

**IN THE INCOME TAX APPELLATE TRIBUNAL “A”, BENCH KOLKATA**

**BEFORE SHRI A.T. VARKEY, JM & DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.1231/Kol/2017**

**(निर्धारणवर्षs / Assessment Year: 2008-09)**

<b>Budhiya Agencies Pvt. Ltd.</b>	<b>Vs.</b>	<b>DCIT, Circle-2, Kolkata</b>
<b>C/o, V.N. Purohit &amp; Co. Chartered Accountants, Diamond Chambers, Unit- III, 4<sup>th</sup> Floor, Suit No. 4G, 4, Chowringhee Lane, Kolkata-700016.</b>		
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AABCB 3261 G</b>		
<b>(Appellant)</b>	<b>..</b>	<b>(Respondent)</b>

Appellant by : Shri S. M. Surana, Advocate

Respondent by : Shri Supriyo Pal, JCIT, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 21/10/2019

घोषणाकीतारीख/Date of Pronouncement : 10/01/2020

**आदेश / O R D E R**

**Per Dr. A. L. Saini, AM:**

The captioned appeal filed by the assessee, pertaining to assessment year 2008-09, is directed against the order passed by the Commissioner of Income Tax (Appeal)-Durgapur, in appeal no. 83/CIT(A)/DGP/2015-16, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the ‘Act’) dated 30/03/2015.

2. The grounds of appeal raised by the assessee are as follows:

- 1. That the ld. CIT(A) has erred in not giving further time considering specific facts and circumstances of the case.*
- 2. That the ld. CIT(A) has further erred in not given any decision on ground no. 7 as to validity of the reopening u/s 147 of the I.T. Act, 1961.*
- 3. That the ld. CIT(A) has further erred in confirming addition of Rs. 20,00,000/- as made by Assessing Officer u/s 68 of the I.T. Act, 1961.*
- 4. That the assessee craves leave to add, to withdraw or amend all or any of the grounds aforesaid on or before the hearing of the appeal.*

3. Facts of the case which can be stated quite shortly are as follows: The assessee filed its return of income for the A.Y. 2008-09 declaring a total income of Rs. 760/-. Later on, assessment was reopened and notice u/s 148 of the Act was issued on 21.03.2014. On perusal of income tax return for the A.Y. 2008-09, the AO noticed that the assessee company kept liability of Rs. 10,73,30,000/- towards Securities Premium Account in the Balance Sheet, whereas returned income of the assessee company during the A.Y. 2007-08 was to the tune of Rs. 760/- only. The assessing officer noticed that the information “to whom shares of the assessee company were allotted during the F.Y. 2007-08” had not been furnished by the assessee. Since the assessee company did not respond the notice u/s 142(1) of the Act, therefore the necessary verification of share premium could not be done. The assessee`s case was re-opened on the basis of deposit of a cheque of Rs. 20 lakh at the bank account of assessee company at ABN Bank, Kolkata by M/s Neelkanth Fiscal Services. Since the assessee company did not furnish the information before the AO during the reassessment proceedings therefore, the Assessing Officer left with no other option but to treat Rs. 20 lakh as unexplained cash credit under section 68 of the Act.

4. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the addition made by

the Assessing Officer. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

6. The Id. Counsel for the assessee submitted before the Bench that reasons recorded by the assessing officer is based on suspicion therefore bad in law and hence reassessment proceedings initiated by AO under section 147 of the Act should be quashed. On the other hand, Id. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

7. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials available on record. The main grievance of the assessee is against the action of the AO in reopening assessment completed u/s. 143(1) of the Act. According to Ld. Counsel for the assessee, the AO without application of mind after receipt of information from ITO, wd.6(3), Kolkata has simply reopened the assessment. According to Ld. Counsel, before the AO decides to reopen the assessment, he has to satisfy the condition precedent to assume jurisdiction and for that he took our attention to the expression used in sec. 147 of the Act which states that AO should have 'reason to believe' escapement of income. According to Id Counsel, even after there is a foundation based on information is there, still there must be some reasons warrant holding a belief that income chargeable to tax has escaped assessment, which expression used by Parliament is stronger than the expression 'satisfied' and in the present case such requirement as contemplated by law has not been met in the 'reason recorded' by the AO before venturing to re-open the assessment which vitiates the re-opening itself. According to Ld. Counsel, even if the information given by the ITO, wd.6(3), Kolkata is adverse against the assessee, at the most it may trigger "reason to suspect"; then AO has to make reasonable enquiry and collect material which would make him believe that there is in fact an escapement of

income. Without doing so, the jurisdictional fact necessary to usurp jurisdiction to reopen the regular assessment cannot be made by the AO. For the said proposition, the Ld. AR drew our attention to following case laws:

- i).PCIT Vs. Meenakshi Overseas Ltd. 395 ITR 677(Del.) (referred to para 19 till para 37).
- ii).DCIT Vs. Greal Wall Marketing Pvt. Ltd. ITA No.660/Kol/2011 (referred to page 10 para 11)
- iii).Shri Raj Kumar Goel Vs. ITO ITA No.1028/Kol/2017 (referred to page 5-8 para 11)
- (iv).Classic Flour & Food Processing Pvt. Ltd. Vs. CIT ITA Nos. 764 to 766/Kol/2014 (page 7 para 12 to 16)
- v).PCIT Vs. Shodiman Investments (P) Ltd. (2018) 93 taxmann.com 153 (Bom) page 4 para 12 to 14)
- vi).KSS Petron Pvt. Ltd. Vs. ACIT ITA No. 224/Mum/2014 (referred to page 3 para 8-11)
- vii).PCIT Vs. Tupperware India Pvt. Ltd. (2016) 236 Taxman 494 (referred to page 3 para 6 and 9)
- viii).DCIT Vs. National Bank for Agriculture and Rural Development ITA No.4964/Mum/2014 (referred to page 10- 13 para 12)

8. We note that the coordinate bench of this Tribunal in ITA No. 660/Kol/2011 for AY 2002-03 in the case of DCIT Vs. Great Wall Marketing (P) Ltd. vide order dated 03.02.2016 has held as under:

*“9. We have given a careful consideration of the submissions made by the learned counsel for the assessee. It is clear from the reasons recorded by the AO that the AO acted only on the basis of a letter received from Investigation Wing, New Delhi. The reasons recorded does not give as to who has given the bogus entries to the assessee. The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee. The reasons recorded which are extracted in the earlier part of the order does not show, what was the information given by DIT(Inv.),New Delhi. The date of the information received by the AO were not spelt out in the reasons recorded. The involvement of the assessee is also not spelt out, except mentioning the corporate bodies who had subscribed to the share capital of the assessee were non-existent and not creditworthy. On identical facts the Hon'ble Delhi High Court in the case of CIT vs Insecticides (India) Ltd (supra) has taken a view that the reasons recorded were vague and uncertain and cannot be construed as satisfaction on the basis of the relevant material on the basis of which a reasonable person can form a belief that income has escaped assessment. The Hon'ble Delhi High Court has also come to the conclusion that the reasons recorded did not disclose the AO's mind regarding escapement of income. The Hon'ble Delhi*

High Court ultimately held that initiation of proceedings u/s 148 of the Act was not valid and justified in the eyes of law. The facts and circumstances in the present case are identical to the case decided by the Hon'ble Delhi High Court. Following the said decision we hold that initiation of re-assessment proceedings is not valid. On this ground, the assessment is liable to be annulled."

9.The Hon'ble Bombay High Court in Pr.CIT Vs. Shodiman Investments (P) Ltd. (2018) 93 taxmann.com 153 (Bom) it has been held as under:

"9. We find that at the time of re-opening of the Assessment, the Assessing Officer did not provide the reasons recorded in support of the re-opening notice in its entirety, to the Respondent-Assessee. This was contrary to and in defiance of the decision of the Apex Court in *GKN Driveshafts v. ITO* [2002] 125 Taxman 963/ [2003]259 ITR 19. The entire objects of reasons for re- opening notice as recorded being made available to an Assessee, is to enable the Assessing Officer to have a second look at his reasons recorded before he proceeds to assess the income, which according to him, has escaped Assessment. In fact, non furnishing of reasons would make an Assessment Order bad as held by this Court in *CIT v. Videsh Sanchar Nigam Ltd.* [2012] 21 taxmann.com 53, 340 ITR 66. In fact, partial furnishing of reasons will also necessarily meet the same fate i.e. render the Assessment Order on re- opening notice bad. Therefore, on the aboveground itself, the question as proposed does not give rise to any substantial question of law as it is covered by the decision of this Court in *Videsh Sanchar Nigam Ltd.'s case (supra)* against the Revenue in the present facts.

10. Besides, the submissions made on behalf of the Revenue that in view of the decision of the Apex Court in *Rajesh Jhaveri Stock Brokers (P) Ltd.'s, case (supra)*, the Assessing Officer is entitled to re-open the Assessment for whatever reasons and the same cannot be subjected to jurisdictional review, is preposterous. First of all, taking out a word or sentence from the entire judgment, divorced from the context and relying upon it, is not permissible (see *CIT v. Sun Engg. Works (P) Ltd.* [1992] 64 Taxman 442/198 ITR 297 (SC). It may be useful to reproduce the context in which the sentence in *Rajesh Jhaveri Stock Brokers (P) Ltd. 's case (supra)* being relied upon by the Revenue to support its case, was made. The context, is as under:

"The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitutions. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed to confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to, income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices." .

Therefore, the sentence being relied upon was made in the context of the change in law that under the amended provision 'reason to believe' that in case of escaped assessment, is sufficient to re-open the assessment. This unlike the earlier provision of Section 147(a) of the Act which required two conditions i.e. failure to disclose fully and truly all facts necessary for assessment and reason to believe that income has escaped assessment Thus, the observations being relied

upon must be read in the context in which it rendered. On so reading the submission, will not survive.

11. Further, a reading of the entire decision, it is clear that the reasonable belief on the basis of tangible material could be, *prima facie*, formed to conclude that income chargeable to tax has escaped assessment. Mr. Mohanty, learned counsel is ignoring the fact that the words 'whatever reasons' is qualified by the words 'having reasons to believe that income has escaped assessment'. The words whatever reasons only means any tangible material which would on application of the facts on record lead to reasonable belief that income chargeable, to tax has escaped, assessment This material which, forms the basis, is not restricted, but the material must lead to the formation of reason to believe that income chargeable to tax has escaped Assessment Mere obtaining, of material by itself does not result in reason to believe that income has escaped assessment. In fact, this would be evident from the fact that in para 16 of the decision in *Rajesh Jhaveri Stock Brokers (P) Ltd.* 's, case (supra), it is observed that the word 'reason' in the 'reason to believe' would mean cause or justification. Therefore, it can only be the basis of forming the belief. However, the belief must be independently formed in the context of the material obtained that there is an escapement of income. Otherwise, no meaning is being given to the words 'to believe' as found in Section 147 of the Act. Therefore, the words 'whatever reasons' in *Rajesh Jhaveri Stock Brokers (P) Ltd.*'s, case (supra), only means whatever the material, the reasons recorded must indicate the reasons to believe that income has, escaped assessment. This is so as reasons as recorded alone give the Assessing Officer power to re-open an assessment, if it reveals/indicate, reasons to believe that income chargeable to tax has escaped assessment.

12. The re-opening of an Assessment is an exercise of extra-ordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. Therefore, the reasons to believe have to be necessarily recorded in terms of Section 148 of the Act, before re-opening notice, is issued. These reasons, must indicate the material (whatever reasons) which form the basis of re-opening. Assessment and its reasons which would evidence the linkage/nexus to the conclusion that income chargeable to tax has escaped Assessment. This is a settled position as observed by the Supreme Court in *S. Narayanappa v. CIT* [1967] 63 ITR 219, that it is open to examine whether the reason to believe has rational connection with the formation of the belief. To the same effect, the Apex Court in *ITO v. Lakhmani Merwal Das* [1976] 103 ITR 437 had laid down that the reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income. If the aforesaid requirement are not met, the Assessee is entitled to challenge the very act of re-opening of Assessment and assuming jurisdiction on the part of the Assessing Officer.

13. In this case, the reasons as made available to the Respondent- Assessee as produced before the Tribunal merely indicates information received from the DIT (Investigation) about a particular entity, entering into suspicious transactions. However, that material is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped Assessment. It is for this reason that the recorded reasons even does- not indicate the amount which according to the Assessing Officer, has escaped Assessment. This is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment.

14. Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a re-opening notice on the basis of intimation regarding re-opening notice from the DDIT (Inv.)

*This is clearly in breach of the settled position in law that re- opening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction.*

*15. Therefore, in the above facts, the view taken by the impugned order of the Tribunal cannot be found fault with. This view of the Tribunal is in accordance with the settled position in law.*

*16. Therefore, the question; as framed does not give rise to any substantial question of law. Thus, not entertained."*

10. Having taken into consideration the aforesaid judicial precedents and other case laws cited before us by both the parties, in order to appreciate the legal ground raised before us, we need to look into the reasons recorded by the AO before proposing to reopen the assessment, which is reproduced as under.

*"It was informed by ITO, Wd. 6(3), Kolkata that during the scrutiny assessment of M/s. Neelkant Fiscal Services P, Ltd, PAN: AAACN9744M at his end on the basis of communication received from the ACIT, CC-XXVH, Kolkata that Rs. 20 lakhs was deposited during AY 2008-09 to the bank account of M/s Budhiya Agencies Pvt Ltd maintained at ABN Amro Bank, Kolkata which was routed through and transferred from A/c. No. 07820200000781 at DCB Bank Kolkata of M/s Neelkant Fiscal Services P. Ltd.*

*On the basis of appraisal report [Badalia Group of cases, Sri M. M. Dagaand I. C. Baid were involved with Badalia Group], assessment was completed by ACIT. CC.XXVII and information was passed on to ITO, Wd. 6(3), Kolkata. He then passed on his findings as stated above for further enquiry at this end.*

*On the basis of above discussion, I have reason to believe that income of the assessee to the tune of Rs, 20,00,000/- has escaped assessment for the A.Y. 2008-09."*

11. After having perused reasons recorded by the AO before reopening and when the validity of the order u/s. 147 of the Act depends upon the AO assuming jurisdiction as contemplated by law to make an order of assessment u/s. 147 of the Act and for that it is necessary that the conditions laid down in the said section viz., AO should record "reason to believe" *that the income chargeable to tax for that assessment year has escaped assessment.* If this condition is not satisfied at the

first place, then it cannot be said that AO has validly assumed jurisdiction u/s. 147 of the Act. Therefore, the question for consideration is whether on the basis of the reasons recorded by the AO to reopen the assessment it can be said that AO on the basis of whatever material before it, had reasons which he had indicated in his “reasons recorded” which warrant holding a belief that income chargeable to tax has escaped assessment. The reasons recorded by AO to reopen has to be evaluated on a stand-alone basis and no addition/extrapolation can be made or assumed while adjudicating the legal issue of AO’s usurpation of jurisdiction u/s. 147 of the Act. From the reasons already set out above and from the gist of the reasons recorded by the AO, we understand that the AO received information from ITO, Wd. 6(3), Kolkata.

We note that reasons recorded by AO are only on the basis of appraisal report. These reasons are merely to conduct further inquiry, which is evident from the second para of the reasons recorded by AO, which is reproduced below( to the extent applicable for our discussion) for ready reference:

***“On the basis of appraisal report [Badalia Group of cases, Sri M. M. Daga and I. C. Baid were involved with Badalia Group], assessment was completed by ACIT. CC.XXVII and information was passed on to ITO, Wd. 6(3), Kolkata. He then passed on his findings as stated above for further enquiry at this end.”***

It is clearly evident from the reasons recorded by the Assessing Officer that there was actually no reason for him to have formed a belief about the escapement of any income of the assessee from the assessment, but the assessment was reopened by him to verify or to conduct further enquiry or to examine certain particulars furnished by the assessee in the return of income. Therefore, it is abundantly clear from the reasons recorded that these are based on appraisal report to conduct further inquiry only. Therefore, it is clear that there is no independent application of mind by AO. If the AO decides to reopen the assessment, he has to satisfy the condition precedent to assume jurisdiction. In the assessee’s case the information



was received by ITO ward 6(3), and even if the information given by the ITO ward 6(3), is adverse against the assessee, at the most it may trigger “reason to suspect”; then AO has to make reasonable enquiry and collect material which would make him believe that there is in fact an escapement of income. Without doing so, the jurisdictional fact necessary to usurp jurisdiction to reopen the regular assessment cannot be made by the AO.

12. We note that the reasons recorded by the Assessing Officer are only “reason to suspect” and the AO has acted based on the information received by him from another Income Tax Officer which is for the purpose to conduct further inquiry only. The reasons recorded by AO to reopen has to be evaluated on a stand-alone basis and no addition/extrapolation can be made or assumed while adjudicating the legal issue of AO’s usurpation of jurisdiction u/s. 147 of the Act. We note that in the assessee’s case the reasons recorded by the AO is not as per the scheme of section 147 of the Act and therefore the reassessment proceedings initiated by the AO should be quashed.

From the aforesaid reasons it is evident that other than the vague information given by another income tax officer ( which is also based on appraisal report of Badalia Group cases), there is no other material, the AO collected after preliminary enquiry which could have enabled him at the time of recording reasons to come to a conscious independent conclusion that “income of the assessee has escaped assessment”. The information given by another Income Tax Officer, based on appraisal report of Badalia Group cases, can only be a basis to ignite/trigger “reason to suspect” for which reopening cannot be made for further examination to be carried out by him in order to strengthen the suspicion to an extent which can form the belief in his mind that income chargeable to tax has escaped assessment. No quantification of income escaping assessment has been spelt out by the AO in the reasons recorded for justifying reopening u/s. 147 of the Act. It has to be kept in mind that merely on an allegations leveled by another

Income Tax Officer, based on appraisal report of Badalia Group cases, can only raise suspicion in the mind of the AO which is not the sufficient/requirement of law for reopening of assessment. The 'reasons to believe' is not synonymous to 'reason to suspect'. 'Reason to suspect' based on an information can trigger an enquiry to find out whether there is any substance or material to substantiate that there is merit in the information adduced by another Income Tax Officer, based on appraisal report of Badalia Group cases, and thereafter the AO has to take an independent decision to re-open or not. And the AO should not act on dictate of any other authority (like in this case an another Income Tax Officer, based on appraisal report of Badalia Group cases), because then it would be borrowed satisfaction.

In such a scenario, when the AO was in receipt of the information from another Income Tax Officer, based on appraisal report of Badalia Group cases, he ought to have made enquiries to unravel the truth. It has to be remembered that information is not synonymous to truth. The AO failed to quantify the escapement of income in the reasons recorded. As stated earlier, we note that AO simply on the basis of the information by another Income Tax Officer, which is based on appraisal report of Badalia Group cases, has formed an erroneous conclusion that there is an escapement of income. The AO is a quasi judicial authority empowered to reopen the completed assessment only in a given case wherein there is reason to believe escapement of chargeable income to tax which is the jurisdictional fact and sine qua non to assume jurisdiction to reopen a completed assessment. It must be kept in mind that reasons to believe postulates foundation based on information and belief based on reason. Even if there is foundation based on information there must be some reason warrant holding the belief that income chargeable to tax has escaped assessment. It has to be kept in mind that the Hon'ble Supreme Court in Ganga Saran & Sons P. Ltd. Vs. ITO (1981) 130 ITR 1 (SC) held that the expression "reason to believe" occurring in sec. 147 "is stronger" than the expression "if satisfied" and such requirement has to be met by the AO in the reasons recorded before usurping the jurisdiction u/s.

147 of the Act. It must be kept in mind that information adverse against the assessee may trigger “reason to suspect” then the AO is duty bound to make reasonable enquiry to collect material which would make him believe that there is in fact an escapement of income which requirement of law has not been fulfilled in this case by the AO. Just because an information was received by another Income Tax Officer, based on appraisal report of Badalia Group cases, the AO cannot reopen the completed assessment. In the light of the above, the AO based on the reasons recorded as set out above could not have initiated a fishing enquiry to find out the veracity of the information given by another Income Tax Officer, based on appraisal report of Badalia Group cases to conduct further enquiry only. The reasons recorded by AO does not stand the test as laid by plethora of judicial precedence as discussed above which is necessary to assume jurisdiction u/s 147 of the Act, therefore, in the light of the aforesaid facts and circumstances of the case as discussed, we find that the reasons recorded by the AO to justify reopening the assessment u/s. 147 fails and, therefore, the very assumption of jurisdiction to reassess the assessee fails and therefore, we quash the reopening and consequent reassessment order framed by him.

13. In the result, the appeal of the assessee is allowed.

**Order pronounced in the Court on 10.01.2020**

**Sd/-**  
**(A.T. VARKEY)**  
**न्यायिकसदस्य / JUDICIAL MEMBER**

**Sd/-**  
**(A.L.SAINI)**  
**लेखासदस्य / ACCOUNTANT MEMBER**

दिनांक/ Date: 10/01/2020  
 (SB, Sr.PS)

Copy of the order forwarded to:

1. Budhiya Agencies Pvt. Ltd.
2. DCIT, Circle-2, Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

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By Order

Assistant Registrar  
ITAT, Kolkata Benches