आयकर अपीलीय अधिकरण नई दिल्ली 'एफ' न्यायपीठ, नई दिल्ली
IN THE INCOME TAX APPELLATE TRIBUNAL,
NEW DELHI 'F' BENCH, NEW DELHI

श्री सी एम गर्ग**, न्यायिक सदस्य एवं श्री एन. के. बिलइया, लेखा सदस्य के समक्ष**
BEFORE SHRI C.M.GARG, JUDICIAL MEMBER AND
SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.132/Del/2018
निर्धारण वर्ष / Assessment Year: 2009-10

Pioneer Town Planners Pvt. Ltd., E-104, Greater Kailash Enclave, Part-I, New Delhi. **[PAN: AAECP 6502F]** **(अपीलार्थी/Appellant)**	**Vs.**	Dy. Commissioner of Income Tax, Circle-19(2), New Delhi. **(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Assessee by	**:**	Shri Suresh K. Gupta, C.A,
प्रत्यर्थी की ओर से /Revenue by	**:**	Smt. Parmita Tripathy, CIT(DR)
सुनवाई की तारीख/Date of Hearing	**:**	09-05-2018
घोषणा की तारीख /Date of Pronouncement	**:**	06-08-2018

आदेश /ORDER

PER C.M.GARG, JUDICIAL MEMBER:

This appeal has been filed by the Assessee against the order of Commissioner of Income Tax (Appeals)-38, New Delhi ('CIT(A)' for short) dated 22.12.2016 for the Assessment Year (A.Y) 2009-10 passed under section 143(3) of the Income Tax Act, 1961 (for short 'the Act').

2. The grounds raised by the Assessee read as follows:

> 1. *That the impugned order of the Ld. Commissioner of Income Tax (Appeals) [hereinafter refer to Ld. CIT (A)] dated 18.09.2017 is bad in law and on facts.*

2. *The Impugned orders of authorities below need be set aside as the reassessment proceedings have been initiated without obtaining a subjective satisfaction by the Pr CIT Delhi-7, New Delhi as the approval u/s 151 is mechanical and without application of mind.*

3. *The reassessment proceedings initiated by the Ld. AO is based on the information received from investigation wing and there was no material before him to substantiate the allegation contained in the information and therefore intiation of proceedings is bad in law.*

4. *The order under appeal is bad in iaw as the assessing officer has passed the order of assessment u/s 143(3) r.w. 147 of the Act without issuing notice u/s 143(2) of the IT Act.*

5. *That the order of the Ld. CIT (A) deserves to be set aside as the assessee was not allowed adequate opportunity of being heard.*

6. *That the order passed by the Ld. CIT (Appeals) under section 250 of the Income Tax Act,1961 is bad in law and not justified because Ld. CIT (A) has dismissed the appeal simply on account of non-prosecution of the appeal by the appellant without appreciating the judgment of Hon'ble Bombay High Court in case of CIT (Central) Nagpur vs. Premkumar Arjundas Luthra (HUF), [2016] 69 taxmann.com 407 (Bombay), where it has been held that law does not empower Ld. CIT (A) to dismiss the appeal for non-prosecution.*

7. *That the order passed by the Ld. CIT (A) u/s 250 of the Act is perverse to the provisions of the law and to the facts of the case, because of not following the provision of section 250(6) of the Income Tax Act, 1961 which states that order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.*

8. *That the addition of Rs. 10,49,00,000/- u/s 68 of the Act has been made by the Ld. Assessing officer and confirmed by the Ld. CIT(A) ignoring the fact that in absence of enquiry by the AO on basis of the evidences furnished, the consequent order need be set aside.*
9. *The Ld.CIT(A) has erred both in law and on facts in confirming addition of Rs.31,47,000/- ignoring the fact that the above addition is based on conjectures and surmises and there was no material before the AO to support the above addition.*

Application of the assessee for admission of additional ground:

3. By way of this application the assessee prayed for admission and adjudication of additional ground which reads as follows*:*

> *"That on facts and in law, the impugned order of assessment is invalid and unsustainable in law as the same has been passed by the AO without providing the reasonable time of four weeks for taking remedy against the order of disposal of preliminary objection against the incorrect assumption of jurisdiction by the AO u/s. 147 in violation of principles enunciated by Bombay High Court in the case of Asian Paints Ltd. 296 ITR 90."*

4. On said application, we have heard the arguments of both sides and carefully perused the relevant material placed on the record of the Tribunal. The ld. Assessee's Representative (AR) submitted that the additional ground is a pure legal grounds and such ground can be raised by the assessee at any appellate stage. For this proposition, the reliance is also placed on the decision of the Hon'ble Supreme Court in the case of *National Thermal Power Corporation Ltd. vs. CIT 229 ITR 383 (SC),* which rendered a proposition that the assessee is entitled to urge additional ground at any stage provided the ground raised emanates from the order under appeal and for adjudicating the ground no fresh evidences are required to adduced. The ld. AR finally submitted that in the interest of justice additional ground, which is only an elaboration of ground No.4, may kindly be admitted for adjudication.

5. The ld. Departmental Representative (DR) submitted that the additional ground cannot be raised before the Tribunal at this belated

stage. However, he could not controvert the fact that the assessee is challenging initiation of reassessment proceedings and consequent orders before the authorities below and the additional ground is a legal ground on the same legal contentions of the assessee.

6. On careful consideration of above rival submissions, we are of the view that from the grounds of the assessee raised in Form No.35 and 36, it is apparent that the assessee is challenging validity of reopening and initiation of reassessment proceedings continuously during assessment and first appellate proceedings and the additional ground sought to be raised is also pertaining to the same legal contention of the assessee. This ground being legal ground may be decided on the basis of material and document already on record and no fresh evidence or document is required to be adduced. Therefore, respectfully following ratio of the decision of Hon'ble High Court of in the case of *National Thermal Power Corporation Ltd.* (supra) the additional ground of the assessee is admitted for hearing. Application for admission and consideration of additional ground is allowed.

Ground No.2, 3, 4 & additional ground of the assessee:

7. Apropos these legal grounds, we have heard the arguments of both sides and carefully perused the relevant material placed on the record of the Tribunal. As agreed by both the parties, we have heard

argument of both the sides on these legal grounds of the assessee, wherein the assessee has challenged to the initiation of reassessment proceedings and reopening of assessment u/s. 147/148 of the Act. The ld. AR submitted that the impugned order of assessment is invalid and unsustainable in law as the same has been passed by the AO without providing the reasonable time of four weeks for taking remedy against the order of disposal of preliminary objection against the incorrect assumption of jurisdiction by the AO u/s. 147 of the Act in violation of principles enunciated by Bombay High Court in the case of *Asian Paints Ltd. 296 ITR 90*. He further submitted that the Impugned orders of authorities below need be set aside as the reassessment proceedings have been initiated without obtaining a subjective satisfaction by the Pr. CIT Delhi-7, New Delhi as the approval u/s 151 is mechanical and without application of mind.

8. The ld. AR vehemently pointed out that the reassessment proceedings initiated by the Ld. AO is based on the information received from investigation wing and there was no material before him to substantiate the allegation contained in the information and therefore initiation of proceedings is bad in law. He also contended that the order under appeal is bad in law as the assessing officer has passed the order

of assessment u/s 143(3) r/w. s. 147 of the Act without issuing notice u/s 143(2) of the IT Act.

9. The ld. AR drew our attention towards copy of proforma of obtaining approval u/s. 151 of the Act along with reasons recorded, which are placed at pgs. 16-18 of the assessee's paper book, submitted that in column 12 Addl. CIT has granted approval without application of mind by writing only 'Yes, I am satisfied'. The ld. AR submitted that as per decision of Hon Madhya Pradesh High Court in the case of *CIT vs. M/s. S. Goyanka Lime and Chemicals Ltd. 231 Taxman 0073 (MP),* where the Joint Commissioner recorded satisfaction in mechanical manner and without application of mind to accord sanction for issuing notice u/s. 148 of the Act and has only recorded so "Yes, I am satisfied" then, the reopening assessment has to be held as invalid. The ld. AR also placed reliance on the decision of ITAT, Delhi in the case of *ITO vs. Virat Credit & Holdings Pvt. Ltd. in ITA No.89/Del/2012 dated 09.02.2018.* The ld. AR submitted that as per decision of Hon'ble High Court of Bombay in WP (L) No.3063/2017 in the case of *Smt. Kalpana Shantilal Haria vs. ACIT dated 22.12.2017*, sanction for issuing a reopening notice cannot be mechanical but has to be on due application of mind. Sanction accorded despite mention of non-existent section in the notice is prima facie evidence of non-application of mind on the part

of the sanctioning authority. Their lordship in this judgment categorically held that such defect cannot be cured u/s. 292B of the Act.

10. The ld. AR placed reliance on the decision of Hon'ble High Court of Delhi dated 31.08.2017 in WP(C) No. 614/2014 in the case of *Yum! Restaurants Asia Pte Ltd. vs. DDIT* it was held that the glaring mistakes in the proforma for approval is the valid ground for quashing the assessment on the premise of non-application of mind by all the authorities involved in the process of recording reasons and providing satisfaction/s. 151 of the Act. Further placed reliance on the decision of ITAT, Mumbai in the case of *GTL Ltd. vs. ACIT reported in 37 ITR (Trib.) 0376 (Mum.)*, notice u/s. 148 of the Act does not mention the fact that the same is issued after the satisfaction of the authority u/s. 151 of the Act, such non-mentioning of this fact renders the consequent assessment invalid in law, Relied on the judgment of *DSJ Communication vs. DCIT 222 Taxman 129 (Bom.)*.

11. On the issue of validity of reopening and initiation reassessment proceedings u/s. 147 of the Act the ld. AR also pointed out that as per ratio of the decision of Hon'ble Bombay High Court in the case of *Asian Paints Ltd. 296 ITR 90 (Bom)*, the AO to wait for four weeks to begin assessment after disposing of the objection and non-compliance of the same renders assessment proceedings void. He submitted that in the

present case the objections of the assessee vide dated 29.11.2016 filed before the AO were disposed of/dismissed by the AO by the order dated 12.12.2016 and he passed impugned reassessment order u/s. 143(3) r/w s. 147 of the Act on 22.12.2016 which is clear violation of directions given by Hon'ble High Court in the case of *Asian Paints* (supra) and on this count also reassessment proceedings and consequent orders are void and thus, bad in law. This view was again approved by Hon'ble High Court of Bombay itself in the subsequent decision in the case of *Aroni Commercials Ltd. vs. DCIT reported in 362 ITR 403 (Bom)* and followed by ITAT, Bombay in the case of *Shri Hirachand Kanuga vs. DCIT in ITA No.4261 & 4262/2012 dated 27.02.2015.*

12. On these submissions, the ld. DR could not controvert the facts that the AO disposed of objections of the assessee by way of passing order on 12.12.2016 and impugned reassessment order u/s. 143(3) r/w s. 147 of the Act was passed only after 10 days of disposal of objections. These facts trigger the ratio of the decision of Hon'ble Bombay High Court in the case of *Asian paints* (supra), wherein their lordship directed that the AO to wait for four weeks to begin assessment after disposing of the objections of the assessee and non-compliance the same renders assessment proceedings void and bad in law. Present impugned reassessment order cannot be held sustainable and

valid as the AO has passed the same immediately after 10 days of disposal of/dismissal of objection of the assessee which is clear violation of direction of Hon'ble High Court of Bombay in the case of Asian paints (supra) and legal contention of the assessee on this issue are found to be acceptable and we hold so.

13. The ld. AR drew our attention towards reasons recorded and submitted that there is no date in the reasons recorded which shows casual approach of the AO while recording the reasons. The ld. AR submitted that as per decision of Hon'ble Jurisdictional High Court of Delhi in the case of *PCIT vs. Meenakshi Overseas P. Ltd.* 395 ITR 677 (Del) if the reasons failed to demonstrate the link between the tangible material and formation of the reasons to believe that the income has escaped assessment then, it would amount to borrowed satisfaction and it has to be presumed that there is no independent application of mind by the AO to the tangible material which forms the basis of the reason to believe that income has escaped assessment. The ld. AR submitted that from the three pages of reasons recorded, it is discernable that in first four paras the AO has noted facts of the information received from DDIT (investigation), Faridabad, in para 6 *modus operandi* of entry providers has been noted thereafter, in para 7 & 8, it has been arisen that either during survey or post survey proceedings the assessee

company has not submitted satisfactory explanation to prove identity, genuineness and creditworthiness of share capital/premium introducers and thus, the same is from paper companies of entry operator and then, he recorded satisfaction that the assessee company taken bogus/accommodation entries. The ld. AR vehemently pointed out that thereafter in last para 9 & 10, the AO, without applying mind to the information received from the Investigation Wing, recorded that he has reason to believe that the an income has escaped assessment which clearly shows that the AO proceeded to initiate initiatory assessment proceedings and reopening of assessment without having any valid satisfaction on the basis of borrowed satisfaction as there was no independent application of mind to the tangible material received from Investigation Wing, which could form the basis reason to believe that income has escaped assessment.

14. Further placing reliance on the decision of Hon'ble High Court of Delhi in the case of *PCIT vs. G&G Pharma India Ltd. reported in 384 ITR 147 (Del),* the ld. AR submitted that reopening of assessment by an AO based on the information received from the Director of Investigation without making any effort to discuss the materials on the basis on which he formed a prima facie opinion that income had escaped assessment. The Court held that the basic requirement of s. 147 of the Act that AO

should apply independent mind in order to form reasons to believe that income had escaped assessment had not been fulfilled.

15. The ld. AR submitted that as per ratio of the decision of Hon'ble High Court of Delhi in the case of *PCIT vs. RMG Polyvinyl (I) Ltd. reported in 396 ITR 5 (Del),* where information was received from investigation wing that assessee was beneficiary of accommodation entries but no further inquiry was undertaken by AO, said information could not be said to be tangible material as per se and, thus, reassessment on said basis was not justified. Finally, the ld. AR submitted that the impugned initiation of reassessment proceedings, notice and all consequent proceedings and orders are not valid and bad in law therefore, the same may kindly be quashed.

16. Replying to the above, the ld. DR submitted that the copy of proforma for obtaining approval u/s. 151 of the Act and reasons recorded by the AO are the internal departmental communication between the PCIT and ACIT and the PCIT being administrative head and senior to the ACIT has power to peruse the approval u/s. 151 of the Act and his sings thereon does not make the same as mechanical and without application of mind and the same cannot be termed or alleged as invalid or bad in law. The ld. DR submitted that in column 12 of approval the ACIT Shri Sarabjeet Singh has granted valid approval by

noting that “Yes, I am satisfied” which is sufficient to comply with the provisions of s. 151 of the Act. He also submitted that if there is any defect therein the same is rectifiable u/s. 292B of the Act and thus, the reassessment proceedings and orders cannot be challenged on this count. The ld. DR further submitted that the format/ proforma for granting approval u/s. 151 of the Act has been designed by the Department and there is no role of AO in framing and designing the same and the allegation of non-application of mind on the basis of such proforma or words used by the approving authority cannot be made.

17. The ld. DR submitted that the team of Revenue officers work under the supervision and guidance of PCIT and the Department is very careful about the compliance of the provision of the Act as well as directions of Hon'ble Supreme Court, Hon'ble High Court and CBDT Circulars and also towards working of the Revenue Officers in the cases of initiation of reassessment proceedings and framing of reassessment orders. The ld. DR submitted that the proforma of approval u/s. 151 of the Act is being followed all over India and the ACIT applied his mind to the all material placed before him by the AO prior to granting approval u/s. 151 of the Act in column 12 of the proforma. Therefore, allegations made by the ld. AR are not sustainable and tenable and the same may kindly be dismissed.

18. Placing rejoinder to the above, the ld. AR submitted that in the reasons para 6 the information of DDIT (Investigation) has been given and reference of various entry providers such as Shri Himanshu Verma, Shri Praveen Aggarwal etc. who are engaged in providing accommodation entries through dummy companies with dummy directors. The ld. AR submitted that in the table given in para 3 is taken along with para 6 of the reasons recorded then, it is clear that the names of companies are 13 and above named two persons at serial No. 11 & 12 have been noted and there is no name of entry provider in the other 11 columns and there is no link in the reasons recorded with regard to these 11 companies. The ld. AR submitted that these facts clearly show that the AO has acted on suspicion only and not on any credible input available to him through DDIT (investigation) information or otherwise on the basis of any exercise or application of mind by himself. Therefore, the reassessment proceedings and all consequent orders are not sustainable and bad in law. Reiterating his earlier arguments, the ld. AR vehemently pointed out that the approval/sanction given in para 12 of the proforma is not a valid sanction as per ratio of the various decisions including decision of Hon'ble High Court of Madhya Pradesh in the case of *S. Goyanka Lime and chemicals Ltd.* (supra), which has been upheld by Hon'ble Supreme Court by dismissing SLP of the Revenue reported in 237 Taxman 378 (SC) therefore, initiation of reassessment

proceedings u/s. 147 of the Act, notice u/s. 148 of the Act, reassessment proceedings and all consequent orders may kindly be quashed.

19. On careful consideration of above rival submissions, first of all, we may point out that from the proforma of approval u/s. 151 of the Act placed at pgs. 16-17 of the assessee paper book, it is clear that in column 12 the ACIT has granted approval for the issue of notice u/s. 148 of the Act by writing that "Yes, I am satisfied" which is not sufficient to comply with the requirement of s. 151 of the Act. As per ratio of the decision of High Court of Madhya Pradesh in the case of CIT v. M/s. S. *Goyanka Lime and Chemical Ltd.* (supra), where the JCIT/ACIT has only recorded "Yes, I am satisfied" then, it has to be held that the approving authority has recorded satisfaction in a mechanical manner and without application of mind to accord sanction for issuing notice u/s. 148 of the Act for reopening of assessment and in this situation initiation of reassessment proceedings and reopening of assessment has to be held as invalid and bad in law. Therefore, we are inclined to hold that the reopening of assessment and notice u/s. 148 of the Act are bad in law and consequently all subsequent proceedings in pursuant thereto are also bad in law and the same cannot be held as valid and sustainable.

20. So far as legal contention of the ld. AR on behalf of the assessee regarding non-application of mind by the AO, while recording reasons for

reopening of assessment, is concerned from careful perusal and reading of the three pages of reasons recorded, we observe that in first four paras the AO has noted facts of the information received from DDIT (investigation), Faridabad, further, in para 6 *modus operandi* of entry providers has been noted thereafter, in para 7 & 8, it has been arisen that either during survey or post survey proceedings the assessee company has not submitted satisfactory explanation to prove identity, genuineness and creditworthiness of share capital/premium introducers and thus, the same is from paper companies of entry operator and then, he recorded satisfaction that the assessee company taken bogus/accommodation entries. Thereafter, the AO in last para 9 & 10, without applying mind to the information received from the Investigation Wing states/writes that he has reason to believe that the income has escaped assessment. The text and words used by the AO in the reasons recorded for reopening of assessment clearly show that the AO proceeded to initiatory assessment proceedings and reopening of assessment without having any valid satisfaction and only on the basis of borrowed satisfaction as there was no independent application of mind by the AO to the tangible material received from Investigation Wing which could form the valid basis and reason to believe that income has escaped assessment.

21. In view of decisions of Hon'ble High Court of Delhi in the cases of *PCIT vs. Meenakshi Oversaes (supra), PCIT vs. G&G Pharma (I) Ltd. (supra) and decision in the case of PCIT vs. RMG Polyviny (I) Ltd.* (supra), where information was received from investigation wing that assessee was beneficiary of accommodation entries but no further inquiry was undertaken by AO, said information could not be said to be tangible material per se and, thus, reassessment on said basis was not justified. In the case of *Meenakshi Overseas* (supra), their lordship speaking for the Hon'ble Jurisdictional High Court held that where the reasons recorded by the AO failed to demonstrate the link between the tangible material and the formation of the reasons to believe that income has escaped assessment then, indeed it is a borrowed satisfaction and the conclusion of the AO based on reproduction of conclusion drawn in the investigation report cannot be held as valid reason to believe after application of mind. In this judgment their lordship also held that where nothing from the report of investigation wing is set out to enable the reader to appreciate how the conclusions flow there from then there is no independent application of mind by the AO to the tangible material which form the basis of the reasons to believe that income has escaped assessment.

22. In the present case, as we have noted above, the conclusion recorded by the AO in para 9 & 10 of the reasons is based on the information received from the director of investigation wing and the AO without making any effort to examine and discuss the material received from the Investigation Wing and without application of the mind to the same formed a reason to believe that income had escaped assessment. This shows that the AO proceeded to initiate reassessment proceedings on the basis of borrowed satisfaction without any application of mind and exercise on the information received from the Investigation Wing of the Department. Therefore, we have no hesitation to hold that the AO proceeded to initiate reassessment proceedings u/s. 147 of the Act and to issue notice u/s. 148 of the Act on the basis of borrowed satisfaction and without any application of mind and examination of the so called material and information received from the investigation wing to establish any nexus, even prima facie, with the such information. Therefore, in our considered opinion the initiation of reassessment proceedings u/s. 147 of the Act, notice u/s. 148 of the Act, reassessment proceedings and all consequent proceeding and orders, including impugned reassessment and first appellate order, are bad in law and thus, not sustainable and we hold so. Accordingly, on the basis of foregoing discussion, grounds No.2, 3, 4 and additional ground of the

assessee are allowed and impugned proceedings, notice u/s. 148 of the Act and all consequent orders are quashed.

Other ground of assessee on merits:

23. Since, by the earlier part of this order we have quashed initiation of reassessment proceedings u/s. 147 of the Act, notice u/s. 148 of the Act, reassessment proceedings and impugned reassessment & first appellate order therefore, other grounds of the assessee on merits become academic and infructuous and hence, we are not adjudicating the same as having become infructuous.

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

Order pronounced in the open court on this day of 06th August, 2018.

Sd/-	**Sd/-**
(एन.के. बिलइया**)**	) सी एम गर्ग)
(N.K.BILLAIYA**)**	**(C.M.GARG)**
लेखा सदस्यAccountant Member/	**न्यायिक सदस्य/Judicial Member**

सूरत / Surat; दिनांक Dated : 06th August, 2018

EDN

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी/The Appellant; 2.प्रत्यर्थी /The Respondent; 3.आयकर आयुक्त(अपील) /The CIT(A)-38, New Delhi; 4. Prl. CIT, New Delhi; 5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **नई दिल्ली** / DR, ITAT, New Delhi; 6. गार्ड फाईल / Guard file.