IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.1243/Del/2014 & 2526/Del/2014
Assessment Year : 2004-05

M/s BVJ Exports (P) Ltd., 14B/23, 1st Floor, Dev Nagar, New Delhi – 110 005. PAN : AAACB5523E.	Vs.	Income Tax Officer, Ward-3(1), New Delhi.
(Appellant)		(Respondent)

Appellant by	:	Shri Deepak Ostwal, CA and Shri Rishabh Ostwal, Advocate.
Respondent by	:	Shri S.K. Jain, Senior DR.
Date of hearing	:	09.08.2016
Date of pronouncement	:	19.08.2016

ORDER

PER G.D. AGRAWAL, VP :-

These appeals by the assessee for the assessment year 2004-05 are directed against the order of learned CIT(A)-VI, New Delhi dated 26th December, 2013 and 20th February, 2014.

ITA No.1243/Del/2014 :-

2. In this appeal, the assessee has raised various grounds. Ground Nos.2, 3 & 4 are against the reopening of assessment.

3. We have heard the submissions of both the sides and perused the material placed before us. The Assessing Officer recorded the following reasons for reopening of assessment :-

"A Report on enquiries made by the Directorate of Income Tax (Investigation), New Delhi into accommodation entries given by entry operators has been received. Here, 'entry' means issuance of cheque against receipt of unaccounted cash for the amount of cheque plus some commission or service charges. This report was received in the office of Commissioner of Income Tax, Delhi-I, New Delhi and was subsequently forwarded vide F.No.CIT-I/2005-06/2132 dated 13.03.2006. It has been revealed from the report that many persons were using services of accommodation entry operators to channelize their own unaccounted money in their regular books of accounts by routing the same through the Accounts of Accommodation entry providers.

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

2.1 Entries were being broadly taken for two purposes :-

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

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

2.2 The assessees who had unaccounted money (referred to as entry takers or beneficiaries) and wanted to introduce the same in the books of accounts without paying tax, approached another person (referred to as entry operator) handed over the cash (plus commission) and took cheque/DDs/Pos. The rate of commission for this 'service' varied from .5% to 1%. The cash was being deposited by the entry operator in a bank account. In most of these bank account either in his own name or in the name of the relative/friends or other person hired by him or a concern controlled by him, for the purpose of opening bank account. In most of these bank accounts the introducer was the main entry operator and cash deposit slips and other instruments were filled by him. The other persons (in whose name the A/c is opened) only used to

sign the blank cheque book and hand over the same to the main entry operator and entry operator then used to issue cheques/DDs/Pos in the name of the beneficiary from the same account (in which the cash is deposited) or another account in which funds were transferred through clearing in two or more stages. For this purpose, the beneficiary in turn deposited these instruments in his bank accounts and the money came to his regular books of account in the form of gifts, share application money, loan etc. through banking channels.

2.3 These account holders included small time employees of main entry operators whose earning did not justify huge deposits in accounts operated in their names as sole account holders or in the names of companies/partnership firms/sole proprietorship concerns of which they were made directors/partners/sold proprietors. They earned normally Rs.3 to 5 thousand per month in their normal work and some extra income for lending their names for the purpose of different bank accounts. Their signatures were taken on blank gift deeds, cheque books, share application money etc. In fact, these persons signed all types of papers they were asked to sign. They were made directors of companies, partners of firms and proprietor of different concerns solely for operation of these accounts. Actually, many of them were not even aware of the tax implications etc. Their only concern was with the few thousand rupees given to them by the entry operators.

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

4. In the instant case, information has been received that the assessee has taken accommodation entry as noted below:-

Bank of the assessee	*Branch of the assessee's bank*	*Amount (Rs.)*	*Instrument No. through which entry taken*	*Date on which entry taken*	*Name of account holder through which entry given*	*Bank from which entry taken*	*Branch of entry giving bank*	*Account No. of entry giving account*
Stanchart	*Sansad Marg*	*100000*	*124220*	*13 Dec-03*	*Arpit Sales Corp.*	*Keshav Sehkari*	*Karol Bagh*	*695*
Stanchart	*Conn Place*	*100000*	*137787*	*4-Feb-04*	*Arpit Sales Corp.*	*Keshav Sehkari*	*Karol Bagh*	*695*
Stanchart	*Conn Place*	*300000*	*137788*	*5-Feb-04*	*5-Feb-04*	*Arpit Sales Corp.*	*Keshav Sehkari*	*695*
Standard Chartered Bank	*Service Branch*	*305000*	*306088*	*4-Jul-03*	*P.K. Investments*	*Federal*	*Karol Bagh*	*5771*
Standard Chartered Bank	*Service Branch*	*300000*	*371004*	*28-Dec-03*	*P.K. Investments*	*Federal*	*Karol Bagh*	*5771*
Standard Chartered Bank	*Service Branch*	*400000*	*874972*	*4-Feb-04*	*P.K. Investments*	*Federal*	*Karol Bagh*	*5771*
Standard Chartered Bank	*Service Branch*	*200000*	*874973*	*5-Feb-04*	*P.K. Investments*	*Federal*	*Karol Bagh*	*5771*
Standard Chartered Bank	*Service Branch*	*500000*	*857644*	*18-Mar-04*	*P.K. Investments*	*Federal*	*Karol Bagh*	*5771*
Standard Chartered Bank	*Service Branch*	*200000*	*857652*	*26-Mar-04*	*P.K. Investments*	*Federal*	*Karol Bagh*	*5771*
Total		*2405000*						

5. As per the investigation report, the creditworthiness of the lenders in these cases has not been established and these transactions are non-genuine. I have also perused the return of the assessee for the assessment year 2004-05 and the above income is not reflected in the return. I,

therefore, have reason to believe that this amount of Rs.2429050/- (Rs.2405000/- plus commission of Rs.24050/- , being 1% of the said amount) represents income of the assessee chargeable to tax which has escaped assessment for the A.Y. 2004-05. The assessment u/s 143(1) of the Income Tax Act was done on 8.4.2005."

4. From the above, it is evident that up to paragraph 3, there is a general discussion with regard to the modus-operandi of entry providers. In paragraph 4, there is information with regard to the assessee by which the name of the bank, amount and the date have been given. Thereafter, in paragraph 5, the Assessing Officer mentioned that as per investigation report, the creditworthiness of the lenders in these cases has not been established and these transactions are not genuine. The Assessing Officer verified the return for the relevant assessment year and found that the above income is not reflected in the return of income. He, therefore, issued notice for reopening of assessment. From the above, it is evident that the information mentioned in the reasons recorded is only general in nature i.e., it gives the details of cheques received by the assessee, bank account number of the assessee where cheques are credited and the bank details of the persons who gave the cheques. However, the nature of the amount received is not mentioned. In paragraph 3 of the reasons recorded, the Assessing Officer has mentioned that the accommodation entry is provided in the form of credit entries, share capital, gift, sale consideration etc. However, in respect of credit in the assessee's account, it is not mentioned whether the credit is by way of loan or share capital or gift or sale consideration. When the Assessing Officer has not even seen the nature of the credit in the assessee's account, how can he form an opinion that the transaction is not genuine. We find that in identical facts, Hon'ble Jurisdictional High Court in the case of Pr.Commissioner of Income Tax-4 Vs. G & G

Pharma India Ltd. in ITA No.545/2015, order dated 8th October, 2015, held as under:-

> *"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:*
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> *"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."*
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> *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.*
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> *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."

5. The ratio of the above decision would be squarely applicable to the case of the assessee because, in this case also, the Assessing Officer simply on the basis of the report of Investigation Wing of the Income Tax Department formed an opinion for escapement of income without any independent application of mind by him. The reasons recorded nowhere demonstrate how the credit entry in the bank account of the assessee is undisclosed income of the assessee. The Assessing Officer has even not mentioned the nature of the entry but has simply mentioned that the creditworthiness of the lenders in these cases has not been established. At the time of hearing before us, it was pointed out by the learned counsel that the credit is not on account of loan but part of the credit is against the share capital, part is repayment of the loan advance by the assessee and part of the amount is received against the sale of the shares by the assessee. In the above circumstances, we, respectfully following the judgment of Hon'ble Delhi High Court in the case of G & G Pharma India Ltd. (supra), hold that the reopening of the case of the assessee for the assessment year under consideration is bad in law. Accordingly, the notice issued u/s 148 of the Act is quashed and consequentially, the

assessment order passed in pursuance to such notice is also quashed. Once the assessment order itself has been quashed, the other grounds of the assessee's appeal wherein the assessee has challenged the additions made in the assessment order do not survive for adjudication.

ITA No.2526/Del/2014 :-

6. In this appeal, the only ground raised is against the levy of penalty of ₹30,000/- u/s 271(1)(b) of the Act.

7. We have heard the submissions of both the sides and perused the material placed before us. This penalty has been levied for the alleged failure of the assessee to furnish necessary details during the course of assessment proceedings. Since while disposing of assessee's appeal in ITA No.1243/Del/2014 as above, we have already quashed the notice u/s 148, consequentially, the assessment proceedings conducted in pursuance to such notice have also become void ab-initio. Once the assessment proceedings itself have become void ab-initio, the assessee cannot be penalized for alleged non-compliance to the notice issued in such assessment proceedings. We, therefore, cancel the penalty levied u/s 271(1)(b) of the Act.

8. In the result, both the appeals of the assessee are allowed.

Decision pronounced in the open Court on 19.08.2016.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(G.D. AGRAWAL) VICE PRESIDENT

VK.

Copy forwarded to: -

1. Appellant : **M/s BVJ Exports (P) Ltd.,**
   14B/23, 1st Floor, Dev Nagar, New Delhi – 110 005.

2. Respondent : **Income Tax Officer, Ward-3(1), New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar