

IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'C' : NEW DELHI)

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI J.S. REDDY, ACCOUNTANT MEMBER

ITA No. 5311/Del/2013

Assessment Year: 2000-01

INCOME TAX OFFICER,
WARD 12(1), CR BUILDING,
NEW DELHI

vs.

M/S GA BUILDCON PRIVATE
Ltd., ROOM NO. 205, WADHWA
COMPLEX, LAXMI NAGAR, DELHI-92
(PAN: AAACG9109R)

(APPELLANT)

(RESPONDENT)

AND

CROSS OBJECTION NO. 42/Del/2014

(IN ITA NO. 5311/DEL/2013)

Assessment Year: 2000-01

M/S GA BUILDCON PRIVATE LIMITED, vs.
C/O RRA TAXINDIA,
D-28, SOUTH EXTENSION, PART-I,
NEW DELHI – 49

INCOME TAX OFFICER,
WARD 12(1), NEW DELHI

(APPELLANT)

(RESPONDENT)

Department by : Sh. T. Vasanthan, Sr. DR

Respondent by : Dr. Rakesh Gupta, Adv., Mr. Somil Aggarwal,
Adv. & Sh. Abhishek Anand, Adv.

Date of Hearing : 17-03-2016

Date of Order : 07-04-2016

ORDER

PER H.S. SIDHU, J.M.

The Department has filed the Appeal and Assessee has filed the
Cross Objection which is emanate from the Order dated 29.7.2003 of the

Ld. CIT(A)-IX, New Delhi pertaining to assessment year 2000-01. The grounds raised in the revenue's appeal reads as under:-

- “1. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the addition of Rs. 95,00,000/- made by the AO u/s. 68 of the Income Tax Act, 1961.
2. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the addition of Rs. 22,22,178/- made by the AO on account bogus sundry creditors.
3. On the facts and circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs. 9,00,000/- made by the AO in respect of commission payment.
4. The appellant craves to add, alter, amend, modify, and or forego any ground of appeal at any time before or during the hearing of this appeal.”

2. The grounds raised by the Assessee in the Cross Objection reads as under:-

- “1. That having regard to the facts and circumstances of the case Ld. CIT(A) has erred in law and on facts in confirming the action of AO in passing the impugned assessment u/s. 147 that too without assuming jurisdiction as per law and without complying with the mandatory conditions as envisaged under

section 147 to 151 and the impugned order has been passed without recording valid reasons in the eyes of law and without obtaining valid approval as per law.

2. That having regard to the facts and circumstances of the case, action of the Ld. CIT(A) in confirming the action of the AO in reopening the impugned assessment u/s. 147 is bad in law and against the facts and circumstances of the case.
3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not directing the AO to accept the return of income filed by the assessee at loss of RS. 2824/-.
4. That the Cross Objector craves the leave to add, amend, modify, delete any of the ground(s) of cross objection before or at the time of hearing.”

3. The brief facts of the case are that the return of income was filed on 30.11.2000 declaring a loss of Rs. 2824/-. The same was processed u/s. 143(1) of the I.T. Act, 1961. On the basis of information received from Investigation Wing of the Income Tax Department that the assessee company was involved in receiving accommodation entries and after analysis of the Bank Statement of the assessee obtained by AO from Corporation bank, Kabir Nagar, Shahdara, Delhi, the AO recorded the reasons thereof and issued notice u/s. 148 of the I.T. Act to reopen the case

on 17.4.2006. In response to the said notice, the assessee vide his letter dated 6.11.2006, stated that the original return filed on 30.11.2000 may be treated as return filed in compliance to the notice. The reasons for reopening for assessment was communicated to the assessee. The case was fixed for hearing by issuing notice u/s. 143(2)/142(1) and in compliance Ld. Authorised Representative filed the submissions alongwith power of attorney dated 15.9.2007. Thereafter, the AO after considering the material available on record made the various additions and completed the assessment at Rs. 1,26,19,360/- u/s. 143(3)/147 of the Act vide order dated 20.12.2007.

4. Against the Order of the Ld. AO, assessee appealed before the Ld. CIT(A), challenging the validity of reassessment as well as the additions in dispute who vide impugned order dated 29.7.2013 has partly allowed the appeal of the Assessee and deleted the additions in dispute.

5. Aggrieved with the aforesaid order of the Ld. CIT(A), Revenue is in Appeal before the Tribunal against the deletion of additions and Assessee has filed the Cross Objection challenging the legal issue of reopening of assessment.

6. Now we first deal with the Assessee's Cross Objection and adjudicate upon the legal issue of reopening of assessment.

7. At the time of hearing, Ld. Counsel of the assessee has only argued the legal ground challenging the validity of reopening u/s. 147 of the I.T.

Act. He draw our attention towards the page no. 4 & 5 of the Paper Book which are the copies of the reasons recorded by the AO and approval accorded thereon by the Addl. CIT and notice issued by the AO u/s. 148 of the I.T. Act. He further stated that the notice u/s. 148 dated 17.4.2006 is beyond 4 years and therefore, the assessment u/s. 148 is illegal.

7.1 Ld. Counsel of the assessee further stated that no proper satisfaction was recorded before issue of notice u/s. 148; no independent conclusion that there was escapement of income and no proper satisfaction / approval has been obtained from the Addl. CIT. In support of his contention, he relied upon the following cases and stated that the legal issue involved in the present case is squarely covered by these case laws and requested to follow the same reasoning in the present case.

- a) ITO vs. Satya Narayan Parwal, ITAT, Jaipur Bench 96 ITD 0362.
- b) ACIT vs. Heera Lal, ITAT, Jaipur Bench 106 TTJ 0114.
- c) United Electrical Company (P) Ltd. vs. CIT 258 ITR 317 (Del) – Delhi High Court.
- d) ITO vs. NC Cables Ltd. & Ors., ITA No. 4122/Del/2009 & CO No. 388/Del/2009, Delhi, 'E' Bench, ITAT, New Delhi

- e) ITO vs. M/s Direct Sales (P) Ltd. & M/s Direct Sales Pvt. Ltd. vs. ITO in ITA No. 3545/Del/2010 and CO No. 138/Del/2010, Delhi 'B' Bench, ITAT.
- f) Sh. Amarlal Bajaj vs. ACIT & ACIT vs. Amarlal Bajaj decided in ITA No. 511/Mum/2004 & CO 534/Mum/2004 of ITAT, 'E' Bench, Mumbai.
- g) Chhugamal Rajpal vs. SP Chaliha & Ors. 79 ITR 603 (SC)

In view of above, he requested that reopening the impugned assessment u/s. 147 is bad in law and against the facts and circumstances of the case and needs to be quashed.

8. On the contrary, Ld. DR relied upon the order passed by the CIT(A) on the issue of validity of reopening and stated that Ld. CIT(A) has rightly upheld the action of the AO of reopening. He stated that approval has been given as per law and reasons has also been recorded on the basis of the sufficient material on record as per law. He further stated that if there is a mistake committed by the AO while issuing the notice u/s. 148, that can be rectified and may be set aside to the AO. In order to support his contention, he draw our attention towards the Hon'ble Supreme Court Judgment dated 11.7.2008 in the case of M/s Deepak Agro Foods vs. State of Rajasthan & Ors. reported in 2008-TIOL-134-SC-CT.

9. We have heard both the parties and perused the relevant records available with us, especially the orders of the revenue authorities and the case laws cited by both the parties. In our view, it is very much necessary to reproduce the reasons recorded by the AO before issue of notice u/s. 148 and the approval of the Ld. Addl. CIT, New Delhi for reopening of assessment which reads as under:-

“M/s G.A. Buildcon Pvt. Ltd. A.Y. 2000-01.

Information was received from the director of income tax (investigation)-II, New Delhi vide letter dated 21/04/2003 that Shri Bipin Aggarwal S/o Shri Ram Kumar Aggarwal, R/o B-128, Surajmal Vihar, Delhi has been providing bogus entries of purchase, sale and expenses to various persons through a number of business entities, which are being run by his associates. These business entities are merely the paper companies who are engaged in providing such entries only. List of cases who were involved with the said Shri Bipin Aggarwal for such bogus transactions was provided with the information. The assessee company M/s G.A. Buildcon Pvt. Ltd. is one of the recipients of bogus entries relating to purchase, sale, expenses etc. for the period of FY 1999-2000 relevant to AY 2000-01 in the list. The bank statement of the

assessee company has been obtained from CORPORATION BANK, SHDARA, DELHI (C.A. NO. 75189) for the period from 1/04/1999 to 31/03/2000. Perusal of bank statement also shows that huge transaction have been made during the relevant period.

In view of the facts mentioned above, it is clear that the assessee has not correct and true disclosure for the AY 2000-01, tax on the amount involved in the transaction made during the year with the associate entities of Sh. Bipin aggarwal in the form of bogus entries of sale, purchase and expenses has escaped assessment. I, therefore have reasons to believe that the income of the assessee has escaped assessment and this is a fit case for assessment within the provisions of sections 147 of the I.T. Act, 1961 for the assessment year 2000-01.

In view of the provisions of section 149(1)(b) necessary approval for the issue of the notice u/s 148 may kindly be accorded for one AY 2000-01. For approval please.

Sd/-

17/04/2006

Income Tax Officer, W-12(l).

Addl. CIT, Range-12, New Delhi.

“As proposed approved.”

SD/-

17/4/06

Addl. CIT, Range-2, Delhi

9.1 After going through the reasons recorded by the Assessing Officer, New Delhi for reopening and the approval thereof by the Ld. Addl. CIT, Range-2, Delhi, we are of the view that AO has not applied his mind so as to come to an independent conclusion that he has reason to believe that income has escaped during the year. In our view the reasons are vague and are not based on any tangible material as well as are not acceptable in the eyes of law. A perusal of the above demonstrates that the Addl. CIT has written “As proposed Approved” which establishes that he has not recorded proper satisfaction / approval, before issue of notice u/s. 148 of the I.T. Act. Thereafter, the AO has mechanically issued notice u/s. 148 of the Act, on the basis of information allegedly received by him from the Directorate of Income Tax (Investigation), New Delhi. Keeping in view of the facts and circumstances of the present case and the case law applicable in the case of the assessee, we are of the considered view that the reopening in the case of the assessee for the asstt. Year in dispute is bad in law and deserves to be quashed. To support our view, we find that the ITAT, ‘E’ Bench, New Delhi in the case of ITO vs. M/s NC Cables

Ltd. in ITA No. 4122/Del/2009 (AY 2001-02) and in Cross Objection No. 388/Del/2009 in the matter of M/s NC Cables Ltd. vs. ITO, vide order dated 22.10.2014, on the issue of reopening, has held as under:-

“10.2. The Mumbai ‘E’ Bench of the Tribunal in ITA 611/Mum/2004 Amarlal Bajaj (supra) order dt. 24.7.2013 has considered the legal position and held as follows.

“5. We have considered the rival submissions and carefully perused the orders of the lower authorities and also the material evidences brought on 8 record from both sides. We have also the benefit of perusing the order sheet entries by which the Ld. CIT has granted sanction. Let us first consider the relevant part of the provisions of Sec. 151 of the Act.

151. (1) In a case where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 [by an Assessing Officer, who is below the rank of Assistant Commissioner [or Deputy Commissioner], unless the [Joint] Commissioner is

satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice} :

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice. (2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of [Joint} Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the [Joint} Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.}

[Explanation.-For the removal of doubts, it is hereby declared that the Joint Commissioner, the Commissioner or the Chief Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of

notice under section 148, need not issue such notice himself.} "

6. A simple reading of the provisions of Sec. 151(1) with the proviso clearly show that no such notice shall be issued unless the Commissioner is satisfied on the reasons recorded by the AO that it is a fit case for the issue of notice which means that the satisfaction of the Commissioner is paramount for which the least that is expected from the Commissioner is application of mind and due diligence before according sanction to the reasons recorded by the AO. In the present case, the order sheet which is placed on record show that the Commissioner has simply affixed "approved" at the bottom of the note sheet prepared by the ITO technical. Nowhere the CIT has recorded his satisfaction. In the case before the Hon'ble Supreme Court (supra) that on AO's report the Commissioner against the question "whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148 merely noted "Yes" and affixed his signature there under. On these facts, the Hon'ble Supreme Court observed that

the important safeguards provided in sections 147 and 151 were lightly treated by the officer and the Commissioner. The Hon'ble Supreme Court further observed that the ITO could not have had reason to believe that income had escaped assessment by reasons of the appellant-firm's failure to disclose material facts and if the 9 Commissioner had read the report carefully he could not have come to the conclusion that this was a fit case for issuing a notice under section 148. The notice issued under section 148 was therefore, invalid. It would be pertinent here to note the reasons recorded by the AO. "Intimation has been received from DCIT-24(2), Mumbai vide his letters dt. 22nd February, 2002 that one Shri Nitin I. Rugmani assessed in his charge had arranged Hawala entries in arranging loans, expenses, gifts. During the year Shri Amar G. Bajaj, Prop. Of Mohan Brothers, 712, Linking Road, Khar (W), Mumbai-52 was the beneficiary of such loans, expenses and gifts. The modus-operandi was to collect cash from the parties to whom loans were given and cash was deposited into account of Shri Nitin I. Rugani and cheques were issued to the beneficiary of the loan

transaction. In order to ensure that the money reached by cheques to the beneficiary Shri Nitin I. Rugani kept blank cheques of the third parties. The assessee Shri Amar G. Bajaj had taken benefit of such entries of loans, commission ad bill discounting of Rs. 8,00,000/-, 11,21,243/- and 9,64,739/- respectively. The assessment was completed u/s. 143(3) of the I. T. Act on 31st March, 1998 by DCIT-Spl. Rg. 40, Mumbai. It is seen from records that the aforesaid points have not been verified in the assessment. I have therefore reason to believe that by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, income has escaped assessment within the meaning of proviso to Sec. 147 and explanation 2 (c)(i) of the income-tax Act, 1961."

7. In the light of the above mentioned reasons, in our considerate view, Section 147 and 148 are charter to the Revenue to reopen earlier assessments and are, therefore protected by safeguards against unnecessary harassment of the assessee. They are sword for the Revenue and shield for the assessee. Section 151

guards that the sword of Sec. 147 may not be used unless a superior officer is satisfied that the AO has good and adequate reasons to invoke the provisions of Sec. 147. The superior authority has to examine the reasons, material or grounds and to judge whether they are sufficient and adequate to the formation of the necessary belief on the part of the assessing officer. If, after applying his mind and also recording his reasons, howsoever briefly, the Commissioner is of the opinion that the AO's belief is well reasoned and bonafide, he is to accord his sanction to the issue of notice u/s. 148 of the Act. In the instant case, we find from the perusal of the order sheet which is on record, the Commissioner has simply put "approved" and signed the report thereby giving sanction to the AO. Nowhere the Commissioner has recorded a satisfaction note not even in brief. Therefore, it cannot be said that the Commissioner has accorded sanction after applying his mind and after recording his satisfaction.

8. Hon'ble Delhi High Court in the case of United Electrical Co. Pvt. Ltd. Vs CIT 257 has held that "the

proviso to sub-section (1) of section 151 of the 10 Act provides that after the expiry of four years from the end of the relevant assessment year, notice under section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some in-built safeguards to prevent arbitrary exercise of power by an Assessing Officer to fiddle with the completed assessment". The Hon'ble High Court further observed that "what disturbs us more is that even the Additional Commissioner has accorded his approval for action under section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of the said parties, perhaps he would not have granted his approval, which was mandatory in terms of the proviso to sub-section (1) of section 151 of the Act as the action under section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The

Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case there has been no application of mind by the Additional Commissioner before granting the approval".

9. The observations of the Hon'ble High Court are very much relevant in the instant case as in the present case also the Commissioner has simply mentioned "approved" to the report submitted by the concerned AO. In the light of the ratios/observations of the Hon'ble High Court mentioned hereinabove, we have no hesitation to hold that the reopening proceedings visa-vis provisions of Sec. 151 are bad in law and the assessment has to be declared as void ab initio. Ground No. 1 of assessee's appeal is allowed.

10. As we have held that the reassessment is bad in law, we do not find it necessary to decide other issues which are on merits of the case."

10.3 No contrary judgment or order is brought to our notice. This being a Co-ordinate Bench order, we are required to follow the same.

10.4 The decision cited by the Ld. DR does not pertain to the issue of contravention of provisions of S. 151 of the Act. These judgments are on other aspects relating to reopening. Thus respectfully following the decision of the Coordinate Bench in the matter, we hold that the reopening is bad in law for the reason that the Ld. CIT(A), Delhi has not recorded his satisfaction as contemplated u/s. 151 of the Act.”

9.2 No contrary judgement or order is brought to our notice by the Ld. DR, except one judgment in the case of Hon'ble Supreme Court of India in the case M/s Deepak Agro Foods vs. State of Rajasthan & Ors. reported in 2008-TIOL-134-SC-CT. We find that this judgment is totally distinguished to the facts and circumstances of the case, because it is related to assessment orders passed under the Rajasthan Sales Tax Act, 1994. In the case of the assessee, Notice u/s. 148 has been issued without proper approval, without applying the mind and in a routine manner which is not permissible under the law. Therefore, the facts of the case is totally distinguishable on the facts of the case law cited by the Ld. DR i.e. M/s Deepak Agro Foods vs. State of Rajasthan & Ors. (Supra)

9.3 Since the decision of the ITAT, 'E' Bench, New Delhi in the case of ITO vs. M/s NC Cables Ltd. in ITA No. 4122/Del/2009 (AY 2001-02) and in Cross Objection No. 388/Del/2009 in the matter of M/s NC Cables Ltd. vs. ITO (Supra), is a Co-ordinate Bench decision, we are required to follow the same. Thus, respectfully following the decision of the

Coordinate Bench in the matter, in which one of the Accountant Member was the Party, we hold that the reopening is bad in law for the reason that the Addl. CIT has not recorded his satisfaction as contemplated u/s 151 of the Act and accordingly, we quash the orders of the authorities below and allow the Cross Objection filed by the Assessee.

REVENUE'S APPEAL

10. Since we have quashed the orders of the authorities below on the legal issue itself, hence, the issues raised by the Revenue in its Appeal have become infructuous, therefore, the same are dismissed as such.

11. In the result, the Assessee's Cross Objection stands allowed and Revenue's appeal stand dismissed.

Order pronounced in Open Court on this 07-04-2016.

Sd/-
(J.S. REDDY)
ACCOUNTANT MEMBER

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Dated : 07-04-2016

SR BHATANGAR

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.