IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "SMC" BENCH: NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.7127/Del/2019
[Assessment Year : 2011-12]

Raghav Softech Pvt. Ltd. Vardhman Grand Plaza, Manglam Place, Sector-3, Rohini, New Delhi AAECR2527G	vs	ITO Ward-20(4) New Delhi
APPELLANT		**RESPONDENT**

Appellant by	None
Respondent by	Shri Om Prakash, Sr. DR
Date of Hearing	03.01.2022
Date of Pronouncement	18.01.2022

ORDER

PER KUL BHARAT, JM :

This appeal by the assessee is directed against the order of the Ld. CIT(A)—7, New Delhi dated 17th June, 2019, pertaining to the Assessment Year 2011-12. The assessee has raised following grounds of appeal:-

> *"1. 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 illegally, violating the principles of natural justice, 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.

2.1 *On the facts and circumstances of the case, the learned Ld. CIT (A) has erred, both on facts and in law, in sustaining the assessment that could not have been reopened u/s 147/148 as no valid reasons have been recorded by the Assessing Officer to establish any satisfaction on his part that any income belonging to the appellant has escaped assessment.*

2.2 *On the facts and circumstances of the case, the Ld. CIT (A) has erred, both on facts and in law, in sustaining the assessment despite the fact that the provisions of section 148 of the Income Tax Act, 1961 are not at all applicable in the circumstances in as much as the case has been reopened solely to verify the disclosed investment.*

3. *On the facts and circumstances of the case, the Ld. CIT (A) has erred, both on facts and in law, in sustaining the assessment despite the fact that the Ld. Assessing Officer has not given proper opportunity of being heard to the appellant and has not confronted the appellant with the material collected behind the back of the appellant upon which the Assessing Officer has relied in making the additions.*

4.1 *On the facts and circumstances of the case, the Ld. CIT(A)has erred, both on facts and in law, in sustaining the assessment of the appellant at income of Rs. 10,00,850/- as against the income of Rs.850/-declared by the appellant.*

4.2 *On the facts and circumstances of the case, the Ld. CIT (A) has erred, both on facts and in law, in sustaining the assessment making addition u/s 69 of the I T Act., despite the fact that the same is not at all applicable in the facts and circumstances of the case.*

4.3 On the facts and circumstances of the case, the Ld. CIT (A) has erred, both on facts and in law in totally ignoring the submissions of the appellant, relying on irrelevant judgments and sustaining the assessment, which was completed on the basis of assumptions and surmises.

5. On the facts and circumstances of the case, the Ld. CIT (A) has erred, both on facts and in law, in sustaining the assessment despite the fact that the appellant has not agreed for the addition on its own rather the same was under undue presser and therefore the assessment order is illegal being in violation of the principles of natural justice.

2. No one appeared on behalf of the assessee. The notice sent through "Speed Post" with acknowledgment due is returned by the postal authorities. It is seen from the record that on earlier occasions also, the notices were returned by the postal authority. The assessee has not provided any new address to the Registry. Therefore, the appeal was taken up for hearing in the absence of the assessee.

3. The facts giving rise to the present appeal are that the assessee Company filed its return of income on 13/10/2011 declaring income at Rs. 850/-. Thereafter, the assessment of the assessee was reopened on the basis that information was received that the assessee had made investment in shares of M/s Mirzapur

Chemicals Works Pvt. Ltd. during the Financial Year 2010-11. The Assessing Officer was of the view that the amount of Rs. 10 lacs has escaped assessment in the case of the assessee. Therefore, the A.O issued notice u/s 148 after taking approval from the competent authority. In response thereto, the assessee filed its return of income through electronical mode on 26/09/2018 at Rs. 852/- in response to the notice, Shri Pramod Kumar C.A, attended the hearings the Assessing Officer, therefore, on the basis that the Directors of M/s Mirzapur Chemicals Works Pvt. Ltd. fail to attained the office of the Assessing Officer made addition of Rs. 10 lacs.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who sustained the addition.

5. Ld. Departmental Representative supported the orders of the assessee authorities below.

6. I have heard the Ld. Departmental Representative and perused the material available on record and gone through the orders of the authorities below.

7. Ground No. 1, 2 & 3 are against legality of the reopening of the assessment before the Ld.CIT(A). The assessee has made the following submissions in respect of these grounds.

"VALIDITY OF ISSUE OF NOTICEU/S 148 and[ORDER PASSED U/S 147/143(3)

1. *The order passed by the Ld. Assessing Officer u/s 147/143(3) is pot sustainable as the same is bad in law and contrary to the facts on account of following parameters: -*

A. *Notice issued u/s 148 is bad in law as the same has been issued based upon borrowed satisfaction;*

B. *- The Ld. Assessing Officer has relied upon documents which do not constitute admissible evidences;*

C. *The Ld. Assessing Officer has relied upon information collected at* the back of the assessee *without affording a proper opportunity to cross-examine.*

D. *The. addition made by the Ld. Assessing Officer are not sustainable as the assesses has submitted complete documents related to the transaction and the transaction is duly reflected in the audited books of accounts thus provisions of Section 69 are not applicable.*

A notice has been issued purely on borrowed satisfaction;

2. A perusal of the reasons recorded clearly reveals that the notice issued u/s 148 is bad in law and contrary to the facts as:-

- *notice has been issued purely on borrowed satisfaction of*

ITO(HQ) (I&C1).

- *No belief has been recorded in the reasons for reopening of the case.*

- *The reason that income chargeable to tax has escaped assessment is arrived solely on the basis of* ITO(HQ) (I&C1), Lucknow.

- *The report of the ITO(HQ) (I&C1), Lucknow, has not been provided to the assessee.*

- *It is strange to observe no proper approval is obtained to issue notice u/s 148, as prescribed u/s 151.*

The only inescapable conclusion is that the reasons for believing have been recorded without linking the ' pre-existing records to the information received and due application Of independent mind and are on suspicion only. Therefore, the 'reasons recorded' (so called) do not constitute the reasons to believe as envisaged in section 147. ,

In "nutshell" the assessee strongly submits that looking to the overall facts and circumstances of the case, them was no occasion or justification, either factual or legal, to issue notice u/s 148 and the reassessment proceedings based *on such reasons are not valid in the eyes of law and the assessment therefore deserve to be held as void as no material/information was available with the Assessing Officer at the time of recording "reason to believe".*

3. Reliance is placed on following recent judgments:

Pr GIT G & G Pharma India Ltd (Honble Delhi High Court)

(2016) 384 ITR 147

In ACTT v. Dhariya Construction Co.(2010)328 ITR SIS 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 u/s 147 of the IT Act, 1961. The A.O has to, *applying 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."*

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 A.O has to apply his mind to the materials, conclude that he has reason to believe that income of the Assesses has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analyzing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity.

- *CIT Vs. Suren International (2013) 357 ITR 24 (Hon'ble Delhi High Court) wherein the court held as under:-*
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"………………….In the first instance, we do not find the reasons in law, at all. A *bare perusal of the table of alleged accommodation entries included in the reasons as recorded, discloses that the same entries have been repeated six times.*

This is clearly indicative of the callous manner in which the reasons for initiating reassessment proceedings are recorded and we are unable to countenance that any belief based on such statements, can ever be arrived at. The reasons have been recorded without any application of mind and thus no belief that income has escaped assessment can be stated to have been formed based on such reasons as recorded,"

□ *Pr CIT v Meenakshi Overseas (P) Ltd (2017) 395ITR 0677 Hon'hie Delhi High Court) held as under:*

"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 Assesses and against the Revenue. The appeal is,*

accordingly, dismissed but with no orders as to costs. *Emphasis Added)*

4. It is further submitted that from the assessment order, it is evident that the Ld. Assessing Officer has relied completely on the information sent by the ITO (HQ) (1 & C1), Lucknow, He has not formed his own belief for the issue of notice (as held by Ranchi bench of the High court of Patna In the case of Jaiswal & others Vs. TTO & others (176 ITR 352) which is very important The information contained in the letter is very limited & does not detail the exact nature of the transactions & nature of The escapement of the income.

Similarly in case of CIT v. Atul Jain (2007) 164 Taxman 33 (Delhi) It' was held that merely because some intra-departmental information was received by assessing officer to the effect that assessee had taken a bogus entry of long term capital gain after paying equivalent amount in cash together with premium for accommodation entry, assessing officer was not justified in mechanically reopening assessment on basis of such information.

The Hon'ble WAT, Delhi Bench in the case of Mrs. Vinita Jain vs. (TO reported, in (2007) 158 Taxman 167 (Dei.) (Mag.) quashed the notice issued under section 148 as well as consequent assessment where assessment was reopened on the basis of report of the DDI, who believed that transaction of capital gain shown by the assessee was bogus. The Hon'blc Bench while quashing the notice observed that "Where Assessing Officer reopened assessee's *assessment merely because DDW (Inv.) believed that transaction of capital gains shown by assessee was bogus and no separate reason*

disclosing satisfaction of Assessing Officer for formation of belief that income of assessee had escaped assessment had been recorded, notice issued under section 148 was to be quashed and assessment made in pursuance thereof was to be annulled".

This decision of the Hon'ble ITAT was challenged by the Revenue before the Hon'ble Delhi High Court and stood reported in (2008) 299 ITR 383 (Del.). The Hon'ble High Court approved the findings as recorded by the Hon'ble ITAT, as referred above and further observed as under:

Reassessment—Notice—Information that assessee made bogus entry of capital gains by paying cash with premium for taking a cheque for that amount—Scanty and vague—Correctness of information not verified—Satisfaction of Assessing Officer for Issuing notice not recorded—No "reasons to believe warranting issuance of notice—Income-tax Act, 1961, ss, 147, 148.*

In para 12 of the said report the Hon'ble High Court held that "From the decision of the Hon'ble Supreme Court. It is clear that a mere statement of facts in the assessee form of a report is not a substitute for reasons that are required to be recorded before issuing a notice under section 148 of the Act:

In para 19 of the said report the Hon'ble High Court held that "The Assessing Officer did not verify the correctness of the information received by him but merely accepted the truth of the vague information m a *mechanical manner. The Assessing Officer has not even recorded his satisfaction about the correctness of the information or his satisfaction that a case has been made out for Issuing- a notice under section 148 of*

the Act Read in this light, what has been recorded by the Assessing Officer as his "reasons to believe'' is nothing more than a report given by him to the Commissioner, of Income-tax.

As held by the Supreme Court in Chhugamal Rajpal (1971) 79 ITR 603, the submission of the report is not the same ,as recording of reasons to believe for issuing a notice. The Assessing Officer has dearly substituted form for substance and, therefore, the action of the respondent fails foul of the law laid down by the Supreme Court in Chhugamal Rajpal (1971) 79 ITR 603 which is clearly applicable to the facts of these appeals.

- *It is submitted that the report of the ITO(HQ) (I&CI),Lucknow if any, may be a source of investigation, and it is therefore, the law has placed a rider to it, before the report, being used as *material'' for subjecting the assesses to re-assessment proceedings, after receipt of report, the Assessing Officer has to apply his mind and after performance of that mental exercise of his own he could form the requisite formation of belief that the income of the assessed liable* to *tax for a particular year has escaped assessment The Assessing Officer thereafter can issue notice to the appellant Assessee respectfully submits that there existed no 'material', which could lead to formation of 'belief' that any income of the assessee chargeable to tax had escaped assessment within meaning of section 147 of the Income tax Act, 1961. The Initiation of proceedings under section 147 is not based on an independent application of mind but on the "borrowed satisfaction" of ITO(HQ) (I& CI),Lucknow.*

- *The Assessing Officer cannot find a convenient short cut to this*

legal, requirement of formation of *belief followed by recording of reasons by vaguely referring to the "report" without 'spelling out of any of' those specific contents, allegations and there after efforts of his own, showing mental exercise' done on his 'part leading* to *the formation of belief as required for subjecting the assessee to re-assessment proceedings. At feast the "reasons recorded" in the present case do not show any satisfaction of the Assessing Officer issuing the notice.*

- *In the case of Madan Lai Jindal Vs. 170 reported in (1973) 92 ITR S46 (Cat.) the Hon'ble High Court quashed the notice under section 148 where reopening was based on the letter from another ITQ, who during the course of assessment notice, escapement It was held by the Hon'ble High Court that it is true that the. letter of the ITO, "J" Ward, could have been a source of information upon which the ITO in this case could have independently formed-his-own belief'. -But it is not clear as to whether the ITO made any effort to form any independent belief but had merely acted on the suggestion of the ITO, "J" Ward. In the aforesaid, view of the matter the said impugned notice must also be quashed."*

- *The sole basis of the formation of the said belief has been .the report of the ITO(HQ) (I&CI),Lucknow, but neither the report given by him nor the text of enquiries (said to have been made by the FTO(HQ) (I&CI),Lucknow, has been provided at all. Even the process of making enquires has not been made part of records. In absence of such requisite material, the so called 'reason' cannot be said to be based on any material to draw the requisite 'belief' of escapement of income. In the case of Anant Kumar Saharia* vs. *CIT reported in (1998) 232 ITR 533 (Gau.)*

the Hon'ble High Court held that "there must be nexus between the material .and the belief of escapement This exercise must contain a definite, application of mind by the Assessing Officer.

- *The above facts along with the judicial pronouncements of various courts include the jurisdictional High Court, make it very clear that notice issued u/s 148 is void and deserves to be quashed and assessment made in pursuance thereof also deserves* to *be annulled.*

5. *In our case there is no reason to believe that the income has escaped assessment The A.O recording reasons has not satisfied himself-far escapement of income arid issued notice on the basis of information received from the.ITC(HQ) (I&CI),Lucknow.*

6. *It is clear that at the time of recording of reason your office does not have REASON TO BELIEVE rather have REASON TO SUSPECT with purely subjective satisfaction and issued notice in a mechanical system/order. There is no material available on record except the[1] information of ITO(HQ) (I&CI),Lucknow which is totally insufficient to reach to any conclusion.*

7. *Your office does not have ANY REASON TO BELIEVE that the assessee's income for the above said assessment year have escaped assessment and has merely satisfied and worked in mechanical order and just followed the directions of senior authorities.*

8. *Mere stating the facts or finding of the case basis on which your office have reasons to believe is BAD in law. On what basis your office has reasons to believe that the transactions stated in the reasons are alleged transactions. It seems a blind*

faith had been placed on the (I&CI),Lucknow without application of mind to form a reason to read and obeyed as "HOLY GETTA'

9. *A perusal of the assessment order makes it very dear that the Ld, Assessing Officer has given more, than due importance to information provided by the TTO(HQ) (I&CI),Lucknow and ignoring the submissions of the assessee.*

Appellant wish to draw your honor kind attention to the Following recent judgments on the issue . as listed below: -

1. *India Terminal Connector Systems Ltd, v DOT (2011) 16 TAXMANN.COM 196 (Delhi)*

Where A.O initiated reassessment proceedings on basis of information received from Investigation Wing that assessee was involved in giving and taking accommodation entries and reasons recorded by him were totally silent with regard to amount and nature of bogus entries, initiation of reassessment proceedings was bad in law.

Formation of the required opinion and. the belief by the Assessing Officer is a condition precedent to exercise jurisdiction to initiate proceedings under section 147, The fulfillment of this condition is not a mere formality, but it is mandatory.. The failure to fulfill that condition would vitiate the entire proceedings,

2. *Sarthak Securities Co. P, Ltd. v ITO (2010) 32$UR 110 Delhi*

6, *that the reasons recorded for initiation of proceedings under section 147(2) do not disclose the basis. The proceedings have*

been initiated on the ground of information received from the investigation wing but me order of the Assessing Officer does not reflect any independent application of mind to the information so *received. It is urged that the respondent No. 1 has failed to appreciate the raito laid down in the decision rendered in Lovely Exports (P) Ltd's case (supra) when all the requisite information was available with the Assessing Officer from the very beginning.*

3. *Further, the alleged information provided by the Add!. D.1T has been accepted as gospel truth without any verification by the Assessing Officer. The law postulates the Assessing Officer (and not the Add!. DTT) to have reason to believe,*

2, *CIT Vs. SFIL Stock Broking Ltd. (2010) 325 ITR 285 Delhi*

It was clear that the Assessing Officer referred to the information and the two directions as reasons on the basis of which he was proceeding to issue notice u/s 148. These could not be he reasons on the basis of which he was proceeding to issues notice u/s 148. These could not be the reasons for proceeding u/s 147/148.

4. Signature Hotels P. Ltd. v ITO (2011) 338 ITR 51 Delhi

The aforesaid Section is wide but it is not plenary, We *have to consider and examine the crucial expression* "reason *to believe" used in the said Section. The Assessing Officer must have "reason to believe" that an income chargeable to tax has escaped assessment. This is mandatory and the "reasons to believe" are required to be recorded in writing by the Assessing Officer.*

5. ITO *v Lakshya Exim. P. Ltd. and Lakshya Exim P. Ltd. Vs. ITO (2010) 39 SOT 220 Delhi*

Whether, on facts, it was apparent that proceedings under section 147 had been initiated by Assessing Officer on a *non-existent ground inasmuch as there was no material on record to entertain a belief that* assesses *had raised bogus loam or share capital from "V" Ltd. –Held, Yes- Whether, therefore, assumption of power by Assessing Officer conferred u/s 147 was without jurisdiction and it was liable to be cancelled-Held, yes*

10. *Thus the above, so called, report of the ITO(HQ) (I&CI),Lucknow, does not contain material, empowering the AO to issue notice u/s 148.*

11. The contention of the assessee, that the notice has been issued, application of mind, is duly established and proved as-the reasons recorded do not Contain the nature of income which ''has' escaped assessment.

B. The Ld. Assessing Officer has relied upon documents which do not constitute admissible evidences;

12. The La. Assessing Officer, in the assessment order has extensively mentioned that during course of verification in the case of M/s Mirzapur Chemical Works P. Ltd. it has been found that some companies have substantial investments.

13. The above information is too limited to form a *belief moreover which is not supported by any material on record.*

14. It is further submitted that the issue has been recently examined by the Hon'ble Supreme Court wherein it has

observed as under:-

The Supreme Court rejected the demand for a probe into bribes allegedly paid to politicians mentioned in the so-called Birla-Sahara diaries, saying it would be dangerous for democracy to order a probe on the basis of loose sheets inadmissible as evidence.

A bench of Justices Arum Kumar Mishra and Amitava Roy concluded that " no case is made out of order an Investigation. The ruling is a setback to opposition leaders, especially Congress Vice-President Rahul Gandhi and Delhi Chief Minister Arvind Kejrival spells relief for PM Narendra Modi and others whose names figured in the purported diaries.

The order came after a marathon four-and-ahalf-hour-long hearing, the bulk of which was taken up by advocate Prashant Bhushan and his father Shanti Bhushan arguing for an SIT probe into the "diaries" on what they called strong ethical and legal grounds as well as to eliminate the risk of supervisions of democracy because of rampant corruption.

After giving them a patient and long hearing, Justices Mishra and Roy said: There has to be some cogent evidence pointing out that the persons, against whom the documents are presented, are involved of have done some act in that period which may have some correlation with the random entries (revealed in the documents)."

The bench added: "Otherwise, the process of law can be abused easily to achieve the ulterior objectives. No democracy can survive in case investigation is readily set out against constitutional-, functionaries without cogent material."

'We *find the documents seized from Birla and Sahara groups to be random computer entries diaries, emails and Excel Sheets. These are not maintained on a regular basis as books of account, said the Bench, virtually putting a stamp of approval on the Income Tax Settlement Commission 's recent decision, based on a forensic test, to discard the Sahara Diary and documents as constituting evidence.*

The Bench relied heavily on the Hon'ble Supreme Court judgment in the V C Shukla case in which it had ruled that diary entries alone cannot be treated as evidence unless corroborated by other independent details. When we examine this with the findings in the V. C Shukla case, we are of the considered opinion that no case is made out against anyone o warrant directing investigation against any person.," it said. "We are of the opinion that in the peculiar facts and circumstances of this case, no case Is made out to direct investigation against political personalities, officers and others/ the bench said and dismissed the application filed by common cause through Bhushan seeking an independent Supreme Court monitored investigation into the Birla-Sahara diaries.

When Prashant Bhushan said that the SC did order registration of FIRs leading to an investigation on the basis or entries in the Jain Hawala diary case, the Bench said: "it was an intolerable irony. On the one hand, the Supreme Court said investigate and prosecute, one the other hand, it said no evidence so discharge. What role the Vineet Narain case played at that point of time, it is not for us to judge."

Attorney general Mukui Rohatgi quickly picked the threads from the bench on the Jain hawala case which saw a number of

top-ranking politicians being prosecuted after their names figured in the diary maintained by an alleged hawala operator, *eventually all the accused were discharged for want of evidence. A travesty happened in that case. The Hon'ble Supreme Court directed registration of case. The Delhi HC quashed the charges and SC upheld the discharge. But many politicians suffered the travesty for years. Let the chapter not be repeated in the Birla-Sahara case," he said.*

The Bhushans argued that as per the Constitution bench judgment of the Hon'ble Supreme Court in the Lalita Kumari case, if any document revealed cognizable offence, police had no option but to lodge an FIR.

the law is above you'. If these documents containing detailed evidence revealing systematic bribery of political class, bureaucracy and others did not form the basis for lodging of an FIR,

"In a democracy, the message needs to be sent loud and dear that 'howsoever high you may be, the law is above you'. If these documents containing detailed evidence revealing systematic bribery of political class, bureaucracy and others did not form the basis for lodging of an FIR, then it would be a very sad moment in the life of a country governed by the rule of law, the Bhushans said.

During the hearing, when the Bhushans were pressing for the registration of an FIR on the basis of the Birla-Sahara diaries, Rohatgi said: "Every day the I-T department seizes thousands of pages of documents implicating one or the other. If this is taken to be cogent evidence for registration of FIR, every day

FIRs will have to be registered starting from the President to a peon."

Thus no adverse inference can be drawn against the assessee relying on the report of the ITO(HQ) (I&CI), Lucknow.

C. *The Ld. Assessing Officer has relied upon information collected at the back of the assessee without affording a proper opportunity to cross-examine;*

15. *As necessary documents, relied upon by the report of the ITO(HQ) (I&CI),Lucknow, have not been provided to the assessee, the assessee could not seek opportunity to cross-examine the person(s) whose statement (if any) has been relied upon by the Ld. Assessing Officer.*

16.Thus the principal of natural justice has been completely ignored, over-ruled and disregarded in the present case. ' :

16. *On going through the reasons recorded, the assessee observed as under:-*

- *The contents of report of the ITO(HQ) (I&CI),Lucknow are completely missing.*
- *The material collected by way UO(HQ) (I&CI),Lucknow has not been specified.*
- *Who carried out the investigation and on whom the investigation was conducted.*
- *Who has recorded the reasons and when.*
- *The name and capacity of person(s) who's statement(s) were recorded, if any.*

- *Contents of the statements) recorded, if any.*
- *Nexus of the assessee with those statements) recorded, if any.*
- *Allegations against the assessee in those statements) recorded, if any,*

18. The proceedings u/s 147 has been initiated based on the information received from report of the ITO(HQ) (I&CI),Lucknow. However, neither the report nor the-statement of the-directors was paraphrased or provided along with the reasons to the appellant during the course of assessment proceedings.

19. *It is settled law that no evidence can be used against the assessee which has not been made subject to cross-verification.*

20. *The learned AO has erred on facts and in law by not providing the opportunity of cross examination to the assessee.*

21.*Kind attention is brought to the decision of Hon'ble Delhi HAT in case of Mod Adhesives P Ltd in (ITA No 3133/Del/2018):*

"Particularly once reopening u/s 148 of the Act is resorted being extra-ordinary jurisdiction, on the basis of aforesaid apprehension and charge of accommodation entry u/s 68 of the Act for share capital received, firstly in my view AO should discharge the crucial and critical burden u/s 148 of the Act to bring home the material that income has escaped assessment without which assessee cannot be asked to prove negative. For this reference may be made to sagacious observations of Hon'ble Delhi high court in Pardeep Gupta case 303 ITR 95. If this primary burden u/s 148 lying on AO remains un-

discharged then in my considered opinion entire proceedings shall crumble (refer *latin maxin sublato fundamento cadit opus meaning once foundation falls super structure falls) . In present case A.O till end has not brought on records the statement of much less offered their cross examination to assessee herein to justify the allegations leveled in detailed reasons recorded which would in my opinion make the reopening as invalid (refer Apex court leading decision in case of Andaman Timber Industries reported at 127 DTR 241 order dated 02/09/2015 and. Bombay high court decision in case of H.R. Mehta reported at 387ITR 561) This violation of natural justice in my view is a serious flaw and goes to the root of the matter and nullifies the entire proceedings." (Emphasis Added)*

22. *Assessing Officer has not brought any tangible material, on record, on the basis of which it has been Resumed or has reason to believe that the assessee company is at fault for not disclosing the correct particulars of Income to the extent of an amount of Rs.10,00,000/-, is escaped assessment due to failure on the part of assesses.*

23, *It is painfully stated that the impugned material/ information was never confronted to the assesses at any stage of assessment.* The *reliance placed by the Assessing Officer on such material for making the addition, without confronting the same to the assesses and without adequate opportunity of cross examination, flouts ail the principles* of natural *Justice and is not legally sustainable.*

Case Laws: Multitex Filtration Engineers P. Ltd. V. Dy CIT (2007) 13 SCI' 208 (DELHI)

It was held that where assesses company was found to have received certain amounts as share application money from two companies promoted by one 'S' and addition of such Share application money was made to assessee's income under section, 68 since addition made by lower authorities suffered from a primary infirmity in sense that same had been made without testing alleged evidence available with assessing officer in spite of specific request by assessee for cross examination of "S" addition made to income of assessee u/s 68 on basis of statement of 's' was not justified & same was to be deleted, (Assessment Years 2000-01, 2001- 02) "

CIT V. PRADEEP KUMAR GUPTA (2008) 303 ITR 95{DEL)

In this case honorable Delhi high court held that the reassessment based on deposition of third party without allowing opportunity to assessee to cross examine third party is not valid.

It has been held by the Hon'ble Supreme Court In Krishan Chand Cheliaran 125 ITR 713 (SC) that where any evidence in the form of statement of third party is used against the assessee without confronting the same to the assessee and without adequate opportunity of cross examination, it did not constitute any material evidence at all and therefore any addition based on such material was not in accordance with law. Further, It has been held by the Hon'ble Supreme Court in Menka Gandhi Vs. Union of India AIR 978 S.C 597, a judicial decision or administrative decision render or an order made in violation of rule of audit alterm partern is null and void and the order made in such a case needs to be struck down on that score.

24. Similar view was expressed by Hon'ble Supreme Court in the case of Nawab Khan Abbas Vs. State of Gujarat AIR 974 at page 1479. In C. Vasantilal & Co. V. CIT (1962) 45 ITR 206 (S.C) the Hon'ble Supreme Court held that it was open to an Income tax officer to collect materials to facilitate assessment even by private enquiry, But If he desires to use the materials so collected, the assessee must be informed of the materials and must be given an adequate opportunity of explaining it Similar view- was expressed in Dhakeswari Cotton Mills Ltd. v CIT (1954) 26 ITR 775 (SC). It is also held in the case of Narayan Chandra Baiaya v. CIT (1951) 20 ITR 287 (Cal) that natural justice requires that before charging person with financial liability he should be informed of the materials on which the charge was going to be imposed and given an opportunity to rebut the effect of the materials, if he can. It was observed in the case of Universal Cables Ltd V. Union of India (1977) Tax LR 1825, 1833 (MP) that even when the material used is within the knowledge of the person proceed against, he must be told that I would be used against him, for unless he is so informed he should have no opportunity of offering his explanation for meeting the inference that the authority seeks to draw from it. Similar views we have heard both the parties and perused the material available on record expressed in the case of Collector of Central Excise Vs. Sanwarmal Purohit, (1969) Assam LR (Hon'ble Supreme Court) 11; Prakash Cotton Mills Vs. B. V. Rangwati AIR 1971 Bom 386, 392).

25. In the case of S. L. Kapoor Vs. Jagmohan AIR 1981 Hon'ble

Supreme Court. 136, 145 it was observed hat to put it differently, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. The person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken ayah s him. If that is made known the requirements are met. In the case of Nagulakonda Venkata Subba Rao v CIT (1957) 31 ITR 781 (AP) it was held that in discharge of their duties, the officers receive a good deal of information which is not at all evidence according to the, accepted notions of law. Consequently, it is only fair and just that the accuracy or otherwise of such information be ascertained by giving the assessee an opportunity to prove that the officer is misinformed.

26. In the following cases it has been observed that in fact, it is incumbent upon the tax officer to apprise the assessee of the data on which he based his conclusions and, then, to give *the assesses an opportunity of rebutting the same. If there is nothing in* the records to *show tha*t the assessee had been apprised of the data and an opportunity to rebut *it, the* resultant assessment *cannot be upheld (Dayaram Surajmai v, CIT (I960) 38 ITR 12* (Mys); Bhagwanjibhai Mrambhai *v CST (1961) 12 STC 502 (MP); Aswini Kumar Dutt v. CTO, 61 CWN* 950 (Cal). *It* is *worth noting that this obligation is not diluted even where the material* relates to the *file of the* assessee himself (Ponkunnam Traders v. Add!. ITO (1972) 83 ITR 508 (Ker).

27. *In the case of CIT Vs. Eastern Commercial Enterprise, (194) 210 ITR 103, 110-11 (Cal). It was observed that it is trite law that cross-examination is the sine qua non* of due process *of taking evidence and no adverse inference can be drawn against a party unless* the party is put on *notice of the case maple out against him. He must be supplied the contents of* all such evidence, *both* oral and *documentary, so that he cart prepare to meet the case* against him. *This necessarily, also postulates that he should cross-examine* the witness *hostile to him.*

28. *Reliance is placed on the recent judgment of the Hon'ble President* of the income Tax *Appellate Tribunal, Delhi Benches "SMC", New Delhi in the case of M/s, Goldline* Polymers Pvt. *Ltd. Delhi v IJO Ward 12(2) New Delhi decided in IT.A. .No. 3453/D/2005 wherein* the *Bench* observed that—

……………….*alleged statement of Shri Rastogi recorded at the back of the* assessee was *not of any evidentiary value as assessee was not allowed any opportunity to.* cross-examine Shri. Rastogi**.**

29. Further reliance is placed on the latest judgment of Hon'ble Delhi High Court in the case of -CIT v SMC Global Share Brokers 288 ITR 345 (Del)."

8. However, the Ld.CIT(A) rejected the submissions of the assessee rejected the grounds of the assessee by observing as under:-

"4.3 In this regard it is also pertinent to mention that while dealing with concept of burden of proof, onus of proving is always on the person who makes the claim and not on the Revenue. While dealing with the issue of deciding the burden of proof, Hon'ble Supreme Court in the cases of CIT Vs. Diurgaprasad More 82 ITR 540 and Sumati Dayal Vs. CIT 214 ITR 801 has held that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not real and that Taxing Authorities are entitled to look into surrounding circumstances to find out the reality and the matter has to be considered by applying the lest of human probabilities. The Hon'ble court also held that, It is no doubt, true that in. all case in which a receipt is sought to be taxed as income: the burden lies on the Department prove that it is the taxing provision and if a receipt is in the 'nature of income',, the burden to prove that it is not taxable because it falls within exemption provided by the Act, lies upon the assessee. In the case of Durgaprasad More (Supra), the Hon'ble High Court went on to add that a party who relies on a recital in a Deed has to establish the truth of this recital, otherwise it will be very easy to make self serving statements in-document either executed or taken by a party Who relied on those recitals. If all that an assesses who wants to evade tax has to have some recitals made in a document either executed by him or executed to evade tax The Horrible Court-further held that the Taxing Authorities we have heard both the parties and perused the material available on record not required while looking at the documents produced before them. They, were entitled to look in to the surrounding circumstances to find out the reality of the recitals made in those documents.

4.4. In yet-another case of casting of onus viz. Jamnaprasad Kanhaiyalal Vs. CIT 130 ITR 244(SC), Hon'ble Apex Court while

considering the scope of immunity u/s. 24 of F.No.{2) Act 1965 held that the immunity provided cannot be. Invoked in assessment proceedings relevant to any person other than the person making declaration under the Act. In that case, the firm Jamnaprasad Kanhaiyalai had shown cash credits in the names of 5 sons of Kanhaiyalal who had made voluntary disclosure under the Voluntary Disclosure Schem&'ogf 1965 but the Ld. A O. had not found the explanation satisfactory regarding the credit worthiness of the parties and the same came to be confirmed by the Hon'ble Supreme Court. If against such strict terms of immunity, the Hon'ble Supreme Court Smt. Kiran Navin Doshi could confirm the rejection of explanation of cash credit, in the instant case the appellant has failed to even corroborate the claim, before the Ld. A.O .

4.5 Reliance is also placed on the judgment of Hon'ble Supreme Court in the case of Sri Meenakshi Mills Ltd 63 1TR 609 where it was held that the I.T. Authorities are entitled to pierce the veil of Corporate Entity and to look into reality of transaction. In the case of McDowell & Co. 154 1TR 148(SC) it was stated that implications of tax avoidance are manifold. First, there is substantial loss of much needed public revenue. Next, there is serious disturbance caused to the economy of the country due to piling of mountains of black money, causing inflation. Thus, there is "the large hidden loss" to the community (as pointed but by Master Sheatcroft in 18 Modern Law Review 209) by some of the members in the country being involved in the perpetual war waged between .the tax payer and his expert team of advisors, and accountants on the one side and the tax gatherer and his perhaps not so successful advisors on the other side. Hon'ble Court further held that it was for the Court to take stock to determine the nature of new and sophisticated legal devices to avoid tax and consider whether the situation created by the

devices would be related to the existing legislation with the aid of emerging techniques of interpretation as was done in Ramsay, Burmah Oil and Dawson to expose the devices for what they really are and to refuse to give judicial benediction.

4.6. *It is also a settled legal proposition that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. Therefore, onus is always on a person who asserts a proposition or fact, which is not self evident, The onus, as a determining factor of the whole case can only arise if the Tribunal, which is vested with the authority to determine, finally all questions of fact, finds the evidence pro & con, so evenly balanced that it can come to no conclusion, then, the onus will determine the matter, Needless to say that the onus is heavy or light, depending on the facts and circumstances of each case. There cannot be any doubt that onus as a determining factor comes into play where, either there is no evidence on either side, or where it is equally worthless or where ft is equally- balanced. It is imperative to mention here that where such is not the ease and all available evidence is considered, without reference to the onus and without relying on the circumstances that onus lies on a particular party, the issue is determined on facts and the onus cannot be said to have influenced the decisions. However, in the instant case, the appellant has miserably failed to lead evidence and hence, onus is a determining factor.*

4.7. *The Hon'ble Supreme Court, in the case of Chuharmal v. CIT [1988] 172 ITR 250/38 Taxman 190 highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by Smt. Kiran Navin Doshi the Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills*

Ltd. v. CIT [1954] 26 ITR 775. The Hon'ble Supreme Court, in the case of Chuharmal (supra) held that what was meant by saying that Evidence Act did not apply to the proceedings under Income-tax Act, 1961, was that the rigours of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble, Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary principle of common law jurisprudence viz, where a person was found in possession of anything, the onus of' proving that he was not its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies its conditions .and was applicable to taxing proceedings.

4.8. *Hon'ble Bombay High Court in the case of Kiilick Nixon Ltd. v. Deputy Commissioner of Income-tax [2012] 20 taxmann.com 703 (Born.) was similarly faced with the question of sham transactions and it inter alia, held as under:*

"Section-254 of the Income-tax Act, 1961, read with rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Orders of - Assessment year 2001-02 - Assesses transferred certain land to hank - Assesses claimed to have incurred long-term and short-term capita flosses an share trading transactions - Accordingly, if set off said losses against capita/ gain earned on sale of land - Assessing Officer found that assesses entered into sham and bogus share trading transactions resulting in capital loss with purpose to reduce tax liability arose on capital gain - Assessing Officer, therefore, discarded capita! losses - Commissioner (Appeals) confirmed

order of Assessing Officer - Tribunal also confirmed order of Assessing Officer, and while doing so, referred to a decision of Supreme Court in case of Sumati Dayal v. CIT [1995] 214 JTR 801 / 80 Taxman 89 to held that evidence produced must be analysed by applying theory o f surrounding circumstances and human probabilities - Assessee alleged that without bringing said case to notice of parties, revenue had caused prejudice to is case all in violation of principles of natural justice and of rule 11 - Whether since decision of Supreme Court in Sumati Dayal case (supra) ms cited by Tribunal only for purpose of reiterating well settled and established position of law, it could not be said to have caused prejudice to assessee held, yes Whether when a transaction is sham and not genuine as in instant case, then it could not be considered to be a part of tax planning or legitimate avoidance of tax liability - Held, yes - Whether further since issues in instant case were purely questions of facts on which there were concurrent .findings of authorities below, if was to he held that , there was no question of law to be considered - Held, yes {In favour of revenue.

14. So far as the principle laid down in the matter of Omar Salay Mohamed Sait (supra) is concerned there can be no dispute about the proposition laid down therein. However we have not been shown how the Tribunal was in breach of the same. We Smt. Kiran Navin boshi find that the Tribunal has considered the evidence of purchase and sale of shares to book long term and short term losses and taking all the evidence together including the surrounding circumstances reached a finding that the purchase and sale of shares is not genuine. So far as the decision of the Supreme Court in Vodafone

International Holdings 8. V. v. Union of India [1012] 204 Taxman 408 / 17 taxmann.com 202 is concerned, the Court considered its decisions -in the matters of Me bowell A Co. Ltd. v. Commercial Tax Officer [1985] 154 ITR 48/22 Taxman 11 (SC), Union of India v. Azadi Bachao Andolan [2004] 10 SCC1 and the Mathuram Agarwai v. State of Madhya Pradesh [1999] 8 SCC 667 and concluded that were the transaction is not genuine but a colourable device there could be no question of tax planning. The Supreme Court in the aforesaid case after considering the aforesaid two decisions concluded as follows: "The majority judgment in Mcboweil held that tax planning' may be legitimate Provided it is within ilieframeit 'ark of law'. Para-

45. In i/u later part of Para 45, it held that " Colourable device cannot be a part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods" It is the obligation of every citizen to pay the taxes without resorting to subterfuges". The above observations should be read with para 46 where the majority holds Mon this aspect one of us, Chinappa Reddy, J, has, proposed a separate opinion with which we agree". The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious: methods and subterfuges. Thus, it cannot he said that all lax planning is illegal/illegitimate. Moreover, Redd'y, J. himself says the agrees with the majority. In the judgment of Reddy, J. there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability (Paras 7-10, 17 and 18J. In our view, although Chibnappa Reddy, J. makes a number of observations regarding the need to depart

from the "Westminster[11] and tax avoidance- these are clearly only in the context of artificial and colourable devices. Reading Mcboweil, in the manner indicated hereinabove, in cases of treaty shopping and /or tax avoidance, there is no conflict between Mc Dowell and Azadi Bachao or between McDowell and Mathuram Agarwal."

15. The aforesaid observations of the Supreme Court makes it very dear that a colourable device cannot be a part of tax planning. Therefore where a transaction is sham and not genuine as in the present case then it cannot he considered to be a part of tax planning or legitimate avoidance of tax liability. The Supreme Court in fact concluded that there is no conflict between its decision in the matter of Mcboweil Smt. Kiran Navin boshi ((supra)] Azadi Bachao (supra) and Mathuram Agarwal (supra). In the present case the purchase and sale of shares, so as If a fake long term and short term capital loss found as a matter of fact by ail the three authorities to be a sham. Therefore authorities came to a finding that the same was not genuine. So far as the question Nos. (ii), (Hi) (iv) and (v) are concerned, we hold that these are pure questions of facts and as there are concurrent finding of the authorities below, no question of law arises for this court to interfere.

4.9. *Similarly, in the case of KHANDELWAI, ?RAJ)NG CO. v. ASSISTANT COMMISSIONER OF INCOME-TAX [1996] 55 TTJ 261 (JR.), it was observed and held as under:*

"7. We take up the first contention of Shri Singh vi. It was contended that only gross profit rate should have been applied and the addition should have been to that extent only.

8. Let, us assume that the impugned purchases in this case are bogus—what can be the causes and effects? Either corresponding bogus sales have to be accounted for, or, the closing stock to that extent have to be increased. But if either is done, the very purpose o f entering 'bogus' purchases is defeated. What can be the purpose to enter a bogus purchase in the books, obviously to show lesser profit than actually earned. This in turn could be to bring the gross profit rate to near about the earlier years' performance in order to avoid a deeper probe by the taxing authority dot to avoid paying higher taxes. Thus, when once bogus purchase is entered in the book - without a corresponding sales or increase in stocks, the obvious result would be lowering of g.p. rate. If these bogus purchases Ore removed, the g.p. rate would automatically go up. Under the assumption that the purchases are bogus, one situation "visualized is that there are no corresponding at what rate can be more justifiable than by the bogus purchase itself?

9. Likewise there can be another situation also. The purchase may be bogus and correspondingly there may be a bogus sales also, and since both are bogus, the GP rate is obviously manipulated o affect the overall result. Then, accepting Shri.Sanghvi's contention would further make the accounts bogus. Similarly, there may be many such situations because, accountancy is essentially an art and not a science.

10. The point we are trying to drive home is that when a bogus entry is found in accounts, there cannot be a better solution than a remove that entry. The legitimate way of removing the entry would be, as every student of accountancy would agree,

is to do what has been omitted to be done or undo what has been wrongly done.

Smt. Kiran Navin Doshi

11. Now, so far we were only assuming that the purchases are bogus. Coming to the facts of the case, were the purchases worth Rs. 86,500/-. Really bogus. There is no doubt about it. The investigations got done by the Assessing Officer leave hardly any doubt about it. The failure on the part f the assessee to snow cause strengthens the department 'his stoic' silence of the assesses also blunts the assesses's argument that Shri Hukamchand's statement was recorded at its back. It may have been recorded at its back, but the results thereof were informed to the assessee and that is what the assesses was asked to explain and failed to do so. Thus, now we are not assuming but are concluding that the purchases of Rs. 86,5OO were, in fact bogus. In case of bogus 'mines, in our opinion, what could be the best remedy, has been discussed above. The Assessing Officer has simply done that. We are unable to appreciate- Shri Singhvi's contention. Had there been suppression of safes, probably, depending, on the facts of the case, the addition to the extent of g.p. rate would have been suppression of sales, probably depending on the facts of the case, the addition to the extent of g.p rate would have been sufficient But in case of bogus purchases we do not see a better solution than the one adopted by the Assessing Officer.

12. But what about the quantitative record which is said to have tallied? In the instant case the assessee has maintained the stock register but the same has been test-checked by the Assessing Officer. There is no specific discussion or finding as

regards quantitative tally. However, when in substance the transactions have been proved to be bogus the unverified quantitative tally cannot lead us to conclude otherwise. Under the circumstances of this case, we are not inclined to give much we weightage to this contention of the assessee.

4.10,*Further, in Deoria Oxygen Company v. Commissioner of Income-tax {2007] 180 TAXMAN 427 (ALL.), it was observed and Held as under:*

**40. This leaves us to the question as to whether the Tribunal should have given due regard to the legitimate outgoings in the /arm of the entire purchases, of gas cylinders or not. The principle regarding making of a best judgment; assessment has been well settled by the Apex Court in the case of Dhakeswari Cotton Mills Ltd. v. CIT[1954] 26 ITS 775 wherein the Apex Court has held as follows:-*

"As regards the second contention, we are in entire agreement with the learned Solicitor- General when he says that the Income- tax Officer is no/fettered by technical rules of evidence and pleadings, and that, he is entitled to act on material which may not be accepted as evidence in a court of law, but there the-agreement ends; because it is equally dear that in making the assessment under sub-section (3) of section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make Smt. Kiran Navin Dash/ an assessment without suspicion to support the assessment under section 23(3). 'The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh v, CIT [1944] 12 ITR 393. . . (782).

41. In the present case we find that the Commissioner of Income-tax (Appeals) as also the Tribunal has recorded a categorical, finding of fact that the applicant did not make purchases to the extent he has shown The purchases in question have conclusively been provided to be bogus. If the purchases of the gas cylinders have not been made and on the other hand have been found to be bogus by all the authorities including the Tribunal, the question of legitimate outgoings in the form of purchases of the gas cylinders would not arise. Therefore, the Tribunal was justified in not giving benefit of the alleged amount spent towards the purchases of gas cylinders." 7.18. In Samurai Software (P.) Ltd. v. Commissioner of Income- tax [2008] 299 ITU 324 (RAJ.), it was held as under: "8. The Tribunal considered the matter in paragraph 8 of its order thus: % We have cam fully considered the rival submissions of the parties material available on record purchases totaling to Rs. 4,37,048 were not fund recorded in the seized books of account of the assessee-company. No .surrender was made on behaif of the company by any of the directors of the assessee-company. The surrender was made by Shri Mahesh Toshnimi, one of ' the directors of the company in his individual capacity and not on behalf of the assessee- company add 'the same was considered in his personal assessment. Under the law, the company is a separate juridical person. The surrender made by Shri Mahesh Toshniwai, in his mdmdmi capacity not binding on the assessee-company. -Shri] Mahesh Toshniwai in his personal statements; has nowhere stated that the surrender was made on behalf of the assesses- company. We also find that even in the return filed in response to a notice under section 148, the assessee-company did not include the said amount of bogus purchases. The assessee- company has not

placed any material! as to show that the said purchases, in fact, belong to Shri Mahesh Tashniwal and not the assessee-company. Under these circumstances, we do not find any merit in the plea of the learned authorized representative that since the said amount of purchases has been added in the hands of Shri Mahesh Tashniwal, no addition can be made in the hands of the assessee-company. It is a settled law that the tax has to be levied an the real person. Under these circumstances and Smt. Kiran Navin Doshi keeping in view the decision of the Hon'ble Delhi High Court as relied an by the learned Departmental representative in the case of CIT v. La Media! [2001] 250ITR 575, we are of the view that the assessee-company has debited bogus purchases, in its books of account which the assessee-company could not substantiate and, according^ the. Commissioner of Income-tax (Appeals) was not justified in deleting the addition of Rs 4,57,048, which is directed to be reversed and added in the ., Income of the assessee-company. Consequently, the addition made by the Assessing Officer amounting to 8s. 4,37,048is upheld. The ground taken by the Revenue, is therefore, allowed."

8. *The Tribunal, thus, by its order dated June 10, 2002, set aside the order of the Commissioner of Income-tax (Appeals) and restored the addition of Rs. 4,37,048 in the hands of the appellant-company as was done by the Assessing Officer.*

9. *In so far as the addition of Rs. 4,37,048 in the hands of the appellant company is concerned, we havesatisfied with the reasons given by the Tribunal in paragraph 6 of its order.*

The addition of the amount of Rs. 4,37,048 in the hands of the appellant-company cannot be %. , said to be unjustified."

.11. In the case of Indian Woollen Carpet Factory vs. Income-tax Appellate Tribunal 120023125 TAXMAN 763 (RAJ.) it was held as under:

**If the transactions were genuine and if the parties had migrated somewhere else, their latest addresses should have been supplied and burden was on the assessee to prove the genuineness ' of the transactions, when" the assessee claimed that the purchases were genuine. It was true that no loan had been taken from the parties. The case before the Assessing Officer was H that the assessee claimed some purchases from same parties, whom he could not produce or those parties were not available when the summon under section 131 was issued. Therefore, the Initial dispute was with regard to genuineness of the transaction regarding purchase of wool from me parties the assessee had failed to discharge the onus to prove the genuineness of the transactions were found bogus,*

4.12 In Sanjay Oilcake industries vs. Commissioner of Income-tax 120091 3.16 ITR 274 was held as under.

"12. Thus, it is apparent that both CIT(A) and the Tribunal have concurrently accepted the finding of the AO that the apparent sellers who had issued sate bills were not traceable. That I will received from the parties other than the persons who had issued bills for such goods.

Though the purchases arc shown to Smt. Kiran Navin Doshi have been made by making payments thereof by account payee cheques, the cheques have been deposited. In bank accounts f ostensibly in Me mine of the apparent sellers, thereafter entire amounts have been Withdrawn by bearer firms arid there is no trace or identity of the person withdrawing the amount from the bank accounts. In light of the aforesaid nature of evidence it is not possible to record a different conclusion, different from one recorded by CIT(A) and the Tribunal concurrently holding that the apparent sellers were not genuine, or were acting as conduit between the assesses firm and the actual sellers of the raw materials. Both CIT(A) and the Tribunal ham therefore come to the conclusion that in such circumstances, the likelihood of purchase price being inflated cannot be ruled out and there is no material to dislodge such finding The issue is not whether the purchase price reflected in the books of accounts matches the purchase price stated to have been paid to other persons. The issue is whether the purchase price paid by the assesses is ref fee fed its' receipts' by the recipients. The assesses has, by state of evidence available on record, made if possible for the recipients not being traceable for the purpose of inquiry as to whether the payments made by the assesses have been actually received by the apparent sellers. Hence, the estimate made by the two appellate authorities does not warrant interference. Even otherwise, whether the estimate should be at a particular sum or at a different sum, can never be an issue of law."

4.13. In the case of Assistant Commissioner of Income-tax v Tribhovandas Bhimji Zaveri „ [2000] 74 ITD 92 (MUM.), Hon'ble Mumbai Bench of HAT while dealing with the issue of bogus purchases where similar arguments were advanced to buttress the claim of purchase, held as under:-

*"Considering the number of coincidences involved in the scheme, we are of the view that the entire scheme has been planned and coordinated by the assessee-firm. In the case of Homi Jehangir Gheesta Vs. CIT(1961) the Tribunal can consider probabilities property arising from the facts alleged or proved and by doing so the Tribunal does net indulge in conjectures, surmises or suspicions. The apex Court expressed a similar view in the case of Summati Dayal vs. CIT (1995) 125 CTR (SC) 124 ; (1995) 214 ITR 801 (SC) and held that the decision of an adjudicating body based on surrounding circumstances and human probabilities is not bad in law and deserves to be upheld. In the case of McDowell d Co. Ltd vs. CTO (1985) 47CTR (SC) 126 : (1985) 154 ITR 148 (SC), the apex Court held that colourable devices are not part of legitimate tax planning, Going by the ratio of- these decisions, we are of the view that the assesses firm cannot be dissociated * from the scheme of declaration of gold under the Amnesty Scheme in Smt. Kiran Navin Doshi the names of the family members of the partners of the assesses- firm, as different ,individuals could not have hit Upon the same idea of acquiring gold in the year of account relevant for the asst, yr, 1978-79 and declaring such gold under the Amnesty Scheme and getting the gold valued by the same valuer on the same day and filing their returns under the Amnesty Scheme on the same day, i.e. 30th March, 1987,*

and subsequently getting the gold, the ornaments to the assessee-firm in the same veer of account without the planning, controlling and coordination of a central, agency and that agency in the surrounding circumstances appears to be only the assessee-firm. The apex Court has held in the case of Jarmaprasad Kanhaiyalal (supra) that there is no doubt taxation in faxing the person to whom the income actually belonged with the persons who falsely declared them in their returns filed under the 'Voluntary Disclosure Scheme. That is a risk which an assessee resorting to unfair 'tax saving device's has necessarily to run and an assesses who has resorted to such devices has to thank himself for it.

As regards the issue of cross-examination, in T. Devasahaya Nadar v, CIT {1964] 51 ITR 20 (Mad.), it was held:

'It cannot be hid down as a general proposition of taw that the Income-tax department cannot rely upon any evidence which has not been subjected to cross-examination. An ITO occupies the position of a quasi-judicial Tribunal and is not bound by the rules of the Evidence Act, but he must act in consonance with natural justice, and or such rule is that he should not use any material! against an assessee without giving the assesses an opportunity to meet it He is not bound to divulge the source of his information. There is no denial of natural justice if the ITO refuses to produce an informant for cross- examination though if a witness is examined in the presence of the assessee, the assessee must he allowed to cross-examine him. The range of natural justice is wide and whether or not, .there has been violation of natural justice would depend on the facts and

circumstances of the case."

4.14. ***The Supreme Court had also an occasion to consider the applicability of the principles of natural justice in R.S. Dass v. Union of India AIR 1967 SC 593. Referring to the same, the Supreme Court in Chairman, Board of Mining Examination v. Ranijee AIR 1977 SC 965, inter alia, held as follows:***

Natural justice is no unruly horse, no lurking land mine, nor a judicial cure all. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential procession propriety being conditional by the facts and circumstances of such Smt. Kiran Navin Doshi situation, no breach of natural justice can he complained of. Unnatural expansion of natural justice, without reference to the administrative realities and oilier factors of a given case, can he exasperating. We can neither be financial nor financial but should he flexible yet firm in this jurisdiction.

4.15. ***in GTC Industries Ltd. v. Assistant Commissioner of Income- tax [1998] 65 ITD 380 (BQM), it was held as under:***

"105. In our opinion right to cross-examine the witness who made adverse report, is not an invariable attribute of the requirement of the dictum, 'audi alteram partern The principles of natural justice do not require formal cross- examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence and is the creation of Court. It is part of legal and statutory justice and not a part of natural justice, therefore, it cannot be hid down as a general proposition of law that the

revenue cannot rely on any evidence which has not been subjected to cross-examination. However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross- examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of Collateral Nature."

4.16. *To sum up, I would like to quote the landmark case of State Bank of India v. S.K.Sharma AIR 1996 SC 364 where the Hon'ble Apex Court observed:*

"Justice means justice between the parties. The interest of justice guilty demand. 'that the guilty should be punished and that technicalities and irregularities which d: hut occasion failure of justice are mat allowed to defeat the ends of justice. Principles of natural justice ore but the means to achieve the end of justice. They cannot be perverted to achieve from opposite end,"

4.18. Thus, the AO in this case had provided ad equate opportunities to the r substantiate his case which he failed to do and consequently surrendered the amount at assessment stage. The AO was therefore stopped from making any further inquiries and now retraction at this stage without registering any protest to the wording of the assessment order earlier is not justified."

9. I have carefully considered the finding of the Ld.CIT(A) and the assessment order. The Assessing Officer made addition by observing as under:-

> *"7. During the course of assessment proceedings, A.R. was asked to submit the details with respect to investment made during the year in shares. A.R. filed ail details w.r.t. investment made during the year along with the confirmation. Assesses company failed to produce the confirmation of M/s. Mirzapur Chemical Works Pvt. Ltd. Accordingly, to confirm the genuineness of the transaction, 133(6) was issued to M/s. Mirzapur on its both the addresses, the letter received back unserved, however A.R. send reply from the address of G.A. of M/s. Mirzapur which is not acceptable/tenable. Further to confirm the genuineness of transaction, summons were issued to all the Directors of M/s, Mirzapur u/s 131 of the Act on 20.11.2018 to appear before the undersigned on 26.11.2018, however, on 26.11.2018 C.A. ShrI M.K. Jindai /AR of M/s. Mirzapur Chemicals Works Private Limited attended the office pf the undersigned and filed a letter dated 26.11.2018 stating therein that "all the directors are out of city and wilt not be able to attend the hearing. Accordingly, in the absence of reply received from M/s. Mirzapur Chemical Works Pvt. Ltd. w.r.t*

the investment made and also the Directors of Mirzapur Chemical Works Ltd. were failed to attend the office of undersigned in response to summon issued u/s 131 of the Act. This fact was brought to the knowledge of A.R. and was asked to show cause as to why Rs. 10,00,000/- should not be added to the income of the Assessee. On being confronting on this, vide notesheet entry dated 04.12.2018, A.R. agreed for the addition to buy peace and further litigation in the matter. Accordingly, I hereby add back Rs. 10,00,000/- to the income of assessee for the year under consideration as its unconfirmed investment in shares of M/s. Mirzapur Chemicals Works Pvt. Ltd. u/s 69 of the Act.

(Addition :Rs. 10,00,000/-)

10. From the above finding of the Assessing Authority, it is clear that the addition was made purely on the basis that the Director of M/s Mirzapur Chemicals Works Pvt. Ltd. failed to attend the office of the assessing authority. It is seen that the Authorized Representative had categorically stated before the Assessing Officer that the Directors of M/s Mirzapur Chemicals Works Pvt. Ltd. were out of station. The Assessing Officer had not given other

opportunity to the assessee to support its contention. Under these circumstances, I am of the considered view that the assessee was not provided adequate opportunity by the Assessing Authority. Therefore, the impugned assessment order is set aside and assessment is restored to the file of the Assessing Officer to make it denovo assessment after giving sufficient opportunity to the assessee. Further, the Assessing Officer would also advert to the objections of the assessee against the reopening of the assessment. The grounds raised by the assessee are allowed for statistical purpose.

11. Ground No. 4.1 to 4.3 are against sustaining the addition of Rs. 10 lacs and Ground No. 4.2 to 4.5 are in support of the Ground No. 4.1.

12. As I have already set aside the impugned order in respect of legality of the reopening and providing adequate opportunity to the assessee to the file of the Assessing Officer . This issue is also restored to the Assessing Officer to make a fresh assessment. The grounds raised by the assessee are allowed for statistical purpose.

13. The appeal of the assessee is allowed for statistical purpose.

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 18th January , 2022.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Dated : 18/01/2022

R. N
Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI