IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "SMC-2" NEW DELHI)
BEFORE SHRI I.C. SUDHIR: HON'BLE JUDICIAL MEMBER

ITA No. 1372/Del/2015
Assessment Year: 2006-07

Unique Metal Industries, Prop. Sabina Kalam, 513-Cganekuab Riadm Sadar Bazar, Delhi (PAN: ACPPK2193R) (Appellant)	vs.	Income-tax Officer, Ward 39(3), New Delhi. (Respondent)

Appellant by: S/Shri Ved Jain, Adv. & Ashish Goel, CA
Respondent by: Shri Gaurav Desai, Sr. DR

Date of hearing : 17 .09.2015
Date of pronouncement: 28 :10.2015

ORDER

PER I.C. SUDHIR: JUDICIAL MEMBER

1. This is an appeal arising from the order passed by the learned CIT(A) dated 22.12.2014. The assessee is an individual carrying on the business in the name of Unique Metal Industries. It filed its return of income for the assessment year under consideration on 27.9.2006 declaring an income of Rs.1,14,218/-. The same was accepted under section 143(1) of the I.T. Act vide intimation dated 3.1.2007.

2. Later on, on the basis of the information received from the learned Commissioner of Income Tax, Central – 2, New Delhi that the assessee has

received accommodation entries; the assessment was reopened by issue of notice under section 148 after recording the reasons on 28.3.2013. The Assessing Officer thereafter completed the reassessment whereby an addition of Rs.13,85,309/- was made by holding that the purchases made by the assessee are bogus.

3. Aggrieved by the order of the Assessing Officer, the assessee came in appeal before the learned CIT(A). It was contended by the assessee that the reopening of assessment is bad in law. It was further contended that the addition made by the Assessing Officer is unsustainable as the assessee has maintained complete books of accounts and in the absence of any defects pointed out therein, no addition could be made. The learned CIT(A) vide impugned order dated 22.12.2014 upheld the action of the Assessing Officer of reopening the assessment. On the issue of addition of entire purchases of Rs.13,85,309/-, the learned CIT(A) held that the sale made by the assessee have been accepted as genuine by the Assessing Officer and accordingly entire purchases cannot be disallowed keeping more particularly the fact that the payments for the purchases have been made from disclosed sources. The learned CIT(A) was of the view that the total sales cannot be regarded as profit. However, taking into account the fact that the assessee might have obtained some benefit on account of procurement of bills on which VAT

was to have shown to have been paid and keeping in view the provisions of Section 40A(3) whereby 20% of expenditure is disallowed in case of cash purchases, she held that 20% of the purchases may be considered as profit and accordingly restricted the addition to 20% of the total purchases made by the assessee.

4. Aggrieved by the order of the learned CIT(A), the assessee is in appeal. In the appeal assessee has raised following grounds:-

"*1. On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad, both in the eye of law and on the facts.*

2. On the facts and circumstances of the case, CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the initiation of the reassessment proceedings and the reassessment order are bad both on facts and in law and liable to be quashed as the statutory conditions and procedure prescribed under the statute have not been complied with.

3 (i) On the facts and circumstances of the case, CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the reassessment proceedings initiated by the learned A.O. are bad in the eye of law as the reasons recorded for the issue of notice under Section 148 are bad in the eye of law and are contrary to the facts.

(ii) On the facts and circumstances of the case, CIT(A) has erred both on facts and in law in rejecting the contention of the assessee

that the reassessment order passed by the A.O. is bad and liable to be quashed as the same has been reopened on the basis of the reasons which are vague and has been recorded without application of mind on the part of the A.O.

4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the rejection of the books of accounts of the assessee by the AO, despite the fact that the assessee has been maintaining proper books of accounts as per law.

5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the addition of an amount of Rs.2,77,062/- on account of bogus purchases.

6. On the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition to the extent of 20% of such purchases, without there being any basis for the same.

7.(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming that the firms M/s Vishnu Trading Company, M/S Shree Shyam Trading Company & M/s Shree BankeyBihari Trading Co. are not engaged in the actual business ignoring the fact that during the course of the search substantial inventory in respect of the material being purchased by the assessee were found which confirm the fact that this firm was doing actual business.

(ii) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in rejecting that the inference drawn by the AO merely on the basis of a statement that these firms are not in actual business is baseless and contrary to the facts on record.

8. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in rejecting the contention of the assessee in ignoring the fact that there being a complete tally of the quantity purchased and sold the allegation that the assessee has not made purchases cannot be sustained.

9. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in confirming the addition to the extent of 20% of such purchases rejecting the material and evidences brought on record by the assessee to show that the purchases were made in regular course of the business and material so purchased was sold in the regular course of business.

10. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in rejecting the contention of the assessee that the addition so made on the basis of material collected at the back of the assessee is bad in law & liable to be deleted.

11. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts & in law in rejecting the contention of the assessee that the addition made by the learned AO is untenable in the eye of law having been made without providing opportunity to cross examine the person on the basis of whose statement the allegations have been made against the assessee and without following the principle of natural justice.

12. The appellant craves leave to add, amend or alter any of the grounds of appeal."

5. Ground no. 1 and 12 are general in nature and need no adjudication.

6. Ground no.2 and 3 are regarding reopening of the assessment. In this regard the learned AR submitted that the reopening per se is bad in law as is evident from the reasons recorded by the Assessing Officer. It was submitted that in the reasons recorded, the Assessing Officer has simply narrated the letter received by it from the CIT, Central – 2, New Delhi whereby there is an allegation that certain person have provided accommodation entries. On the basis of this, the Assessing Officer has simply stated that the following accommodation entries have been taken by the assessee as per the list of accommodation entries:-

Sl. No.	Accommodation entry provided by	Amount of accommodation entry
1.	Shree Shyam Trading Co.	Rs.2,44,399
2.	Vishnu Trading Co.	Rs.8,12,542
3.	Shree BankeyBihari	Rs.3,28,368
	Total	Rs.13,85,309

6.1 It was submitted that the assessee has filed the return of income and the Assessing Officer was having the balance sheet and profit and loss account of the assessee. He ought to have first considered the facts of assessee's case with that of the information received by it. Only after having applying his mind the Assessing Officer ought to have recorded the reasons. It is a case of non-application of mind and the Assessing Officer reopened

the assessment merely on the basis of the direction received from the higher authorities.

6.2 It was further contended that the Joint Commissioner has also not applied its mind as is evident from the approval given. He has also not looked into the facts of the case so as to have a reason to believe that income has escaped assessment. It was further stated that the above facts can be corroborated from the assessment order itself whereby the Assessing Officer himself has stated that he was not having copy of the statement and other information at the time of recording reasons which was important for him to apply his mind while forming belief of income escaping assessment. In this regard attention was invited to para 3 on page 5 of the assessment order where the Assessing Officer has stated that post reopening of the assessment it had conversations with the ACIT, Central Circle-10, New Delhi and has written various letters starting from 23.07.2013 to 24.12.2013 asking basic information which included copy of statements recorded about the allegation levied against the assessee. These facts clearly demonstrate that no information was with the Assessing Officer except the letter received from learned CIT, Central-II, New Delhi and he has reopened the assessment without there being any valid evidence and without application of mind. Attention was also invited to page 4 of the assessment order which is a

tabulates sheet prepared by the AO at the time of reopening of the assessment to show that AO has not looked even at the return of income as is evident from answer to column 7, (a) and (b), 8, etc. It was further contended that AO has simply mentioned accommodation entries in the reasons even without specifying the nature of such accommodation entries, whether it is share capital, loan introduced or claim of expenditure, etc. Thus it is a case of total non-application of mind by AO as well as that of JCIT.

6.3 The learned AR further submitted that this assessment has been opened on the basis of direction received from CCIT as is evident from the reasons recorded itself when AO has quoted that directions were received to take action under section 148. It was further contended that the assessment can be reopened when there are reasons to believe and such belief has to be of the Assessing Officer and for this the Assessing Officer has to carry out honest and unbiased exercise looking into the material available with him. In support thereof the learned AR has placed reliance on the following judgments:-

i) Sarthak Securities Company Pvt. Ltd. vs ITO (2009) 329 ITR 110
ii) Signature Hotels (P) Ltd. vs ITO (2011) 338 ITR 51 (Del)
iii) CIT vs. SFIL Stockbroking Co. (2010) 325 ITR 285 (Del)

6.4 In reply the learned DR submitted that in this case information has been received after the assessee's return was accepted under section 143(1). In the information provided by the CIT, Central – 2, New Delhi there is a clear allegation that these persons have provided accommodation entries. Since the name of the assessee appears in the list of accommodation entries the Assessing Officer was justified in recording reasons and reopening the assessment. It was submitted that at the time of reopening of the assessment only a prima facie view has to be taken and there need not be any conclusive evidences. It was further submitted that name of the assessee was appearing in the list of the accommodation entries provided and hence Assessing Officer was well within his power to reopen the assessment. The learned DR further submitted that the learned CIT(A) was justified in rejecting this ground of the assessee. In support thereof the learned DR placed reliance on the judgment of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd.291 ITR 500.

7. I have perused the assessment order, order passed by the learned CIT(A) as well as the paper book. It will be relevant to refer to the reasons recorded by the Assessing Officer and the approval of the Joint Commissioner of Income Tax which reads as under:-

"Reasons for the belief that the income has escaped assessment in the case of M/s Unique Metal Ind for the assessment year 2006-07

A letter bearing F.No. Addl. CIT/(Hq)/(Coord.)/Accommodation entry/2012-13/15016 dated 26.03.2013 was received from the Office of the Chief Commissioner of I. Tax, Delhi-I, New Delhi herein forwarding letter bearing F. No. CIT©-II/2012-13/3898 dated 19.3.2013 received from the Commissioner of I. Tax, Central-II, New Delhi along with a CD containing the details of accommodation entries provided by Sh. Rakesh Gupta & Sh. Vishesh Gupta and Sh. Navneet Jain & Sh. Vaibhav Jain **and direct this** office to take necessary action as per section 148 in respect of entries pertaining to A.Y. 2006-07, which is time barring on 31.03.2013.

The information provided by the CIT, Central-II, New Delhi vide his letter dated 19.03.2013 reads as under:-

"Kindly find enclosed herewith letter dated 13.03.2013 of ACIT, Central Circle-10 duly forwarded by the Addl. CIT, Central Range-IV, along with its enclosures on the subject mentioned above.

2. The assessment of search cases of Sh. Rakesh Gupta, Sh. Vishesh Gupta, Sh. Navneet Jain & Sh. Vaibhav Jain are under process with the ACIT, Central Circle-10. During the assessment proceedings u/s 153A in the aforesaid cases, details regarding accommodation entries given by the above entry providers has been obtained by the AO.

3. The list of accommodation entry recipients has been obtained from Sh. Rakesh Gupta and Sh. Vishesh Gupta. Hard copy of the list is enclosed as Annexure A, duly signed by Sh. Vishesh Gupta. The list gives the name of the firm which has provided the accommodation entry along with the name and address of recipients of accommodation entry.

4. Sh. Naveen Jain & Sh. Vsaibhav Jain has provided accommodation entry through thirty-seven paper entities. The list of the firms giving accommodation entry is enclosed as annexure-B. The list of accommodation entry recipients, has been obtained from Sh. Navneet Jain & Sh. Vaibhav Jain. It does not give year wise bifurcation... Hard copy of the lost is enclosed as annexure-C, duly signed by Sh. Vaibhav Jain. Thus, the firms mention in the list 'B' have provided accommodation entries to the firms mentioned in list 'C'.

5. The soft copy of the information in respect to annexure A, B & C is also enclosed.

6. The information of accommodation entry includes A.Y. 2006-07 also, which is a time barring year for taking action u/s 148.

7. The information is forwarded to you for early dissemination to various field officers in Delhi (Soft copy also enclosed).

On examining the list of accommodation entries provided by Sh. Rakesh Gupta & Sh. Vishesh Gupta dn Sh. Navneet Jain & Sh. Vaibhav Jain pertaining to A.Y. 2006-07, it is noted that the

following accommodation entries have been taken by the assessee namely M/s Unique Metal Industries:-

Sl. No.	Accommodation entry provided by	Name of party to whom accommodation entry is provided	Amount of Accommodation entry
1	Shree Shyam Trading Co.	M/s Unique Metal Industries	Rs.2,44,399/-
2	Vishnu Trading Co.	M/s Unique Metal Industries	Rs.8,12,542/-
3	Shree BankeyBihari	M/s Unique Metal Industries	Rs.3,28,368/-
		Total amount of entries=	Rs.13,85,309/-

Since Sh. Rakeh Gupta & Sh. Vishesh Gupta dn Sh. Navneet Jain & Sh. Vaibhav Jain during the course of assessment proceedings u/s 153A of I. Tax Act have admitted that they have given accommodation entries to the parties whose lists have been provided by them to the ACIT, Central Circle-10, New Delhi, therefore, it is fair to conclude that M/s Unique Metal Industries whose name is appearing in the said list, has taken accommodation entries from Sh. Rakeh Gupta & Sh. Vishesh Gupta dn Sh. Navneet Jain & Sh. Vaibhav Jain pertaining to A.Y. 2006-07.

In view of the above, I have reasons to believe that income chargeable to tax of M/s Unique Metal Industries amounting to Rs.13,85,309/-for the F.Y. 2005-06 relevant to A.Y. 2006-07 has escaped assessment and it is a fit case for initiation of proceedings u/s 147 of the Act.

Proposal in the prescribed form for the A.Y. 2006-07 (F.Y. 2005-06) is submitted herewith for kind consideration and necessary approval u/s 2006-07 (F.Y. 2005-06) is submitted herewith for kind consideration and necessary approval u/s 151(2) of the I. Tax Act, 1961 as the same is getting barred by limitation on 31/3/2013.
If approved, notice u/s 148 of the act may be issued.

Sd/-
28.3.2013
(PawankumarVashist)
Income Tax Officer
Ward-39(3), New Delhi

Joint CIT, Range-39, N.Delhi

For the reasons recorded by the Ao, ITO Ward – 39(3), it is a fit case for issue of notice u/s 148 of the I.T. Sct, 1961. Accordingly necessary approval for reopening the above case for A.Y. 2006-07 is hereby given s per the provision of section 151(2) of I.T. Act, 1961.

ITO, Ward 39(3)

Sd/-
28.3.2013
(Vijay BabuVasanta)
Jt. Commission of Income Tax
Range-39, New Delhi"

8. On going through the above reasons it is evident that this assessment has been reopened on the basis of the letter received from the ld. CIT, Central-2, New Delhi with the direction to take necessary action as per section 148

of the Act. As per this, accommodation entries were obtained by various persons from Sh. Rakesh Gupta and Sh. Vishesh Gupta as well as Sh. Navneet Jain and Sh. Vaibhav Jain. Copy of this list was forwarded in a CD to the Assessing Officer. Thus this list contained the name of the assessee. The Assessing Officer reopened the assessment on the basis of this information. The basis given by the Assessing Officer in the reasons is that these persons have admitted that they have given accommodation entries to the parties whose lists have been provided by them. From the above facts it is apparent that the Assessing Officer at that point of time when he recorded the reasons was not having the copy of the statement or any other material in which these people have alleged to have provided accommodation entries to the assessee. This position gets also corroborated from the facts stated by the Assessing Officer himself in the reassessment order in para 3 page 5 which read as under:-

> *"Here it is pertinent to mention that in the intervening period, this office had conversations with the ACIT, Central Circle-10, New Delhi from whom vide this office's letter dated 23.07.2013, 02.09.2013, 14.10.2013, 06.11.2013, 22.11.2013, 09.12.2013 & 24.12.2013 and vide Joint CIT, Range-39, New Delhi's letter dated 16.12.2013, the following details/documents were sought:-*

(i) Copies of the statements recorded of Sh. Rakeh Gupta & Sh. Vishesh Gupta dn Sh. Navneet Jain & Sh. Vaibhav Jain in search/post search/assessment proceedings.

(ii) Soft copies of the tatements recorded of Sh. Rakeh Gupta & Sh. Vishesh Gupta dn Sh. Navneet Jain & Sh. Vaibhav Jain in search/post search/assessment proceedings.

(iii) Hard copy of assessment orders passed in these cases for A.Y. 2006-07

(iv) Soft copy of assessment orders passed in these cases for A.Y. 2006-07

(v) Any other detail/document you may deem fit that need to be confronted with the parties whose cases have been reopened u/s 148 of I. Tax Act.

4. In response to these letters, the ACIT, Central Circle-10, New Delhi vide his letter dated 20.12.2013, received by this office on 27.12.2013, forwarded his reply along with supporting documents, which were running into 92 pages. After going through the reply forwarded by the ACIT, Central Circle-10, New Delhi and the annexure enclosed therein, this office was of the view that the purchase bills provided by the 11 firms/concers controlled and managed by Sh. Rakesh Gupta and Sh. VisheshGupt or their family members is nothing but bogus purchase bills/accommodation bills."

9. The above facts stated by the Assessing Officer makes it abundantly clear that at the time of formation of the belief to reopen assessment the Assessing Officer was not having the above said information. Only that he

was having the letter along with list which was forwarded by the CIT, Central-2, New Delhi.

10. The above observation of the Assessing Officer also shows that it was letter dated 20.12.2013 received by him on 27.12.2013 on the basis of which the Assessing Officer could make a view that the purchase bills provided by these persons or their family members is nothing but bogus purchase bills. At the time of recording of the reasons the Assessing Officer apparently was not having any idea about the nature of the transactions entered into by the assessee. In the reasons recorded there is no mention about the nature of the transactions. As per provision of section 147 an assessment can be reopened if the Assessing Officer has reasons to believe that any income chargeable to tax has escaped assessment. The reasons to believe has to be that of the Assessing Officer and further there have to be application of mind by the Assessing Officer though the reasons to believe does not mean that the Assessing Officer should have finally ascertained the fact that income has escaped assessment but at the same time, it also means that the Assessing Officer is required to examine the facts on the basis of the information and satisfy himself that the taxable income has escaped assessment. In the present case, on going through the reasons it is quite evident that the

Assessing Officer was also not aware of the nature of the accommodation entries. In the reasons recorded he has simply mentioned the name of the party and the amount and nowhere has stated the nature of such entry. This also shows that the Assessing Officer has made no effort to look into the return of the assessee which was available with him. This fact gets further supported from the sheet appended to the reasons and quoted on page 4 of the assessment order whereby against Item no. 7, whether the assessment is proposed to be made for the first time, the Assessing Officer has stated 'Yes', and in Column no. 7(a), whether any voluntary return had already been filed and in Column no. 8 (b), date of filing the said return 'NA' has been stated. Thus this is a clear case of non-application of mind by the Assessing Officer. It may also be relevant that on page 2 of the assessment order, the Assessing Officer himself has stated that in this case the return of income for the year under consideration was filed with this ward on 27.09.2006. These facts clearly demonstrate that the return was with the same ward and at the time of recording of the reasons for reopening the assessment, the Assessing Officer has not looked at the return and in a mechanical way, on receipt of the letter from the CIT, Central-2, New Delhi the assessment has been reopened. It is a settled position of law that there must be material for formation of a belief that income has escaped

assessment. Further reasons referred to must disclose process of reasoning by which the Assessing Officer holds reason to believe. There must be nexus between such material and belief. Further and most importantly the reasons referred to must show application of mind by the Assessing Officer. It is also a settled law that the validity of the initiation of the reassessment proceeding is to be judged with reference to the material available with the Assessing Officer at the point of time of the issue of notice under section 148. In the present case, as is evident from the assessment order, the Assessing Officer was having nothing except the list provided by the CIT, Central-2, New Delhi about the list of accommodation entries. Beyond that he was not having the copies of the statement of any of these persons. He was not having copy of the assessment orders and other details or document which would have enabled the Assessing Officer to apply his mind and form a belief that income has escaped assessment. In fact this information was not with the Assessing Officer till fag end of the reassessment proceedings, a fact admitted by the Assessing Officer himself in the assessment order. The judgment relied upon by the learned AR also supports the case of the assessee. In the case of Sarthak Securities Pvt. Ltd. vs. ITO (2009) 329 ITR 110 the Hon'ble jurisdictional Delhi High Court has held that under the

circumstances narrated hereinabove the reopening cannot be said to be a valid reopening. The Hon'ble Court has held as under:-

> *"In the case at hand, as is evincible, the AO was aware of the existence of four companies with whom the assessee had entered into transaction. Both the orders clearly exposit that the AO was made aware of the situation by the Investigation Wing and there is no mention that these companies are fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicate independent application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive proof is not germane at this stage but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to apply. As is manifest from the perusal of the supply of reasons and the order of rejection of objections, the names of the companies were available with the authority. Their existence is not disputed. What is mentioned is that these companies were used as conduits. The same has not been referred to while passing the order of rejection. The assessee in his objections had clearly stated that the companies had bank accounts and payments were made to the assessee company through banking channel. The identity of the companies was not disputed. Under these circumstances,*

it would not be appropriate to require the assessee to go through the entire gamut of proceedings. It is totally unwarranted. Resultantly, the initiation of proceedings under s. 147 and issuance of notice under s. 148 are hereby quashed."

11. Similarly in Signature Hotels (P) Ltd. vs. ITO (2011) 338 ITR 51 (Del) the Hon'ble Court has also quashed the reopening of the assessment on the ground that the AO did not independently apply his mind to the information received from the Director of Income Tax (Inv.). The relevant observation of the Court reads as under:-

"The first sentence of the reasons states that information had been received from Director of IT (Inv.) that the petitioner had introduced money amounting to Rs. 5 lacs during financial year 2002-03 as per the details given in Annexure. The said Annexure relates to a cheque received by the petitioner on 9th Oct., 2002 from SS Ltd. from the bank and the account number mentioned therein. The last sentence records that as per the information, the amount received was nothing but an accommodation entry and the assessee was the beneficiary. The aforesaid reasons do not satisfy the requirements of s. 147. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure. Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses

escapement of income. Annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the AO did not apply his own mind to the information and examine the basis and material of the information. The AO accepted the plea on the basis of vague information in a mechanical manner. The CIT also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the AO did not independently apply his mind to the information received from the Director of IT (Inv.) and arrive at a belief whether or not any income had escaped assessment. Company SS Ltd. had applied for and was allotted shares in the petitioner company on payment by cheque of Rs. 5 lacs. SS Ltd. is an incorporated company and the petitioner has pleaded and stated that the said company has a paid-up capital of Rs. 90 lacs. The company was incorporated on 4th Jan., 1989 and was also allotted PAN in September, 2001. The facts indicated above do not show that SS Ltd. is a non-existing and a fictitious entity/person. For the reasons stated above, writ of certiorari is issued quashing the proceedings under s. 148"

12. In the case of CIT vs. SFIL Stockbroking Co. (2010) 325 ITR 285 (Del) also the Hon'ble High Court has quashed the reopening proceedings on the ground that from the reasons it is not discernible as to whether the AO has applied his mind to the information and independently arrived at a belief that income has escaped assessment. The Hon'ble Court has held as under:-

"The first sentence of the so-called reasons recorded by the AO is mere information received from the Dy. Director of IT (Inv.). The second sentence is a direction given by the very same Dy. Director to issue a notice under s. 148 and the third sentence again comprises of a direction given by the Addl. CIT to initiate proceedings under s. 148 in respect of cases pertaining to the relevant ward. These three sentence are followed by the following sentence, which is the concluding portion of the so-called reasons : "Thus, I have sufficient information in my possession to issue notice under s. 148 in the case of M/s SFIL Stock Broking Ltd. on the basis of reasons recorded as above." From the above, it is clear that the AO referred to the information and the two directions as 'reasons' on the basis of which he was proceeding to issue notice under s. 148. These cannot be the reasons for proceeding under s. 147/148. The first part is only an information and the second and the third parts of the beginning para of the so-called reasons are mere directions. From the so-called reasons, it is not at all discernible as to whether the AO had applied his mind to the information and independently arrived at a belief that, on the basis of the material which he had before him, income had escaped assessment. Consequently, the Tribunal has arrived at the correct conclusion on facts. There is no substantial question of law which arises for consideration."

13. In view of the above discussed facts of the present case, the reopening of the assessment is without application of mind and examination of the facts and accordingly the reopening is held to be invalid and accordingly the same is quashed. Accordingly the reopening is held to be bad in law and ground nos.2 and 3 are allowed.

14. Ground nos. 4 to 11 are regarding addition of Rs.2,77,062/- sustained by the CIT(A) being 20% of the disallowance of Rs.13,85,309/- made by the Assessing Officer. The Assessing Officer has made addition of the above said amount holding that the purchases made by the assessee are bogus. In this regard the Assessing Officer has stated that the assessee has made purchases from the following three parties which are bogus:-

Sl. No.	Accommodation entry provided by	Amount of accommodation entry
1.	Shree Shyam Trading Co.	Rs.2,44,399
2.	Vishnu Trading Co.	Rs.8,12,542
3.	Shree BankeyBihari	Rs.3,28,368
	Total	Rs.13,85,309

15. The Assessing Officer after rejecting the books of accounts made the above addition.

16. The learned CIT(A) approved the action of the Assessing Officer holding the purchases to be bogus but held that since sales have been accepted as genuine, for determining the net profit it will not be appropriate to tax the entire sales as income. The learned CIT(A), however, held that the payment for the purchases has been made from the disclosed sources and accordingly it also cannot be held that the purchases were made from unaccounted income. However, taking into consideration the fact that assessee would have saved some money by way of value added tax on purchases without bills and also referring to the provisions of section 40A(3), she has held that a profit at the rate of 20% can be assumed to have been earned by the assessee over and above what has been declared on such purchases and accordingly she has restricted the addition to 20% of the purchases as profit earned by the assessee on these purchases.

17. It was contended by the learned AR that the action of the learned CIT(A) in estimating the profit at 20% of the purchases is untenable. It was contended that the action of the Assessing Officer in rejecting the books of accounts and holding that the purchases are bogus is legally untenable. In the present case the Assessing Officer as well as learned CIT(A) has relied upon the statement of these persons without even verifying the facts and

without allowing assessee an opportunity to cross examining these persons. The Assessing Officer and learned CIT(A) have considered the statement of these persons as a gospel truth, ignoring the fact that these persons, in order to save their own skin, have made such statement and got scot free by getting taxed on a small percentage on accommodation charges. The Assessing Officer as well as learned CIT(A) has ignored the most important aspect that these persons were engaged in the scrap trade. It is not a case where these persons are alien to the trade. The whole basis of making the allegation is the survey carried out by the department on these persons on 26th April, 2010. At the time of the survey, inventory of the stock was prepared and at that time these persons were found holding substantial amount of stock in the form of copper and brass scrap as is evident from the inventory prepared at that time. In this regard attention was invited to PB Pg. 232 which is the inventory of the stock prepared at the time of survey on 26th April, 2010 in the case of Sh. Rakesh Gupta, Proprietor, M/s Vishnu Trading Co., one of the firms from whom assessee has made purchases. Attention was also invited to assessment order passed in the case of M/s Vishesh Gupta, another person on the basis of which allegation has been made of bogus purchases for the assessment year 2011-12 (i.e. date of survey, 26th April, 2010). In this case also in the assessment order dated 28th

March, 2013 placed in PB Pg. 233, it has been stated that brass stock was found and thereafter addition has been made in respect of business of scrap of brass and copper.

18. Now in these circumstances it was argued by the learned AR that it cannot be said that these persons were not in trade. These persons being in trade and assessee having made purchases, the payment for such purchases having been made by account payee cheque, there was no reason for the Assessing Officer to draw adverse inference against the assessee.

19. It was also further argued that no further material has been brought on record by the Assessing Officer and no further investigation has been carried out so as to substantiate the allegation that the purchases are not genuine. On the contrary the assessee has provided sufficient material and evidences by way of quantitative tally, as also identification of the parties to whom the sales have been made. The sales being genuine, the purchases obviously will be genuine. The conclusion reached by the Assessing Officer as well as learned CIT(A) that the assessee would have made purchases from other parties and have obtained accommodation entries from these persons is nothing but indulgence in surmises and conjectures. In fact there is no such material. It was further submitted that the list on the basis of which the

allegation has been made that the purchases are not genuine, were found during the course of survey. These were the sheets which were prepared by the so called alleged accommodation entry providers to save their own skin and hence the same cannot be relied upon and make the sole basis for making addition in the hands of the assessee.

20. It was further submitted that the statement of these persons has been used against the assessee without providing opportunity of cross examination. These persons, as per this statement, are the witnesses of the Revenue and as such onus was upon the Revenue to produce these persons for cross examination. In this regard it was further submitted that the Assessing Officer has gone wrong in shifting onus on the assessee for cross examination. My attention was invited to the assessment order page 16, where these persons have not appeared before the Assessing Officer despite summons being issued by the Assessing Officer. Adverse inference cannot be drawn against the assessee because of non-appearance of these persons consequent to the summons issued by the Assessing Officer. On the contrary, the non-appearance by these persons for cross examination supports assessee's stand that the purchases were genuine and that is why in order to avoid their lie getting exposed these people have opted not to appear

for cross examination. My attention was also invited to the observation of the learned CIT(A) whereby she having accepted the fact that the Assessing Officer could have enforced attendance but still has drawn adverse inference against the assessee. It was submitted by the learned AR that the learned CIT(A) has placed reliance entirely on the statement of these persons which in the present case cannot be relied upon in the absence of the facts brought on record that these persons were in scrap trade and further the fact that these persons have not appeared for cross examination. It was further submitted that credence cannot be given to statement of a person who by his own admission is engaged in dubious activities. It was further submitted that the observation made by the learned CIT(A) that name of the assessee appear in the list cannot be a basis for drawing adverse inference. Further these persons have not been questioned about the transaction with the assessee particularly keeping in view of the fact that the payments have been made by account payee cheque. There is no adverse finding regarding the bank account. It was further submitted that the learned CIT(A) is wrong in making observation that there is no expenditure on account of cartage, loading and unloading. In this regard the learned CIT(A) has ignored the fact that these are small traders and not doing much transaction. Further purchases and sales are locally in Delhi within the same area i.e. old Delhi.

All the movement of the goods was through hand driven carts and the freight charges wherever paid have been duly accounted for as cartage. In this regard attention was invited to page 5 of the Paper book which is the profit and loss account where a sum of Rs.1375 is the expenditure on account of the cartage. It was further submitted that the assessee in the present case has filed all possible evidences. The Assessing Officer thereafter has made no further examination of these details and the documents and accordingly the Assessing Officer was not justified in drawing adverse inference against the assessee. The learned AR also referred to the purchases and sales invoices so as to demonstrate the quantity and movement of the goods purchased and sales made and the direct co-relation between the quantity purchased and the quantity sold by it. The learned AR further submitted that the observation made by the learned CIT(A) in this regard are factually incorrectly particularly keeping in view the fact that she herself has stated that the allegation of the Assessing Officer on bogus purchases by making an observation that the dealing is not free from any doubt.

21. On the issue of estimation of profit at 20% the learned AR submitted that the learned CIT(A) has gone wrong in applying the rate of 20%. It was submitted that the VAT applicable on scrap is 4% and the assessee has paid

the VAT as is evident from the sales and purchase invoices and accordingly the learned CIT(A) has indulged into surmises by making an observation that assessee would have saved something on the VAT. It was further submitted that the sales and purchases have been made at the prevalent market rate and there is no adverse finding given by the Assessing Officer regarding understatement of sales or overstatement of the purchase consideration. In the absence of any adverse finding regarding the value of the sales, the learned CIT(A) was not correct in enhancing the profit by 20%. On the issue of invoking provision of section 40A(3) it was argued that the learned CIT(A) is not correct in applying this provision as all payments have been made by account payee cheque. It is not the case of the Assessing Officer also that the payments have been made in cash. Further there is no material or evidence brought on record that assessee has made purchases from any person outside the books of accounts. In the absence of any material or evidence, provision of section 40A(3) cannot be invoked. In the alternative and without prejudice it was submitted that in case it is being alleged that the purchases are not genuine then obviously corollary should have been that the sales are not genuine as is being held in the case of Sh. Rakesh Gupta and Sh. Vishesh Gupta and Sh. Naveenet Jain & Sh. Vaibhav

Jain instead of assuming that the assessee would have made purchases from outside sources in cash.

22. In reply the learned DR vehemently supported the order of the learned CIT(A). It was contended that the learned CIT(A) has been most fair in restricting the addition to 20% despite holding that the purchases are bogus. It was contended that the statement of these persons are quite categorical. In the statement it has been admitted by these persons that they have provided accommodation bills. The list submitted by these persons also confirm the fact that there was no transaction between the assessee and these persons. Though these persons were in the same trade but the fact remains that the transactions recorded by the assessee as purchase were not definitely entered into. On the issue of the cross examination it was submitted that the Assessing Officer has done his best and since these persons did not appear in response to the summons issued, the Assessing Officer was handicapped and hence he was justified in drawing adverse inference on the basis of the statement already provided by these persons.

23. I have considered the submission of both learned AR as well as DR and perused the assessment order, order passed by the learned CIT(A) and the paper book. In this case the learned CIT(A) has held that the purchases

are bogus but considering the fact that the sales and trading profit has to be determined, she has estimated profit of 20% on alleged bogus purchases.

24. Now the issue is whether on the facts and circumstances of this case it can be said that the purchases are bogus. The Assessing Officer has placed reliance on the statement of Sh. Rakesh Gupta and Sh. Vishesh Gupta and Sh. Naveenet Jain & Sh. Vaibhav Jain. Admittedly these statements were recorded at the back of the assessee. Though the copy of the same was provided to the assessee but an opportunity of cross examination has not been allowed to the assessee. The Assessing Officer in this regard has stated that he has issued summons to these persons repeatedly but these persons have not appeared nor has filed the desired details and documents. In the absence of their cross examination and also in the absence of furnishing desired details and the documents it will not be appropriate to substantiate the addition on the basis of the statement. On examination of facts it also transpires that these persons were in the trade of scrap, the same business in which the assessee is engaged. A survey was carried out on these persons and during the course of the survey it is not the case of the department that they were not found not carrying on the same business. On the contrary

there is evidence on record that these persons were not only in the business of scrap but also stock of scrap was also found with them.

25. The department has also made assessment of these persons in respect of the business of scrap carried on by them. The Revenue is doubting the purchases of the assessee on the basis that these persons have made a statement that they have issued accommodation bills and have not made actual sales to the assessee. Can such statements be taken at its face value? If these people were engaged in the scrap trade as contended by the learned AR then there is every possibility that these persons would have collected the scrap for which they were not having any invoices or source of supply and have sold the same to the assessee and to various other parties. On being caught at wrong foot these persons have taken the defence that the sales made by them are not genuine and they have issued accommodation bills. In the present case the assessee has made purchases and there are corresponding sales. These sales are not being doubted. If sales are not being doubted then obviously purchases would be there. Now the learned CIT(A) held that the purchases made by the assessee are not genuine and assessee would have made purchases from some other persons. The case of the assessee is that it has made purchases from these very persons and

having made the payment by account payee cheque and there being nothing adverse in the transaction, it is for the supplier i.e. so called people to explain their source of purchase and not the assessee. The Revenue is trying to shift the onus on the assessee by making presumption that the purchases made by it are not genuine despite accepting its sales. In my opinion shifting of this onus and the assumption being made that purchases are not genuine in the present set of facts is not correct. There would have been some logic, had these people would not have been in the same trade and had there been some other circumstances leading to the conclusion that the so called purchases by the assessee under no circumstances can be from these persons. Adverse inference cannot be drawn against a person merely on the basis of doubt. Doubt howsoever strong cannot par-take the character of legal proof. In the present cases there is complete trail of the purchases and sales so far assessee is concerned. The assessee has been able to co-relate each transaction of purchase with sales as is evident from the submission made before the learned CIT(A).

26. There is a complete co-relation between the purchases and the sales and the same is fully documented. Thus the AO as well as learned CIT(A) was not correct in drawing adverse inference against the assessee on this

account. I further note that the learned CIT(A) while giving a finding that the purchases are bogus has placed much reliance on the statement of these persons. As discussed hereinabove the statement of these persons cannot be taken on the face of it in view of the surrounding facts. These persons were definitely in the trade. These persons have not appeared before the Assessing Officer despite repeated summons being issued. Had these persons were clean and wanted to stand by their statement given before the Assessing Officer and the affidavit filed, there was no reason for these persons to not to appear and to stand by their statement. I am also of the view that the CIT(A) was not justified in drawing adverse inference on the basis of the transportation. As rightly pointed by the learned AR that these were local movements. The purchases and sales were within the walled city of Delhi where the transportation is by manual driven carts and the charges for the same are debited under the head cartage. Further when sales are accepted as genuine, then definitely the transactions have occurred and movements of goods have taken place. It is also not the case of the learned CIT(A) that transactions has not happened. Thus transportation on such facts cannot be a basis to draw adverse inference against the assessee. I further note that the learned CIT(A) has upheld the allegation of the Assessing Officer of the bogus purchases by making an observation that the appellant's

dealing with these parties is not free from any doubt. It is a settled law that doubt cannot be a basis for sustaining the allegation. On the contrary the assessee had lead sufficient evidences in support of its purchases which the Assessing Officer in my view has not been able to rebut. Accordingly I am of the view that in the facts and circumstances of the case it cannot be said that the purchases made by the assessee are bogus.

27. As regards the addition of 20% sustained by the learned CIT(A) I am of the view that since purchases are not bogus, the addition on this account cannot be sustained. Even otherwise the addition of 20% on the facts and circumstances is apparently too high. The learned CIT(A) having held that tax has to be levied on real income and the profit cannot be ascertained without deducting the cost of purchases from the sales as otherwise it amount to levy of tax on gross receipt, she ought to have applied profit rate in this nature of trade. Estimating profit at the rate of 20% by taking into consideration the provisions of section 40A(3) will not lead to determination of correct real income. Section 40A(3) is meant for a different purpose when the assessee has made purchases in cash. This provision cannot be applied in such cases. Once the purchases are held to be bogus then the trading results declared by the assessee cannot be accepted and right course

in such case is to reject books of accounts and profit has to be estimated by applying a comparative profit rate in the same trade. Though there can be a little guess work in estimating profit rate but such profit rate cannot be punitive.

28. In view of the above, the addition sustained by the learned CIT(A) is directed to be deleted and ground no.4 to 11 are allowed.

30. In result, the appeal is allowed.

Order pronounced in the open court on 28.10.2015

(I.C. SUDHIR)
JUDICIAL MEMBER

Dated: 28 /10/2015
Mohan Lal

Copy forwarded to:

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

ASSISTANT REGISTRAR

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