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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **ITA 545/2015**

PR. COMMISSIONER OF INCOME TAX-4 ..... Appellant

Through: Mr.Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

G & G PHARMA INDIA LTD ..... Respondent

Through: Mr. Kapil Goel, Advocate.

CORAM:
DR. JUSTICE S.MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

O R D E R

% 08.10.2015

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') is directed against the order dated 9th January 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3149/Del/2013 for the Assessment Year ('AY') 2003-04.

2. The issue sought to be projected by the Revenue is whether the ITAT was correct in holding that the Assessing Officer ('AO') has not applied his mind and not come to an independent conclusion that he has reason to believe that the income of the Assessee has escaped assessment which was the jurisdictional requirement for reopening of the assessment under Section 147/148 of the Act.

3. The Assessee filed its return on 14th November 2004 at Rs.1,190/- which was processed under Section 143(3) of the Act on 1st March 2004. Thereafter, on the basis of information received from the Directorate of Investigation, the AO issued notice under Section 148 of the Act to the Assessee on 19th March 2010 i.e., more than six years after the assessment. The AO made various additions and completed the assessment at Rs.55,50,1801. The Appeal of the Assessee was dismissed by the Commissioner of Income Tax (Appeals) [CIT (A)] by order dated 30th August 2011.

4. The Assessee's further appeal was allowed by the ITAT by the impugned order dated 9th January 2015. The ITAT set out in the impugned order the reasons recorded by the AO for the reopening of the assessment by the AO by the letter dated 15th September 2010, and came to the conclusion that, apart from making a mere reference to information received from the investigation wing, the AO mechanically issued notice under Section 148 of the Act, without coming to an independent conclusion that he has reason to believe that the income has escaped assessment during the AY in question.

5. When this appeal was first listed on 7th August 2015, the Court enquired from Mr. Kamal Sawhney, learned Senior Standing counsel for the Revenue, whether he could produce the materials on the basis of which the assessment was reopened. He sought and was granted three weeks time for this purpose. The matter was next listed on 10th September 2015 when on account of the fact that the date had been wrongly noted by the learned Standing counsel , the case was adjourned for today. It was made clear on 10th September 2015

that the order dated 7th August 2015 must be complied with positively before the next date of hearing.

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

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 .

14. In the circumstances, the conclusion reached by the ITAT cannot be said to be erroneous. No substantial question of law arises.

15. The appeal is dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 08, 2015
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