IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA
(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, JudicialMember)

I.T.A. No. 1375/Kol/2017
Assessment Year: 2009-10

A.C.I.T. Central Circle-1(1), Kolkata……Appellant
AaykarBhawanPoorva
110, Shantipally
3rd Floor
Kolkata – 700 107

M/s. Adhunik Cement Ltd……Respondent
(Now Dalmia Bharat Cement)
Anil Plaza II
4th Floor
G.S. Road, Near ABC
Guwahati – 781 005
[PAN : AAFCA 1128 F]

Appearances by:
ShriS.K. Tulsiyan, Advocate, appeared on behalf of the assessee.
ShriG. Mallikarjuna, CIT,D/R. appearing on behalf of the Revenue.

Date of concluding the hearing :May 3rd, 2018
Date of pronouncing the order :May 18th , 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This is an appeal filed by the assessee directed against the order of the ld. Commissioner of Income Tax (Appeals)-20, Kolkata, dt. 29/03/2017, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2009-10.

2. Facts in brief:-

The assessee is a company and is in the business of manufacturing of cement. It filed its original return of income for the impugned Assessment Year 2008-09, on 24/09/2009. A search operation was conducted on the company u/s 132 of the Act. A notice u/s 153A of the Act was issued to the assessee on 18/12/2012. The assessee filed a return in response to this notice u/s 153A of the Act and thereafter assessment was completed u/s 143(3) r.w.s. 153A of the Act, on 31/03/2014.

2.1. A second search and seizure operation was conducted on the assessee u/s 132 of the Act on 11/03/2016. Thereafter a notice u/s 148 of the Act was issued to the assessee for the impugned Assessment Year 2009-10 on 22/03/2016. The assessee filed a reply to the same on 13/04/2016. The assessee contended that the notice for re-opening of the assessment was issued only after a lapse of four years from the end of the Assessment Year and hence it was barred by limitation and that the notice was issued

without jurisdiction of the competent authority. The assessee also filed a return of income in response to this notice issued u/s 148 of the Act on 06/05/2016.

In reply to the assessee's request, the Assessing Officer vide his communication dt. 12/07/2016, briefly stated the reasons for reopening. Thereafter on 05/08/2016, he provided the assessee with a copy of the information received by the Assessing Officer from DDIT (Inv.) Unit-1(2), Guwahati on 22nd March, 2016, based on which reasons were recorded that the assessee's income subject to tax has escaped assessment and notice u/s 148 of the Act was issued on the same date i.e. 22/03/2016. The assessee filed objections for the reopening of the assessments on 08/12/2016. Thereafter the Assessing Officer provided a certified copy of the reasons recorded for reopening of the assessment for the Assessment Year 2009-10, on 9th December, 2016.

2.2. The Assessing Officer rejected the objections filed by the assessee for reopening the assessments. Copy of the statements of Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan, recorded u/s 131(1A) of the Act, on 13/03/2016, by the investigation wing, was provided to the assessee. On 19th December, 2016, the assessee made a request for cross-examination of Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan. The opportunity for cross-examination of these two persons was provided to the assessee on 22nd December, 2016. Both these persons denied the contents of the statement recorded u/s 131(1A) on 13.03.2016. During the course of assessment proceedings the Assessing Officer sought explanation from the assessee, as to why the share capital raised along with premium should not be treated as undisclosed income of the assessee. After considering the statements of the assessee, on 30th December, 2016, the Assessing Officer passed an order u/s 147 r.w.s. 143(3) of the Act.

2.3. Aggrieved the assessee carried the matter in appeal, wherein he challenged the legality of the reopening of the assessments as well as the addition on merits. The ld. First Appellate Authority for the reasons given in his order held that the reopening of assessment is bad in law. Hence he allowed the appeal of the assessee.

3. Aggrieved the revenue is in appeal before us on the following grounds:-

> *"1. That in the facts and circumstances of the case, the LdCIT(A) erred in holding that the statements of ShriSandip Sharma and ShriDilip Kumar Khetan recorded on 11/03/2016 were not voluntary and therefore there was no reason to reopen the case, without assigning any reason as to why it was not voluntary.*
>
> *2. That in the facts and circumstances of the case, the Ld CIT(A) erred in holding that statements of ShriSandip Sharma and ShriDilip Kumar Khetan recorded on 11/03/2016 were not voluntary merely based on some answers given during cross-examination in spite of the fact that the A.O had brought material evidence on record*

in the form of answers given in some other questions, that ShriKhetan and ShriSharma were lying during cross-examination meaning thereby the statements recorded on 11/03/2016 was correct.

3. That in the facts and circumstances of the case, the LdCIT(A) erred in holding that statements of ShriSandip Sharma and ShriDilip Kumar Khetan recorded on 11/03/2016 were not voluntary ignoring the fact that the blatant lie of ShriKhetan regarding the ownership of his mobile number was unearthed during the cross-examination itself, which has been discussed in the order itself rendering the whole statements given during the course of examination to be false.

4. The appellant craves the leave to make any addition, alteration and modification etc. of ground or grounds during the course of hearing of the appeal.

4. Shri G. Mallikarjuna, ld. CIT, D/R, argued that the ld. First Appellate Authority was wrong in holding that the reopening of the assessee was bad in law. He submitted that the reopening of the assessment was made based on information received from the investigation wing i.e. DDIT (Inv.) Unit-1(2), Guwahati (hereinafter the 'DDIT (Inv.)') on 22/03/2016. He submitted that the letter contained information that the assessee has raised bulk amount of capital and share premium from 15 companies based in Kolkata and these were not found to be existing in their respective registered addresses. He further submitted that statements were recorded from two persons, who are Directors in these companies i.e. Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan and these persons in their statements have admitted that these were paper companies and that they have provided accommodation entries to M/s Adhunik Cements Ltd. He submitted that the statement of these two persons are *prima facie* material based on which the Assessing Officer has come to a reasonable conclusion that the income of the assessee subject to tax has escaped assessment and accordingly had recorded reasons for reopening and reopened the assessment, in accordance with law. Coming to the retraction by these two individuals, he vehemently contended that the retraction was after considerable time and were not based on cogent material or evidence. He submitted that these two persons have not filed any affidavit in support of their retraction of statements made before DDIT (Inv.) and have not stated the facts and circumstances which led to their disclosure before the DDIT(Inv.). He contended that the retraction was an afterthought and cannot be accepted and the assessments based on the statements have to be upheld. He relied on the decision of the Ahmedabad Bench of the Tribunal in the case of *ShriKantilal C.Shah Vs. The Asst.CIT* being IT(SS)A No.21/AHD/2009, dt. 24/06/2011, for the proposition that retraction of statement cannot be made without any strong supporting evidence and after considerable time.

The ld. D/R, strongly disputed the finding of the ld. CIT(A) that the reopening of the assessment is bad in law and submitted that this finding has to be reversed.

4.1. The ld. Counsel for the assessee, on the other hand, strongly opposed the contentions of the ld. D/R and submitted that the entire reopening was based on the alleged statements recorded by the Investigation wing from two persons, namely, Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan. The assessee objected to the reopening which was after four years and has also sought cross-examination of these two witnesses of the revenue. He pointed out that the Apex Court in the case of *Andaman Timer Industries vs. CCE (2015) 127 DTR 241,* has recognised the right of the assessee to cross-examine the witness of the revenue. He took this bench through the replies given by these two witnesses of the revenue during the course of cross-examination and submitted that it is not a case of retraction. He pointed out that it was during cross examination of the revenue witness, the facts have come out and to call it retraction, is factually and legally incorrect. Hence he argued that the propositions of law relied upon by the ld. D/R, on the issue of retraction, is not applicable to the facts of the case. He contended that the entire reopening was based on two statements made by Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan and these two persons during the course of cross-examination have categorically stated that they have signed on the dotted line, under threat and coercion and that they do not know any of the contents recorded in the statements, by the investigation wing. They are further stated that in no way connected with any of the 15 companies either as Directors or shareholders. He argued that once this denial of the contents in the statement by the persons who gave the statements could not be rebutted by the revenue authorities, the material based on which the reopening was done becomes non-existing material and hence the reopening is bad in law. He further submitted that during the course of earlier assessment proceedings made u/s 153A r.w.s. 143(3) of the Act, the Assessing Officer had made detailed enquiries as regards share capital received by issuing notice u/s 133(6) of the Act to all the shareholders and subscriber companies and that replies were filed by each of these companies before the A.O.. He submitted that after being fully satisfied with the identity, creditworthiness and genuineness of these transactions, the Assessing Officer accepted the same and completed assessment u/s 143(3) of the Act r.w.s. 153A of the Act on 31/03/2004. Thus, the reasons recorded for reopening of the assessment was

nothing but a mere change of opinion on the same set of facts and that too without enquiry or application of mind.

4.2 He further submitted that the reopening of assessment is bad in law for the following reasons:-

a) The reopening was based on the information received from DDIT (Inv.), without application of mind or enquiry.
b) The reopening is barred by limitation, as it is beyond the period of four years and as the original assessment order was framed u/s 143(3) of the Act and as the Assessing Officer in the reasons recorded has not alleged that the assessee failed to disclosed, truly and fully, all necessary facts required for the assessment as stipulated in the proviso to Section 147 of the Act.
c) The statements recorded u/s 131(1A) of the Act, were not during the course of any proceedings under the Act and have not evidentiary value and that even otherwise these statements have been denied by the witnesses of the revenue and hence the basis on which the re-opening was done does not exist anymore. He relied on a number of case-law in support of his contentions that there is no evidential value in the statements recorded from Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan. We would discuss the case law as and when necessary.

4.3. On a query from the Bench that, as on the date of recording of reasons, the Assessing Officer had information and that the statements recorded from these two persons were in existence and the correctness or otherwise of the same can be decided only during the assessment proceedings, the ld. Counsel for the assessee submitted that these two persons have stated on oath during the cross-examination before the Assessing Officer that they do not know the contents of the statements and they were forced to sign the same and denied the contents therein and hence the statements in question cease to be evidence *ab initio* and hence the reopening based on such statements is bad in law. He further pointed out that the Assessing Officer did not verify the information received by him from the DDIT(Inv.) and on the same day, based on this information issued notice u/s 148 of the Act and thus the reasons are recorded without application of mind. He further submitted that mandatory approved u/s 151 of the Act was not obtained.

The ld. D/R, in reply submitted that the statement recorded u/s 131 is a valid statement and that the denial is wrong as the Assessing Officer has referred the matter to the DDIT(Inv.) and the DDIT(Inv.) has stated that these persons had also given similar statements.

5. Rival contentions heard. On careful consideration of the facts of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

The only issue that has to adjudicated by us is as to whether the ld. First Appellate Authority is right in holding that the reopening of assessment under facts and circumstances of the case, is bad in law.

5.1. Admittedly the reopening is beyond a period of four years from the end of the Assessment Year i.e. 2009-10. The original assessment has been completed u/s 153A r.w.s. 143(3) of the Act, on 31/03/2014. Thus, the proviso to Section 147 of the Act, applies in this case.

5.2. The reasons recorded for reopening are as follows:-

"The regular assessment for the Assessment year 2009-10 in this case was completed on 31.03.2014 u/s 153A/143(3) of the Income Tax Act, 1961 on a total income of Rs. 9,48,520/- . Subsequently this office was in receipt of letter from the DIT(lnv.)Unit-1(2),Guwahati on 22.03.2016. The letter contained information regarding raising bulk amount of share capital and share premium during the relevant period from fifteen companies based in Kolkata.

During the course of search on 11.03.2016 it was found that none of the fifteen companies were found to be existing at their respective registered addresses. The companies are also seen to appear in the list of "jamakharchi" company. The Statement of Directors of some of such paper companies were recorded u/s 131(1A) of the IT Act. They had admitted that they provide accommodation entries to M/s Adhunik Cement Limited. This indicates that undisclosed income in the form of share capital and share premium of M/s Adhunik Cement Limited had been introduced through these fifteen bogus/papers company.

Capital raised during the period was Rs. 11,05,00,000/-. Entries were provided with the aid of 15 companies as per list annexed. Names of these companies also features in the list of jamakharchi companies compiled by the Directorate of Income Tax (Investigation), Kolkata. Statements of Directors of some of such paper companies were recorded u/s 131(1A) of the Income Tax Act, 1961 during the course of search wherein they admitted to providing such accommodation entries to M/s Adhunik Cement Limited.

In view of the above fact I have reason to believe that the income of the assessee chargeable to tax for the assessment year 2009-10 has escaped assessment within the meaning of Section 147 of the Income tax Act 1961.

Issue statutory notice u/s 148 of the I.T. Act. 1961 to the assesse company requesting to deliver a return of income for the assessment year 2009-10 within thirty days of receipt of notice."

The reasons were recorded on 22.03.2016 which is the day on which the letter was received from DIT(Inv.) Unit 1(2) Gauhati dated 22.03.2016 and received as the same day by the A.O.

5.3. A perusal of the above recorded reasons demonstrates that the Assessing Officer has not alleged that there is a failure on part of the assessee truly and fully discloses all the material facts which are necessary for assessment. The case law on this matter is as follows:

*"T*he 'A' Bench of this Tribunal in the case of *M/s. Beekay Steel Industries Ltd. vs. DCIT CC-XXX, Kolkata, in* I.T.A. No. 105/Kol/2015, order dt. 31/05/2017, held as follows:

4.4. The Hon'ble Bombay High Court in the case of Tao Publishing (P) Ltd. v. Dy.CIT reported in (2015) 370 ITR 135 (Bom.), has held as follows:-

> *"10. As stated above, the reasons supplied to the Petitioner do not disclose that there was any failure on the part of the Petitioner to provide all the material facts. That being the position, this ground could not have been taken up against the Petitioner at the time of disposing of the objections. Once this was not the basis for issuance of notice for Reassessment, it cannot be held against the Petitioner that the Petitioner had failed to make a true and full disclosure. It will have to be held that the Petitioner did not fail to make full and true disclosure of all material facts. The jurisdictional requirement for carrying out the reassessment, after the expiry of period of four years, is not fulfilled in the present case."*

4.5. The Hon'ble Bombay High Court in the case of Sound Casting (P) Ltd. v. Dy. CIT reported in 250 CTR 119 (Bom.) (HC), has held that there is no allegation in the reasons which have been disclosed to the assessee that there was any failure on his part to fully and truly disclose material facts necessary for assessment and therefore reopening beyond four years was not valid. (A.Y. 2005-06).

4.6. The Hon'ble Delhi High Court in the case of CIT vs. Orient Craft Ltd. reported in [2013] 354 ITR 356 (Del.)(HC) has held as follows:

> *"The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147."*

4.7. The Hon'ble Delhi High Court in the case of Haryana Acrylic Manufacturing Co. v. Commissioner of Income-Tax and Anor. reported in [2009] 308 ITR 38 (Delhi) has held as follows:

> *"**26**Viewed in this light, the proviso to section 147 of the said Act, carves out an exception from the main provisions of section 147. If a case were to fall within the proviso, whether or not it was covered under the main provisions of section*

147 of the said Act would not be material. Once the exception carved out by the proviso came into play, the case would fall outside the ambit of section 147.

***27** Examining the proviso [set out above], we find that no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied:*

(a) an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year; and (b) unless any income chargeable to tax has escaped assessment forsuch assessment year by reason of the failure on the part of the assessee: (i) 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 (ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out 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. This is clearly not the case here because the petitioner did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. If it is also found that the petitioner had disclosed fully and truly all material facts necessary for its assessment, then no action under section 147 could have been taken after the four year period indicated above. So, the key question is whether or not the petitioner had made a full and true disclosure of all material facts ?

***29** 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 WelIntertrade Private Ltd (supra) we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania (supra) 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 view-point, we hold that the notice dated 29.03.2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order*

dated 02.03.2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above.

4.8. Applying the propositions laid down in the above case law to the facts to this case, we have to necessarily hold that the re-opening of the assessment proceedings is not valid that there is not even a whisper in the reasons recorded for the reopening of the assessment that there is a failure on the part of the assessee to disclose fully and truly all the necessary material facts required for assessment in view of the 1st proviso to Section 147 of the Act. In this case no tangible materials have come to the possession of the Assessing Officer subsequent to the Assessment Order u/s 143(3). Re-opening is done based on the same material and record and hence it is bad in law. As far as the contention, that there is a change in opinion is concerned, we are unable to agree with the ld. Counsel for the assessee as there was neither a query on this issue by the Assessing Officer during the original assessment proceedings, nor there was a reply by the assessee. Hence there was no opinion formed. Thus, the question of change of opinion does not arise.

4.9. In any event, as we have held that the re-opening is bad in law as it does not fulfill the requirement of the Proviso to Section 147 of the Act, and as no tangible material has come to the possession of the Assessing Officer, we quash the assessment and allow the appeal of the assessee."

5.4. Applying the propositions of law laid down in these decisions, to the facts of the case, we have to necessarily hold that the reopening is bad in law, as in this case on hand, there is no whisper, much less an allegation that there is failure on the part of the assessee to disclose fully and truly all material facts, necessary for assessment. Hence the mandatory requirements of the proviso to section 147 has not been fulfilled in this case.

6. The DDIT (Inv.), addressed a letter to the Assessing Officer and the allegations of these letters were based on the statements recorded from Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan by the investigation wing. During the course of cross-examination, these two persons have stated as follows:-

a) They were not associated, in any manner, with these companies on any date before or during the recording of statement on 11/03/2016 or thereafter.
b) That they were called on phone by the investigation wing and were made to sign on dotted line without even being allowed to read the contents mentioned in the statements by the authorities.
c) Statement was not recorded as per his answers and that Mr. Mishra, ADIT, threatened them that he would get them arrested, if they do no sign the statements and that the threatening continued for more than two hours. On being assured that their signing of the statement would not affect them

personally, they signed the statements without reading the same and hence they do not confirm any of the contents recorded in these statements.

d) He denied that the mobile number belongs to them and hence was not in a position to comment on the contents.

These denials have gone unchallenged by the revenue. No further investigation was carried out or evidence collected to prove that the answer given by these persons during cross-examination is factually incorrect. Thus, the basis on which the DDIT (Inv.) wrote the letter dt. 22/03/2016 to the Assessing Officer cease to exist. Hence, in our view, the ld. CIT(A) on going through the statements and holding that they were not voluntary, was right in coming to a conclusion that the reopening of the assessment based on such material is non-existent and that the very basis of the reopening does not exist.

The denial of a witness of the contents in a statement is not the same as a retraction. These are two different things. We now discuss the case law on this issue.

6.1. The Hon'ble Calcutta High Court in the case of Dr. PankasBiswas vs. State of West Bengal, C.R.A. 418 of 2012, held as follows:-

> *"I am in agreement with the submission of the learned counsel for the assessee that statement recorded under Section 14 of the Code of Criminal Procedure cannot be treated as substantive evidence when the maker does not depose of such facts on oath during trial. Hence, there is no direct evidence on record connecting the assesse with the alleged crime."*

The Hon'ble Karnataka High Court in the case of *CIT vs. R.N. ThippaShetty reported in [2010] 230 CTR (Kar) 265*, held as follows:-

> *"It is further pertinent to mention here that once the statements said to have been recorded under s. 132(4) of the Act were withdrawn, then there existed no material on record to warrant reopening of the case against the assessee under s. 148 of the Act. If the very basis on which reopening was ordered did not exist, there was no question for reopening of the case. This material aspect of the matter has not been considered by the AO, who proceeded to direct reopening of the case, without there being any legally admissible evidence available on record. Thus the very issuance of notice under s. 148 of the Act is found to be illegal and absolutely without jurisdiction."*

The Hon'ble Gujrat High Court in the case of *CIT vs. Shardaben K. Modi reported in [2014] 365 ITR 169 (Guj)*, held as follows:-

> *"Any notice of the reopening issued under Section 148 would be required to be tested at the touchstone of the reasons recorded by the Assessing Officer, as could be noticed from the record itself, the very basis on which the revenue has sought to reopen the assessment is not found cannot be sustainable.*
>
> *From the findings of the Tribunal, it is apparent that it has in clear terms recorded that considering the evidentiary value of the statement recorded under Section 133(A) use of such*

statement cannot be permitted without any corroborative evidence and the Tribunal having found that except the version of the assessee's son recorded under Section 133(A) which too was retracted later on, there was nothing to base the entire proceedings of reopening. Moreover, what is further recorded by the Tribunal is the circular of CBDT dated 10-03-2003 wherein the insistence on the part of the board is not to force any confession as any such confession recorded by the officer is based on no other evidence except the oral version in confessional mode and if later on it is retracted, it leaves the revenue with no basis."

The Hon'ble ITAT, Delhi in the case of G.K. Consultants Ltd. vs. ITO in ITA No. 1502/Del/2013, held as follows:-

"20. On the basis of following discussion and submissions and contention of both the parties, we also observe that the statement of ShriSubodh Gupta CA was recorded during the course of survey in his personal capacity and which was retracted on 4.11.2003 and retracted statement recorded during the survey cannot be a basis of assumption of jurisdiction u/s 147 of the Act. Respectfully following the decision of Hon'ble Karnataka High Court in the case of CIT vsDr. R.N. ThippaShetty, we are inclined to hold that if the very basis on which reopening was ordered did not exist, then there was no question of reopening the assessment and thus, notice u/s 148 of the Act deserves to be held as illegal and without jurisdiction."

6.2. Applying the propositions of law laid down in the above judgements to the facts of this case, we uphold the finding of the ld. CIT(A) that the reopening of amount is bad in law.

6.3. We also find total non-application of mind by the A.O. The letter dated 22.03.2016 was written by the DDIT (Inv.) to the A.O. and the same was received by the A.O. at Kolkata on the same day from Gauhati. The reasons for reopening were recorded the same day i.e. 22.03.2016. The letter of the DDIT (Inv.) say that post search investigation are in progress. Addresses of the alleged paper companies from whom bogus share capital is alleged to have been generated, evidence based on which such allegation is made, copies of the alleged statements of the two persons were not with the A.O. at the time of reopening of assessments. No enquiry or prima facie verification was made. The case law on this issue is as follow:

7.1. The Hon'ble Delhi High Court in the case of *Commissioner of Income-tax, IV v.Insecticides (India) Ltd[2013] 357 ITR 330 (Delhi)* upheld the order of the ITAT Delhi Bench in *ITA Nos. 2332-2333/Del/2010*, holding as follows:-

"7. We may point out at this juncture itself that the Tribunal did not go into the question of merits. It only examined the question of the validity of the proceedings under Section 147 of the said Act. The Tribunal, in essence, held that the purported reasons for reopening the assessments were entirely vague and devoid of any material. As such, on the available material, no reasonable person could have any reason to believe that income had escaped assessment. Consequently, the Tribunal held that the proceedings under Section 147 of the said Act were invalid.

8. The Tribunal gave detailed reasons for concluding that the proceedings under Section 147 were invalid. Instead of adding anything to the said reasons, we think it would be appropriate if the same are reproduced:—

"In the case at hand, as is seen from the reasons recorded by the AO, we find that the AO has merely stated that it has been informed by the Director of Income-tax (Inv.), New Delhi, vide letter dated 16.06.2006 that the above named company was involved in giving and taking bogus entries/transactions during the relevant year, which is actually unexplained income of the assessee company. The AO has further stated that the assessee company has failed to disclose fully and truly all material facts and source of these funds routed through bank account of the assessee company. In the reasons recorded, it is nowhere mentioned as to who had given bogus entries/transactions to the assessee or to whom the assessee had given bogus entries or transactions. It is also nowhere mentioned as to on which dates and through which mode the bogus entries and transactions were made by the assessee. What was the information given by the Director of Income-tax (Inv.), New Delhi, vide letter dated 16.06.2006 has also not been mentioned. In other words, the contents of the letter dated 16.06.2006 of the Director of Income-tax (Inv.), New Delhi have not been given. The AO has vaguely referred to certain communications that he had received from the DIT(Inv.), New Delhi; the AO did not mention the facts mentioned in the said communication except that from the informations gathered by the DIT (Inv.), New Delhi that the assessee was involved in giving and taking accommodation entries only and represented unsecured money of the assessee company is actually unexplained income of the assessee company or that it has been informed by the Director of Income-tax (Inv.), New Delhi vide letter dated 16.06.2006 that the assessee company was involved in giving and taking bogus entries/transactions during the relevant financial year. The AO did not mention the details of transactions that represented unexplained income of the assessee company. The information on the basis of which the AO has initiated proceedings u/s 147 of the Act are undoubtedly vague and uncertain and cannot be construed to be sufficient and relevant material on the basis of which a reasonable person could have formed a belief that income had escaped assessment. In other words, the reasons recorded by the AO are totally vague, scanty and ambiguous. They are not clear and unambiguous but suffer from vagueness. The reasons recorded by the AO do not disclose the AO's mind as to what was the nature and amount of transaction or entries, which had been given or taken by the assessee in the relevant year. The reasons recorded by the AO also do not disclose his mind as to when and in what mode or way the bogus entries or transactions were given or taken by the assessee. From the reasons recorded, nobody can know what was the amount and nature of bogus entries or transactions given and taken by the assessee in the relevant year and with whom the transaction had taken place. As already noted above, it is well settled that only the reasons recorded by the AO for initiating proceedings u/s 147 of the Act are to be looked at or examined for sustaining or setting aside a notice issued u/s 148 of the Act. The reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No addition can be made to those reasons. Therefore, the details of entries or amount mentioned in the assessment order and in respect of which ultimate addition has been made by the AO, cannot be made a basis to say that the reasons recorded by the AO were with reference to those amounts mentioned in the assessment order. The reasons recorded by the AO are totally silent with regard to the amount and nature of bogus entries and transactions and the persons with whom the transactions had taken place. In this respect, we may rely upon the decision of Hon'ble jurisdictional Delhi High Court in the case of CIT v. Atul Jain [2000] 299 ITR 383, in which case the information relied upon by the AO for initiating proceedings u/s 147 of the Act did indicate the source of the capital gain and nobody knew which shares were transacted and with whom the transaction has taken place and in that case there were absolutely no details available and the information supplied was extremely scanty and vague and in that light of those facts, the Hon'ble Jurisdictional Delhi High Court held that initiation of proceedings u/s 147 of the Act by the AO was not valid and justified in the eyes of law. The recent decision of Hon'ble jurisdictional High Court of Delhi in the case of Signature Hotels (P.) Ltd. (supra) also supports the view we have taken above."

9. We do not see any reason to differ with the view expressed by the Tribunal. No substantial question of law arises for our consideration. The appeals are dismissed. There shall be no order as to costs.

7.2. The Hon'ble Delhi High Court in the case of Principal CIT vs G&G Pharma India Ltd. in ITA 545/2015 vide order dt. 08.10.2015 at paras 12 and 13 was held as follows:

> *"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 Feb. 2003, from four entries which were received by the assessee on a single date i.e. 10th Feb. 2003, from four entries which were termed as accommodation entries, which information was given to him by the Director Investigation, the A.O. 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 A.O. 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 A.O., 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 u/s 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the A.O. 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 decision discussed, the basic requirement that the A.O. 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. A perusal of the reasons recorded demonstrate total non application of mind by the A.O. Thus applying the proposition laid down by the Jurisdictional High Court in G&G Pharma India (supra) we hold that the reopening of assessment is bad in law"*

7.3. The Hon'ble Delhi High Court in the case of Signature Hotels (P) Ltd. vs ITO and another, reported in 338 ITR 51 (Delhi) has under similar circumstances held as follows:

> *"For the A.Y. 2003-04, the return of income of the assessee company was accepted u/s 143(1) of the Income-tax Act, 1961 and was not selected for scrutiny. Subsequently, the Assessing Officer issued notice u/s 148 which was objected by the assessee. The Assessing Officer rejected the objections. The assessee company filed writ petition and challenged the notice and the order on objections.*
>
> *The Delhi High Court allowed the writ petition and held as under: '(i) Section 147 of the Income-tax Act, 1961, is wide but not plenary. The assessing Officer must have 'reasons to believe' that income chargeable to tax has escaped assessment. This is mandatory and the 'reason to believe' are required to be recorded in writing by the Assessing Officer.*
>
> *(ii) A notice u/s 148 can be quashed if the 'belief' is not bona fide, or one based on vague, irrelevant and non-specific information. The basis of the belief should be discernible from the material on record, which was available with the Assessing Officer when he recorded the reasons. There should be a link between the reasons and the evidence material available with the Assessing Officer.*
>
> *(iii) The reassessment proceedings were initiated on the basis of information received from the Director of Income-tax (Investigation) that the petitioner had introduced money amounting to Rs.5 lakhs during F.Y.2002-03 as stated in the annexure. According to the information, the amount received from a company, S, was nothing but an accommodation entry and the assessee was the beneficiary. The reasons did not satisfy the requirements of section 147 of the Act. There was no reference to any document or statement, except the annexure. The annexure could not be regarded as a material or evidence that prima facie*

showed or established nexus or link which disclosed escapement of income. The annexure was not a pointer and did not indicate escapement of income.

(iv) Further, the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. There was no dispute that the company, S, bad a paid up capital of Rs. 90 lakhs and was incorporated on January 4, 1989, and was also allotted a permanent account number in September 2001. Thus, it could not be held to be a fictitious person. The reassessment proceedings were not valid and were liable to the quashed.

7.4. In the case of CIT vs Atul Jain reported in 299 ITR 383 it has been held as follows:

"Held dismissing the appeals, that the only information was that the assessee had taken a bogus entry of capital gains by paying cash along with some premium for taking a cheque for that amount. The information did not indicate the source of the capital gains which in this case were shares. There was no information which shares had been transferred and with whom the transaction had taken place. The A.O. did not verify the correctness of information received by him but merely accepted the truth of the vague information in a mechanical manner. The A.O. had not even recorded his satisfaction about the correctness or otherwise of the information for issuing a notice u/s 148. What had been recorded by the A.O. as his 'reasons to believe' was nothing more than a report given by him to the Commissioner. The submission of the report was not the same as recording of reasons to believe for issuing a notice. The A.O. had clearly substituted form for substance and therefore the action of the A.O. was not sustainable"

Applying the proposition of law laid down in these cases to the facts of the case we hold that the reopening is bad in law as the reasons recorded are without independent application of mind.

7. In view of the above discussion, we hold as follows:-

8. Ground No. 1 & 2 of the revenue is to be dismissed as it challenges the conclusion of the ld. CIT(A) that the statement of Mr. Sandeep Kumar Sharma and Mr. Dilip Kumar Khetan, recorded on 11/03/2016 were not voluntary on the facts and circumstances of the case. The facts as brought out clearly demonstrates that the answers given by these two persons in the cross-examination has not been controverted by the revenue with evidence.

9. Ground No. 3 is also to be dismissed, in view of our findings in Ground No. 1.

10. Thus, all the grounds of the revenue are to be dismissed.

11. In the result, appeal of the revenue is dismissed.

Kolkata, the 18th day of May, 2018.

Sd/-	Sd/-
[**S.S. Viswanethra Ravi**]	[**J. Sudhakar Reddy**]
Judicial Member	Accountant Member

Dated 18.05.2018
{SC SPS}

Copy of the order forwarded to:

1. ***M/s. Adhunik Cement Ltd***
(Now Dalmia Bharat Cement)
Anil Plaza II
4th Floor
G.S. Road, Near ABC
Guwahati – 781 005

2. ***A.C.I.T. Central Circle-1(1), Kolkata***
AaykarBhawanPoorva
110, Shantipally
3rd Floor
Kolkata – 700 107

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches