IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR

(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER & SHRI RAM LAL NEGI, JUDICIAL MEMBER)

ITA.No:98/Raipur/2012 & C.O. No. 01/Raipur/2016
(Assessment Year: 2004-05)

Asstt. Commissioner of Income tax 1(2), Raipur	**V/S**	**Maruti Clean Coal & Power Ltd. Hira Arcade, Pandri Raipur(CG)**
Maruti Clean Coal & Power Ltd. Hira Arcade, Pandri Raipur(CG)	V/S	**Asstt. Commissioner of Income tax 1(2), Raipur**
(Appellant)		**(Respondent)**

ITA.No:187/Raipur/2014
(Assessment Year: 2004-05)

Deputy Commissioner of Income tax 1(2), Raipur	**V/S**	**Maruti Clean Coal & Power Ltd. Flat No. 301-302, Ram Residency, Shankar Nagar, Raipur(CG)**
(Appellant)		**(Respondent)**

PAN: AADCN4801C

Appellant by	**: Shri P.K. Mishra, D.R.**
Respondent by	**: Shri Salil Kapoor, Adv. , Raman Chawla, C.A. & Soumya Singh, Adv.**

(आदेश)/ORDER

Date of hearing : 05 -03-2018
Date of Pronouncement : 07 -03-2018

PER N.K. BILLAIYA, ACCOUNTANT MEMBER

1. This appeal by the Revenue and cross objection of the Assessee are directed against the order of the Ld. CIT(A), Raipur dated 30.04.2012 pertaining to A.Y. 2004-05.

2. The grievance of the revenue relates to the deletion of the addition of Rs. 35 lacs made by the A.O. u/s. 68 of the Act. In its cross objection, the assessee has challenged the reopening of the assessment by the issue of notice u/s. 148 of the Act.

3. Since the cross objection of the assessee goes to the root of the matter, we take up the cross objection first. In this case, the original assessment was framed u/s. 153A r.w.s. 143(3) of the Act vide order dated 31.12.2008. A notice u/s. 148 was issued and served on 31.03.201. Since the impugned assessment year is 2004-05, therefore, it can be safely concluded that the notice u/s. 148 of the Act was issued beyond 4 years from the end of the assessment years.

4. The reasons for reopening the assessment are as under:-

Annexure-'A'

In the Course of investigation made by the Investigation Wing under the DIT (Investigation), New Delhi into the cases of various entry operators and had circulated a CD containing the statement and details of the entry operators and the beneficiaries. The date in the CD shows that M/s Maruti Clean Coal & Power Ltd. PAN No. AADCH4810C has taken accommodation entries of Rs. 35,00,000/- during the F.Y. 2003-04 relating to A.Y. 2004-05 from the Laboratories Overseas (P) Ltd., Parkash Punit Commerce & Consultant, Rubik Export Ltd, Satwant Singh Sodhi Construction, Mestro Marketing & Advertising (P) Ltd, Ethnic Creations (P) Ltd. and Baldev Harish Electricals (P) Ltd. The ACIT has made assessment u/s 153A with section 143(3) of IT Act, 1961 in the assesse's case. The accommodation entries from the various parties mentioned above, which did not find place in the assessee's book of account. Accordingly, I have reasons to believe

that the above income chargeable to tax escaped assessment and it is proposed to assess/ re-assess that income and such other income which comes to notice subsequently during course of investigation by DIT (Investigation). Therefore, notice u/s 148 is issued for A.Y. 2004-05

G.N. SINGH
Asstt. Commissioner of IT, Circle-1(2),
RAIPUR (36 Garh)

5. We are unable to understand when in the reasons so recorded, the A.O. himself is stating that the accommodation entries from the various parties mentioned above, which did not find place in the assessee's books of account, therefore, he has reasons to believe that the income chargeable tax has escaped assessment. When the entries are not found in the books of the assessee how the same could be made basis for reopening the completed assessment. In our understanding of the law, veracity of the notice u/s. 148 of the Act has to be tested on the basis of the notice itself. As mentioned elsewhere, the notice is issued after four years from the end of the relevant assessment years, First proviso to section 147 of the Act squarely apply and the same is as under:-

> ***Provided*** *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.*

6. The mandate of this proviso is that income that has to be taxed must have escaped assessment by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

7. There is not even a whisper in the reasons recorded for the reopening of the assessee relating to non disclosure of full and true facts by the assessee. The Hon'ble High Court of Delhi in the case of Haryana Acrylic Manufacturing Company 308 ITR 38 had the occasion to consider a similar issue and observed as under:-

> *20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade (P.) Ltd.'s we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above.*

8. A similar view was taken by the Hon'ble High Court of Punjab and Harayana in the case of Dulichand Singhania 269 ITR 192, the relevant part reads as under:-

> *13. The entire thrust of the findings recorded by the AO in his order dt. 13th March, 2003 is to justify his satisfaction about escapement of income. According to him, it was a clear case of escapement of income as defined in Expln. 2 to Section 147 as the assessee had been allowed*

excessive relief under Section 80O of the Act. However, it is not necessary for us to go into the merits of this finding as the second requirement of the proviso has not been satisfied obviously. The reasons recorded by the AO for initiation of proceedings under Section 147 of the Act have already been reproduced above. A bare perusal of the same shows that the satisfaction recorded therein is merely about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Absence of this finding, which is a "sine quo non" for assuming jurisdiction under Section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the AO wholly without jurisdiction. As already observed, the learned counsel for the Revenue has conceded that neither in the reasons recorded nor in the order dt. 13th March, 2003, has the assessee been charged with failure to disclose, fully and truly all material facts necessary for his assessment. In Fennei (India) Ltd. v. Dy. CTT (2000) 241 ITR 672 (Mad), similar matter had come up for consideration before the Madras High Court and it has been held as under:

"The precondition for the exercise of the power under Section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably "entertained by the AO that any income chargeable to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further precondition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Section 142 or Section 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the AO does not acquire jurisdiction to initiate any proceeding under Section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the AO must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. The relevant words in the proviso are, ".....unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee....."

Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on

the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment.

Whenever a notice is issued by the AO beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons referred to in the main paragraph of Section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the AO to record that anyone or all the circumstances referred to in the proviso existed before the issue of notice under Section 147."

Similarly, in Aivind Mills Ltd. v. Dy. CTT (2000) 242 ITR 173 (Guj) it was held as under:

"It is a clear case where the AO has no reason to link escapement of income from assessment with non-disclosure of any material fact necessary for his assessment at the time of original assessment but is due to an erroneous decision on the question of law by the AO. Thus, the case is squarely covered by the proviso to Section 147 and not Section 149. Initiation of proceedings under the proviso being clearly barred by time, the AO could not have assumed jurisdiction by issuing notice under Section 148 in respect of the asst. yr. 1982-83."

9. We find that during the course of the assessment proceeding u/s 153A/143(3) of the Act, the assessee has filed complete details of share application money received and refunded along with names/addresses/PAN details for A.Y. 2001-02 to 2007-08.

10. Coming back to the reasons recorded for reopening of the assessment as mentioned elsewhere, it can be seen that there is no independent application of mind by the A.O. It appears that the A.O. has borrowed the investigation made by the Investigation Wing under the DIT (Investigation), New Delhi. The

Hon'ble High Court of Delhi in the case of G & G Pharma India Ltd. 384 ITR 147 has observed as under:

> *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.*

11. The Hon'ble High Court of Delhi in 338 ITR 51 had the occasion to consider identical set of facts and observed as under:-

> *13 Annexure attached to the said proforma placed on record of the petitioner reads as under:*

Beneficiary's name	*Value of entry taken*	*Instrument No. by which entry taken*	*Date on which entry taken*
Signature Hotels Pvt. Ltd.	*500000*	*(AC No.-21060)*	*09-Oct-02*
Name of account	*Bank from which entry*	*Branch of entry giving*	*A/c No. entry*

holder of entry giving account	*given*	*bank*	*giving account*
Swetu Stone PV	*SBP*	*DG*	*50106"*

14. The first sentence of the reasons states that information had been received from Director of Income-Tax (Investigation) that the petitioner had introduced money amounting to Rs.5 lacs during financial year 2002-03 as per the details given in W.P. (C) NO. 8067/2010 Page 12 Annexure. The said Annexure, reproduced above, relates to a cheque received by the petitioner on 9th October, 2002 from Swetu Stone PV 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.

15. The aforesaid reasons do not satisfy the requirements of Section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure, which has been quoted above. 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 Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the W.P. (C) NO. 8067/2010 Page 13 information received from the Director of Income-Tax (Investigation) and arrive at a belief whether or not any income had escaped assessment.

12. Considering the facts of the case in hand in totality qua the reasons for reopening the assessment in the light of the judicial decisions discussed hereinabove, we have no hesitation to hold that the notice issued u/s. 148 of the Act is without jurisdiction and the same is set aside.

13. ITA No. 98/Ahd/2012 is the appeal by the Revenue on merits of the case since we have quashed the re-assessment order itself, we do not find it necessary to dwell into the merits of the case. Appeal dismissed.

14. ITA No. 187/Raipur/2014 is appeal by the revenue preferred against the order of the ld. CIT(A), Raipur dated 05.06.2014 pertaining to 2004-05.

15. The sum and substance of the grievance of the revenue is that the ld. CIT(A) erred in deleting the addition of Rs. 1.50 crores made u/s. 68 of the Act. The revenue is further aggrieved that the ld. CIT(A) has overlooked the compliance of specific directions issued by the ITAT.

16. This is the second round of litigation. In the first round of litigation, the assessment travelled up to the Tribunal and the Tribunal vide order dated 10.02.2012 in IT(SS)A No. 08/BLPR/2010 had set aside the matter before the A.O. The relevant findings of the Co-ordinate Bench read as under:-

> *"However principles of natural justice demand that when the assessee wants to cross examine a person an opportunity should be granted to him so as to make the addition justified. Further the A.O. has not enquired from the alleged shareholders as to whether they have received the money prior to issue of cheques. The bank accounts of the shareholders have not been examined by the A.O. to find out whether cash of equivalent amount has been deposited prior to issue of cheques or there were sufficient balance in the various bank accounts out of which cheques have been issued. Under these circumstances and in the interest of justice we deem it proper to restore the issue to the file of the A.O. with a direction to afford an opportunity to the assessee to cross-examine Shri Neeraj Jain and decide the issue in the light of our observations above and in accordance with law. Needles to say, the A.O. shall give due opportunity of being heard to the assessee. We hold and direct accordingly. The ground raised by the assessee is accordingly allowed for statistical purpose."*

17. Pursuant to the directions of the Tribunal, the assessment was once again framed by making similar addition vide order dated 28.03.2013.

18. When the matter was agitated before the ld. CIT(A), the ld. CIT(A) observed that the A.O. has only relied on statement of Shri Neeraj Jain which cannot be used against assessee in the absence of cross objection. The ld. CIT(A) further observed that the addition was made partly on evidence and partly on suspicion. The ld. CIT(A) concluded by holding that the A.O. relied upon the material without conducting the enquiry prescribed by the Tribunal and proceeded by deleting the additions made by the A.O.

19. Aggrieved by this, the revenue is before us. The ld. D.R. strongly supported the findings of the A.O. It is the say of the ld. D.R. that it is incorrect to say that the A.O. disregarded the directions of the Tribunal. The ld. D.R. vehemently stated that the A.O. issued notice to Shri Neeraj Jain at the last available address and the same returned unserved. The ld. D.R. continued by saying that the A.O. did afford the opportunity of cross examination of Shri Neeraj Jain but since the notices/summons could not be served upon Shri Neeraj Jain, it cannot be said the A.O. has violated the directions of the Tribunal.

20. Replying to the submissions of the ld. D.R. the ld. Counsel for the first time took the plea that the entire assessment is bad in law as it has been framed u/s. 153A r.w.s. 143(3) of the Act without there being any incriminating material found at the time of search. Strong reliance was placed in on the decision of the Hon'ble High Court of Delhi in the case of Kabul Chawla 380 ITR 573 and the decision of the Tribunal Kolkata Bench in the case of Peerless General Finance and Investment Company Ltd. 21 SOT 440.

21. We have given a thoughtful consideration to the orders of the authorities below. We will first adhere to the challenge of the assessment on the ground that no incriminating material was found at the time of search. To this extent, there is no dispute because neither the Assessing Officer nor the First Appellate Authority has referred to any incriminating material found at the time of search. The additions made by the A.O. are on the basis of some material found during the course of survey operations in the premises of some third person. On the contrary, the First Appellate Authority has categorically held that no incriminating material was found at the time of search.

22. Now the question is whether this new ground can be taken up for the first time in set aside proceeding before the Tribunal. We find that the issue regarding the right of the assessee to challenge the legal validity of the order. In the second round of litigation was considered by the Hon'ble Gujarat High Court in the case of P.V. Doshi 113 ITR 22.

> *"In that case, a reassessment order under section 147 was passed by the Assessing Officer and in an appeal before the AAC against that reassessment order, the assessee gave up the contention regarding the validity of the notice of reassessment. The AAC dismissed the assessee's appeal on merits. On further appeal, the Tribunal remanded the case to the Assessing Officer with directions to cross-examine a witness. On second round of appeal before the AAC from the order passed on remand, the assessee contended that the reassessment proceedings were not validly initiated. The AAC observing that no reasons had been recorded by the Assessing Officer as required by section 148(2), annulled the order of reassessment. On appeal by the department, the Tribunal held that once the Tribunal passed an order, the matter became final and that the order restoring the case to the file of the ITO with clear instructions only to cross-examine a witness meant that the only point that was left open was in respect of the issue set aside and not the legal or jurisdictional aspect whether the reassessment proceedings were correctly initiated. On a reference, the Hon'ble High Court held as under:—*
>
> > *"that as a jurisdictional provision which was mandatory and enacted in public interest could never be waived and the want of jurisdiction was discovered by the Appellate Assistant Commissioner, there was no question of waiver by the assessee. No question of finality of the remand*

order of the Tribunal could arise because the mandatory conditions for founding jurisdiction for initiating reassessment proceedings had not been fulfilled. The order of reassessment was, therefore, not valid."

In view of the ratio of the above decision of Hon'ble Gujarat High Court, it is evident that jurisdictional provision, which is mandatory, can be taken up in the second round of litigation. We, therefore, respectfully following the above decision of Hon'ble Gujarat High Court permit the assessee to raise the issue relating to validity of the order in second round of litigation. Accordingly, we proceed to examine the assessee's contention on merits."

23. Coming to the merits of the case as mentioned elsewhere, there is no dispute that no incriminating material has been found at the time of search and therefore it is now settled proposition of law that no assessment u/s. 153A of the Act can be framed in the absence of any incriminating material found at the time of search. For this proposition, we draw support from the decision of the Hon'ble High Court of Delhi in the case of Kabul Chawla (supra).

24. In the light of the above discussion, we have no hesitation to hold that the impugned assessment order is bad in law and is accordingly quashed. The appeal of the Revenue becomes a nullity.

Order pronounced in Open Court on	07- 03- 2018

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER **True Copy**

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

RAIPUR: Dated 07/03/2018

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.

मेसर्स मारुती क्लिन कोल अँण्ड पॉवर लिमीटेड, वार्ड नं. 42 बिल्डींग नंबर 14, आयकर कॉलोनी के पास रायपुर

5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Sr. P.S.
ITAT,Raipur