

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE : A : NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 4395/Del/2019
Assessment Year : 2010-11

AKG SECURITIES & CONSULTING LTD.,
3776/309, NIRMAL MARKET,
NETAJI SUBHASH MARG,
DARYAGANJ,
NEW DELHI – 110 002
(PAN: AAACA7549K)
(Appellant)

Vs.

ITO, WARD-1(1),
NEW DELHI
ROOM NO. 380-A,
C.R. BUILDING, IP ESTATE,
NEW DELHI – 110 001

(Respondent)

Assessee by : Mr. Rohit Tiwari, Adv. & Sh. Vinjay
Verma, Adv.
Department by : Sh. S.N. Pandey, Sr. DR.

ORDER

PER H.S. SIDHU, JM

This appeal filed by the assessee is directed against the order passed by the Ld. CIT(A)-I, New Delhi on 26.03.2019 in relation to the assessment year 2010-11 on the following grounds:-

1. The order passed by the Ld. CIT(A) under section 250 of the Act is bad in law and on the facts and circumstances of the case.
2. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case in upholding the order passed by the AO, thereby sustaining additions of Rs. 2,18,73,416/- on account of fictitious profit or loss entries received from

various clients by misusing Client Code Modification facility without having sufficient material on record.

3. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case in sustaining the non-jurisdictional order passed by the AO u/s. 147 read with Section 143(3) of the Act.
4. The above grounds of appeals are independent and without prejudice to one another.
5. The appellant may be allowed to add / withdraw or amend any ground of appeal at the time of hearing.

2. The brief facts of the case are that assessee company is engaged in the business of sale and purchase of shares. The assessee filed its return of income on 30.9.2010 at NIL income. In this case, information was received from ADIT(Inv.), Unit-1(3), Ahmedabad through CD wherein it was informed that assessee company has claimed fictitious losses and profits by misusing the CCM facility in F&O segment amounting to Rs. 2,18,73,416/-. The assessment in this case was completed at an income of Rs. 2,18,73,416/- u/s. 147/143(3) of the Income Tax Act, 1961 (in short "Act") vide order dated 10.1.2017. Against the assessment order, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 26.3.2019 has dismissed the appeal of the assessee. Aggrieved with the appellate order dated 26.3.2019, assessee is in appeal before the Tribunal.

3. Ld. Counsel for the assessee stated that assessee has challenged the reopening u/s. 147 of the Income Tax Act, 1961 on various grounds which have already been adjudicated and decided in favour of the assessee by the various decisions of the ITAT and the Hon'ble High Courts. He argued that the impugned order passed by the Ld. CIT(A) is without jurisdiction,

erroneous and wrongly been passed, because the reassessment passed by the AO u/s. 143(3)/147 of the I.T. Act, 1961 is invalid on the basis of the notice u/s. 148 of the Act which is invalid and has been issued without applying his mind only on the basis of the information received from the ADIT(Inv.), Unit-1(3), Ahmedabad through CD wherein, it was informed that assessee company has claimed fictitious losses and profits by misusing the CCM facility in F&O segment amounting to Rs. 2,18,73,416/-. He submitted that AO has blindly relied upon the Investigation Wing which itself is not based on any material against the assessee. The mere recording of reasons on the basis of information from Investigation Wing and issuing notice for initiation of reassessment proceedings does not constitute application of mind much less independent application of mind. Therefore, the proceeding is without jurisdiction. In this regard, he relied upon the decision of the Hon'ble Bombay High Court in the case of M/s Coronation Industries Ltd. vs. DCIT (2017) 82 taxmann.com 75 (Bombay) wherein it has been held that mere client code modification by broker does not mean that any income has escaped assessment. Ld. Counsel for the assessee stated that the AO has not investigated the matter himself and has not made any enquiry to corroborate the information of the Investigation Wing on which basis the case of the assessee has been reopened, meaning thereby the AO has not applied his mind and only issued notice u/s. 148 of the Act on the basis of the information received from the ADIT(Inv.), Unit1(3), Ahmedabad. To

support the aforesaid contention, he draw our attention towards the order of the Hon'ble Supreme Court of India in the case of ACIT vs. Dhariya Construction Co. (2011) 197 Taxman 202 (SC); Hon'ble Delhi High Court decisions in the case of Pr. CIT vs. RMG Polyvinyls (I) Ltd. (2017) 83 taxmann.com 348 (Delhi); Pr. CIT vs. Meenakshi Overseas P Ltd. vs. ITO 395 ITR 677 (Del.) and Pr. CIT vs. G&G Pharma India Ltd. 384 ITR 147 (Del.).

3.1 Ld. Counsel for the assessee placed the copy of reasons recorded by the AO and approval granted by the Pr. CIT, Delhi-1, New Delhi wherein, he has granted the approval by only mentioning that "***I am satisfied***", which shows that Ld. Pr. CIT, Delhi-1, New Delhi has not recorded proper satisfaction and without application of mind gave the approval in a mechanical manner. He further stated that this issue is squarely covered by the decision of the Hon'ble Delhi High Court in the case of United Electrical Company (P) Ltd. Vs. CIT & Ors. 258 ITR 317 (Del.). Therefore, he requested that the same ratio may be followed in the present case and appeal of the assessee may be allowed accordingly by quashing the reassessment proceedings.

3.2 Thirdly, on the merits of the case, Ld. Counsel for the assessee stated that the orders of the authorities below cannot be accepted since the AO has not pointed out any basis or material or evidence to support his findings that the assessee has received entry of fictitious losses. The AO has

not spelt out in the reasons recorded as well as the assessment order as to on which scrips the assessee has taken loss entries. He submitted that the addition has been made by the AO despite assertions by the assessee that the assessee has no knowledge and have no role in modification in code as the assessee is doing business through share broker and has no right/ authority in execution of trade. In view of above, he requested to delete the addition in dispute.

4. Ld. DR on the other hand, heavily relied upon the order of the Ld. CIT(A). As regards jurisdiction of the assessee is concerned, he submitted that the Ld. CIT(A) has already decided the issue against the assessee which is self-explanatory and, therefore, the ground raised by the assessee on this issue should be dismissed. So far as the merit of the case is concerned, he submitted that here also the Ld. CIT(A) has given a clear cut finding that assessee has misused the facility of client code modification for creating artificial loss which came to light on the basis report of the Investigation Wing. Therefore, he requested to upheld the order of the Ld. CIT(A) on jurisdiction as well as on merits.

5. We have heard both the parties and carefully considered the rival submissions and perused the orders of the authorities below alongwith Paper Book filed by the assessee of the case laws relied upon. We 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:-

**FORM FOR RECORDING THE REASONS FOR INITIATING PROCEEDINGS
UNDER SECTION 148 AND FOR OBTAINING APPROVAL OF
THE PR. COMMISSIONER OF INCOME TAX IN THE CASE OF
M/S A.K.G. Securities and Consultancy Ltd FOR AY 2010-11**

1	Name & Address of the Assessee	M/s A.K.G. Securities and Consultancy Ltd 3776/309, Nirmal Market, Netaji Subhash Marg, Daryaganj, Delhi-110002
2	PAN No.	AAACA7549K
3	Status	Company
4	Ward/Circle	Ward-1(1), New Delhi
5	Assessment year in respect of which it is proposed to issue notice u/s 148	2010-11
6	The quantum of income which has escaped assessment	Rs.2,18,73,416.90
7	Whether the provisions of section 147 r.w. Explanation 2 - (a) or (b) or (c) are applicable or both the sections are applicable	Yes, provisions of Sec. 147 read with Explanation - 2 (b) applicable.
8	Whether the assessment is proposed to be made for the first time. If the reply is in affirmative, please state (a) Whether any voluntary return has already been filed; and (b) If so, the date of filling the said return	Yes Yes 30/09/2010
9	If the answer to item 8 is in the negative please state (a) The income originally assessed (b) Whether it is a case of under assessment, assessment at too low rate, assessment which has been made the subject of excessive relief or allowing of excessive loss or depreciation	N.A.
10	Whether the provisions of section 150(1) are applicable. If the reply is in affirmative the relevant facts may be stated against item no. 11 and it may also be brought out that provisions of section 150(2) would not stand in the way of initiating proceedings u/s 147.	No

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SHILPA CHOPRA
Asstt. Commissioner of Income Tax
Circle-1(1), New Delhi

11	Reasons for the belief that income has escaped assessment	As per Annexure 'A' <i>KRP</i> (K. R. Phillips) Income Tax Officer, Ward-1(1), New Delhi
12	Whether the Pr. Commissioner of Income Tax is satisfied on the reasons recorded by the DCIT, that it is a fit case for the issue of a notice u/s 148.	<i>7</i> <i>see substance</i> <i>RK</i> <i>28/3/2019</i> (Rajnish Kumar) Pr. Commissioner of Income Tax, Delhi-1, New Delhi

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SHILPA CHOPRA
Assistant Commissioner of Income Tax
Ward-1(1), New Delhi

Recording of reasons for reopening the case of M/s A.K.G. Securities and Consultancy Ltd, A.Y.2010-11, PAN: AAACA7549K

The assessee company M/s A.K.G. Securities and Consultancy Ltd was incorporated on 12.05.1994. The business of the assessee is not mentioned in the Return of Income for AY 2010-11. The company filed its Return of income for A.Y. 2010-11 on 30.09.2010 showing 'Nil' income. Thereafter the return was processed u/s 143(1) of I.T. Act on 30/08/2011. The case was not picked up for scrutiny, so assessment u/s 143(3) was not made.

2. Information has been received from Asst. Director of Income-tax (Investigation), Unit-1(3), Ahmedabad through CD wherein it was informed that some companies have indulged in tax evasion practices by claiming fictitious profit/losses by using Client Code Modification (CCM) facility in F&O segment on NSE.

3. The report explains at length the modus operandi adopted by these companies. Client Code Modification means modification / change of the client codes after execution of trades. Vide Circular no. SMD/POLICY/Cir-703 dated February 6, 2003 SEBI mandated that the stock exchanges shall not normally permit changes in the client code except to correct for genuine mistakes. Every client is given a code which is registered with the stock exchanges. The client code modifications permit brokers to rectify human errors when a client inadvertently provides a wrong code or when a wrong code is punched in by the broker whilst executing the trade. The broker is allowed to change it between 3.30 pm and 4 pm to rectify a genuine error that may have occurred while entering the code. The facility ensures smooth functioning of the system and is to be used as an exception rather than routine. However, many brokers misused this facility of CCM for creating artificial losses/profits and providing such fictitious profits/losses to various clients by charging some commission.

4. Stock exchanges allow client code modifications but only to rectify a genuine error that may have occurred at the time of placing the order. Contrary to its motive, CCM facility was being misused and brokers transferred gains or losses from one person to another by changing the code, in the garb of correcting an error. These gain or loss-book entries were then used to evade taxes.

5. Non genuine CCM were carried out to book contrived losses. This facility was used by brokers to transfer gains or losses from one individual to another by modifying client codes in the guise of rectifying an error. It became a practice to book artificial profits or losses to impact tax liabilities.

6. Pursuant to above observations by the Finance Ministry about many modifications taking place in derivatives transactions, SEBI conducted a probe into 'modification of client codes' by brokers. Subsequently, the Ahmedabad Investigation Directorate carried out coordinated surveys u/s 133A of the Income-tax Act, 1961 at the premises of 12 brokers and few of their clients across India. The survey report has been prepared by ADIT(Inv.), Unit-1(3), Ahmedabad on the basis of data received from National Stock Exchange (NSE) and the same information has been passed on across India in respect of misusing CCM facility. On detailed analysis, it was established that the brokers have misused CCM facility and created non-genuine losses/profits which were given to different clients/beneficiaries according to their requirement. Such clients have taken fictitious losses to set off against their profit with a view to reduce their tax liability. Some of the clients also put fictitious profit to cover up their undisclosed income or to set off these profits against the huge losses.

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Assistant Commissioner of Income Tax
Circle-1(1), New Delhi

7. As per the information, M/s A.K.G. Securities and Consultancy Ltd (PAN-AAACA7549K) has also found indulging in the CCM activities and got fictitious loss entries amounting to Rs.2,18,73,416.90 during the AY 2010-11 (relevant to FY 2009-10) to various parties through CCM. The details of such transactions are placed at Annexure-'A'. On analysis of data, it is seen that there are 70 transactions wherein ascertained loss is shifted out. 1 transaction resulting in no profit no loss and 444 transactions where ascertained profit is shifted out. These transactions were carried out as Original Client and the ascertained profit shifted out was Rs.1,50,72,907/-. Further, there are 237 transactions where loss has been shifted in. 3 transactions resulting in no profit no loss and 11 transactions where profit has been shifted in. These transactions were carried out as Modified Client and the ascertained losses shifted in was Rs.(-)68,00,509.90. Thus, M/s A.K.G. Securities and Consultancy Ltd got fictitious loss of Rs.2,18,73,416.90 from various brokers who carried out non-genuine CCM.

8. Reason for information to belief

I have carefully perused and analysed the facts of the case as detailed above and the following facts emerge from the same:

- (i) Particulars of all brokers are found recorded in Annexure-B from whom the assessee company has received fictitious profits/loss in lieu of paying commission to the brokers.
- (ii) Perusal of the information in table, it clearly shows that the name of the assessee company M/s A.K.G. Securities and Consultancy Ltd appears as client who has received fictitious profits/losses from various brokers who misused the CCM facility provided by SEBI.

9. Income chargeable to tax escaping assessment

Having perused and considered the information received from the Assistant Director of Income-tax (Investigation) and examining the return filed by the assessee company, I am satisfied that the assessee company has not disclosed the transaction carried through CCM and has thus failed to disclose fully and truly all material facts necessary for assessment. Therefore, after considering the information received and facts of the case, I have reason to believe that income of Rs.2,18,73,416.90 has escaped assessment for AY 2010-11 within the meaning of section 147/148 of the Income-tax Act, 1961.

The assessment/re-assessment proceedings in this case for A.Y. 2010-11 pertain to period beyond four years but before the expiry of six years from the date of issue of notice. In view of the same, as no assessment has been made in this case for A.Y. 2010-11 u/s 143(3) or u/s 147, the first proviso to section 147 is not applicable to the case.

Moreover, as the case pertains to a period beyond four years from the end of relevant assessment years at the time of issue of notice, necessary sanction has to be obtained from Pr. Chief Commissioner of Income Tax or Pr. Commissioner of Income Tax or Commissioner of Income Tax, in view of the amended provisions of section 151 w.e.f. 01.06.2015. The necessary sanction in this regard is being obtained separately from Pr. Commissioner of Income Tax, Delhi-1, New Delhi before the issue of notice u/s 148.

(K.R. Philips)

Income Tax Officer
Ward-1(1), New Delhi

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31/05/19

SHILPI CHOPDA
SHILPI CHOPDA
Assistant Commissioner of Income Tax
Circle-1(1), New Delhi

5.1 After perusing the aforesaid reasons recorded, we find that it is a case where action for reopening is taken mechanically on the information from the Asstt. Director of Income Tax (Investigation), (Unit)1(3), Ahmedabad through CD wherein it was informed that some companies have indulged in tax evasion practices by claiming fictitious profit / losses by using Client Code Modification (CCM) facility in F&O segment on NSE. On the basis of this information, the reassessment proceedings were initiated u/s. 147 of the Act after taking approval of the Pr. CIT, Delhi-1, New Delhi and notice u/s. 148 of the Act was issued upon the assessee on 28.3.2017. In response to the same, the AR of the Assessee filed a letter dated 15.6.2017 stating therein that the return filed vide acknowledgement no. 164874331300910 dated 30.9.2010 should be considered as original in response to notice u/s. 148 of the Income Tax Act, 1961 also requested to provide copy of reasons recorded for issuing the notice u/s. 148 of the Act, which was provided by the AO to him. AO has blindly relied upon the Investigation Wing which itself is not based on any material against the assessee. The mere recording of reasons on the basis of information from Investigation Wing and issuing notice for initiation of reassessment proceedings does not constitute application of mind much less independent application of mind. Therefore, the proceeding is without jurisdiction. It is noted that AO has not investigated the matter himself and has not made any enquiry to corroborate the Information of the Investigation Wing on which basis the case of the assessee has been reopened, meaning thereby the AO has not applied his mind and only issued notice u/s. 148 of the Act. Thus, the AO has acted mechanically and without any independent application of mind. It is further noted that initiation of proceedings is based on non application of mind much less independent application of mind but is a case of borrowed satisfaction. Nothing is independently examined or considered by the AO

which can demonstrate application of mind by him. To support our aforesaid view, we draw support from the following decisions:-

i) ACIT vs. Dhariya Construction Co. (2011) 198 taxman 202 (SC) wherein the Hon'ble Court has held that :

"Section 147 of the Income Tax Act, 1961 – Income escaping assessment – Non-disclosure of primary facts – Whether opinion of District Valuation Officer (DVO) per se is not an information for purposes of reopening of an assessment under section 147; Assessing Officer has to apply his mind to information, if any, collected and must form a belief thereon – Held, yes."

ii) Pr CIT v. RMG Plyvinyl (I) Ltd. (2017) 83 taxmann.com 348 (Hon'ble Delhi High Court has observed as under:-

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 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."

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

"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.

5.1.1 We further find that the Hon'ble Bombay High Court in the case of Coronation Agro Industries Ltd. (Supra) has held that mere client code modification by broker does not mean that any income has escaped assessment.

5.2 We have heard rival contentions and perused the orders of the revenue authorities, case laws relied by the Id. Counsel for the assessee, we are of the considered view that the jurisdictional issue has already been adjudicated and decided in favour of the Assessee by the various decisions of the Hon'ble Supreme Court and the Hon'ble High Courts, in the cases discussed above, which have been respectfully followed by the Tribunal. Therefore, we have no other alternative except to respectfully follow the same case laws, because no contrary decision has been brought to my knowledge by the Ld. DR under the similar facts and circumstances of the case.

5.3 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 and needs to be quashed.

5.4 Further, after perusing the aforesaid reasons recorded and its approval, as reproduced above, wherein the ITO has recorded the reasons undated and Ld. Pr. CIT, Delhi-1 has granted the approval by mentioning that "***I am satisfied***", which shows that Ld. Pr. CIT-1, New Delhi has not recorded proper satisfaction and without application of mind gave the approval in a mechanical manner. Keeping in view of the facts and circumstances of the present case and the case laws applicable in the case of the assessee, we are of the considered view that the reopening in the case of the assessee for the asstt. year in dispute is bad in law and deserves to be quashed. Our aforesaid view is fortified by following decisions having similar facts and circumstances of the case.

A) United Electrical Company (P) Ltd. Vs. CIT & Ors. 258 ITR 317 (Del.) In this case, approval by the Addl. CIT u/s. 151 was given in the following terms:-

"Yes, I am satisfied that it is a fit case for issue of notice u/s. 148 of the Income Tax Act."

Analyzing, the above satisfaction/approval, it has been held that the CIT is required to apply his mind to the proposal put up to him for approval in the light to the material relied upon by the AO. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case, there has been no application of mind by the Addl. CIT before granting the approval. (Para 19).

(B) Hon'ble Supreme Court of India in the case of CIT vs. S. Goyanka Lime & Chemical Ltd. reported in (2015) 64 taxmann.com 313 (SC) arising out of order of Hon'ble High Court of Madhya Pradesh in CIT vs. S. Goyanka Lime & Chemicals Ltd. (2015) 56 taxmann.com 390 (MP).

"Section 151, read with section 148 of Income Tax Act, 1961 – Income escaping assessment – Sanction for issue of notice (Recording of satisfaction) – High Court by impugned order held that where Joint Commissioner recorded satisfaction in mechanical manner and without application of mind to accord sanction for issuing notice under section 148, reopening of assessment was invalid – Whether Special Leave Petition filed against impugned order was to be dismissed – Held, Yes (in favour of the Assessee)."

5.5 In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, we are of the considered view that 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 and also the approval granted by the Pr. CIT, Delhi-1, New Delhi is a mechanical and without application of mind, which is not valid for initiating the reassessment proceedings issue of notice u/s. 148 of the I.T. Act, 1961 and is not in accordance with section 151 of the I.T. Act, 1961,

thus, the notice issued u/s. 148 of the Act is invalid and accordingly the reopening in this case is bad in law and therefore, the same is hereby quashed. Accordingly, the legal ground on both counts, raised by the assessee's counsel, as aforesaid, is allowed. Since we have quashed the reassessment, hence, other grounds have become academic and therefore, are not being adjudicated.

6. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced on 27-02-2020.

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 27-02-2020

SRB

Copy forwarded to:

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

AR, ITAT, NEW DELHI.