IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

BEFORE SRI G.D. AGARWAL, HON'BLE VICE PRESIDENT
SRI C.M.GARG, JUDICIAL MEMBER

ITA No. 7/Del./2013 : Asstt. Year : 2005-06

Suresh M. Bajaj R-898, New Rajinder Nagar New Delhi	Vs	ITO Ward – 33(4) New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AADPB7622G		

Assessee by : Sh. P.C.Yadav, J.M
Revenue by : Sh. Anima Barnwal, Sr. DR

Date of Hearing : 04.02.2016		**Date of Pronouncement : 19.02.2016**

ORDER

PER C.M.Garg, J.M.

This appeal has been preferred by the assessee against the order of the CIT(A)-XXVI, New Delhi dated 26.10.2012 passed in first appeal no. 254/2009-10 for AY 2005-06.

2. The grounds raised by the assessee read as under :

"1. That the order of the Learned Commissioner of Income-Tax (Appeals) is against facts and law.
2. That the learned Commissioner of Income-tax (Appeals) is not justified in confirming the action of re-opening of assessment under section 147/148 of the Income-tax Act, 1961.
3. That the learned Commissioner of Income-tax (Appeals) is not justified in confirming the addition of Rs. 2,47,468."

Legal Ground no. 1 & 2

3. We have heard arguments of both the sides and carefully perused the relevant materials placed on record before us. The Ld. Counsel of the assessee pointed out that in the reason recorded the AO did conducted any examination or verification from the assessment records to form a prima facie believe to assume valid jurisdiction for action and notice u/s 148 of the Income Tax Act, 1961 (for short the Act). The Ld. Counsel vehemently pointed out that the AO proceeded to take action u/s 147/148 of the Act in a mechanical manner and without application of mind to the details received from AR data. The Ld. Counsel has also placed his reliance on the various decisions including decision of Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs. G & G Pharma dated 8.10.2015 in ITA no. 545/2015.

4. Replying to the above the Ld. DR supported the action of the AO and contended that the assessee incurred huge expenditure through credit card during relevant period and hence, the AO rightly formed no valid opinion and he had reason to believe that income has escaped assessemtn for this period pertains to huge expenses incurred through credit card.

5. On careful consideration of above rival submissions of both the sides at the outset, we find it appropriate to reproduced impugned reasons recorded by the AO, which reads as follows :

"INCOME TAX OFFICER
WARD 33(4), NEW DELHI

REASONS FOR REOPENING THE ASSESSMENT
U/S 147/148 OF THE I.T.ACT, 1961 FOR A.Y. 2005-06

Name of the assessee Sh. Suresh M. Bajaj,
A.Y. 2005-06
PAN AADPB7622G

On the basis of information based on AIR data of 2004-05 (A.Y. 2005-06) it has been noticed that the assessee sh. Suresh M. Bajaj r/o R-898, New Rajinder Nagar, New Delhi incurred the expenditure through credit card, the details of which are given herebelow:

Transaction Date	Txn. Code	Transaction amount
31.3.2015	Credit Card	Rs. 2,47,468/-

Since the expenditure of Rs. 2,47,468/- incurred by the assessee through credit card remained unexplained, I have, therefore, reasons to believe that income to the tune of Rs. 2,47,468 has escaped assessment because the assessee has failed to disclose full and true particulars of his income.

Issue notice u/s 148 of the I.T.Act, 1961.

Sd/-
(RANJIT ISSAR)
INCOME TAX OFFICER
WARD 33(4), NEW DELHI"

6. From the reasons recorded it is apparent that the AO proceeded to initiate proceedings and to issue notice u/s 147/148 of the act on the basis of AIR information and without verifying the same from the relevant assessment record of the assessee wherein the assessee filed copies of the letters submitted to the DCIT, Banglore on 8.10.2007 in reply to notice u/s 142(1) of the Income Tax Act, 1961(for short the Act) dated 15.9.2007 wherein the assessee informed that the payments are made out of his current account in the name of Mohan Brothers which is debiter to his personal A/c in the firm M/s. Mohan Brothers. The Ld. AR has not disputed that copies of these notices and reply of the assessee to DCIT Banglore was placed on record during original assessment proceedings.

7. In the light of above noted facts it is amply clear that the AO proceeded to take action and to issue notice u/s 148 of the Act without application of mind in a mechanical manner which is not a valid assumption of jurisdiction to issue notice u/s 148 of the Act. AT this point, we respectfully take note of the dicta

laid down by Hon'ble High Court of Delhi in the case of CIT vs. G& G Pharma (Supra) wherein their lordship held as under :

"7. Mr. Sawhney, has placed extensive reliance on the decision dated 21st March 2012 passed by this Court in ITA No. 643 of 2011 (***CIT v. India Terminal Connector System Ltd.)*** where, according to Mr. Sawhney, in similar circumstances, the appeal of the Revenue was allowed and the matter was remanded to the ITAT for examination of the case on merits. He also relied upon the decision of the Supreme Court in ***Phool Chand Bajrang Lal v. Income-tax Officer (1993) 203 ITR 456 SC***. The main thrust of the submission of Mr. Sawhney is that, as was in the case of ***India Terminal Connector System*** (*supra*), in the present case as well, there was specific information regarding the name of the entry provider, the date on which the entry was taken, the cheque details as well as the amount credited to the account of the Assessee. He accordingly submitted that this by itself constituted sufficient material for the AO to form an opinion that the "assessee company has introduced his own unaccounted money in its bank account by way of accommodation entries".

8. Mr. Kapil Goel, learned counsel for the Assessee, placed reliance on other decisions of this Court including ***CIT v. Pradeep Kumar Gupta (2008) 303 ITR 95***; the decision dated 27th March 2015 in W.P.(C) No. 5330 of 2014 (***Krown Agro Foods Pvt. Ltd. v. ACIT***); the decision dated 4th August 2015 in ITA No. 486 of 2015 (***CIT v. Shri Govind Kripa Builders P.Ltd.***) and the decision dated 24th August 2015 in ITA No. 226 of 2015 (***CIT v. Ashian Needles Pvt. Ltd.***)

9. The Court at the outset proposes to recapitulate the jurisdictional requirement for reopening of the assessment under Section 147/148 of the Act by referring to two decisions of the Supreme Court. In ***Chhugamal Rajpal v. SP Chaliha (1971) 79 ITR 603***, the Supreme Court was dealing with a case where the AO had received certain communications from the Commissioner of Income Tax showing that the alleged creditors of the Assessee were "name-lenders and the transactions are bogus." The AO came to the conclusion that there were reasons to believe that income of the Assessee had escaped assessment. The Supreme Court disagreed and observed that the AO "had not even come to a prima facie conclusion that the transactions to which he referred were not genuine transactions. He appeared to have had only a vague felling that they may be '"bogus transactions'." It was further explained by the Supreme Court that:

> "Before issuing a notice under S. 148, the ITO must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under S. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of cl. (a) or cl. (b) of S. 147 are satisfied, the ITO has no jurisdiction to issue a notice under S. 148."

The Supreme Court concluded that it was not satisfied that the ITO had any material before him which could satisfy the requirements under Section 147 and therefore could not have issued notice under Section 148.

10. In ***ACIT v. Dhariya Construction Co.(2010)328 ITR 515*** 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 under s. 147 of the IT Act, 1961. The AO has to apply 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."

11. The above basic requirement of Sections 147/148 has been reiterated in numerous decisions of the Supreme Court and this Court. Recently, this Court rendered a decision dated 22nd September 2015 in ITA No. 356 of 2013 (***Commissioner of Income Tax II v. Multiplex Trading and Industrial Co. Ltd.***) where the assessment was sought to be reopened beyond the period of four years. This Court considered the decision of the Supreme Court in ***Phool Chand Bajrang Lal v. Income-tax Officer*** (*supra*) as well as the decision of this Court in ***M/s Haryana Acrylic Manufacturing Co. (P) Ltd. v. CIT 308 ITR 38 (Del)***. The Court noted that a material change had been brought about to Section 147 of the Act with effect from 1st April 1989 and observed: "29. It is at once seen that the Amendment in Section 147 of the Act brought about a material change in law w.e.f. 1st April, 1989. Section 147(a) as it stood prior to 1st April 1989 required the AO to have a reason to believe that (a) the income of the Assessee has escaped assessment and (b) that such escapement is by reason of omission or failure on the part of the Assessee to file a return or to disclose fully and truly all material facts necessary for his assessment for that year. After the Amendment, only one singular requirement is to be fulfilled under Section 147(a) and that is, that the AO has reason to believe that income of an Assessee has escaped assessment. However, the proviso to Section 147 of the Act provides a complete bar for reopening an assessment, which has been made under Section 143(3) of the Act, after the expiry of four years. However, this proscription is not applicable where the income of an Assessee has escaped assessment on account of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. Thus, in order to reopen an assessment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty. It is in the aforesaid context that this Court in *M/s Haryana Acrylic Manufacturing Co. (P) Ltd.* (*supra*) explained that the ratio of the decision in *Phool Chand Bajrang Lal* (*supra*) may not be entirely applicable since the same was in respect of Section 147(a) as it existed prior to the amendment."

12. In the present case, after setting out four entries, stated to have been received by the Assessee on a single date i.e. 10th February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated: "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has introduced its own unaccounted money in its bank account by way of above accommodation entries." The above conclusion is unhelpful in understanding whether the AO applied his mind to the

materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the Assessee, which must have been tendered along with the return, which was filed on 14th November 2004 and was processed under Section 143(3) of the Act. Without forming a *prima facie* opinion, on the basis of such material, it was not possible for the AO to have simply concluded: "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO must apply his mind to the materials in order to have reasons to believe that the income of the Assessee escaped assessment is missing in the present case.

13. Mr. Sawhney took the Court through the order of the CIT(A) to show how the CIT (A) discussed the materials produced during the hearing of the appeal. The Court would like to observe that this is in the nature of a post mortem exercise after the event of reopening of the assessment has taken place. 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 AO has to, applying his mind to the materials, conclude that he has reason to believe that income of the Assessee has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analysing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity ."

8. At this stage, we also find it appropriate to consider preposition laid down by Hon'ble High Court of Delhi in the case of CIT vs. Orient Craft Ltd. reported as 354 ITR 536 (Del), as relied by the ld. AR, wherein it was held thus :

> *"The argument of the revenue thatg an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (Supra) would also appear to be self-defeating, because if an "Intimation"is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation was earlier issued under section 143(3) and another applicable where an intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to*

believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do nto meet the standards set in the various judicial pronouncements."

9. When we logically analyse the facts of the case, specially averments of the AO in the reasons recorded, then we note that in the operative paragraph the AO has held that "since the expenditure of Rs. 2,47,468/- were incurred by the assessee through credit card remained unexplained, I have reason to believe that income to the tune of Rs. 2,47,468/- has escaped assessment". This conclusion of the AO is factually baseless as this issue was posed to the assessee by DCIT, Banglore replying to his notices and the ld. DR has nto disputed that copies of the said notices and reply was filed before the AO on the assessment record. In this situation it was on the AO to peruse the relevant assessment record of AY 2005-06 which forming reason to believe and thus it is safely presumed that the AO initiated reassessment proceedings u/s 147 of the Act and issued notice u/s 148 of the Act without application of mind working in a mechanical manner and thus the same are not sustainable in the facts and on law.

10. Respectfully following the dicta laid down by jurisdictional High Court in the case of CIT vs. G & G Pharma (Supra) we are inclined to hold that the AO issued notice u/s 148 of Act on the wrong and invalid assumption of Jurisdictional and all subsequent proceedings is pursuance thereto can't be held as sustainable and valid hence, the same deserve to be quashed and we quash the same. It is ordered accordingly. Accordingly, legal ground no. 1 & 2 of the assessee are allowed.

11. Since, we have quashed notice u/s 148 of the Act as well as reassessment order passed in pursuant thereto u/s 143(3) u/s 147 of the Act the ground no. 3 of the assessee on merit become sacademic and infructuous and we dismiss the same being infructuous without any delibration on merits.

12. In the result, appeal of the assessee is allowed on legal grounds.

Order Pronounced in the Court on 19/02/2011.

Sd/-	Sd/-
(G.D.Agarwal)	**(C.M.Garg)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 19/ 02/2016
Binita
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)

		Date	Initial	
1.	Draft dictated on	08.02.2016		
2.	Draft placed before author	08.02.2016		
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			PS/PS
6.	Kept for pronouncement on	19.02.2016		PS
7.	File sent to the Bench Clerk	19.02.2016		PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			