

Girraj Kishore, Prop., Hathras vs Department Of Income Tax on 18 July, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH, AGRA

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER

ITA Nos.124 & 120/Agr/2011
Assessment Years: 1996-97 & 1997-98 respectively

Income Tax Officer,
Ward-3(4), Hathras.

(Appellant)

vs. Shri Girraj Kishore,
Prop. M/s Ashirbad,
Tajpur, Mursan,
Hathras.
(PAN: ALEPK 0709 M)
(Respondent)

Appellant by : Shri Waseem Arshad, Sr. D.R.

Respondent by : Shri C.S. Agarwal &
Shri R.A. Agarwal, Advocates

Date of Hearing : 18.07.2012
Date of Pronouncement of order : 31.08.2012

ORDER

PER A.L. GEHLOT, ACCOUNTANT MEMBER:

These are appeals filed by the Revenue against the common order dated 07.02.2011 passed by the ld. CIT(A), Ghaziabad for the A.Ys. 1996-97 & 1997-98 respectively.

A.Ys. 1996-97 & 1997-98.

2. Common grounds have been raised by the Revenue in both the appeals except for difference of amount involved. For the purpose of ready reference, grounds of appeal in ITA No.124/Agr/2011 for A.Y. 1996-97 are reproduced as under:-

"1. The Ld. CIT(A) has erred in law and on facts holding that issuance of notice u/s 148 is not sustainable and reopening assessment is invalid, ignoring the fact that there was enough material available to the AO to form a belief that income has escaped assessment.

2. The powers of the Ld. CIT(A) are coterminous with that of A.O. The Ld. CIT(A) has erred in law, in not curing the defects, if any, in the assessment order, when he was

duty bound to do so as has been held in the following judicial pronouncement :-

i) CIT vs. Kanpur Coal Syndicate, (1964) 53 ITR 225 (SC) "The AAC has plenary powers in disposing of an appeal. The scope of his power is coterminous with that of the ITO. He can do and also direct him to do what he has failed to do. If the ITO has the option to assess one or other of the entries in alternative, the AAC can direct him to do what he should have done in the circumstances of the case."

ii) CIT vs. Jay Textile Mills (1981) 128 ITR 480 (Punj. & Har.) "The AAC while deciding an appeal is clothed with very wide powers, so as to do justice to the assessee and also to watch the interest of the revenue. The powers vested in the ACC are wide enough to protect the interest of the revenue and the powers are appellate as well as revisional."

iii) Subramania Iyer vs. CIT (1978) 113 ITR 685 (Kerala) "The power of the appellate authority are very wide and appellate authority could substitute the order of ITO by one or by its own. The appellate authority can consider the material A.Ys. 1996-97 & 1997-98.

available in the case and come to an independent conclusion, whether any penalty should be imposed, if so, the quantum of the penalty. In fact, the appellate authority has a duty to come to such an independent conclusion."

3. The Ld. CIT(A) has erred in law and on facts, in deleting the addition in the gross profit amounting to Rs.13,10,664/-

4. The Ld. CIT(A) has erred in law and on facts, in deleting the addition of Rs.1,57,254/- on account peak investment in purchase of drafts u/s 69 of the I.T. Act, 1961.

5. The Ld. CIT(A) has erred in law and on facts, in deleting the addition of Rs.79,000/- on account of unexplained cash credit u/s 68 of the I.T. Act, 1961.

6. The Ld. CIT(A) has erred in law and on facts, in deleting the addition of Rs.14,302/- on account of interest on unexplained cash credits.

7. Appellate craves leave to amend, alter, add or modify any ground or grounds of appeal either before or at the time of hearing of case."

3. The legal grounds i.e. ground nos.1 & 2 have been heard and stated by the bench in the Court that the appeal is heard only on legal ground and if hearing on merit will find necessary, the appeal will be re-fixed for hearing. Therefore, in this appeal only legal ground challenging reopening has been decided as under:-

4. The brief facts of the case are that the assessee is proprietor of M/s. Ashirwad, an authorized dealer of M/s. I.B.P. Co. Ltd., engaged in the business of running a Petrol Pump at Mursan, Hathras. The assessee filed returns of income A.Ys. 1996-97 & 1997-98.

for both the years which were processed under section 143(1)(a) of the Income Tax Act, 1961 ('the Act' hereinafter). The case of the assessee was reopened on the basis of complaint filed by Shri Ram Gopal Agarwal, S/o. Shri Ganga Saran Agarwal, who is claimed to be a Commission Agent of the assessee. The complainer submitted photostats copies of daily papers of sales for the period from 01.05.1997 to 31.12.1997 and purchase and sale papers from 01.10.1994 to 31.12.1997. The complainer also pointed out that drafts have been purchased by the assessee in the names of other registered dealers. The A.O. asked the assessee why the difference in gross profit worked out on the basis of re casted trading accounts considering papers submitted by the complainer and the gross profit shown in the books of account may not be added to his income. The A.O. after considering submissions made by the assessee rejected the assessee's contention challenging reopening. The A.O. finally computed the total income from business as under :-

"2. Business Income Gross Profit assessed Rs.15,37,229/-

Expenses claimed in the P&L a/c (-) Rs.1,88,179/-

Net profit computed Rs.13,49,050/-

Add: additions u/s 69 for unexplained investment as discussed above Rs.1,57,254/-

Add: Additions u/s 68 of Un-explained cash credits & interest thereon as discussed above (17,000 + 18,000 + 15,000 + 10,000 + 19,000 & intt.

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of 14,302/-)

Rs.93,302/-

Add: self disallowance of misc. exp.

Rs.500/-

Total Income from the business

Rs.16,00,106/- "

5. The assessee challenged order of CIT(A) on legal as well as merit of the case. The CIT(A) decided the legal issue in favour of the assessee as under :-

(Page nos.15 to 18) "8.1(g) Inference:-

In such a peculiar facts and circumstances of this case, I tend to agree with all the above contentions.

It is not a case wherein the purported documents have been found from the custody or possession of the assessee. In fact, it has also not been established the said documents are in the handwriting of the assessee or any of his employee. It is not a case where any of these documents can be called to be a document on the basis of which proceedings can be initiated without establishing genuineness and authenticity

of such documents. In the instant case, it is an admitted fact by even A.O., during hearing on 14.01.2011, that photo copies had been furnished which are not even certified to be true copies; but also are illegible and are not in the hand writing of the assessee or any of his employee. It is not the submission of the assessee that an assessee is entitled to call upon the Income Tax Officer to explain the sources of the document or material on the basis of which he wants to draw adverse inference. However, it is equally well settled that burden in such a case is on the Income Tax Officer to establish that the document or material on the basis of which he is proceeding to draw an adverse inference against the assessee, are those of the assessee. The learned Income Tax Officer has, in the instant case, proceeded on the assumption, that the documents pertain to assessee, on a mere supposition that many of the entries in those papers are finding place in the books of accounts regularly maintained by the assessee!! The AO has ignored the possibility that the purported alleged documents may be fabricated, more particularly when it has A.Ys. 1996-97 & 1997-98.

not been established that such documents have been found in the custody, control or possession of the assessee and are in the handwriting of the assessee?! In fact it is an obvious possibility, since such fabricated alleged documents have been furnished by the complainant. Why did he furnish the same, what was his motive, what did he gain, from whose custody he got the aforesaid documents!! These have not been verified and tested before drawing the adverse inference against the assessee. In fact, even some of the entries had tallied with the books of accounts maintained by the assessee, it was possible by the complainant is gaining access to assessee's books and then fabricating the loose sheets incorporating the transactions!! What the A.O. has ignored to appreciate is that such loose papers are not even complete record for the entire period! It is submitted, had the same been genuine, obviously there would have been availability of complete record. If a person can go all the way to fabricate the documents and proceed to complaint without gaining any advantage, it is quite possible that he could fabricate entries on some sheets on papers by incorporating some genuine entries also to give a colour of genuineness of such entries. However, it is a case, where the originals are not being produced or not brought on record at all; which burden squarely lay on the A.O., but which he miserably failed to discharge. The A.O. has grossly erred in concluding that some photo copies can be made the basis for concluding that the said purported record is in respect of transactions of the assessee. Reliance has correctly been placed on the judgment of the Hon'ble Supreme Court in the case of Indian Oil Corporation V/s ITO reported in 159 ITR 956 wherein it was held that "the reasons to believe is not the same thing as reasons to suspect", or on the judgement of the Hon'ble Delhi High Court in the case of Ashok Kumar Sen V/s Commissioner of Income Tax reported in 132 ITR 707 (at page 710-711), wherein it was held as under:

"The words "if the Income Tax Officer has reason to believe "used in Section 147(a) suggest that the belief must be that of an honest and reasonable person based upon

reasonable grounds and that the ITO may act under this Section on direct or circumstantial evidence but not on mere suspicion gossip or rumor. The powers under A.Ys. 1996-97 & 1997-98.

this section are not plenary. They are subject to judicial review".

I also find that the A.O. in the assessment order have wrongly relied, for action u/s 148, on case laws as-

I. T. O. V/s Selected Dalurbad Coal Co. (P) Ltd., 217 I.T.R. (SC) (1996) Raymond Wollen Mills Ltd. V/s 236-I.T.R.-34 (SC) S.K. Gupta & Co. V/s I.T.O. 246 ITR--560(2000) These case laws indeed are the law of the land. But, unfortunately, AO has not understood the judicial tenets elucidated therein. It is true that at the time of issuance of notice u/s 148; what is only required is some relevant material and a bonafide application of mind by AO.

But, in this case, "material" is not established to be relevant to appellant's business. These were likely to be complainant's nefarious intention to damage the appellant; this likelihood was obvious by the sort of photo stat copies being presented by the complainant. The AO's application of mind is not found to be bonafide, in the wake of detailed discussion held on this issue.

All these papers are photocopy papers - original never brought on record, neither seen by the A.O. who completed the assessment so as to call these papers as authenticated papers and also not produced for verification before the appellant, inspite of so many written requests made during the course of the assessment proceedings. The complainant was not even confronted to the appellant inspite of specific request. The A.R. invited my attention towards letters dated 14.07.04 and Dt. 17.12.10, copy placed on my record also, requesting the A.O. to produce the originals at appeal's hearing stage in my officer. The A.O. Shri Vipin Arora who appeared before me on Dt. 14.01.11 at the time of hearing of the appeal, admitted that the originals are not available with him in his records or with the complainant and as per record, never brought on record.

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In view of the non-availability of the original papers, no reliance can be placed on the same and also otherwise these papers are not related to the business of the appellant, as have been held by me in earlier para of my order.

In the instant case there was no materiel for the 'Reason to Believe' that the purported documents on the basis of which proceedings have been initiated belongs to assessee. In fact, there was no material to establish that all such purported documents have anything to do with the business of the assessee as they -

i) had not been found either from the possession or control of the assessee.

ii) Even in the handwriting of the assessee.

iii) Ever have been written or maintained by the assessee, his staff/employees

iv) Or name of 'Ashirwad' or Girraj Kishore- written or mentioned anywhere After consideration of facts of the case, I am of the view that at the initiation stage, there was no material in possession of the AO which could enable him to form a 'Reasonable Believe' to authorized him from action U/s 148. In fact the court have also held that the A.O. must satisfy himself if any valid material existed for such action and if he proceeds merely on 'suspicion or Hearsay' evidence, no justice is being followed. In the instant case, neither at the initiation stage nor thereafter, there is any evidence on record, which could justify action of the A.O. Therefore, it is held that the issue of notice U/s 148 is not sustainable in law. Assessments so framed are cancelled and held beyond jurisdiction in both the assessment years.

6. Ld. Departmental Representative supported the order of the A.O. and submitted that it is not necessary that documents belong to the assessee but the contents of the documents pertained to the assessee. The ld. Departmental Representative referred page no.3 of A.O.'s order and submitted that the A.Ys. 1996-97 & 1997-98.

contention of the assessee was not correct that Shri Kamal Babu Agarwal was Manager of the assessee's firm w.e.f. 01.04.1999 while as per Photostat copies of the cash memo/bills, the date written was 09.11.1997 which is in the handwriting of Shri Kamal Babu Agarwal, Manager. Therefore, it is incorrect to say that he was employed w.e.f. 01.04.1999 only. Ld. Departmental Representative submitted that the A.O. has examined the various parties by issuing summons under section 131 of the Act. Ld. Departmental Representative submitted that for the purpose of invoking section 147, reopening of assessment, there should be only prima facie reason to believe and complete finding is not necessary. Ld. Departmental Representative submitted that the CIT(A) without appreciating the facts noted by the A.O. that there was prima facie reason for reopening of the assessment, decided the issue in favour of the assessee.

7. Ld. Authorised Representative relied upon the order of CIT(A). Ld. Authorised Representative drew our attention at page nos.2 & 9 of assessee's Paper Book where copies of reasons for issue of notice under section 148 recorded by the A.O. has been placed.

8. Ld. Authorised Representative further submitted that there is absolutely no basis or material for any reason to believe that the income of the assessee had A.Ys. 1996-97 & 1997-98.

escaped assessment or that the purported trading account as is alleged to have been prepared by the A.O. on the basis of photocopy of documents provided by the complainant allegedly representing the trading transactions of the assessee. Ld. Authorised Representative submitted that the assessee requested the A.O. to provide opportunity of examination of complainant to enable him to rebut the allegation. Ld. Authorised Representative submitted that the complainant was never examined by the A.O. nor such opportunity was provided for cross examination of the assessee. Ld. Authorised Representative submitted that to confer jurisdiction under section 147 to reopen an assessment certain conditions are required to be satisfied, the first one is that the A.O. must have reason to believe that the income, profits or gains chargeable to tax had been under-assessed or escaped

assessment ; the second one is that he must have reason to believe that such escapement or under-assessment was occasioned by reason of assessee's failure to disclose fully and truly all material facts necessary for the assessment of that year. Both these conditions are conditions precedent to be satisfied. Ld. Authorised Representative submitted that these conditions have not been satisfied in the case of the assessee. Therefore, the CIT(A) has rightly quashed the A.O.'s order. Ld. Authorised Representative in support of his contention relied upon judgement of Hon'ble Supreme Court in the case of Indian Oil Corporation vs. ITO, 159 ITR 956 (SC). Ld. Authorised Representative further submitted that A.Ys. 1996-97 & 1997-98.

suspicion is not reason to believe. There must be a tangible material for the formation of a reason to believe. Ld. Authorised Representative in support of his contention relied upon the judgment of Hon'ble Delhi High Court in the case of United Electrical Co. P. Ltd. vs. CIT, 258 ITR 317(Delhi). Ld. Authorised Representative referred the order of the CIT(A) and submitted that the CIT(A) considered the inspection report of the Inspector of District Supply Office and Inspector of Weights & Measurement Office. On complaint made by the complainant Shri Ram Gopal Agarwal as per the report there was no irregularities in the business of the assessee and the complaint was rejected. Ld. Authorised Representative submitted that the loose papers given by the complainer to the A.O. does not come within the compass of the definition of the word 'document' to be used as an evidence, therefore, have no evidentiary value and accordingly same cannot form the basis for assessing the alleged undisclosed income. The Photostat of documents relied have not been proved to be written by the assessee relating to virus business transactions in the normal course of business and, therefore, the said loose papers also does not fall within the compass of the meaning of books of accounts. Ld. Authorised Representative while summing up his arguments submitted that the various judgements relied upon, for which supporting Paper Book has been filed, may be considered. The gist of those judgements are reproduced as under:-

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A) Proceedings under section 147 of the Act can be initiated on the basis of the tangible material. Ld. Authorised Representative in support of his contention relied upon the following judgements:-

i) ITO vs. Lakhmani Mewal Das reported in 103 ITR 437

ii) United Electrical Co. Pvt. Ltd. vs. commissioner of Income tax, reported in (2002) 258 ITR 317

iii) CIT vs. Kelvinator India reported in 256 ITR 1(SC) B) Truth of document can be verified only by examining the writer of the document. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Ramji Dayawala & Sons (P) Ltd. vs. Invest Import reported in AIR 1981 SC 2085 C) Reasons to believe are justifiable. Ld. Authorised Representative in support of his contention relied upon the following judgements:-

i) Asoke Kumar Sen vs. ITO & Anr. reported in 132 ITR 707

ii) Madnani Engineering Works Ltd. reported in 118 ITR 1 D) Reasons to believe are not the same thing as reason to suspect. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Indian Oil Corporation vs. ITO reported in 159 ITR 956 E) Burden to establish the allegation, lies on the allegor. Ld. Authorised Representative in support of his contention relied upon the following judgements:-

i) Rangammal vs. Kuppuswami and Anr. (2011) 5 MLJ 903 (SC)

ii) Subhra Mukherjee vs. Bharat Cooking Coal Ltd., AIR 2000 SC 1203 F) When the documents have not been found from the possession of the assessee, such document cannot bind the assessee. Ld. Authorised Representative in support of his contention relied upon the following judgements:-

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i) CIT vs. M.K. Brothers reported in 163 ITR 249 (Guj)

ii) ACIT vs. Prabhat Oil Mills reported in 52 TTJ 533 (Ahd) G) Contents contained in document are hearsay evidence unless the writer thereof is examined before the court. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Mohd. Yusuf reported in AIR 1968 Bombay 112 H) Unsigned papers even found from the possession of the assessee cannot be relied upon. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) CIT vs. Kulwant Rai reported in 291 ITR 36 I) Initiation of proceedings on the basis of an allegation is untenable. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) East Coast Commercial Company Ltd. vs. ITO & Others reported in 128 ITR 326 J) Before initiating the proceedings, verification should be done to form the reasons to belief. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Sarthak Securities Co. (P) Ltd. vs. ITO reported in 329 ITR 110 K) Mere assertion for allegation is insufficient for initiation of reassessment proceedings. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Austin Engineering Co. Ltd. vs. Joint CIT reported in 312 ITR 70(Guj) L) The words has "reason to believe" entertained by the Assessing Officer must not be arbitrary or irrational. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Ganga Saran & Sons Pvt. Ltd. vs. ITO reported in 130 ITR 1 A.Ys. 1996-97 & 1997-98.

M) Entries in the accounts of another were not legal and admissible evidence.

Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Chiranjii Lal Steel Rolling Mills vs. CIT reported in 84 ITR 222 N) The Burden is upon the revenue to establish that, there is escapement of income. Ld. Authorised Representative in support of his contention relied upon the following judgements:-

i) CIT vs. Pradeep Kumar Gupta reported in 303 ITR 95.

ii) Tin Manufacturing Co of India vs. CIT reported in 222 ITR 323 O) There is no presumption that a witness appearing for an assessee came forward to give false evidence to oblige the assessee. Ld. Authorised Representative in support of his contention relied upon the following judgement:-

i) Sheo Narain Duli Chand vs. CIT reported in 72 ITR 766 P) Cross Examination. Ld. Authorised Representative in support of his contention relied upon the following judgements:-

i) Kishinchand Chellaram vs. CIT reported in 125 ITR 713

ii) CIT vs. S.M. Aggarwal reported in 293 ITR 43

9. We have heard the ld. Representatives of the parties and records perused. The crux of the matter to be examined in this case is legal issue whether under the facts and the circumstances of the case the A.O. has rightly acquired jurisdiction under section 147 of the Act. To examine this issue, we would like to refer the relevant provisions of section 147 of the Act which reads as under:-

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"Income escaping assessment.

147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his

notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

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 facts⁵⁹ necessary for his assessment, for that assessment year:

[Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]
Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :--

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(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(c) where an assessment has been made, but--

- (i) income chargeable to tax has been under assessed ; or
- (ii) such income has been assessed at too low a rate ; or
- (iii) such income has been made the subject of excessive relief under this Act ; or
- (iv) excessive loss or depreciation allowance or any

other allowance under this Act has been computed.]"

9.1 To appreciate the issue we would also like refer some judicial pronouncements that how this scheme of the Act of reopening works. The Apex Court in the case of Phool Chnd Bajarang Lal And Another vs. ITO, 203 ITR 456 (SC) observed that from the plain phraseology of the section 147 and other related sections of the Act, it appears that two conditions precedent which are required to be satisfied before an Income-tax Officer can acquire jurisdiction to proceed under clause (a) of section 147 read with sections 148 and 149 of the Act, beyond the period of four years but within a period of eight years from the end of the relevant A.Ys. 1996-97 & 1997-98.

year, are : (a) that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to tax had either been under assessed or had escaped assessment and (b) that the Income-tax Officer must have reason to believe that such escapement or underassessment was occasioned by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Both these conditions must co-exist in order to confer jurisdiction on the Income-tax Officer. The Income-tax Officer is obliged, before initiating proceedings under section 148 of the Act, to record the reasons for the formation of his belief to reopen the assessment. 9.2 In the case of Johri Lal (HUF) vs. CIT (1973) 88 ITR 439 (SC) it was held that the formation of the belief by the Income-tax Officer before invoking section 34(1)(a) is a condition precedent. The fulfillment of this condition is not a mere formality, it is mandatory. Therefore, the failure to fulfill that condition would vitiate the entire proceedings.

9.3 In the case of ITO vs. Lakhmani Mewal Das (1976) 103 ITR 437 (SC), it was held that the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the A.Ys. 1996-97 & 1997-98.

material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information"

which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the

formation of the belief must be held in good faith and should not be a mere pretence. It was further held that the powers of the Income-tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The A.Ys. 1996-97 & 1997-98.

underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied.

9.4 In the case of Joti Prasad vs. State of Haryana 1993 AIR 1167 (SC), the Hon'ble Supreme Court while dealing with the meaning of expression "reason to believe" in section 26 of the Indian Penal Code held that reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. 9.5 In the case of Ganga Saran & Sons P. Ltd. vs. ITO (1981) 130 ITR 1 (SC), it was held that it is well settled as a result of several decisions of the court that two distinct conditions must be satisfied before the ITO can assume jurisdiction to issue notice under section 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and, secondly, he must have reason A.Ys. 1996-97 & 1997-98.

to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the ITO would be without jurisdiction. The important words under s. 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied ". The belief entertained by the ITO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the ITO in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a hearing on the matters in regard to which he is required to entertain the belief before he can issue notice under S. 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the ITO could not have reason to believe that any part of the income of the assessee had escaped (See also (2004) 271 ITR 113 (SC) Indra Prastha Chemicals P. Ltd. vs. CIT) 9.6 In the case of ITO vs. Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239 (SC)/Raymond Woollen

Mills Ltd. vs. ITO [1999] 236 ITR 34 (SC), it were A.Ys. 1996-97 & 1997-98.

held that belief should not be arbitrary or irrational but based on relevant and material reasons - The important words under section 147 are 'has reason to believe' and these words are stronger than the words 'is satisfied'. The belief entertained by the ITO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court cannot of course investigate into the adequacy or sufficiency of the reasons which have weighed with the ITO in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147.

9.7 In the case of S. Narayanappa vs. CIT [1967] 63 ITR 219 (SC), it was held that belief must be in good faith, and cannot merely be a pretence - The expression 'reason to believe' does not mean a purely subjective satisfaction on the part of the ITO. The belief must be held in good faith; it cannot merely be pretence. 9.8 In the case of Sheo Nath Singh vs. AAC [1971] 82 ITR 147 (SC), it was held that suspicion, gossip or rumour should not form the basis - The words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds, and that the ITO may act on direct or A.Ys. 1996-97 & 1997-98.

circumstantial evidence but not on mere suspicion, gossip or rumour. The ITO would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section Extraneous and irrelevant material should not be basis for conclusion. 9.9 In the cases of CIT vs. Daulat Ram Rawatmull [1973] 87 ITR 349 (SC); ITO v. Lakshmani Mewal Das [1976] 103 ITR 437 (SC), it were held that there should be some direct nexus between the conclusion of fact arrived at by the authority concerned and the primary facts upon which that conclusion is based. The use of extraneous and irrelevant material in arriving at that conclusion would vitiate the conclusion of fact.

9.10 S.P. Agarwalla alias Sukhdeo Prasad Agarwalla v. ITO [1983] 140 ITR 1010 (Cal.). - A mere confessional statement by a third party (who is a lender of the assessee) that he was a mere name-lender and that all his transactions of loans were bogus, without naming the assessee as one who had obtained bogus loans, would not be sufficient to hold that the assessee's income had escaped assessment. 9.11 Purity Techtexile Pvt. Ltd. vs. ACIT 325 ITR 459 (Bomb) -- Validity of exercise of powers to re-open an assessment has to be decided with reference to A.Ys. 1996-97 & 1997-98.

reasons recorded while re-opening an assessment - Where the A.O. had no reason to believe that income had escaped assessment, reasons recorded while re-opening the assessment did not justify the exercise of the power u/s 148. 9.12 Sarthak Securities Co. P. Ltd. vs. ITO - (2010) 329 ITR 110 (Delhi) A.O. acting under information from

investigation wing - no independent application of mind - not amount to formation of belief - notices to be quashed. 9.13 DASS Friends Builders P. Ltd. vs. DCIT (2006) 280 ITR 77(All) - Under section 147 of I.T. Act, 1961, the words are "reason to believe" and not "reason to suspect" The belief entertained by the A.O. must not be arbitrary or rational. It must be in good faith and not a mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. The material should be relating to the particular year, which the assessment is sought to be reopened. It is not any and every material, however vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of income. 9.14 On plain reading of section 147 and above judicial pronouncements, we noticed that one of the conditions which must be satisfied before the A.O. can A.Ys. 1996-97 & 1997-98.

assume jurisdiction under section 147 of the Act that, he must have reason to believe that the income of the assessee has escaped assessment. If this condition is not fulfilled, the notice issued by the A.O. would be without jurisdiction. The important words under section 147 are "has reason to believe" and these words are stronger than the words "is satisfied ". The belief entertained by the A.O. must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the A.O. in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 148. If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the A.O. could not have reason to believe that any part of the income of the assessee had escaped assessment under that circumstances the notice issued by him would be liable to be struck down as invalid.

9.15 The validity of basis for initiating the reassessment proceedings is to be judged on the basis of reasons recorded by the Assessing Officer and the material A.Ys. 1996-97 & 1997-98.

and information referred to by him in the reasons for initiating such action. It is settled law that Assessing Officer cannot initiate the reassessment proceedings merely on the basis of suspicion or for the purpose of making roving and fishy inquiries. The Assessing Officer cannot support the reopening of the assessment by collecting the material or by making inquiry subsequently after the date of initiation of the proceedings. Thus, the reopening of the assessment is to be seen on the date when the Assessing Officer initiated action u/s 147 of the Act.

10. In the light of above discussions, if we consider the facts of the case under consideration, we noticed that the A.O. recorded the reasons for reopening. A Copy of

reasons recorded by the A.O. has been placed at page no.2 of the paper book. However, a copy is also reproduced in 'synopsis in brief' filed by the assessee on page no.4 & 5 which reads as under:-

"A copy of the reasons to believe as has been supplied to the assessee for the asst. year 1996-97. (placed in the paper book at page 2), reads as under :-

"The assessee runs a petrol pump at Mursan, Hathras. This is proprietorship concern of Sri Giriraj Kishore. The assessee filed his return of income of Rs.40,919/- on 31.10.1996, which was, accepted u/s 143(1)(a) on 22.01.1997. In this case a complaint has been received and it has been found that the assessee made purchases and sales of petroleum product outside the books of accounts too. As per the trading account filed along with the return of income the assessee disclosed purchases and assets as under:-

A.Ys. 1996-97 & 1997-98.

Particulars	HSD	MS	Lubricant & Others	Total
Sales	90,49,538	18,39,820	2,24,826	1,11,14,184
Dealership commission				66,941
Closing stock	1,57,858	1,16,931	2,29,803	5,04,592
Total (1)	92,07,396	19,56,751	4,54,629	1,16,85,717
Opening Stock	2,37,822	1,73,413	98,685	5,09,920
Purchases including expenses	88,68,281	1,69,467	3,44,551	1,09,82,229
Total (2)	91,06,153	19,42,880	4,43,236	1,14,92,211
Gross Profit (Total 1-2)	1,01,292	13,871	11,402	1,93,506
				including commission of Rs.66,941

The complainant has furnished details of purchases and sales and according to this the trading results give following picture:

Particulars	HSD	MS	Lubricant & Others	Total
Sales	1,81,58,815	23,88,159	7,95,061	2,13,67,385
including commission			& 25,350	
Closing stock	2,12,890	1,15,693	1,47,007	4,75,590
Total (1)	1,83,71,705	25,03,852	9,67,418	2,18,42,975
Purchases including expenses &	1,71,55,486	23,11,437	10,20,399	2,04,87,322

opening stock

Gross Profit	12,16,219	1,92,415	52,981	13,55,653
(Total 1-2)				

From the above it is seen that the assessee disclosed gross profit only at Rs.1,93,506/- instead of Rs.13,55,653/- as discussed above. Thus the income of Rs.11,62,147/- has escaped assessment for the assessment year 1996-97.

A.Ys. 1996-97 & 1997-98.

In this connection, it may be noted here that the assessee also made purchases through DDs by depositing cash in SBI Mursan and Aligarh Gramin Bank, Mursan for which details have been obtained and are placed on record. The assessee is a dealer of IBP Ltd. But he has purchased drafts in Benami names viz. M.C. Aggarwal, R.G. Aggarwal, V.K. Aggarwal, G.K. Cottage Industries, Mahesh Chand, K.B.A.G., Deepak G. Singh, Pradeep, Udaiveer, Mohan, Rupesh, Devpal, Kamal, Ajai, K.D., Prem Pal, Renuka, Shiv Kumar, Mukesh, Om Prakash, Karuna etc. in cash in favour of IOC Ltd., BPC, HPC tendering cash to the bank. The total amount of such drafts amounted to Rs.21,95,570/-.

I have therefore, reason to believe that income of Rs.11,62,147/- has escaped assessment for the assessment year 1996-97. Issue notice u/s 148 accordingly.

11. From a perusal of the reasons recorded by the A.O. we notice that the A.O. has heavily relied upon the figures given by the complainant. The photocopies filed by the complainant. The original copies of documents basis on which the AO reopen the case neither were not produced before the A.O nor is available on record. The entire exercise has been done by the A.O. on the basis of photocopies filed by the complainant. The documents were not in the handwriting of the assessee or any of his employees. The A.O. admitted before the CIT(A) that photocopies has been furnished which were not only certified to be true copies but also are illegible and were not in the handwriting of the assessee or any of his employees. The CIT(A) noted the fact that the A.O. has proceeded on assumption that documents pertained to the assessee on a mere supposition that many of the entries in those papers were found placed in books of accounts regularly A.Ys. 1996-97 & 1997-98.

maintained by the assessee. It has also been noted by the CIT(A) that there is a possibility of fabrication of documents which were furnished by the complainant and the A.O. did not take trouble to verify those documents before proceeding in the mater. As discussed above that the requirement of recording reasons is a check against arbitrary exercise of power of A.O. For the purpose of reopening, the A.O. must have reason to believe that there is escaped assessment. We find that the facts recorded in the reasons by the A.O. in the reasons recorded did not amount to reason

to believe as required by section 147 of the Act. If such reasons recorded are to be treated as reason to believe of the A.O. for issuing notice under section 147 then the A.O will get a naked tool in the form of power to reopen each and every case on the basis of false complaint either made by the competitor of the assessee or may be some time by motivation of Revenue Authorities to exercise power under section 147 of the Act. Hon'ble Allahabad High court in the case of Dass Frirnds Builders P. Ltd. V DCIT(2006) 280 ITR 77(All) clearly hold that under section 147 of IT Act,1961, the words are "reason to believe" and not "reason to suspect" The belief entertained by the AO must not be arbitrary or rational. It must be in good faith and not a mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. It is not any and every material, however vague and indefinite or distant, remote and far-fetched, which would warrant the formation of A.Ys. 1996-97 & 1997-98.

the belief relating to escapement of income. In the case under consideration we noticed that the belief entertained by the AO is arbitrary, vague and without basis and material. This fact is supported by the various facts/finding of the CIT (A) that All these papers are photocopy papers - original never brought on record, neither seen by the A.O. who completed the assessment so as to call these papers as authenticated papers and also not produced for verification before the appellant, in spite of so many written requests made during the course of the assessment proceedings. The complainant was not even confronted to the appellant in spite of specific request. The A.O. Shri Vipin Arora who appeared before CIT(A) on Dt. 14.01.11 at the time of hearing of the appeal, admitted that the originals are not available with him in his records or with the complainant and as per record, never brought on record. The CIT(A) held that in view of the non-availability of the original papers, no reliance can be placed on the same and also otherwise these papers are not related to the business of the appellant. The CIT (A) found that purported documents on the basis of which proceedings have been initiated were not belonging to the assessee. In fact, there was no material to establish that all such purported documents have anything to do with the business of the assessee. After considering totality of facts and circumstances of the case we are of the considered view that the proceedings under section 147 of the Act invoked by the A.O. is not in accordance with law therefore same is definitely required to be A.Ys. 1996-97 & 1997-98.

quashed. We find that the CIT (A) has rightly quashed the order of the A.O therefore we confirmed the order of the CIT (A) on the legal issue which has been decided in favour of the assessee.

12. As regards the decisions cited by the Revenue in its grounds of appeal, these did not help the Revenue as section 147 is very clear that the reason to believe must be of the A.O. and not of any other Authority. Therefore, the contention of the Revenue that the powers of the CIT (A) are coterminous with that of A.O. and, therefore, he should cure the defects, does not survive.

13. Since the facts of the case for A.Y. 1997-98 are similar to A.Y. 96-97, therefore, in the light of the above discussions, order of the A.O. for A.Y. 1997-98 is also rightly quashed by the CIT(A). Therefore, order of the CIT(A) for A.Y. 1997-98 is also confirmed.

14. As stated above that both these appeals have been heard on legal issue which is decided in favour of the assessee. In the light of that fact, though the CIT(A) has decided the grounds of appeal on merit in favour of the assessee, but since we did not hear the grounds no.3 to 7 raised on merit, therefore, we are not expressing any opinion on the merit of the case.

A.Ys. 1996-97 & 1997-98.

15. In the result, both the appeals of the Revenue are dismissed as indicated above.

(Order pronounced in the open Court)

Sd/-
(BHAVNESH SAINI)
Judicial Member

Sd/-
(A.L. GEHLOT)
Accountant Member

PBN/*

Copy of the order forwarded to:

1. Appellant
2. Respondent
3. CIT (Appeals) concerned
4. CIT concerned
5. D.R., ITAT, Agra Bench, Agra
6. Guard File.

By Order

Sr. Private Secretary
Income-tax Appellate Tribunal, Agra
True Copy