1099

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "H" DELHI]

BEFORE SHRI A. D. JAIN, JM AND SHRI K. D. RANJAN, AM

I. T. A. Nos. 1501, 1502 & 3531 to 3534 (Del) of 2009.

Assessment years : 2000-01 to 2005-06.

Shri Sanjay Kumar Garg, C-65, 1st Floor, Sangam Apartments, Sector : 9, ROHINI, DELHI – 110 085. **PAN/GIR No. AAVPK 9568 P.**	Vs.	Asstt. Commissioner of Income-tax, Central Circle : 9, NEW DELHI.

AND

I. T. A. Nos. 1797, 1798 & 3707 to 3710 (Del) of 2009.

Assessment years : 2001-02 to 2005-06.

Asstt. Commissioner of Income-tax, Central Circle : 9, NEW DELHI.	Vs.	Shri Sanjay Kumar Garg, C-65, 1st Floor, Sangam Apartments, Sector : 9, ROHINI, DELHI – 110 085. **PAN/GIR No. AAVPK 9568 P.**
(Appellants)		(Respondents)

Assessee by : Shri Ved Jain, C. A.; &
Ms. Rano Jain, C. A.;
Department by : Ms. Reena S. Puri [CIT] – DR;

O R D E R.

PER K. D. RANJAN A.M. :

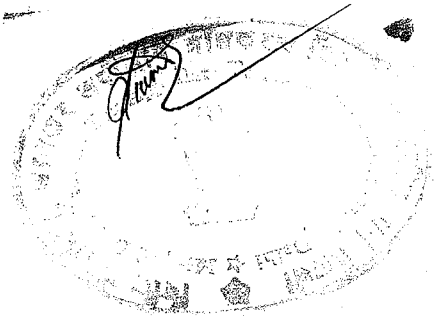
These cross appeals by the assessee and the Revenue for assessment years 2000-01 to 2005-06 arise out of separate orders of the ld. CIT (Appeals)-II, New Delhi. The appeals

assessee as well as Rvenue for A.Y. 2001-02 to 2004-05 were heard together on one date and A.Y. 2000-01 & 2005-06 on other date but for the sake of convenience all appeals are being disposed off, by this common order.

2. First issue for consideration which is common in appeals by the assessee for assessment years 2000-01 to 2004-05 relates to reopening of the assessments under section 147 of the Income-tax Act, 1961 [hereinafter referred to as the Act]. For sake of convenience the grounds of appeal raised by the assessee in this regard for assessment year 2000-01 read as under :-

> *"1. On the facts and circumstances of the case, the order passed by the ld. CIT (Appeals) is bad both in the eye of law and on facts;*
>
> *2. (i) On the facts and circumstances of the case, the ld. CIT (Appeals) has erred both on facts and in law in rejecting the contention of the assessee that no notice issued under section 143(2) by the assessing officer in response to return filed under section 142(1) of the I. T. Act, 1961;*
>
> *(ii) On the facts and circumstances of the case, the ld. CIT (Appeals) has erred both on facts and in law in rejecting the contention of the assessee that no notice under section 148 is served;*
>
> *3. On the facts and circumstances of the case, the ld. CIT (Appeals) has erred both on facts and in law in not considering the contention of the assessee that the AO has failed to follow the procedures laid down by Apex and other Courts in providing reasons for reassessment and opening for reassessment under section 148 of the Income-tax Act, 1961."*

3.1 The facts of the case stated in brief are that the assessee, an Individual, in the relevant assessment years was engaged in the business of commission agent (Pacca and Katcha Arhatia)



of food-grains in the name and style of M/s. Rahul Enterprises as its Proprietor. The assessee filed returns of income for assessment years 2000-01 to 2004-05 as under:-

Asstt. Year	**Date of filing return**	**Income**
2000-01	30/10/2000	Rs.1,41,300/-
2001-02	22/10/2001	Rs.1,45,603/-
2002-03	28/10/2002	Rs.1,67,378/-
2003-04	06/11/2003	Rs.1,97,590/-
2004-05	01/11/2004	Rs.1,11,910/-

3.2 The Investigation Wing of the Department was investigating information that certain food grain merchants were making purchases of damaged food grains in large quantities from Food Corporation of India and other allied Govt. agencies. The damaged food grains so purchased were converted into improved quality by sortex process and sold at a much higher price than sold to cattle-feed manufacturers. However in view of a specific condition laid down by FCI that damaged food grains could be sold only as cattle-feed to cattle feed manufacturers, the food grain merchants had to resort to showing fictitious sales of cattle feed to bogus purchasers/cattle feed manufacturers. For such purposes, these food grain merchants needed purchasers/cattle feed manufacturers and the receipts to show that grains had been sold them as cattle feed. In order to satisfy this condition, the services of parties like Sanjay Kumar Garg and others were taken. They provided names of such purchasers/cattle feed manufacturers in whose names the sales had been made by food grain merchants. The persons in whose names the sales were made were merely bogus concerns of Shri Sanjay Kumar Garg and similar other persons. The modus operandi adopted by grain merchants was to show the sale of the damaged food grains to dummy concerns of Shri Sanjay Kumar Garg and other persons. They sold the damaged food grains after

sortex processing at a much higher price outside the books. The cash thus generated was then paid to Shri Sanjay Kumar Garg, who deposited the same in various bank accounts of the fictitious concerns floated by him. The amounts deposited in the bank accounts of dummy concerns were utilized for payments to food grain merchants by way of cheques as if the purchases of damaged food grains were made by them. As these bogus concerns of Shri Sanjay Kumar Garg were merely name-lenders he was compensated for providing these cross entries of showing bogus purchases of damaged food grains and payments made by cheque/demand draft.

4. A survey under section 133-A of the Act was conducted in this case on 12/07/2004 by Directorate of Investigation, New Delhi. During the course of survey proceedings, statement of Shri Sanjay Kumar Garg was recorded. Certain documents in form of loose papers found were impounded.

5. The case of the assessee was centralized by transferring from Income-tax Officer, Ward-29(1), New Delhi to Central Circle-17 vide order in CIT–X/ord./127/2005-06/514 dated 18/07/2005 along with grain merchants group of cases. Subsequently, in October 2006 the case was again transferred to DCIT Central Circle-9. The assessing officer also collected information from various banks about the cash deposited and cheques issued. Based on information so collected during the course of survey and post survey operations, the Dy. Commissioner of Income- Tax Central Circle-17 New Delhi initiated assessment /reassessment proceedings under section 147 of the Act. The assessing officer issued notice under section 143(2) and 142(1) of the Act. The assessing officer on the basis of information gathered during survey and subsequent enquiries completed assessment by making two additions. The first addition is in respect of commission income which has been estimated by the assessing officer at the rate of 1.75 per cent on declared sales. The other addition is in respect of cash deposits treating cash deposits in the banks for the purpose of accommodation entries pertaining to bogus purchases and sales for and on behalf of other concerns.

6. On appeal before the ld. CIT (Appeals) the assessee challenged the assessment order on assumption of jurisdiction under section 147 as well as on merits. As regards the assumption of jurisdiction under section 147, the assessee submitted that the assessments made under section 147 read with sec. 143 (3) were void and invalid as the same were against the provisions of law and barred by limitations. The assessing officer had failed to follow the procedure laid down by Apex Court and other courts for reopening of assessment under section 147. It was also submitted that the assessing officer had failed to provide reasons for reassessment under section 147 read with section 148 of the Act in spite of the reasons asked by the assessee vide letter dated 19/12/2006.

7. The ld. CIT (Appeals) in order to decide the objections raised by the assessee, directed the assessing officer to verify the records and submit factual report in respect of legal contentions raised by the assessee in the course of appellate proceedings. It was reported by the assessing officer that due process of initiating proceedings under section 148 of the Act were taken after due approval of the Addl. Commissioner wherever necessary and after recording the reasons for initiation of such reassessment proceedings. The assessee was asked for the evidences in support of his contention that he had requested the Assessing Officer to provide reasons recorded for reopening of assessments. The assessee filed a copy of letter dated 19/12/2006. Based on these facts the ld. CIT (Appeals) observed that since returns in response to notices under section 148 were filed on 12/01/2007, the proper procedure for requesting for reasons for reopening of assessments was to first file the returns of income and then seek reasons for such reassessment proceedings. Since the assessee had filed the letter requesting the assessing officer to provide copies of reasons recorded, the same could not have been acted upon for the reasons that there were no returns of income filed in response to notices issued under section 148 by that time. He relied on the decision of Hon'ble Supreme Court in the case of G.K.N Drive Shafts India Ltd. Vs. ITO 259 ITR 19 (SC) which has laid down the procedure for seeking such reasons from the

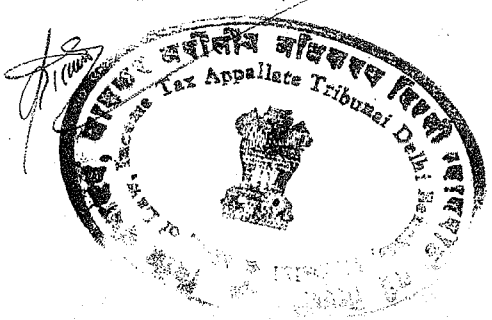
assessing officer in respect of reassessment proceedings. Therefore, there was no legal infirmity which may involve annulment of the assessments. He also placed reliance on the decision of Hon'ble Madras High Court in the case of Areva T & D Ltd. 294 ITR 233 (Mad.) wherein it has been held that assessment made without considering objections of the assessee does not amount to a nullity but a procedural irregularity. He further observed that even by virtue of section 292B of the Act, there was no irregularity in assessment procedure adopted by the AO. Further the assessee had attended the reassessment proceedings. Hence no irregularity was committed by the assessing officer in making assessment. He accordingly rejected the legal ground raised by the assessee in respect of reopening of assessment.

8.1 Before us the ld. AR of the assessee, Shri Ved Jain, submitted that the assessee had obtained copies of notices under section 148 as well as reasons recorded for reopening of the assessments on the basis of application made by the assessee. The reasons for reopening of assessments for assessment years 2000-01 to 2004-05 were recorded on 22/09/2005 and are placed on record. The notices u/s 148 dated 23.09.2005 were issued by Speed Post for these years. Thereafter, the AO on 25th September, 2006 had again reopened the assessments for AY. 2000-01 and 2001-02 after obtaining the approval of Addl. CIT by issue of notices u/s 148 dated 25.09.2006. He further submitted that the assessment for AY 2001-02 was again reopened by issuing notice under section 148 on 24th November, 2006 after recording reasons, which are available from pages 43 to 51 of the relevant assessment records.

8.2 For assessment years 2001-02, 2002-03, 2003-04 and 2004-05 the Assessing Officer issued questionnaires dated 20/09/2006 along with notices under section 142(1) on 21st Sept, 2006. For these assessment years the assessing officer also issued notices under section 143(2) on 31st October, 2006. Thereafter the AO recorded reasons and issued notices under section 148 for assessment years 2002-03, 2003-04 and 2004-05 again on 24th November, 2006. Ld AR of the assessee further submits that from the assessment records it is evident that for assessment

years 2000-01, 2002-03, 2003-04 and 2004-05 the assessing officer issued two notices u/s 148 on 23rd September, 2005 and 25th September, 2006 whereas for assessment year 2001-02 three notices u/s 148 were issued i.e. on 23rd September, 2005, 25th September, 2006 and 24th November, 2006. Further the reassessment proceedings initiated under section 147 on 23rd September, 2005 were not closed or filed before re-initiating the proceedings on subsequent dates. The note dated 2/12/2006 written by the AO on the green sheet clearly establishes this fact. He has further submitted that before the ld. CIT (Appeals) the assessee had taken a specific ground to the effect that the assessment orders passed under section 148/143(3) were void and invalid. It has been submitted by the ld AR of the assessee that this being a legal ground and facts are on record the Tribunal has to decide the issue relating to assumption of jurisdiction u/s 147 of the Act. According to him the assessments framed are bad in law on two counts. Firstly the proceedings initiated during the pendency of the earlier assessment proceedings will be bad in law and the order passed will be invalid and liable to be quashed. Secondly since the notices under section 148 of the Act for assessment years 2000-01 to 2004-05 were issued on 23rd September, 2005, the assessments for these years were to be completed by 31st December, 2006. However, the assessments have been framed on 24th December, 2007. Hence, the assessments made by the assessing officer for assessment years 2000-01 to 2004-05 are barred by limitation.

9. On the other hand, the ld. CIT [DR] submitted that notice under section 148 for assessment year 2000-01 was issued on 25th September, 2006 requiring the assessee to file the return before the expiry of 30 days from the date of service. No notice u/s 148 for this assessment year was issued on 23.09.2005. Hence it is wrong on the part of ld. AR of the assessee to argue that AY 2000-01 notice u/s 148 was issued on 23rd September, 2005. She has further submitted that when notices under section 143(2) dated 31st October, 2006 were served on the assessee on 6.11.2006, the assessee on the backside of notices had written notes that no notice had been received by him prior to 6.10.2006 and to this effect the assessee had filed an affidavit on 11.10.2006. Since there was no proof of service with the Department and in the



absence of any proof of service of notice under section 148 with the Department or with the assessee, the entire 147 proceedings were jeopardized. Hence the issue of notices under section 148 dated 25th September, 2006 were necessitated. She further submitted that service of notice under section 148 is a condition precedent to validity of any reassessment to be made under section 147 and therefore, the service of notice u/s 148 is the foundation of jurisdiction of the assessing authority. She placed reliance on the following decisions for this proposition:-

(i) Shri Nath Suresh Chand Ram Naresh Vs. CIT 280 ITR 396 (All.);

(ii) CIT Vs. Avtar Singh 304 ITR 333 (P & H);

(iii) CIT Vs. Mintu Kaleta 253 ITR 334 (Gauhati);

(iv) Y. Narain Chetty Vs. ITO 35 ITR 388 (SC);

(v) Sewa Lala Daga Vs. CIT. 54 ITR 406 (Cal.);

(vi) Lakshmi Narain Anand Prakash Vs. CST UPTC 125 (All.);

(vii) Bhagwan Devi Sarogi Vs. ITO 119 ITR 906 (Cal.)

(viii) C.N. Nataraj Vs. ITO 56 ITR 250 (Mysore)

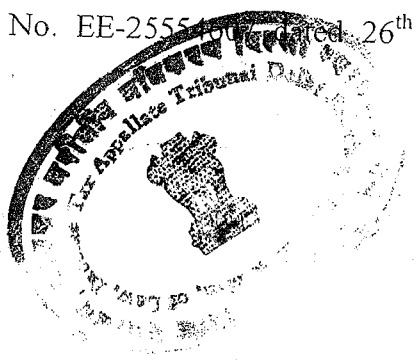
10. Further the assessee had not objected to issue of notice under section 148 on 23rd Sept., 2005, 25th Sept., 2006 and 24/11/2006 in the grounds of appeal. Hence the assessee cannot be permitted at the stage of the Tribunal to raise such issues and contend that assessments made are bad in law. Indeed the assessee has himself claimed that he never received notice dated 23rd Sept., 2005 and 25th Sept., 2006, which in fact led to issue of notices dated 24th November, 2006, which were served on him 5/12/2006. Therefore, it has been submitted that notices under section 148 have been issued properly after due observance of the procedure and assessment has been framed within the time allowed under the statute and, hence the assessments cannot be annulled on the ground that the same had become barred by limitation. Since, the notices issued u/s 148

were not served on the assessee the issue of subsequent notices is perfectly justified and assessments framed cannot be treated bad in law.

11. We have heard both the parties and gone through the material available on record. In assessment year 2000-01 the assessing officer had recorded reasons on 22nd September, 2005 which are also available at pages Nos. 41 to 50 in assessment folder for assessment year 2003-04. There is no evidence including order sheet entry available on record to suggest that notice under section 148 was also issued on 23rd September, 2005. No fresh reasons were recorded before issue of notice u/s 148 on 25.09.2006. The assessing officer had issued notice u/s 148 on 25.09.2006 on the basis of reasons recorded on 22.09.2005. Sub section (2) of section 148 provides that the Assessing Officer before issuing any notice under section 148 shall record his reasons for doing so. Therefore, the recording of reasons forming the belief that certain income has escaped assessment is pre requirement for issue of notice u/s 148. Hence reasons should be recorded by the officer himself before he issues notice u/s 148. There is a time gap of almost one year between formation of belief and issue of notice u/s 148 but since the assessing officer as on 22.09.2005 and 25.09.2006 was the same, the initiation of proceedings assessment u/s 147 cannot be declared bad in law. Had there been change in assessing officer it would have definitely been fatal to the initiation of assessment proceedings u/s 147 of the Act for simple reason that recording of reasons and issue of notice under section 148 should be done by the same assessing officer and not by two different assessing officers. In such situation the requirement of section 148(2) that 'the Assessing Officer shall before issuing any notice under section 148 record his reasons for doing so' would not have been satisfied. There is no lime limit prescribed in law as to how much time before such reasons should be recorded. The additional Commissioner of Income Tax has accorded his sanction for reopening of assessment on the basis of reasons so recorded on 22.09.2005. Hence the requirement of section 151(2) of the Act is also satisfied. Further, the correspondence available on assessment record for assessment years 2001-02 to 2004-05 indicate that the assessing officer had not raised any query about assessment year

2000-01. Order sheet containing the details of the proceedings prior to 15.10. 2007 including initiation of proceeding u/s 147 on 25.09.2006 is not available. Thus from the material available on records it appears that for assessment year 2000-01 notice under section 148 was not issued on 23rd September, 2005 though the reasons for the same were recorded on 22nd September, 2005. In the absence of any evidence on record showing issue of notice under section 148 for assessment year 2000-01 on 23.09.2005, it cannot be said that the notice u/s 148 was also issued by the assessing officer on 25th September, 2006 for this assessment year during the pendency of the assessment proceedings.

20. As regards the issue relating to service of notice before completion of assessment we find that the ld. CIT (A) had obtained the comments of the assessing officer. The AO in his report submitted that notice under section 148 dated 25th Sept., 2006 was sent through Speed Post vide No. EE-25554607 dated 26th Sept., 2006. It was also reported by the assessing officer that the notice was issued after approval of the Addl. Commissioner of Income Tax. The AO also stated that affidavit dated 10-11-2006 was not on record. There was no acknowledgement on the copy of the assessee to evidence the filing of the affidavit in the Department. The ld. CIT (A) on the basis of the above facts observed that the AO had followed the due process of initiating the proceedings under section 147 and notice was issued after approval of the Addl. Commissioner, which was dispatched through Speed Post. When the same was not returned un-served, it has to be presumed that the said notice was served on the assessee. Therefore, the ld. CIT (A) upheld the initiation of the proceedings under section 148 of the Act. We have gone through the assessment folder for A. Y. 20056-06 (Vol. 2) and find that affidavit dated 10.11.2006 is lying in this folder. Hence it is incorrect on the part of assessing officer to say that no such affidavit was available in the assessment records. Moreover the Dy. CIT Central Circle-9 had relied on this very affidavit to re-initiate assessment proceedings for assessment years 2001-02 to 2004-05. However, there is no dispute about the fact that notice u/s 148 was issued through speed post vide No. EE-25554607 dated 26th Sept., 2006. Section 282 of the Income Tax Act, 1961



prescribes the modes of service of a notice either by post or in the way in which a summons issued by a court can be served under the Code of Civil Procedure. Under section 27 of the General Clauses Act, 1887 there is a presumption of effective Service if the notice was properly addressed, prepaid and posted by registered post; and the mere fact that the physical delivery of notice was made to a person other than the addressee, who had no authority to receive the notice on the assessee's behalf, would not be sufficient to prove that there had been no proper service. It would depend on circumstances of each case whether this presumption has been rebutted by proof of further facts and the onus of proving such further facts is on the assessee. In the case before us the notice issued by assessing officer for A.Y. 2000-01 had not been received back and since the assessee had not brought any material on record to rebut the presumption of effective service u/s 27 of the General Clauses Act, 1887, in our considered opinion ld CIT (A) is justified in holding that effective service of notice u/s 148 was made on the assessee.

21. From above it is clear that that the assessing officer had issued valid notice u/s 148 on 25.09.2006 which was served on the assessee through speed post. Hence, both the requirements law of issue of valid notice u/ 148 and service thereof stand satisfied in assessment year 2000-01. As regards the other plea of the assessee that due procedure has not been followed by the assessing officer by not providing the copy of reasons recorded, ld. CIT(A) has dealt with the issue in accordance with law and hence we do not find any infirmity in the order passed by ld. CIT(A). Hence assessment cannot be declared bad in law.

22. In assessment years 2001-02 to 2004-05 the facts are almost identical. In these years the assessing officer recorded reasons for reopening of assessment on 22nd September, 2005 and issued notice under section 148 on 23rd September, 2005. These notices were sent through Speed Post on 23rd September, 2005 itself. These notices have not been received back un-served from postal authorities. These notices were addressed as D-16/406 Sector-7 Rohini, Delhi, the same address at which the notices issued u/s 143(2) on 31.10.2006 for theses assessment years were

served by Income Tax Inspector. The notices under section 142(1) along with questionnaires dated 21st September, 2006 for these assessment years, were also served on this address on Smt. Gita Garg, the wife of the assessee. We have also gone through the assessment records for various assessment years. In assessment folder for assessment year 2005-06 (Volume- III) we find the existence of certain correspondence between the Assessing Officer and his authorized representative, Shri P. N. Chawla, Advocate. It is seen that the ld. counsel for the assessee, Shri P. N. Chawla, appeared before the Assessing Officer on 16/03/2006 with Vakalatnama and a letter requesting the AO to allow photo-stat copies of the documents impounded at the time of survey. Shri P. N. Chawla was asked to deposit Rs.500/- for copying charges and also to bring photo-stat machine and papers and to give the details of the documents to be copied. The case was adjourned to 20th March, 2006. On this date 4th April, 2006 was fixed for getting the photo-copies made. From the noting on 4/04/2006, as per the order-sheet entry, Shri P. N. Chawla, arranged the photo-copier machine at 3.00 PM for getting the photo-stat copies of the impounded documents. On these dates, the assessing officer directed the authorized representative of the assessee to produce Shri Sanjay Kumar Garg.

23. The Assessing Officer vide his letter dated F. No. DCIT/CC–17/2006-07/15 dated 18/04/2006 [placed at page 153 of assessment year 2005-06] addressed to Shri Sanjay Kumar Garg at 250, 1st Floor, Naya Bazar, Delhi (through Shri P. N. Chawla, the counsel for the assessee) intimated fixing the date of hearing for assessment years 2001-02 to 2005-06 on 24th April, 2006. In this letter it was mentioned that enough adjournments have already been granted and the assessments for assessment years up to 2004-05 were going to be barred by limitation that year itself. In response to this Shri P. N. Chawla, Advocate, vide his letter dated 22nd April, 2006 (placed at page 148) informed the Assessing Officer that the notice for assessment year 2001-02 to 2005-06 fixing the case for hearing on 24.04.2006 was received by him on 21st April, 2006 at 4.00 PM and it was not possible to prepare the details in such a short time. It was also stated that Shri Sanjay Kumar Garg had taken photo-stat copies of all the documents seized by

the assessing officer and was in process of getting them ledgerized so that real picture could be merged. For this purpose, he sought time of 15 days and made a request to adjourn the proceedings till 2nd week of May, 2006. This letter was received by the Assessing Officer on 24th April, 2006. The Assessing Officer vide letter F. No. DCIT/CC-17/2006-07/33 dated 25th April, 2006 [placed at page 151] for assessment years 2001-02 to 2005-06 informed the authorized representative of the assessee that a number of time barring cases were involved in the case of Shri Sanjay Kumar Garg and he had been seeking unduly long time for filing of the reply. The assessing officer, however, adjourned the case for hearing to 05th May, 2006 at 11.00 AM. This letter was issued by Speed Post on 26th April, 2006. The AO also issued summons under section 131 dated 26th April, 2006 requiring the assessee to produce complete books of accounts and documents relating to his business for assessment years 2001-02 to 2005-06. In response to this letter, Shri P. N. Chawla, vide his letter dated 03rd May, 2006 [placed at page 185] again submitted that the books of accounts on the basis of seized material for which copies were obtained from the AO were under preparation and it would take another 20 days to complete the same. The AO was requested for further time. The assessing officer vide his letter in F. No. DCIT/CC-17/2006-07/119 dated 24th May, 2006 addressed to Shri P. N. Chawla expressed his anguish that neither Shri S. K. Garg had been produced nor replies filed. Both the times adjournments were sought to compile records on the basis of impounded documents. He was given final opportunity to produce Shri S. K. Garg along with the replies / details for different years. This letter is for assessment year is 2001-02 to 2005-06.

24. The assessing officer issued notices under section 142(1) addressed at D-16/406, Sector : 7, Rohini, Delhi, along with questionnaires on 21st September, 2006 for these assessment years, which were served on Smt. Gita Garg, the wife of the assessee. As per notices issued under section 142(1) the assessee was to comply with the questionnaire dated 20th September, 2006 issued to the assessee in respect of all the assessment years. The case was fixed for hearing on 28th September, 2006 for all the assessment years. Thereafter the AO issued notice under section

143(2) on 31st October, 2006 addressed at D-16/406, Sector : 7, Rohini, Delhi fixing the case for hearing on 10/11/2006 at 12 Noon. These notices were served on the assessee by the Inspector on 6/11/2006. On the back-side of the notices the assessee made a note as under:-

"Mujhe Aaj se pehle koi notice nahin mila hai. Yeh pehla notice dinank 6/11/2006 ko prapt kar raha hoon

Sd/- S.K. Garg

6/11/2006."

25. The assessee also filed affidavit on 10th November, 2006 wherein he has denied to have received any notice prior to notice dated 6/11/2006. The affidavit is lying in assessment folder, for AY 2005-06 (Volume 2) at page 19 and reads as under :-

" AFFIDAVIT

I, Sanjay Kumar Garg, S/o. Shri Ram Chander Garg,, R/o. C-65, 1st Floor, Sangam Apptt., Sector – 9, Rohini, Delhi-85, do hereby solemnly affirm and state as follows :-

1. *That the deponent is Proprietor of M/s. Garg Sales Corporation, 2650, 1st Floor, Naya Bazar, Delhi-6.*

2. *That the deponent is in receipt of Notice u/s 143(2) of the Income Tax Act, 1961 for Asstt. Year 2000-2001 to Asstt. Year 2005-06 on 6/11/2006 from DCIT, Central Circle-9, New Delhi.*

3. *That the deponent has neither received any notice nor have any information about serving any notice to me or my authorized representative from the Income Tax Department before 6/11/2006 in this respect.*

Sd/-

Deponent.

Verification :-

I, Sanjay Kumar Garg, the deponent do hereby verify that the contents of above paras are true to the best of my knowledge and belief and have been explained to me which I understood.

Sd/-

Deponent."

6. From the above correspondence available in the assessment records, it is clear that the assessment proceedings had begun in April 2006 when assessing officer started seeking information. This fact gets established from the letter of the assessing officer in F. No. DCIT/CC–17/2006-07/15 dated 18/04/2006 fixing the case for hearing for assessment years 2001-02 to 2005-06 on 24th April, 2006 (copies of notices / letters are not available on records). In this letter the assessing officer has specifically mentioned that enough adjournments have been allowed and the assessments for assessment years 2001-02 to 2004-05 were getting barred by limitation by the end of 2006. The assessing officer issued summons u/s 131 of IT Act, 1961 to the assessee and also to his authorized representative, Shri P. N. Chawla, for production of books of accounts and other documents for these assessment years as also for the personal appearance of the assessee. Till this stage there was no allegation of the assessee that he had not been served with notices u/s 148 of the Act. Had he not been served with such notice the assessee or his authorized representative would have definitely come out with a plea that he was not aware of reassessment proceedings 147 for assessment years under consideration. He had rather sought time to determine the income based on impounded material. Therefore, the conduct of the assessee and his authorized representative and circumstances indicate that they were very much seized of the fact of service of notices u/s 148. These notices have not been received back un-served from postal authorities. These notices were addressed to assessee at D-16/406, Sector 7, Rohini, Delhi, at which notices issued u/s 143(2) on 31.10.2006 for theses assessment years were served by Income Tax Inspector and notices under section 142(1) along with questionnaires

dated 21st September, 2006 on Smt. Gita Garg, the wife of the assessee. Thus the contents of affidavit are contrary to facts and the conduct of the assessee and hence cannot be relied upon. Therefore, as held in assessment year 2000-01 above there is a presumption under section 27 of the General Clauses Act, 1887 of effective Service of notices issued u/s 148 of Act on the assessee. Hence, we are unable to agree with the contention of ld. CIT(DR) as also of the assessee that notices under section 148 were not served on the assessee.

27. Based on the noting made on the back-side of notice on 6/11/2006 and affidavit dated 10/11/2006, the assessing officer initiated proceedings under section 147 and issued notice under section 148 on 24th November, 2006 for assessment years 2001-02, 2002-03, 2003-04 and 2004-05. Dy. Commissioner of Income-tax, Central Circle-9, recorded reasons, which are identical to the reasons recorded on 22nd September, 2005. Notices under section 148 were served on the assessee on 5/12/2006 for all the four years. The assessing officer completed assessments on 24.12.2007 u/s 143(3)/147 of the Act.

28. In these assessment years the returns of income originally filed were processed u/s 143(1) of the Act. Ld AR of the assessee had advanced legal argument that initiation of assessment proceedings u/s 147 during the pendency of the earlier assessment proceedings initiated under the same section will be bad in law and the order passed will be invalid and liable to be quashed. It is an undisputed fact that the assessment proceedings initiated on 23rd September, 2005 by issue of notice under section 148 for AYs. 2001-02 to 2004-05 were not dropped. Under these circumstances we have to decide as to whether fresh notices u/s 148 during the currency of reassessment/assessment proceedings u/s 147 of the Act for these assessment years are valid and assessment framed consequent thereto are sustainable in law?

29. Under section 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 provisions of section 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 proceedings under this section. Sub section (2) of section 148 provides that the AO shall before issuing any notice under section 148 record his reasons for doing so. Section 149 of the Income-tax Act, 1961 [hereinafter referred to as the Act] prescribes the time limit for issue of notice under section 148. Section 149 of the Act reads as under :-

"149. [(1) No notice under section 148 shall be issued for the relevant assessment year,—

(*a*) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (*b*);

(*b*) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

Explanation.—In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of *Explanation 2* of section 147 shall apply as they apply for the purposes of that section.]

.....

30. Further section 151 requires the sanction of the issue of notice in certain cases. Section 153 of the Act prescribes the time limit for completion of assessment and re-assessments. Sub section (2) of section 153 deals with the time limit in respect of assessments made under section 147. Sub section (2) of section 153 reads as under:-

"(2) No order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of one year from the end of the financial year in which the notice under section 148 was served :

***Provided** that where the notice under section 148 was served on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such assessment, reassessment or recomputation may be made at any time up to the 31st day of March, 2002 :*

Provided further *that where the notice under section 148 was served on or after the 1st day of April, 2005, the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted :"*

31. From the above cited provisions of law it is clear that for assumption of jurisdiction under section 147, the AO is required to issue notice within the time limit specified under section 149 of the Act. However, provisions of section 148 make it mandatory to serve the notice before assessment or reassessment or re-computation of income under section 147 of the Act is made. Under section 149 of the Act, notice under section 148 shall not be issued for the relevant assessment year, if four years have lapsed from the end of relevant assessment year unless case falls under clause (b) of section 149 of the Act. Under clause (b) the cases falling within the period of four years and six years, no notice can be issued unless income chargeable to tax has escaped assessment or is likely to escape assessment Rs.1,00,000/- or more. Further sub section (2) of section 149 provides that notice under section 148(1) shall be issued subject to provisions of section 151. Sub section (1) of section 151 deals with the sanction of the notice in the cases where assessment has been made under section 143(3) or section 147 of the Act. Whereas sub section (2) of section 151 deals with other cases where no notice under section 148 shall be issued by the assessing officer, who is below the rank of Jt. Commissioner of Income-tax, after the expiry of four years from the end of the relevant assessment year unless the Jt. Commissioner is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notice.

32. Section 148 (1) of the Act provides that before making the assessment/re-assessment or re-computation under section 147 the AO shall serve on the assessee a notice requiring him to furnish within such period as may be specified in the notice, a return of his income, in the prescribed form and verified in prescribed manner. However, the provisions of section 149 prescribe the time limit for issue of notice under section 148 of the Act. The Legislature has used two different expressions "issue" in section 149 and "serve" in section 148. Section 149 prescribes the time limit for issue of notice whereas provisions of section 148 require the

Assessing Officer to serve the notice before making assessment or reassessment u/s 147. In R. K. Upadhyaya Vs. Shanabhai Patel 166 ITR 163 (SC) the ITO issued the notice of reassessment under section 147(b) for assessment year 1965-66 by a Regd. Post on 31st March, 1970 and the notice was received by the assessee on 03rd April, 1970. The issue before Hon'ble Supreme Court was whether notice served beyond the period of limitation of issue of notice was valid. Hon'ble Supreme Court observed that the scheme of Income-tax Act, 1961 so far as notice for reassessment is concerned is quite different from that of 1922 Act. A clear distinction has been made out between "issue of notice" and "service of notice" under the 1961 Act. Section 149 of the 1961 Act, which provides the period of limitation, categorically prescribes that no notice under section 148 shall be issued after the period prescribed has lapsed. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Service under 1961 Act is not a condition precedent to conferment of jurisdiction on the ITO; it is a condition precedent only to the making of the order of assessment. It was held that the notice was not barred by limitation and the ITO had jurisdiction to complete the assessment.

33. In CIT Vs. Sheo Kumari Debi 157 ITR 13 (Pat.) (FB) Hon'ble Patna High Court has occasion to examine the difference between the words "issued" and "served". The words "issued" and "served" are not synonyms. Their plain dictionary meaning runs directly contrary to any such assumption. The gap between the two may be wide both in point of time and place. A statute may require that the issuance of a general order be conveyed by publication in the locality without individual service. The word "issue" is to be construed in the context of section 149, which is an express limitation provision creating a precise bar with regard to reopening of assessments. In sub section (3) of section 149 the word "employed" is "served" in the first line while in the penultimate line the word "employed" is "issued". Thus in the same short sub section, the legislature had used these words as distinct and separate. The hallmark of a

limitation provision is that the same must have clear-cut and fixed termini at both ends. Section 149 fixed the terminus a quo from the end of the relevant assessment year i.e. on the 31st March of the said year. On the other hand, the terminus ad quem under clause (a) and (b) is fixed at 4 years, 8 years and 16 years from the fixed date of 31st March of the relevant assessment year. Clearly enough, if the terminus a quo is fixed as the relevant assessment year, namely, 31st March of the said year the other terminus must equally be fixed with regard to the fixed date of issuance of the notice, which is precise and predictable. The plain scheme of section 148 and 151 is that the satisfaction and the sanction of the Commissioner or the Board on the reasons recorded by the ITO is necessary before the notice under section 148 is sent out. If the word "issued" used in both these sub sections is read as "served", it will lead to the strange phenomenon that even after the Income-tax Officer has recorded his reasons and issued the notice, the sanction may, therefore, be recorded before its service on the assessee. A decision is only an authority for what it actually decides, and the quintessence thereof is its ratio and not every observation found therein nor what logically follows from various observations made in it. Hon'ble Patna High Court in Banarsi Devi Vs. ITO (1964) 53 ITR 100 (SC) further observed that the Hon'ble Supreme Court gave a strange and wide meaning of the word "issue" in order to save the Income-tax (Amendment) Act, 1959, from being rendered nugatory. They did not even remotely considered section 149 of the 1961 Act. Consequently, Hon'ble Patna High Court has held that Banarsi Devi's case is no warrant for the abstruse proposition that the word "issued" de- hors its context must always mean "issued" and "served" in every statute or in section 149 of the Act.

34. Thus from the decisions of Hon'ble Supreme Court in the case of R. K. Upadhyaya Vs. Shanabhai Patel (supra) and Hon'ble Patna High Court in the case of Sheo Kumari Debi (supra) the law is settled that term "issue" appearing in section 149 of the Act cannot mean as "issue and serve". The jurisdiction becomes vested in the Assessing Officer to assess/reassess the escaped income the moment the notice u/s 148 is issued. Service under the Act is not a condition

precedent to conferment of jurisdiction on the assessing officer but a condition precedent only to the making of the order of assessment. Therefore the contention of Ld CIT (DR) that without service of notices u/s 148 the assessing officer is not vested with the power to assess/reassess the escaped income and assessment proceedings were jeopardized holds no water and deserves to be rejected.

35. It is a settled law that the expression "issue" means the notice should leave the custody of the assessing officer. The postal Department is not agent of the Income tax Department. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The assessment proceedings can be terminated either by passing of the assessment orders within the stipulated time or by dropping of the proceedings initiated u/s section 147 of the Act. Thus the assessment/reassessment proceedings u/s 147 will not terminate by issue of fresh notice u/s 148. It is also a settled law that the assessing officer can issue as many notices as he may desire as long as other conditions prescribed in law are satisfied. In a case where the assessing officer drops the proceedings initiated earlier and again on same material and information he is debarred to issue fresh notice for the simple reason that issue of notice under such circumstances would amount to change of opinion which is not permitted in view of settled position of law in this regard.

36. Having discussed the legal position in relation to assessment/reassessment proceedings u/s 147 of the Act, we proceed to decide the issue of reopening of assessments for various assessment years under consideration. In the assessment folders the order-sheets exhibiting the initiation of assessment proceedings 147 are also not available. The order-sheets available in assessment folders show that the entries have been recorded from 15.10.2007 by the AO, which appears to have been made on a single date as they are in same ink and without signatures of advocate

37. In the assessment years 2001-02 to 2004-05 the assessing officer had issued notices under section 148 after recording reasons on 23rd September, 2005. The said notices were issued through Speed Post on 23rd September, 2005. The assessing officer again issued notice for assessment year 2001-02 on 25.09.2006 after getting necessary sanction from the Addl.CIT. After receipt of affidavit on 10.11.2006 the assessing officer again issued notices u/s 148 on 24.11.2006 for assessment years 2001-02, 2002-03, 2003-04 and 2004-05. This time the approval of the Addl. CIT was not obtained by assessing officer for assessment year 2001-02. We may like to mention that sanction issued by the Addl. CIT on 25.09.2006 cannot be used second time. It will require satisfaction on part of Addl. CIT before he issues such sanction. Moreover the jurisdiction over the case was transferred to Central Circle-9 from Central Circle-17. On this ground alone the issue of third notice u/s 148 for assessment 2001-02 is bad in law and assessment for this assessment cannot be sustained. Be it as it may the fact remains that for assessment year 2001-02 the assessing officer had issued three notices under section 148 i.e. on 23rd September, 2005, 25th September, 2006 and 24th November, 2006. For other assessment years two notices have issued i.e. on 23.09.2005 and 24.11.2006. As per the decision of Hon'ble Supreme court in the case of R.K. Upadhyay (Supra) the jurisdiction stand vested in the Assessing Officer to assess/reassess the escaped income on 23rd September, 2005. The assessment powers thus vested in the assessing officer have not been terminated either by way of assessment or by way of dropping of assessment proceedings initiated u/s 147. Therefore, the assessing officer had issued notices u/s 148 on 25.09.2006 & 24.11.2006 for assessment year 2001-02 and on 24.11.2006 for assessment years 2002-03, 2003-04 and 2004-05 during pendency of assessment proceedings u/s 147 of the Act.

39. Now let us examine as to whether issue of notice u/s 148 during the period when assessment/ reassessment is pending is a 'nullity' or an 'irregularity'. Hon'ble Supreme Court in the case of Krishan Lal Vs. State of J & K (1994) 4 SCC 422 (SC) had an occasion to examine

the difference between the expressions "irregularity" and "nullity". The Supreme Court referred to the meaning as given in words and phrases (Permanent Edition) where as to 'irregularity' it has been stated that it is "want of adherence to some prescribed rule or mode of proceeding;" whereas 'nullity' is "a void act or an act having no legal force or validity." The safest rule of distinction between 'irregularity' and 'nullity' is to see whether "a party can waive the objection; if he can waive, it amounts to irregularity and if he cannot, it is nullity." Further a waiver is an intentional relinquishment of a known right, but obviously an objection to jurisdiction cannot be waived, for consent cannot give a court jurisdiction where there is none. As discussed above the power to assess get vested in the assessing officer the moment he issues notice u/s 148. The contention of the Revenue that no such plea was taken by the assessee would not mean that the assessing officer got jurisdiction to issue of notice u/s 148 during the currency of assessments. As held by Hon'ble Apex Court in *Krishan Lal's case* it is not an irregularity committed by the assessing officer but an illegality which will render assessments bad in law.

40. Hon'ble Supreme Court in the case of Ranchhoddas Karsandas Vs. CIT, Bombay Circle 26 ITR 105 (SC) held that notice under section 34 (sec. 147 in 1961 Act) issued after the assessee had filed voluntarily return and assessment made thereafter was not valid in law. Hon'ble Supreme Court held that the return having been made it must be disposed off and the income of the assessee must be assessed as laid down in section 23 of 1922 Act. In the case of CIT Vs. Jai Dev Jain and Company 227 ITR 301 (Raj.) the reassessment proceedings initiated under section 147 were not concluded to a logical end. The assessing officer issued fresh reassessment notice. It was held that the assessment made pursuance to reassessment proceedings was not sustainable. In Commercial Art Press Vs. CIT 115 ITR 876 (All.) it was held that when reassessment proceedings commence following the issue of a notice under section 148 and the same are pending, a fresh notice cannot be issued under the same provision. In the case of Srinivasa Computers Vs. ACIT, Com. Circle : 6(4) (2007) 107 I.T.D. 357 (Chennai) it has been held that the AO can issue any number of notices under section 148 provided conditions

stipulated in section 147 are satisfied; same is within the period specified under section 149 read with section 151; and no proceedings are pending either by way of original assessment or by way of re-assessment. The assessment is re-opened when notice is issued under section 148. It is for the completion of the assessment the notice under section 148 should be served on the assessee. From these judicial pronouncements referred to above it is clear that where the reassessment proceedings initiated under section 147 were not concluded to a logical end the assessing officer cannot issue fresh reassessment notice u/s 148. Therefore, in our considered opinion, the assessments for A.Y.2001-02 to 2004-05 framed with reference to the notice issued under section 148 on 24.11.2006 during the pendency of assessment are bad in law. We have in earlier paragraphs have held that notices issued u/s 148 on 23.09.2005 were deemed to have been served on the assessee and since assessments were to be completed by 31.12.2006 the assessments completed on 24.12.2007 with reference to notices issued on 24.11.2006 are barred by limitation. Hence the assessments made u/s 147 deserve to be annulled on both counts. We order accordingly.

45. The ld. CIT (DR) had relied on several decisions in support of her contention that unless notice under section 148 is served on the assessee, the process of reopening of assessment will be completed. In the case of Sri Nath Suresh Chand Ram Naresh (supra) the issue for consideration before Hon'ble Allahabad High Court was that the issue of notice under section 148 is a condition precedent to the validity of any assessment order to be passed under section 147. If no notice is issued or if notice is invalid or is not in accordance with law or is not served on the proper person in accordance with law, the assessment would be illegal and without jurisdiction. The notice should specify the correct assessment year and should be issued to a particular assessee. In this case the Department was seeking to reassess the income of M, Hindu undivided family, under section 147 of the Act, but notice under section 148 was not issued to M, Hindu undivided family. The notice was issued in the name of N and a different GIR number other than that of M was given. Defect in notice was pointed out by the assessee in the letter dated

3.4.1977, and the letter dated 16.03.978, of the Income Tax Officer would not cure the defect in the notice as no notice in the name of M, Hindu Undivided family was issued. Under these circumstances Section 292B was not held applicable. Therefore, the facts of the case of Sri Nath Suresh Chand Ram Naresh are entirely different from the facts of the case before us as this decision of Hon'ble Allahabad High Court does not support the case of the Revenue.

46. In the case of Mintu Kalita (supra) the Income-tax Officer initiated proceedings under section 147(a) and issued notice under section 148 of the Act, but the assessee did not respond to it. Thereafter, in response to notice under section 142(1), an employee of assessee appeared before the ITO and the assessment was completed. The assessee did not raise the question of non-service of notice under section148 before the Income-tax Officer. He contended before the Appellate Assistant Commissioner that the proceedings under section 147 was bad in law and should be quashed on the ground of non service of notice under section 148 to him. The AAC did not accept this contention and disposed off the matter on the merits after allowing certain relief. After remand of the matter by the Tribunal, the Dy. Commissioner (A) again considered the matter and dismissed the appeal. On second appeal before the Tribunal, the Tribunal cancelled the assessment made by the ITO on the ground that there was no proof that the notice under section 148 was served on the assessee. On reference under section 256(2) it was held that the employee of the assessee appeared before the AO only in response to a notice under section 142(1) and not in response to notice under section 148. Section 142 (1) dealt with the enquiry before assessment and the appearance of the employee was to produce accounts or documents before the ITO and the same could not be deem to be knowledge of proceedings under section 147 of the Act. In the absence of the acknowledgement slip or indication of service of notice under section 148 in the order sheet, no notice under section 148 was served on the assessee. Therefore, re-assessment proceedings were not valid. This decision of Hon'ble Gauhati High Court is not applicable to the facts of the case as in this case also there is no issue

of notice under section 148 during the pendency of proceedings already initiated under section 147 of the Act. Hence, is not applicable to the facts of the case.

47. In the case of Avtar Singh (supra) the Commissioner (Appeals) as well as the Tribunal recorded a finding of fact after considering the material available on record to the effect that notice under section 148 was not actually served upon the assessee, which was a condition precedent for making re-assessment or re-computation under section 147 of the Act. The reassessment proceedings were not valid. Service of notice u/s 148 is not a condition precedent to conferment of jurisdiction on the ITO; it is a condition precedent only to the making of the order of assessment. The decision does not deal with a situation in which notice u/s 148 is issued during the pendency of assessment proceedings. Thus this decision of Hon'ble Punjab & High Court is distinguishable on facts.

48. In the case of Y. Narayana Chetty & Others (supra) a registered firm had not given notice of discontinuance of its business under section 25(2) of the I. T. Act, 1922 and the main appellant before the Supreme Court was a partner who had in fact been served personally on behalf of the firm with a notice of reassessment under section 34 (147 in 1961 Act) and other partners who might not have been served had made no grievance in the matter. It was held by the Hon'ble Supreme Court that it was not open to the appellants to contend that the proceedings taken by the Income-tax Officer under section 34 were invalid on the ground that notices of those proceedings were not served on the other alleged partners of the firm. Therefore, this decision of Hon'ble Supreme Court relied upon by the Revenue is of no help as the facts are entirely different from the facts of the case of the assessee.

49. In the case of [illegible] N. Nataraj (supra) the notices under section 148 of the Act were issued in the name of petitioners who were minors and not in the name of their guardians and were

served on a clerk of a petitioner's father, who was neither an agent of the petitioners nor authorized to accept notices on their behalf. It was held that the notices which form the basis of proceedings under section 147 of the Act were wholly invalid and the petitioners could not be assesseed in pursuance of those notices. The decision of Hon'ble Mysore High Court is not applicable to the facts of the case before us as the same is distinguishable on facts.

50. In the case of Sewlal Daga (supra) this decision was rendered in 1922 Act where service of notice was a condition precedent of any reassessment made under section 34 and if a valid notice is not issued as required, the proceedings taken by the Income-tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. This decision was rendered under 1922 Act wherein jurisdiction of Income Tax Officer was to vest only on service of notice was affected. This decision is also distinguishable on facts and law and hence cannot be applied to the facts of the present case where we are discussing the issue of fresh notice during the pendency of reassessment proceedings.

51. Since we have annulled the assessments for assessment years 2001-02 to 2004-05, the Revenue's appeals for these years are dismissed, as infructuous.

52. Now coming to the merits the issues except difference in figures the issue involved in assessee's as well as in Revenue's appeals for assessment year 2000-01 and 2005-06 are identical. For sake of convenience the grounds of appeal for AY 2000-01of both the parties are reproduced as below:-

Assessee's Grounds of appeal for A.Y. 2000-01

4. On the facts and circumstances of the case, the ld. CIT (Appeals) has erred in considering the total of credit side of bank as turnover of the assessee

instead of gross turnover shown by Sales-tax authorities in Sales Tax Assessment i.e. Turnover has been taken as Rs.37,46,15,121/- instead of Rs.28,28,60,808/-;

5. (i) On the facts and circumstances of the case, the ld. CIT (Appeals) has erred both on facts and in law in not accepting the commission of Rs.4,13,947/- as per audited balance sheet and profit and loss account instead of Rs.37,46,153/- as 1% on credit side of turnover;

(ii) Alternatively and without prejudice to above, the ld. CIT (Appeals) has erred on facts and in law in confirming commission @ 1% of turnover instead of 0.10% as per statement under section 133-A of the I. T. Act, 1961 on which basis reassessment is made and without any base, comparable case etc.

52.1 The grounds of appeal raised by the **Revenue for A.Y. 2000-01**, read as under:-

" 1 (a). On the facts and in the circumstances of the case, the ld. CIT (Appeals) has erred in rejecting the rate of 1.75% adopted by the assessing officer by his own estimate of the rate at 1% on the ground that such rate is prevalent in real estate transactions ignoring the fact that the assessee was not dealing with the real estate transaction but with the transaction relating to sale-purchase of food grains;

1 (b). While deciding this issue the ld. CIT (Appeals) has not taken into consideration the fact that the sales tax records of the assessee shows that assessee has made consignment sales and, therefore, the rate of commission was rightly adopted by the assessing officer at 1.75% which is prevalent market rate charged by entry operators for providing fictitious and bogus entries of sales and purchases to the interested parties;

1 (c) That the ld. CIT (Appeals) has erred in not applying the rate of 1.75% on the turnover worked by him at Rs.37,46,15,121/- on the basis of credits appearing in bank accounts of the assessee;

2 (a). On the facts and in the circumstances of the case, the ld. CIT (Appeals) has erred in deleting the addition of Rs.5,06,84,000/- by ignoring the fact that the said amount was the total amount of cash deposited by the assessee in different banks account in his name as well as in the names of dummy and fictitious concerns floated by him for providing bogus entries as admitted by him at the time of recording of his statement during survey proceedings;

2 (b). While deciding this issue the ld. CIT (Appeals) has not considered the fact that the assessee could not furnish any satisfactory reply on the cash deposits made in various accounts amounting to Rs.5,06,84,000/- during the course of assessment proceedings. "

53. From the perusal of grounds of appeal it may be noted that issues are common in assessee's as well as Revenue's appeal. During the year under consideration the assessee was engaged in entry providing business. The ld CIT(A) has taken the sum of cash deposited in various accounts as turnover of this business whereas the assessing officer during the course of assessment proceedings noted that the assessee was also engaged in the business as commission agent. The assessee filed copies of Sales tax order passed under section 23(3) of Delhi Sales Tax Act. The assessing officer had accepted the turnover as mentioned in the Sales Tax assessment orders for each year. However, he found that commission admitted on sales was very low. Moreover, the assessee claimed expenses in profit and loss account. He further noted that the assessee was engaged in providing accommodation entries by way of purchase and sale bills to the needy parties by routing the entries through bank accounts of his own concerns and the bank account of the concerns in the name and friends and relatives which were otherwise being controlled by him. The assessing officer observed that normally commission charged by entry

operators for providing accommodation entries was not less than 2 per cent of the amount involved. Since the assessee's claim for turnover was considered genuine sales on consignment basis, it would fetch commission minimum along with rate of 1.25 per cent another 0.5 per cent for realization of payments within the stipulated period besides reimbursement of expenses relating to consignments from the consigners as per the terms of the market. He applied the commission to be earned at the rate of 1.75 per cent on the sales on which commission was charged. He, therefore, estimated the commission income in each of the years. The amount of commission thus estimated by the AO is as under :-

Asstt. Year	**Turnover**	**Rate of commission.**	**Commission.**
2000-01	Rs.28,28,60,808	1.75 per cent	Rs.49,50,064/-
2005-06	Rs.26,81,21,945/-	-do-	Rs.46,92,134/-

55. As regards the accommodation entry business, the assessing officer observed that the assessee had failed to produce his account books, purchase / sale bills, expenses vouchers, bank statements, consignment records and other supporting documents to substantiate his income shown in the returns of income. The explanation of the assessee that the entries recorded in the bank accounts of Rahul Enterprises represented sale proceeds of food-grains as commission agent was not satisfactory. He further noted that the cash deposits have been made in the bank accounts of various dummy concerns to issue cheques and not for withdrawing the same for re-cycling in the system. Therefore, the benefit of peak credit could not be given. He further noted that the commission at the rate of 2 per cent of the turnover as an entry provider could not be accepted for the reason that the assessee had not come forward to explain his case and provide the names of actual beneficiaries. Until the source of fund was explained by the assessee in the name of actual beneficiaries, the same has to be considered in the hands of the assessee. He,

therefore, held that the cash deposited by him were unexplained. He, therefore, added the amount of cash deposited in respective years as detailed as under:-

Asstt. Year	**Amount deposited in the bank.**
2000-01	Rs. 5,06,84,000/-
2005-06	Rs.67,53,90,956/-

Thus in A.Y. 2001-02, the assessing officer made two additions i.e. the first addition on account commission income on admitted sales at Rs Rs.49,50,064/- and second on account of cash deposited in various Bank accounts controlled and operated by him at Rs. 5,06,84,000/-. Similarly in A.Y. 2005-06 addition was made on admitted sales at Rs Rs.46,92,134/- and on account of cash deposited in Banks of Rs.67,53,90,956/-.

56. On appeal, it was submitted that the assessee had deposited the cash in the bank account maintained with SBBJ, Khari Baoli, Delhi from his regular business. The cash deposited in the bank was through-out the year and not at one given time. The assessee had withdrawn the cash from the same bank from time to time. The cash withdrawn was always more than the cash deposited. Hence, the source of cash deposited in the bank account was proved. Further the cash deposited and withdrawn was in the ordinary course of business. It was also submitted that the assessing officer on one hand had accepted the gross turnover of his business along with treating the commission on the turnover as income of the assessee and on the other hand, he had added the cash deposited in the bank as un-explained deposits contradicting his own stand. Therefore, it was pleaded that neither the addition made in respect of commission income by estimating it at 1.75 per cent of the turnover was correct nor the addition made on account of cash deposited in the bank accounts and accordingly deserve to be deleted.

57. Ld. CIT (Appeals) on consideration of the facts of the case and arguments advanced by the assessee noted that in assessment year 2000-01 as also in assessment year 2005-06 the assessing officer had adopted turnover on the basis of Sales Tax assessments. But on perusal of bank account of State Bank of Bikaner and Jaipur, the credit entries appearing in State Bank of Bikaner and Jaipur were at Rs.33,82,29,330/- out of which a sum of Rs.76,47,809/- represented the cheques returned. He was of the opinion that this amount of Rs.76,47,809/- was to be deducted from the total of the deposits appearing in State Bank of Bikaner and Jaipur. Hence, the net amount credited in SBBJ was at Rs.33,05,81,521/-. Similarly, the ld. CIT (A) also found that the amount deposited in Union Bank of India, Khari Baoli, Delhi, was at Rs.4,40,33,600/-. Thus the total of the amounts deposited in both the bank accounts came to Rs.37,46,15,121/-. The ld. CIT (A) therefore, came to the conclusion that the amount of Rs.37,46,15,121/- was to be taken as receipts of the business of providing accommodation entries for the assessment year 2000-01 on which the commission income was earned. The ld. CIT (A) therefore, adopted the total turnover of the assessee at Rs.37,46,15,121/-. He estimated commission at the rate of 1 per cent on this turnover amounting to Rs.37,46,151 From commission income of Rs.37,46,151/-, the amount disclosed by the assessee at Rs.1,44,555/- was to be deducted and the balance amount of Rs.36,01,596/- (37,46,151-1,44,555) was to be assessed as income from commission business.

58. As regards the addition of Rs.5,06,84,000/- made by the assessing officer on account of cash deposited in the bank accounts, the ld. CIT (A) observed that the AO has simply taken all cash entries in the bank account and the total of the same had been assessed as income from undisclosed sources. The ld. CIT (A) further noted that while taking the above entries, the AO had not considered withdrawals made by the assessee before the cash deposits in the bank account. Where an assessee was maintaining books of accounts and some of the entries in the bank accounts are recorded and some are un-accounted, then the method adopted by the AO is fully justifiable, but in a case where no books of accounts were maintained on regular basis, it

was necessary to examine both deposits and withdrawals before coming to a conclusion that deposits were not supported by any sources. Unless the assessing authority was able to establish that the earlier withdrawals were utilized for some other purposes, the same could not be ignored altogether. He further noted that when entire business had been held as commission activity, the cash deposits also had to be considered as received in the process of providing bogus bills only. It is evident from the account that the assessee was receiving cash and issuing cheques to beneficiaries. Similarly, receipt of cheques is followed by payment in cash. Therefore, it was not correct to hold the cash deposits as separate item of income for which there was no source had been found by the Department. He further noted that in the alternative, if cash deposits represented the sales made by the assessee in its trading account, then due deduction was necessarily to be allowed for purchases as well. It had been held by the Department that the assessee was a commission agent to provide bogus bills of purchases and sales. Accordingly, commission income only had to be computed on the cash deposits also. Alternatively, also no amount was assessable on cash deposits in view of earlier cash withdrawal to meet the subsequent cash deposits. There is no shortage of money at any point of time in the year. Even the minor shortages, if any, were to be ignored due to commission income computed on the business of bogus entries for purchase and sales. Therefore, Ld. CIT(A) came to the conclusion that no adverse view could be taken on cash deposited in the bank accounts.The ld. CIT (Appeals) accordingly deleted the addition of Rs.5,06,84,000/- in assessment year 2000-01.

59. As regards the additions made in assessment year 2005 06, the ld. CIT (A) observed that in this assessment year also the assessing officer had proceeded on the basis of sales tax assessment. But on perusal of bank accounts of State Bank of Bikaner and Jaipur, State Bank of Mysore as well as Syndicate Bank, it was seen that the amount of turnover adopted by the assessing officer was not correct. He had noted that in case of M/s Garg Sales Corporation the credit entries appearing in the SBBJ were at Rs.5,95,66,752; in bank account of State Bank of Mysore Rs.5,92,43,883/-; and in Syndicate Bank of Rs.15,80,38,599/-. Thus, the total credits

with three bank accounts of M/s. Garg Sales Corporation were at Rs.27,68,49,234/-. Out of this Rs 39,65,811/- was on account of cheques returned. Therefore, the net amount credited in these bank accounts was at Rs.27,28,83,423/-. Similarly, the assessee was having bank accounts in Standard Chartered Bank and HDFC, Chandni Chowk in the name of Garg Sales Corporation. The amounts appearing in these accounts were at Rs.50,000/- and Rs.5,63,60,302/-. Similarly, in the name of Rahul Enterprises also the assessee opened an account in Syndicate Bank, Naya Bazar and total credits appearing in that account were at Rs.1,52,22,545/-. All these accounts were used by the assessee to carry on entry business. The total credits appearing in all the account were at Rs.34,45,16,270/- both in the name of Garg Sales Corporation and Rahul Enterprises . The ld. CIT (A) took the credit entries appearing in various bank accounts as turnover He applied 1 per cent commission rate and estimated the income from bogus entry business at Rs.34,45,162/-. The ld. CIT (A) from this amount deducted the income disclosed by the assessee in the return of income at Rs.3,62,128/-. Thus the commission income estimated by CIT (A) from commission entry business carried out in the names of M/s Garg Sales Corporation and M/s Rahul Enterprises at Rs.30,83,034/-.

60. Further the assessing officer added the amount of Rs.67,53,90,956 deposited in the bank accounts held in the names of M/s. Yash Enterprises, GRS & Company, Pradeep Kumar Vikas Kumar, Suraj Enterprises, M/s. Baba Kishore Enterprises and M/s. Mahadev Enterprises. Before the ld. CIT (A) the assessee vehemently objected that he had no nexus whatsoever with these bank accounts which were owned and operated by independent persons. They were assessed separately and were genuine concerns. Hence, the amount deposited in the bank accounts of above concerns could not be related in any manner to the assessee. On consideration of the contention of the assessee, ld. CIT (A) observed that an un-disputed fact was that Shri Sanjay Kumar Garg was carrying the business of providing accommodation entries to the needy business persons and collecting commission from them. The requirement of those business persons were many fold. Hence, it was not possible to help them in the name of only one entity.

With this purpose, the assessee floated various concerns in the names of close relatives and friends and carried on the business of entry provider. The evidences found in the course of survey in the form of bank pay-in slips and cheques lent support to the belief that the assessee was in-charge of entire business of accommodation bills. Further some of the persons in whose names bogus concerns were created have categorically declared that though bank accounts were held in their names, but in reality the same have been operated and controlled by the assessee for providing bills on commission basis. Hence it was difficult to accept the submission of the assessee that he had no connection whatsoever with those entities. Moreover, the assessee himself had admitted in the course of survey, the modus operandi of the entire business module, how he had issued accommodation bills and collected the amounts etc. Therefore, there could not be any iota of doubt about the person who had operated the bank accounts. The business carried on by the assessee was undisputedly to earn commission income. There was no activity of any trading carried on by the assessee through these concerns. In that process cash had been accepted and deposited in the bank accounts and in liue of the same, cheques were issued to various parties. The assessing officer had simply taken all cash entries in the above bank accounts and the total of same had been assessed as income from other sources. The ld. CIT (A) further noted that the assessee was receiving cash and issuing cheques to beneficiaries. Similarly receipt of cheque was followed by payment in cash. In view of this it was not correct to hold the cash deposits as separate item of income for which there was no source found by the Department. In the alternative ld. CIT(A) also noted that if the cash deposits represented the sales made by the assessee in his trading account, then due deduction was necessary to be allowed for purchases as well. There was no evidence found in the course of survey to the effect that the assessee had carried on any business trading activities. Accordingly, only commission income was required to be computed in case of dummy entities considering the total cash entries as turnover of the assessee. Therefore, he came to the conclusion that commission income has to be computed on cash deposits also. He, therefore, directed the AO to compute commission at the rate of 1 per cent.

60.1. The ld. CIT (Appeals) thereafter worked out the total credits in the names of six dummy concerns at Rs.138,45,71,462/- as under:

M/s. Yash Enterprises	Rs 14,04,000/-
M/s GRS & Company	Rs 16,04,53,727/-
M/s Suraj Enterprises	Rs 7,78,34,977/-
M/s Pradeep Kumar Vikas Kumar	Rs60,37,67,397/-
M/s. Baba Kishore Enterprises	Rs 15,90,15,160/-
M/s. Mahadev Enterprises	Rs 38,20,96,201/-
	Rs 138,45,71,462/-

He estimated the commission income of Rs.1,38,45,714/- by applying 1 per cent rate on turnover of Rs 38,20,96,201/-. The contention of the assessee that 50 per cent of commission income should be allowed as deduction as paid to the sister concerns was rejected on the ground that no evidence to this extent was led by the assessee and the bank accounts of all the dummy concerns were controlled and operated by the assessee himself. The ld. CIT (A), however, held that the assessee should be given the benefit to the extent of commission income disclosed by these concerns in their return of income.

60.2 Thus in A.Y.2005-06 Ld. CIT(A) estimated commission income from direct business of entry operations carried out in the names of M/s Garg Sales Corporation and M/s Rahul Enterprises at Rs 30,83,034/- and from business carried in dummy concerns at Rs 1,38,45,,714/- totaling to Rs 1,69,28,748/-.

61. Before us, the ld. AR of the assessee submitted that that assessee is engaged in the business of food grains at commission basis. He relied on the turnover declared to sales tax

Department for the contention that assessee was engaged in commission business in food grains. During the course of survey assessee has stated to have received commission at the rate of .25 per cent out of which .1 per cent was given to the persons in whose names the bank accounts were maintained and expenditure of .05 per cent was incurred in the business of providing entries. On the other hand, the ld. CIT (D)R submitted that the assessing officer has estimated the commission at the rate of 1.75 per cent and, therefore, the ld. CIT (A) was not justified in estimating the commission at the rate of 1 per cent. She further stated that the assessee had to explain the source of deposits in the various bank accounts and in the absence of any such evidence the amounts deposited in the bank accounts have to be treated as his income. Therefore, the ld. CIT (A) was not justified in deleting the addition in respect of amounts deposited in the banks and estimating the commission income on such deposits.

62. We have heard both the parties and gone through the material available on record. During the course of survey operations, statement of the assessee was recorded wherein it has been categorically admitted that no purchase and sale activities are undertaken in the names of firms. The assessee was using the firms for the purpose of providing sale bills for which he was collecting commission. The assessee was depositing cash in the bank accounts of the dummy firms as well as his own firms through which he was carrying out accommodation entry business. At the time of survey no evidence was found to suggest that the assessee was engaged in real commission business. No other source of income was also found. It is also the case of assessing officer that the assessee was carrying on business of entry provider. The assessments were reopened for this purpose only. The ld. CIT (Appeals) has given a finding of fact that the assessee was engaged in the business of providing accommodation entries and, therefore, the amounts deposited in the account of dummy concerns was to be treated as total receipts on which commission was to be determined. Therefore, we are in agreement with the view of the ld. CIT (A) that only commission can be determined on the deposits made in the bank accounts of the dummy concerns. Therefore, we do not find any infirmity in the order passed by the ld. CIT (A) that the amount deposited in the account of dummy concerns cannot be treated as income of the assessee. Therefore, the ld. CIT (A), in our considered opinion, is justified in treating the cash

deposited in various bank accounts controlled and operated by the assessee as the turnover of the accommodation entry business and commission income has to be estimated thereon.

63. The next issue arises for estimation of commission income. In the statement the assessee at the time of survey under section 133A had stated that he charged 25p as commission for providing accommodation entries and out of that 25p he paid 10p to others in whose name bank accounts were maintained and 5p was spent on expenses incurred in relation such business and hence, net commission earned was 10p i.e. 0.10 per cent. The ld. CIT (A) had taken the commission at 1 per cent as against 1.75% applied by the assessing officer for which no evidence during the course of survey was found. The ld. CIT (A) has also noted that there was no clear standard rate of commission for accommodation activities. According to him the people who are engaged in this type of business would not charge less than 1 per cent on the bill amount as done in the case of brokerage on real estate business. He further observed that the rate of 1 per cent commission is very reasonable. Now the issue arises as to whether the commission should be estimated at the rate of .01 per cent or 1.75 per cent or 1 per cent. The ld. CIT (A) for arriving at the rate of commission earned has relied on rate of commission normally charged in case of real estate transactions. In real estate transactions the broker has to identify the suitable buyer/purchaser, inspection of property, visit of interested parties, negotiations of rates, registration of sale deeds etc. whereas in case of bogus entries providers no such activities are involved. Interested party gives cash to entry provider which is deposited in bank account and the entry provider issues cheque. Hence the transactions of bogus entry providers cannot be compared with the transactions of real estate business transactions. He has to ensure the nature of the property and has to satisfy both seller and purchaser. The services rendered by the brokers in real estate transactions are more than the entry providers. Hence both the transactions are not comparable. Therefore, the comparison of commission earned on a real estate transaction, which in fact takes place and commission on transaction which does not at all occur, are not comparable. In accommodation entries the transaction does not take place and, therefore,

commission will be certainly lower than the commission in the case of real estate or real transactions. Moreover, neither the ld. CIT (A) nor the AO had given any comparable case wherein commission at the rate of 1.75 per cent as taken by the AO or 1 per cent adopted by the ld. CIT (A) has been admitted by other assessees engaged in business of bogus provider. Therefore, in the absence of any such material on record, the statement given by the assessee on oath during the course of survey proceedings has to be given credence. The assessee has floated the bogus concerns and has controlled the accounts. During the course of survey, no material was found on the basis of which it could be said that the assessee had passed on .1 per cent commission to the persons in whose names the bank accounts were maintained. In the absence of any evidence having brought on record, we are unable to agree with the assessee that the assessee had passed on commission of 10p to the persons in whose names dummy concerns were floated. However, in the business of entry provider certain expenditure has to be incurred which has been stated to be 5p during the course of survey. Therefore, credit of 5p out of 25p received as commission has to be allowed. Therefore, the assessing officer is directed to estimate commission income by applying 0.2% net commission on turnover determined by the Ld CIT (A) for both the assessment years as against 1% taken by him.

64. In the result, the appeals filed by the assessee for assessment years 2001-02 and 2005-06 partly allowed, in terms indicated above. The appeals filed by the Revenue for both the assessment years are dismissed.

The order pronounced in the open court on : 28-01-2010.

[A. D. JAIN]
JUDICIAL MEMBER

[K. D. RANJAN]
ACCOUNTANT MEMBER

Dated : 28-1-2010.

*MEHTA

" Copy of the order forwarded to :-

1. Appellants. By, Hand
2. Respondents.
3. CIT,
4. CIT (Appeals),
5. DR, ITAT, NEW DELHI.

True Copy. By Order.

Assistant Registrar, ITAT. "

सहायक पंजीकार
Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
नई दिल्ली/ New Delhi