabad dated 03.11.2017 for Assessment Year 2009-10.

2. Vide Ground NO. 1 to 3, the assessee has challenged the reopening of the assessment and by Ground No. 4, the assessee has

challenged the addition of Rs.33,15,990/- made to the returned income of the assessee.

3. Briefly stated the facts of the case are that on the basis of the information received from DDIT Investigation, Unit 5 (1), New Delhi. The A.O came to know that the assessee has paid donation of Rs.12 lacs in cash, Rs. 16.50 lacs through demand draft and Rs. 1.62 lacs in cash against regular fee for admission of his daughter Vaishali Kein in Santosh Medical College, Ghaziabad. As per the A.O, the said information was found during the search and seizure operation carried out on 27/06/2013 in Santosh Group of Institutions and Dr. P. Mahalingam, Ghaziabad. On the basis of this information, and after recording reasons and obtaining prior approval from the PCIT, Ghaziabad, notice u/s 148 of the Act was issued and served upon the assessee along with questionnaire.

4. The assessee was confronted with the information and was asked to explain the sources of funds from which the assessee has made the impugned payments. In its reply, the assessee stated that he has paid Rs. 1, 60,000/-, his daughter has paid Rs. 50,000/-

and his wife has contributed Rs. 2 lacs and the total fees paid for the year was Rs. 4.10 lacs.

5. Not accepting the submissions of the assessee, the A.O was of the firm belief that the information received from DDIT, Investigation shows that the assessee has paid donation of Rs. 12 lacs in cash 16.50 lacs through DD and 1.62 lacs in cash. And accordingly treated the amount of Rs.30.12 lacs as unexplained made out of undisclosed sources and added the same to the income of the assessee.

6. The assessee strongly agitated the matter before the CIT (A) but the CIT(A) was convinced with the findings of the A.O and dismissed the appeal.

7. Before me, the Counsel for the assessee vehemently stated that the A.O without making any enquiry/investigation has simply borrowed the information given by the Investigation Wing without applying his own mind before the issue of notice u/s 148 of the Act. It is the say of the Counsel that the total tuition fees for the first

year was only Rs. 4 lacs and the complete fee of four and half years course was Rs. 18 lacs. Therefore, the claim of the A.O that the assessee has paid Rs. 30.12 lacs is in correct and, therefore, not only the reopening should be quashed but the addition made should also be deleted. Per contra, the DR strongly supported the findings of the A.O and read the operative part of the order of the CIT(A).

8. I have given a thoughtful consideration of the orders to the authorities below and with the assistance of the Learned Counsel. I have considered the relevant documentary evidences brought on record in the form of paper book in the light of Rule 18 (6) of the ITAT Rules. Exhibit 18 is part of the information received from the office of DDIT Investigation and at Serial No. 33 the name of the student Vaishali Kein has been mentioned. And as per this schedule the assessee has paid Rule 30.12 lacs which includes donation of Rs. 12 lacs, regular fee paid through demand draft Rs. 16.50 lacs, regular fee paid in cash Rs. 1.62 lacs. At the same time, I find a certificate issued by the Office of the Finance & Accounts Maharaji Education Trust Santosh Group of Institutions,

Ghaziabad, which is exhibited at Page 27 of the paper book and the same read as under:-

**“OFFICE OF THE FINANCE & ACCOUNTS
MAHARAJI EDUCATIONAL TRUST
Santosh Group of Institutions
No: H-I Santosh Nagar, Pratap Vihar, Ghaziabad - 201 009**

Date: 06-09-2008

To Whom It May Concern

This is to certify that Mr.Vaishali Kain D/o. Shri.Ratan Pal Kain has been admitted in MBBS Course in 2008-2009 Batch in our. Santosh Medical College run by Maharaji Educational Trust. Course is Recognised by the Medical Council of India. The duration of the course is Four and Half years.

<u>Fee</u>	
<u>Structurec 1st Year Tuition Fees</u>	
Tuition Fees	4,00,000/-
<u>IInd Year Tuition Fees</u>	
Tuition Fees	4,00,000/-
<u>IIIrd Year Tuition Fees</u>	
Tuition Fees	4,00,000/-
<u>IVth Year Tuition Fees</u>	
Tuition Fees	4,00,000/-
<u>Final Year Tuition Fees</u>	
Tuition Fees	2,00,000/-

The Demand Draft should be drawn in favour of “**Maharaji Educational Trust**” payable at **Ghaziabad**. This certificate is issued exclusively to enable the student to obtain financial assistance from Bank/Financial Institution. The fee is subject to revision in the forthcoming years.

Sd/-

For Maharaji Education Trust
Accountant

9. A perusal of the aforementioned certificate shows that the tuition fees for the first year is Rs. 4 lacs and the total tuition fees for the entire course of four and half years is 18 lacs. I find that neither the A.O nor the CIT(A) has made any enquiry from the Institution regarding this certificate.

10. There is no dispute that the A.O has simply borrowed the information received from DDIT, Investigation. The reasons recorded for reopening the assessment read as under:-

“Reasons for the belief that income has escaped assessment.

An information has been received from DDI (1.pv.) Unit-5(1), New Delhi that Sh. Ratan Pal Kein, has paid donation of Rs. 12,00,000/- in cash, Rs. 16,50,000/- through DD and Rs. 1,62,000/- in cash against regular fee for the admission in MMBS course of his daughter Ms. Vaishali Kein, during the F.Y. 2008-09 relevant to A.Y. 2009-10 in Santosh Medical College, Ghaziabad. The above information was found during the search and seizure operation carried out on 27/06/2013 in Santosh Group of Institution & P. Mahalingam, Ghaziabad.

I have gone through the contents of letter of DDI (Inv.) New Delhi and found that the sources of above deposits are not known and it is assumed that above deposits have been made by the assessee out of undisclosed sources which was not offered to tax for

A.Y. 2009-10.

Therefore, I have reasons to believe that the income of Rs.30,12,000/- (Rs. 12,00,000/- + Rs. 16,50,000/- + Rs. 1,62,000/-), has escaped assessment within the meaning of section 147 of the I.T. Act, which was chargeable to tax for A.Y. 2009-10. If approved, notice u/s 148 of the I.T. Act, 1961, may be issued.”

11. On identical set of facts the Co-ordinate Bench in ITA No. 4035/Del/2017 has decided the appeal in favour of the assessee and against the Revenue. The relevant findings of the Co-ordinate Bench read as under:-

“6. Assessee aggrieved with the order has preferred the appeal before us.

7. The learned authorized representative submitted :-

(i) That the reasons recorded by the Assessing Officer are based on information supplied by the Investigation Wing; there is no independent application of mind by the Assessing Officer. He referred to the reason which clearly shows, according to him, that there is no enquiry made by the Assessing Officer. He, therefore, submitted that the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in Signature Hotels Pvt. Ltd. Vs. ITO 338 ITR 51 (Del.);

(ii) He further stated that satisfaction recorded by the approving authority has merely mentioned "Yes". He submitted that such satisfaction without any reasoning is incorrect. He referred to the

decision of the Hon'ble M.P. High Court in CIT Vs. S. Goyanka Lime and Chemical Ltd. 56 taxman.com 390 (MP). He further stated that Hon'ble Supreme Court has dismissed SLP against the same;

(iii) He further stated that information was received during the course of search and, therefore, the learned Assessing Officer should have invoked the provisions of section 153C of the Act and not section 148 of the Act. For this he relied upon the decision of Co-ordinate Bench in Rajat S. Chhaterji Vs. ACIT in ITA. No. 2430 (Del) of 2015 [order dated 20.05.2016];

(iv) On the merits of the case he submitted that assessee has not paid any money other than Rs.15 lakhs to the institute and, therefore, in absence of any evidence, addition cannot be made;

(v) He further submitted that no cross examination of the person whose statement was recorded was given to the assessee and in absence of cross examination when assessee specifically denied such payment no addition can be made in the hands of the assessee.

7.1 In the end, he submitted that re-opening is invalid and further the addition on the merit also cannot be sustained.

8. The learned Departmental Representative contested the arguments of the learned authorized representative and submitted that there is a definite information received by the Assessing Officer in the letter that assessee has paid Rs.70 lakhs for the admission of his son. The learned Assessing Officer has reason to believe that income of the assessee has escaped assessment. With respect to the merits he submitted that copy of the statement was given to the assessee and there is no request of cross examination. He, therefore, submitted that assessee does not have any case on the merits. He supported the orders of the lower authorities.

9. We have carefully considered the rival contentions and also the orders of the lower authorities. The assessee is an Individual, who filed his return of income under section 139(1) of the Act at Rs.1,52,100/-. During the course of search, under section 132 of the Act on 27.06.2013 on Santosh Group of Institutes and Dr. P. Mahalingam, certain documents were seized. The documents revealed receipt of donation over and above the regular course fees. Dr. P. Mahalingam, in his statement under section 132(4) has admitted the receipt of un-accounted money. From those papers it was found that assessee's son, Dr. Neeraj Goel, who is pursuing MD course in that institute on 3.02.2010 has paid Rs.15 lakhs as regular fees and Rs.55 lakhs as donation. This information was received by the Assessing Officer vide letter dated 11.03.2015. Based on this, the learned Assessing Officer recorded the reasons for re-opening under [section 147](#) of the Act, which are placed at page No. 1 of the paper book. The same is as under :-

“ANNEXURE – A

Reasons recorded for issuing Notice u/s 148 of the Act.

Name of the assessee :	Shri Shiv Charan Goel
Address :	1/7032, Shivaji Park, Shahdara, Delhi - 110 032.
PAN :	Not-available.
Assessment year :	2010-11

A letter dated 05.03.2015 has been received from the Deputy Director of Income Tax (INV.), Unit-5(1), New Delhi in respect of information regarding fee of Rs.70,00,000/- paid in cash to Santosh Medical College, Ghaziabad by Shri Shiv Charan Goel F/O Dr. Neeraj Kumar Goel R/o 1/7032, Shivaji park, Shahdara, Delhi - 110 032.

Based on the above information I am satisfied that the fee paid of Rs.70,00,000/- in cash is assessee's own unexplained income from undisclosed sources and liable to be assessed in the hands of the assessee. Therefore, I have reason to believe that unexplained cash paid towards fee is chargeable to tax and the same has escaped assessment for the year under consideration and is a fit case for reopening u/s 148 of I.T. Act.

The proposal for obtaining kind approval of the competent authority; to initiate proceedings u/s 147/148 is hereby put up for necessary approval. Submitted for further directions and approval please.

Sd/-

(Deepak Kumar)

Income Tax Officer

Ward 56 (4), New Delhi.

Whether the Addl. CIT, Range-56, N. Delhi satisfied on the reasons recorded by the AO that it is fit case for the issue of notice u/s. 148.

Yes

Sd/- 27/3/2015.

Addl. Commissioner of Income Tax,
Range-56, New Delhi. "

9.1 On the same date the reasons were approved by the Addl. Commissioner of Income Tax, Range 56, New Delhi. While approving he has simply mentioned "Yes". Therefore, now the question arises that whether the re-opening has been correctly initiated by the learned Assessing Officer or he has simply acted on the information received from the Investigation Wing. On perusal of the reasons recorded it is apparent that the learned Assessing Officer referred to the letter dated 5.03.2015 received from the Dy. Director of Income Tax, Investigation, and based on that information he stated that he is satisfied that the fee paid of Rs.70 lakhs in cash is assessee's unexplained income from

undisclosed sources. According to the provisions of section 147 of the Income Tax Act if the Assessing Officer has reason to believe that income has escaped the assessment then only he can re-open the assessment. The reason has to be of the assessee and cannot be borrowed one. The Hon'ble Delhi High Court in para No. 15 in Signature Hotels Pvt. Ltd. Vs. ITO (supra) has held that there is no reference to the document or statement in this case except the letter of the Investigation Wing, which has been quoted in the reasons. The Annexure also does not show prima facie or establishes nexus for link which discloses escapement of income. Further the Assessing Officer did not apply his own mind to the information and examined the basis and material or the information. The Addl. Commissioner also granted his approval mechanically. The facts are similar to the facts before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court then held that the reasons do not satisfy the requirement of section 147 of the Act. Therefore, respectfully following the decision of the Hon'ble Delhi High Court, we also hold that re-opening in this case also does not satisfy provisions of section 147 of the Act. In view of this the order passed by the learned Assessing Officer does not stand the test of the ratio Page | 9 I.T.A. No. 4035 (Del) of 2017 - Shri Shiv Charan Goel, Delhi laid down by the Hon'ble Delhi High Court. The learned CIT (Appeals) while upholding the action under section 147 has held that assessee has not filed any return of income. However, when we look at the assessment order, the addition made by the learned Assessing Officer is to the original returned income of Rs.1,52,100/-. Therefore, this finding of the learned CIT (Appeals) is not in conformity with the records. With respect to the finding of the learned CIT (Appeals) that Addl. Director was in possession of adequate information so merely writing "Yes" fulfills the requirement of approval. We note that it is not the Addl. Director, who has approved the re-opening mechanically. Further such approval is also not in conformity with the decision of Hon'ble M.P.

High Court. In view of the above facts, we reverse the finding of the lower authorities and set aside the assessment order passed by the learned Assessing Officer holding that re-opening under section 147 is not valid.

12. The Co-ordinate Bench in another case in ITA No. 1106/Del/2018 had the occasion to consider the appeal again on similar set of facts and once again decided the issue in favour of the assessee and against the Revenue. The relevant findings of the Co-ordinate Bench read as under:-

6. I have heard both the parties and carefully considered the same. I note that in this case the AO while recording the reasons for the belief that income has escaped assessment has recorded the reasons as under:-

"In this case, as per record the assessee has not filed her return of income for AY 2007-08. Further, as per information received. Ms. Megha Gupta, r/o 2-E, Kamla Nagar, Delhi PAN ALBPG3157A, during the F.Y. 2006-07 relevant AY 2007-08, has given donation in cash of Rs. 21,00,000/- for admission in the course of MBBS to the Santosh Medical College, Ghaziabad. As, the assessee has not filed her return of income for the relevant assessment year i.e. AY 2007-08. Therefore, all the cash transaction made treated as her income from undisclosed sources.

In view of the above, I have reason to believe that assessment Ms. Megha Gupta, PAN ALBPG3147A has escaped her income of Rs. 21,00,000/-. The income of Rs. 21,0,000/- is escaped assessment within the

meaning of section 147(b) and is to be taxed accordingly."

6.1 After perusing the aforesaid reasons recorded, I find that it is a case where action has been taken mechanically on the basis of information received from investigation wing, and, not on an independent application of mind and therefore on this ground too, the proceedings are without jurisdiction. It is apparent from the fact that according to the AO, Investigation Wing has informed that assessee has paid cash of Rs. 21,00,000/- for admission in the course of MBBS to Santosh Medical College, Ghaziabad. It has been further noted that the assessee has not filed return of income for the relevant assessment year i.e. Assessment year 2007-08 and, AO has invoked section 148 of the Act to verify the source of cash paid of Rs. 21,00,000/-. Thus, the AO has acted mechanically and without any independent application of mind. It is also evident that while alleging cash payment of Rs. 21 lacs it is not even known or stated on which date and on what basis such sums was allegedly paid by assessee; the reasons recorded are therefore vague, highly non specific and reflect complete non-application of mind. That reasons recorded are 'reason to suspect' and, is a mere attempt to carry out fishing and roving expedition. It is also noted that in the absence of specific and incriminating material much less tangible and, relevant material to form even prime facie belief that there was alleged payment of Rs. 21,00,000/- is also apparent from the fact that the alleged document found and seized during the course of search/survey action u/s 132/133A of the Act does not reflect any figure of Rs. 21 lacs and in the absence of any independent enquiry or examination of facts on record or noticing the content of alleged documents in the reasons recorded and, reasons being silent as to the specific facts, the vague allegation

shows that action has been taken mechanically on the basis of alleged report of investigation wing, and, not on independent application of mind and therefore on this ground too, the proceedings are without jurisdiction. It is also noted that there is no live link or direct nexus between alleged material and, inference. It is a case of investigation in the garb of action u/s 148 of the Act on the basis that proceedings have been initiated on the basis of no material much less any tangible and, relevant material and as such reasons record do not constitute valid reason to believe for initiating proceedings u/s 147 of the Act. In this regard, I draw support from the decision of the Hon'ble Supreme Court 320 ITR 561 (SC) CIT vs Kelvinator of India Ltd. It is further noted that initiation of proceedings is also based on non application of mind much less independent application of mind but is a case of borrowed satisfaction. To support this view, I draw support from the following decisions:-

- i) 384 ITR 147 (Del) Pr. CIT v. G&G Pharma India Ltd. (introduction of share capital)

"Today when the case was called out, Mr. Sawhney produced before the Court the very same letter of the AO dated 15th September 2010 which has been reproduced in its entirety in the impugned order of the ITAT. He submitted that the AO was himself present in the Court and further efforts would be made to locate the materials on the basis of which the AO formed his opinion regarding reopening of the assessment. The Court was not prepared to grant further time for this purpose since it was not clear that the materials were, in fact, available with the Department. 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."

ii) 395 ITR 677 (Del) Pr. CIT v. Meenakshi Overseas (P) Ltd. v. ITO

"36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons

to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'. The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.

37. For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law.

38. The question framed is answered in the negative, i.e., in favour of the Assessee and against the Revenue. The appeal is, accordingly, dismissed but with no orders as to costs.

iii) 396 ITR 5 (Del) Pro CIT v. RMG Plyvinyl (I) Ltd.

11. There can be no manner of doubt that in the instant there was a failure of application of mind by the AO to the facts. In fact he proceeded on two wrong premises - one regarding alleged non-filing of the return and the other regarding the extent of the so-called accommodation entries.

12. Recently, in its decision dated 26th May, 2017 in ITA NO.692/2016 (Principal Commissioner of Income Tax-6 v. Meenakshi Overseas Pvt.

Ltd.), this Court discussed the legal position regarding reopening of assessments where the return filed at the initial stage was processed under Section 143(1) of the Act and not under Section

143(3) of the Act. The reasons for the reopening of the assessment in that case were more or less similar to the reasons in the present case, viz., information was received from the Investigation Wing regarding accommodation entries provided by a 'known' accommodation entry provider.

There, on facts, the Court came to the conclusion that the reasons were, in fact, in the form of conclusions "one after the other" and that the satisfaction arrived at by the AO was a "borrowed satisfaction" and at best "a reproduction of the conclusion in the investigation report."

13. As in the above case, even in the present case, the Court is unable to discern the link between the tangible material and the formation of the reasons to believe that income had escaped assessment. In the present case too, the information received from the Investigation Wing cannot be said to be tangible material per se without a further inquiry being undertaken by the AO. In the present case the AO deprived himself of that opportunity by proceeding on the erroneous premise that Assessee had not filed a return when in fact it had.

14. To compound matters further the in the assessment order the AO has, instead of adding a sum of 78 lakh, even going by the reasons for reopening of the assessment, added a sum of Rs.1.13 crore. On what basis such an addition was made has not been explained.

15. For the aforementioned reasons, the Court is satisfied that no error was committed by the ITAT in holding that reopening of the assessment under Section 147 of the Act was bad in law."

6.2 Keeping in view of the facts and circumstances of the case as explained above and respectfully following the precedents, as aforesaid, the proceedings initiated by invoking the provisions of section 147 of the Act by the AO and upheld by the Ld. CIT(A) are nonest in law and without jurisdiction, hence, the assessment is quashed. Since I have already quashed the assessment, the other grounds have become academic and are therefore not adjudicated and accordingly, the assessee's appeal is allowed.”

13. The facts of the case in hand are identical to the facts considered by the Co-ordinate Benches (supra). Therefore, respectfully following the findings of the Co-ordinate Benches, I am of the considered view that the proceedings initiated by invoking provisions of Section 147 of the Act are non est of law and without jurisdiction. Hence, the assessment is quashed. Since, the assessment order has been quashed by me. I do not find it necessary to well into merits of the case. Appeal filed by the assessee is accordingly allowed.

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

Order pronounced in the open court on 22 .05.2019.

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Dated: 22 .05.2019

R.N

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	21.05.2019
Date on which the typed draft is placed before the dictating Member	21.05.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	22.05.2019
Date on which the final order is uploaded on the website of ITAT	22.05.2019
Date on which the file goes to the Bench Clerk	22.05.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

