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

BEFORE SHRI R.S. SYAL, VICE- PRESIDENT

ITA No.1033/Del/2013
Assessment Year : 2003-04

Kailashpati Overseas Pvt. Ltd., C/o Kapil Goel, Advocate, A-1/25, Sector-15, Rohini, Delhi.	Vs.	ITO, Ward 5(1), New Delhi.

PAN : AAACK1244M

(Appellant) (Respondent)

Appellant by : Shri Kapil Goel &
Shri Mukul Gupta, Advocates
Respondent by: Ms Bedobani, DR

Date of Hearing : 30.05.2017
Date of Pronouncement: 31.05.2017

ORDER

This appeal by the assessee is directed against the order passed by the CIT(A) on 17.01.2013 in relation to the assessment year 2003-04.

2. It is a recalled matter inasmuch as the earlier ex parte order passed by the Tribunal was subsequently recalled on 31.03.2017 for rendering decision on merits.

3. The first issue taken in this appeal is against the initiation of reassessment proceedings.

4. Briefly stated, the facts of the case are that the assessee filed return on 17.11.2003 declaring loss of Rs.6,718/-. The AO issued notice u/s 148 of the Income-tax Act, 1961 (hereinafter also called `the Act') dated 17.03.2010 on the premise that income chargeable to tax had escaped assessment, which was highlighted because of some investigation conducted by the Investigation Wing of the Department on certain persons engaged in providing accommodation entries. The initiation of reassessment was done on the basis of report received from the Investigation Wing that the assessee was the beneficiary of Rs.10 lac through accommodation entries received from M/s S.J. Capital Ltd. Such a view was canvassed on the bedrock of statements on oath u/s 131 of Shri Mahesh Garg of M/s S.J. Capital Ltd., recorded on 10.9.2003 and 22.9.2003, in which he admitted to have been involved in providing accommodation entries. The assessee raised objections against the initiation of reassessment proceedings, which came to be dismissed vide order dated 03.12.2010. Thereafter, the AO issued notice u/s 142(1) read with section

143(2) for proceeding further in the matter. The assessee was supplied a copy of such statements u/s 131 of Shri Mahesh Garg and also an affidavit signed by Shri Mahesh Garg on 06.02.2004 which was filed before the Addl. DIT (Inv.). During the course of assessment proceedings, the assessee was called upon to explain as to why the sum of Rs.10 lac be not added to its income. Summons were issued by the AO u/s 131 to M/s S.J. Capital Ltd., but, the same could not be served as the party did not exist at the given address. The assessee appeared before the AO and filed letter stating that only a sum of Rs.5 lac was received from M/s S.J. Capital Ltd., on account of sale of shares. Shri Naveen Garg, the Director of the assessee company filed copies of statement of account and contract note issued by M/s S.J. Capita Ltd. He was made aware that summons u/s 131 issued to M/s S.J. Capital Ltd. could not be served as the said party did not exist at the given address. He was once again asked to show cause as to why the amount of Rs.5 lac be not treated as unexplained cash credit. The assessee submitted that M/s S.J. Capital Ltd. was a listed stock broker of the Delhi Stock Exchange and, hence, the transaction was genuine. The AO found from the contract note of M/s S.J. Capital Ltd. that the shares of M/s Tarang Distributors were claimed to have been sold to M/s S.J. Capital

Ltd. only. Notice u/s 133(6) was issued to the Delhi Stock Exchange. Vide their reply dated 28.12.2010, it was informed that no trade was recorded through M/s S.J. Capital Ltd. and, further, the shares of M/s Tarang Distributors were not listed on the Stock Exchange. Invoking the provisions of section 68, the AO treated the sum of Rs.5 lac credited in the books of the assessee as unexplained and made addition for the same. The ld. CIT(A) dismissed the assessee's grounds on initiation of reassessment proceedings as well as on merits, against which the assessee has come up in appeal before the tribunal.

5. I have heard the rival submissions and perused the relevant material on record. The first issue raised by the ld. AR is against the initiation of reassessment proceedings. In order to appreciate the rival contentions, it would be apt to take note of the reasons recorded by the AO before issuing notice u/s 148, which are as under:-

> "M/s.Kailashpati Overseas (P) Ltd.
> ASSIT. YEAR 2003-2004
>
> Investigations were conducted by the Investigation wing of the Department on certain persons engaged in providing accommodation entries to beneficiaries of their services, in return of commission. It has been revealed that many persons were using services of accommodation entry operators to channelise their own unaccounted money in their regular books of accounts by routing the same through the accounts of Accommodation entry providers.

2. The modus operandi of these entry providers and beneficiaries of their services, was detected to be as under:

2.1 Entries were being broadly taken for two purposes:

01. To plough back unaccounted black money for the purpose of business or for personal needs such as purchase of assets etc., in the form of gifts, share application money, loans etc.

02. To inflate expenses in the trading and profit and loss account so as to reduce the real profits and thereby pay less taxes.

2.2 The assessees who had unaccounted money (called as entry takers or beneficiaries] and wanted to introduce the same in the books of accounts without paying tax, approached another person (called as entry operator) and handed over the cash (plus commission) and had taken cheques/DDs/POs. The cash was being deposited by the entry operator in a bank account either in his own name or in the name of relative/friends or other person hired by him, for the purpose of opening bank account. In most' of these bank accounts the introducer was the main entry operator and the cash deposit slips and other instruments were filled by him. The other persons (in whose name the A/c is opened) only used to sign the blank cheque book and hand over the same to the main entry operator. The entry operator then used to issue cheques/DDs/Pos in the name of the beneficiary from the same account (in which the cash is deposited) or another account in which funds were transferred through clearing in two or more stages. The beneficiary in turn deposited these instruments in his bank accounts and the money came to his regular books of account in the form of gift, share application money, loan etc through banking channels.

2.3 The operators gave the account holders amounts ranging from Rs 1000 to 2000 per month. These account holders were masons, plumbers, electricians, peons, drivers etc, whose earnings are not sufficient for a living. They earned normally Rs 3 to 5 thousand per month in their normal work and by working for the entry operators earned extra income of Rs 2 to 4 thousand per month. Their signatures were taken on blank gift deeds, cheque books, share application money etc. In fact these persons signed all types of papers they were asked to sign. They were made directors of companies, partners of firms and proprietor of different concerns solely for operation of these accounts. Actually, many of them were not even aware of the tax implications etc. Their only concern was with the few thousand rupees given to them by the entry operators.

3. Summing up, the report as a result of these extensive enquiries carried out by the D.I.T. (lnv.), New Delhi has established the non-genuineness of transactions, whether shown by beneficiaries as inflow of Share Capital or receipt of Gifts or consideration for sale-purchase. The creditworthiness of the persons/persons controlling the concerns who have given these credit entries/share capital/gifts/sale consideration has also not been established as they have been seen to be man of no means.

4. The said report of Investigation wing of the Department, on the investigations conducted in the case of various accommodation entry providers along with the list of the beneficiaries of their services, was forwarded to this office through Addl.CIT, Range-5, vide letter F.No. Addl. CIT/Range-5/2005-06/759, dated 13.3.2006.

5. In the instant case of the assessee, M/s. Kailashpati Overseas (P) Ltd., information has been received that the assessee has taken accommodation entries as noted below:-

Bank of the assessee	Branch of the Bank	Amount	Instrument No.	Date	Credit entry coming from the account of
BOP	PREET VIHAR	500000		7-Jan-03	S J CAPITAL LTD
BOP	PREET VIHAR	500000		7-Jan-03	S J CAPITAL LTD
	TOTAL	1000000			

5.1 Further, enquiries by the Investigation Wing revealed that one Shri MAHESH GARG, Slo Shri R.S. GARG, R/o G-8/94, SEC.15, ROHINI, New Delhi was controlling a number of bank accounts in various names & was using various persons enlisted in his affidavit dated 6.2.04 to operate these accounts. In this regard, statements on oath u/s 131 of the I. T. Act, 1961 of Shri Mahesh Garg was recorded on 10.9.2003 and 22.09.2003 by the Addl. D.I.T. (Inv.), Unit-l, New Delhi. Following is the gist of the statements & letters containing admissions relevant to this case: -

(i) Statements were given on oath by Shri Mahesh …….. Addl. D.I.T. (Inv.), Unit-I, New Delhi on 22.9.2003 in which he has admitted to have indulged in giving entries. He has also

admitted that he is controlling various persons who sign on his behest to provide the accommodation entry.

(ii) Sh. Mahesh Garg in his statement dated 10.9.2003 has elaborated the modus operandi adopted by them in giving accommodation entries in his answer to question 4, 5 and 6.

(iii) Shri Mahesh Garg has admitted that M/s S.J. Capital Ltd., the company which has given accommodation entry in this case was controlled by him and was used for the purpose giving accommodation entries.

6. As per the findings of the investigation report, the creditworthiness of the lenders has not been established and these transactions seem to be non genuine. I therefore have reasons to believe that this amount of Rs. 10,00,000/- represents income of the assessee chargeable to tax which has escaped assessment for A. Y. 2003-04.

Sd/-
INCOME TAX OFFICER,
WARD-5 (1), NEW DELHI."

6. It can be seen from the above reasons recorded by the AO that he received report of Investigation Wing of the Income-tax Department on the investigations conducted in the case of accommodation entry providers, which highlighted certain beneficiaries of their services. Such a list included the name of the assessee as beneficiary of two accommodation entries of Rs.5 lac each. During the course of assessment proceedings, it transpired that, in fact, there was only one entry of Rs.5 lac and the other entry was a duplication of the same. It can be noticed from the Table reproduced in the reasons that though the total has been taken at Rs.10 lac of two separate transactions, but, particulars of both the transactions are

identical. The important thing to be noted is that the column 'Instrument number' in the above Table is blank for both the transactions. The absence of the relevant `instrument number' of the transactions led to the recording of the same transaction twice. In my considered opinion, this fact *per se* cannot invalidate the reassessment proceedings. There is no denial of the fact that the particulars of one transaction, incorporated in the report of the Investigation Wing of the Department as the accommodation entry, absolutely matched with the transaction of Rs.5 lac as recorded by the assessee in its books of account. It goes without saying that if the AO has recorded more than one reasons for initiation of reassessment and the reassessment can be sustained on at least one of such reasons, then no exception can be taken to the initiation of reassessment. As the AO correctly recorded the facts of one transaction, which gave him reason to believe about the escapement of income, though the second one was duplicate, no fault can be found with the AO in initiating the reassessment proceedings.

7. The ld. AR then argued that the mere fact of receipt of report of the Investigation Wing cannot entitle the AO to go ahead with the initiation of reassessment proceedings. In my considered opinion, this contention is

unfounded in the facts and circumstances prevailing in the instant case. It can be seen that the Investigation Wing of the Department carried out investigation on accommodation entry providers. Statement of Shri Mahesh Garg of M/s S.J. Capital Ltd. was recorded by the Addl. DIT (Inv.) in which he admitted to have opened bank accounts in the name of various individuals, firms and companies which were being used for providing accommodation entries. Signed list of such entities was also given by Shri Mahesh Garg. Statements of persons, who were working for him and were shown as directors in many companies controlled by him, were also recorded by the Investigation Wing. Extensive enquiries conducted by the DIT (Inv.) brought to light the racket of accommodation entries and its beneficiaries through share capital, receipt of gifts or consideration for sale purchase. Name of the assessee company found specific mention in such list given by Shri Mahesh Garg during the course of his statement on oath, being receipt of consideration for sale of shares to M/s S.J. Capital Ltd. Under such circumstances, the report of the Investigation Wing coupled with the statement on oath of Shri Mahesh Garg admitting to have provided accommodation entry to the assessee, in my considered opinion, constituted

a tangible material leading to the formation of belief by the AO about the escapement of income by the assessee.

8. The Hon'ble Supreme Court in *Raymond Woolen Mills vs. ITO (1999) 236 ITR 34 (SC)* has held that there should be reason to believe about the escapement of income at the stage of initiation of reassessment proceedings. Sufficiency or correctness of such material cannot be considered at that stage. The Hon'ble Apex Court has held in *ACIT vs. Rajesh Jhaveri Stock Broker (P) Ltd. (2007) 291 ITR 500 (SC*) that : `The word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion'. Explaining the position further, it laid down that : `at the initiation stage, what is required is "reason to believe", but *not the established fact of escapement of income*. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is

so because the formation of belief by the AO is within the realm of subjective satisfaction.'

9. At this stage, it is relevant to take note of the judgment of the Hon'ble Supreme Court in *Phoolchand Bajrang Lal and Anr vs. ITO and Anr (1993) 203 ITR 456 (SC*), in which AO's jurisdiction to initiate reassessment was challenged. Repelling the assessee's arguments, the Hon'ble Supreme Court held that an ITO acquires jurisdiction to reopen assessment under s. 147(a) r/w s. 148 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission of failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In that case, the ITO was held to have rightly initiated the reassessment

proceedings on the basis of subsequent information, which was specific, relevant and reliable.

10. The ld. AR has drawn my attention towards certain decisions in which initiation of reassessment on the basis of report of the Investigation Wing has been held to be invalid. In the like manner, the ld. DR has also brought to my notice certain decisions in which view has been taken in favour of the Revenue. On going through such decisions, it is observed that the predominant view is in favour of upholding the initiation of reassessment proceedings on the basis of the report of the Investigation Wing indicating the receipt of accommodation entries by the assessee.

11. In *Rajat Export Import Pvt. Ltd. vs. ITO (2012) 341 ITR 135 (Del)*, the AO received report from the Investigation Wing made by the DIT (Inv.), indicating that the assessee in that case received accommodation entries. The assessee challenged notice u/s 148 as well as all the subsequent proceedings emanating therefrom. Dismissing the writ petition, the Hon'ble High Court upheld the view point of the Revenue by holding that the material before the AO afforded a live link or nexus to the formation of the *prima facie* belief that income chargeable to tax had

escaped assessment in the assessee's hands and, hence, the reopening of the assessment was declared as valid.

12. Similarly, in *AGR Investment Ltd. vs. Addl.CIT and Anr (2011) 333 ITR 146*, the Hon'ble Delhi High Court upheld the validity of initiation of reassessment proceeding when a specific information was received from the office of the DIT (Inv.) as regards the transactions entered into by the assessee with several companies which had given accommodation entries. It was held that the fresh information received by the AO was a valid material on the basis of which notice u/s 148 was issued.

13. The Hon'ble Delhi High Court dealt with an identical fact situation in *CIT vs. Nova Promoters And Finlease (P) Ltd. (2012) 342 ITR 169 (Del)*, wherein the initiation of reassessment was made on the basis of report of Investigation Wing about the assessee being a beneficiary of accommodation entry. The Hon'ble High Court found that the assessment was reopened on the basis of information received from the investigation wing of the Department about the existence of accommodation entry providers and their "modus operandi" in which the assessee was also found to be involved. Upholding the initiation of reassessment, the Hon'ble High

Court held that : `at the stage of issuing the notice under section 148 the merits of the matter are not relevant and the Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax at escaped assessment'.

14. In *AG Holdings Pvt. Ltd. vs. ITO (2013) 352 ITR 364 (Del)*, the Hon'ble jurisdictional High Court has upheld the initiation of reassessment proceedings under similar circumstances when the assessee therein was beneficiary of some accommodation entries about which the report of Investigation Wing was received by the Assessing Officer.

15. In *CIT vs. Jansampark Advertising and Marketing (P) Ltd. (2015) 375 ITR 373 (Del)*, the assessment was reopened and addition u/s 68 was made on the ground that the assessee was in receipt of accommodation entries. Setting aside the order passed by the Tribunal, the Hon'ble High Court held that the initiation of reassessment was valid.

16. In *Bright Star Syntex Pvt. Ltd. VS. ITO (2016) 387 ITR 231 (Bom),* the AO initiated the reassessment on the basis of some information indicating the assessee as a beneficiary to accommodation entry. The assessee challenged the initiation of reassessment by way of a writ. Dismissing the

petition, the Hon’ble High Court held that at the stage of initiation of reassessment, the AO is not required to have conclusive evidence that income chargeable to tax has escaped assessment. As the reasons recorded for reopening established a link between the material available and the conclusion reached by the AO for reopening the assessment, the Hon’ble High Court refused to interfere by observing that the expression `reason to believe’ cannot be read to mean that the AO should have finally established beyond doubt that income chargeable to tax has escaped assessment.

17. In *Yogendra Kumar Gupta vs. ITO (2014) 366 ITR 186 (Guj)*, the Assessing Officer obtained information contained in the report of DCIT, Central Circle, Calcutta that the assessee therein obtained accommodation entry in the form of loan. The assessee filed writ petition challenging the notice of reopening. The Hon'ble High Court dismissed the petition by holding that there was a live link between the material coming into the possession of the Assessing Officer in the form of report of the Department and the formation of belief about the escapement of income. Relying on the judgment of the Hon'ble Supreme Court in the case of *Phoolchand Bajranglal (supra),* the Hon'ble High Court held that sufficiency of reasons recorded by the Assessing Officer need not be gone into. At this juncture, it

is pertinent to mention that the SLP filed by the assessee against the judgment stands dismissed by the Hon'ble Supreme Court in *Yogender Kumar Gupta vs. ITO (2014) 227 Taxman 374 (SC).*

18. In a very recent judgment of the Hon'ble jurisdictional High Court in *Paramount Intercontinental vs. ITO (2017) 392 ITR 505 (Del),* the initiation of reassessment proceedings has been upheld under similar circumstances.

19. Reverting to the facts of the instant case, it is seen that the AO received information from the Investigation wing about the beneficiaries of accommodation entries, which included the name of the assessee. The information also gave details of the M/s S.J. Capital giving accommodation entry to the assessee. Further, statements of Sh. Mahesh Garg recorded u/s 131 admitting the operation of racket of accommodation entries and also his affidavit in this regard were before the AO. There was a close nexus between report of the Investigation Wing and the formation of belief by the Assessing Officer about the escapement of income of the assessee for the year under consideration. Such information was specific, not general or vague, and referred to transactions entered into by the assessee in its books

of account during the year under consideration. Thus, it is abundantly clear that such a material was sufficient enough for the Assessing Officer to initiate the reassessment. In my considered opinion, no exception can be taken to the view canvassed by the Assessing Officer in initiating the reassessment on this score.

20. The ld. AR raised yet another legal issue challenging the initiation of reassessment proceedings. Referring to the approval of the Addl. CIT to the reasons recorded by the Assessing Officer, it was submitted that the Addl.CIT simply mentioned: "Yes, I am satisfied" which, in his opinion, was insufficient to divulge the application of mind by the Addl.CIT. It was, ergo, prayed that the reassessment be quashed on this score.

21. I am not persuaded to concur with the submission advanced on behalf of the assessee in this regard. It can be seen from the accompanying reasons running into three pages which comprehensively record about the racket operated by entry providers in giving accommodation entries to various assessees. The report of Investigation Wing received by the Assessing Officer clearly brought out the fact of the assessee having received accommodation entry from M/s S.J. Capital Ltd. The reasons

further record that Shri Mahesh Garg of M/s S.J. Capital Ltd. admitted to have given accommodation entries, *inter alia*, to the assessee. It was under such circumstances of the reasons were crying hoarse about the escapement of income, that the Addl. CIT gave his concurrence to the initiation of reassessment by mentioning that he was satisfied. There may be a different situation in which the reasons recorded by the Assessing Officer do not apparently bring out a case of escapement of income. In such circumstances, it becomes obligatory on the part of the Addl. CIT to give the reasons before approving the initiation of reassessment. If, however, the reasons are so patent and glaring and no rational person can admit of a contrary view, the simple remarks given by the Addl. CIT about he being satisfied, cannot be termed as insufficient.

22. Adverting to the facts of the instant case, I find that the Addl. CIT was right in according sanction to the initiation of reassessment with his observations 'Yes, I am satisfied' given in the backdrop of the detailed reasons recorded by the Assessing Officer which were placed before him for approval. I, therefore, hold that the ld. CIT(A) has taken an unimpeachable view in declaring the initiation of reassessment proceedings as valid.

23. Now, I take up the addition on merits. The assessee claimed to have sold shares of M/s Tarang Distributors Pvt. Ltd. to M/s S.J. Capital Ltd. for a sum of Rs.5 lac. The ld. AR, on going through the contract note fairly admitted that the transaction of sale of shares was made to M/s S.J. Capital Ltd. These shares were claimed to have been subscribed to by the assessee company on 17.01.2002 and sold to M/s S.J. Capital Ltd. on 10.12.2002. Both the purchase and sale transactions of 10,000 shares were at Rs.50/- each.

24. The Assessing Officer, on receipt of information about accommodation entry provided by the alleged buyer of the shares (namely, M/s S.J. Capital Ltd.) issued summons u/s 131, but, the same could not be served as the said party did not exist at the given address. The assessee was made aware of it. M/s S.J. Capital Ltd. was controlled by Shri Mahesh Garg, who, in his statement recorded by the Addl. CIT (Inv) admitted to be involved in providing accommodation entries. The list of beneficiaries provided by him also included the name of the assessee. During the course of first appellate proceedings, the assessee contended that it had not received any accommodation entry. The remand report was called for from the Assessing Officer, who reported that one Shri Sanjay Kumar was a dummy

director of M/s S.J. Capital Ltd., who, in his statement along with Shri Trilok Chand Bansal, recorded by the Investigation Wing of the Department in the year 2003, submitted that he was an employee of Shri Mahesh Garg and that further Shri Mahesh Garg himself opened bank accounts in his name and made him to sign blank cheques, blank papers, etc. These facts cast doubt over the genuineness of the transaction.

25. On the other hand, there is an important factor which cannot be lost sight of is that the assessee purchased such shares for a sum of Rs.5 lac in the preceding year on 17.01.2002 and reflected the same in its balance sheet. Such shares were sold in the instant year on 10.12.2002, again, for a sum of Rs.5 lac. In fact, the purchase transaction made in the preceding year has been squared up in the instant year. This factor though supports the genuineness of the transaction, but cannot lead to a positive conclusion about the genuineness of the transaction of sale of shares in the instant year as there is a possibility of shares not having been actually sold. It is more so because Shri Mahesh Garg of M/s S.J. Capital Ltd. himself admitted of providing accommodation entries alone.

26. At this stage, it is relevant to mention that the assessee contended before the Assessing Officer, vide his letter dated 24.02.2010, copy placed at page 61 onwards of the paper book, that cross-examination of Shri Mahesh Garg be allowed to it so as to bring the truth on record. This contention of the assessee was not accepted by the Assessing Officer. Ground no. 3 taken before the ld. CIT(A), again, records that the assessee requested the Assessing Officer for allowing cross-examination of Shri Mahesh Garg which was not allowed. The ld. CIT(A) did deal with this ground in the impugned order.

27. It is the first principle of natural justice that if an adverse material is sought to be applied against the assessee, then, adequate opportunity must be given to him for controverting such material/evidence. If the material to be used against the assessee is a statement of some person and the assessee wants to cross-examine him, it becomes the duty of the Assessing Officer to provide an opportunity to the assessee to cross-examine such person before drawing any adverse inference against the assessee on the basis of such a statement. I find that in the given circumstances the request of the assessee for allowing cross-examination of Shri Mahesh Garg has not been accepted, which the assessee needs to be given.

28. The ld. AR vehemently contended that since no cross-examination was allowed, the addition be deleted. To buttress this contention, the ld. AR relied on the judgment of the Hon'ble Supreme Court in *Andaman Timber Industries VS. Commissioner of Central Excise (2015) 281 CTR 241 (SC)*. This was countered by the ld. DR who also relied on certain judgments of Hon'ble Supreme Court including *ITO VS. M. Pirai Choodi (2011) 334 ITR 262 (SC).*

29. I am more convinced with the arguments of the ld. DR that non-granting of opportunity to cross-examine by the Assessing Officer is an irregularity which can be set right by making good such deficiency and giving opportunity of cross examination. The facts of *Andaman Timber Industries (supra)* are that the statements of two buyers were recorded and on that basis, a show cause notice was served upon the assessee stating as to why the price at which the goods were sold to these customers from the depots may not be the basis for determining the value for the purpose of excise duty. Apart from contesting truthfulness of the statement of these two witnesses, the assessee also contended amongst others: *'that on the same ground, proceedings were taken earlier which resulted in favour of the assessee by the decision of the Tribunal and that decision of the*

Tribunal was accepted as no further appeal was filed by the Department thereagainst.’ It is apparent from the factual position recorded from this case that the earlier reassessment proceedings on the same issue were decided in favour of the assessee by the order of the Tribunal and such decision by the Tribunal was accepted by the Revenue. Since the Department once again sought to revalue the goods for the purpose of excise duty, the Hon'ble Supreme Court held that non-allowing of opportunity of cross-examination was fatal to the proceedings. These observations of the Hon'ble Supreme Court are required to be seen in the context in which these were made, namely, the earlier proceedings taken against the assessee on the same ground were decided by the Tribunal in the assessee’s favour which had attained finality. It is found that the facts of the instant case are entirely different. It is not a case in which the earlier reassessment was settled in the assessee’s favour and the Department sought to reopen the assessment once again on the same reasons.

30. At this stage, it is significant to mention that there is no dearth of judgments from various courts including the Hon'ble Apex Court in which the matter has been restored for making good the deficiency of the earlier

non-granting of opportunity of hearing to the assessee. The orders have not been quashed on this score.

31. In *Guduthur Bros. vs. ITO (1960) 40 ITR 298 (SC)*, the appellants failed to furnish return within the prescribed time and the ITO proceeded to impose penalty without affording a hearing. The AAC set aside the order imposing penalty and directed refund of any penalty that might have been recovered. On receipt of the AAC's order the ITO issued a further notice calling upon the appellants to appear before him so that he might be given opportunity of being heard. The apex Court was called upon to determine whether it was open to the ITO to take up the matter at the point at which the illegality supervened and to correct the proceedings or vitiate the proceedings. It was held that the notice issued to the appellants to show cause as to why the penalty should not be imposed on them, did not cease to be operative because the AAC pointed out an illegality which vitiated the proceedings after they were lawfully initiated. It was further held that the ITO was well within his jurisdiction to continue the proceedings from the stage at which the illegality had occurred and to assess the appellants to a penalty, if any, which the circumstances of the case may require. It is pertinent to note that this judgment was given by a Bench comprising of

three Judges, whereas the judgment in *Andaman Timber Industries (supra)* was rendered by a Bench comprising of two Judges and further the case of *Guduthur Brothers (supra)* was not brought to the notice of the Hon'ble apex Court. Similar view was taken by the Hon'ble Summit Court in the case of *Kapurchand Shrimal vs. CIT ((1981) 131 ITR 451 (SC).*

32. In *CIT vs. Jai Prakash Singh (1996) 219 ITR 737 (SC)* a return was filed voluntarily by one out of ten legal representatives disclosing entire income of deceased. The assessment was completed in this case when the legal representative complied with the notices under ss. 142(1) and 143(2). Later on an objection was raised for the first time in the appeal that the notice had not been issued to the other legal representatives, and it was claimed that the assessment so made should be held to be null and void. The Hon'ble Supreme Court held that an omission to serve notice or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where such liability is created by distinct substantive provisions. It was further laid down that any such omission or defect may render the order irregular, depending upon the nature of the provision not complied with but certainly not void or illegal. The broad principles that emerge from the judgments of the Hon'ble

Supreme Court as noted above are that an irregularity is a deviation which does not take away the foundation or the authority for the proceedings, whereas the nullity is a proceeding which is taken without any foundation. A proceeding is a nullity when the authority taking up the proceeding has no jurisdiction. The test to determine whether the order passed is invalid or irregular, is to see whether order is for lack of jurisdiction or procedural fault. In the case of a total lack of jurisdiction, any order passed by an authority can be null and void but when the jurisdiction is improperly or irregularly exercised, the order does not become void *ab initio*. The defect in procedure will not ordinarily amount to lack of jurisdiction. Any procedural omission or irregularity in observing those provisions in a given case, would not render the assessment void. The lapse or omission on the part of the AO has no impact on his jurisdiction to pass a valid assessment order after correcting the infirmity and thereafter to effect the final assessment order. It is always open to the concerned authority to take up the matter at the point at which the illegality supervened to correct those proceedings. Sec. 142(3) provides that the assessee shall be given an opportunity of being heard in respect of any material gathered on the basis of any enquiry and proposed to be utilised for the purpose of assessment.

The provisions of s. 142(3) fall in Chapter XIV which bears the caption "Procedure for assessment". It thus comes out that the provisions of s. 142(3) are only procedural in nature and part of the assessment proceedings. Any non-compliance with this will be an irregularity to be cured from the point from where it had occurred. In the case of *Bhagwat Prasad vs. CIT (1998) 232 ITR 480 (All)*, it was held as under :

> "Assessment order which was made in violation of the requirements of s. 144B otherwise also in breach of the principles of natural justice suffered from a procedural irregularity which was curable."

33. The Hon'ble Apex in an identical fact situation in *ITO VS. M. Pirai Choodi (2011) 334 ITR 262 (SC)* came across a situation in which opportunity to cross examine witness was not allowed by the AO. The Hon'ble High Court quashed the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the assessee. Setting aside this view, the Hon'ble Supreme Court in judgment rendered by three judges held that the High Court should have directed the AO to grant an opportunity to the assessee to cross-examine the concerned witness rather than quashing the assessment. Similar view has been taken by the

Hon'ble Apex Court in *Supdt. (Tech) Central Excise VS. Pratap Rai (1977) 114 ITR 231 (SC).*

34. Taking into consideration the entire conspectus of the case, I am of the considered opinion that there is no force in the argument of the ld. AR that the assessment be quashed for not providing the assessee an opportunity of cross examining Sh. Mahesh Garg. This being a procedural irregularity, is directed to be made good by the AO by allowing the assessee an opportunity to cross examine Shri Mahesh Garg.

35. In the result, the appeal is allowed for statistical purposes.

The decision was pronounced in the open court on 31st May, 2017.

Sd/-

(R.S. SYAL)
VICE PRESIDENT

Dated:31st May, 2017.
dk
Copy forwarded to

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

Dy. Registrar, ITAT, New Delhi