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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 13.09.2012

+ ITA 367/2012

CIT Appellant

Through Ms. Suruchi Aggarwal, Advocate

versus

DEV DUTT PRASAD RAJ KUMAR GARG Respondent

Through Mr. S. Krishan, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% The Revenue claims to be aggrieved by the order of ITAT passed in ITA No.1522/DEL/2010 and ITA No.2727/DEL/2010. The question of law sought to be urged is whether the Tribunal fell into the error in upholding the deletion of Rs.1,01,00,000/- under Section 69A on the ground that appropriate opportunity had been denied to the assessee.

2. The brief facts are that the assessment in respect of AY 2001-2002 was sought to re-opened under Section 147 on account of a raid carried out in the premises of one Sh. B.M. Gupta. After reopening of the assessment and during the course of proceedings that AO relied upon an entry which cited a numeral '177' against which a sum of Rs.1,01,00,000/-, was shown and sought to be connected with the assessee. The reassessment order also



referred to a statement made by one Sh. Ram Avtar Singhal, Chartered Accountant and also the statement of Sh. B.M. Gupta as well as certain documents. On the basis of these, it was held that a sum of Rs.1.01 crores ought to be added back under Section 69A and brought to tax. The assessee's appeal was accepted primarily on the ground of denial of proper opportunity by the Appellate Commissioner. The assessee and the Revenue felt aggrieved as far as question of validity of reassessment was concerned on the merits of reassessment order. The Tribunal rejected both the appeals. The assessee has not questioned the reopening of the assessment under Section 147-148. The Tribunal's reasoning as far as it upholds the Appellate Commissioner's order vis-à-vis deletion of a sum of Rs.1.01 crores is as follows:-

“10. Learned counsel for the assessee, on the other hand, contends that neither the said Shri Brij Mohan Gupta was allowed to be cross-examined nor a copy of his statement was given despite several requests. The AO's contention to the effect that the contents of the statement were made known to the assessee, is not a compliance of mandatory requirement to provide the assessee incriminating material to defend its case. CIT(A) has categorically held that:

- (i) Complete statement of Brij Mohan Gupta was never given.*
- (ii) No adverse observations were made by AO on remand report called upon by the CIT(A).*
- (iii) Beyond the belief of presumption on the information supplied by the DCIT-19, New Delhi, no further inquiry or investigation was carried out by the AO to sustain this addition.*
- (iv) Cross-examination of Shri Brij Mohan Gupta was never allowed despite CIT(A)'s direction and remand of the matter.*
- (v) The assessee firm had strongly denied having any financial transaction with Mr. Brij Mohan Gupta.*

10.1. In view of these findings, CIT(A) has rightly held that the addition made by the AO, without any corroborative evidence, whatsoever, was unjustified.”



3. We have heard counsel for the parties. In the recent decision reported as *ITO v. M. Pirai Choodi*, (2011) 334 ITR 262 (SC), the supreme Court held as follows:-

“.....We are of the view that the High Court should not have set aside the entire assessment order. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness. Be that as it may, we are of the view that, even on this particular aspect, the assessee could have gone in appeal to the Commissioner of Income-tax (Appeals). The assessee has failed to avail of the statutory remedy. In the circumstances, we are of the view that the High Court should not have quashed the assessment proceedings vide the impugned order.”

4. In the present case, the AO has referred to certain materials. A close reading of the assessment order discloses that neither has the contentions of the assessee been discussed nor any attempt made to connect entry 177 with the assessee. It is also apparent from the Appellate Commissioner's order that these matter were not put to the assessee. Consequently, there cannot be two opinions of the fact that assessee was denied proper opportunity to deal with the materials sought to be relied upon. However, in view of the ruling of the Supreme Court in *Dhakeswari Cotton Mills Ltd. V. Commissioner of Income-tax, West Bengal v. CIT*, 26 ITR 775 (SC,) this Court is of the opinion that the Tribunal ought not to have merely upheld the CIT (Appeal)'s order but should have remanded the proceeding to correct the irregularities which crept in during the reassessment proceedings. Accordingly, we direct the AO to consider the entire matter afresh after giving all the necessary materials in his possession which deemed are adverse, to the assessee and also after further affording an opportunity for



cross-examination of such witnesses as he seeks to rely upon, to the assessee.

5. The appeal is allowed and the Tribunal's impugned judgment is set aside to the extent, the appeal is accordingly allowed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

SEPTEMBER 13, 2012

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