

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.2418/M/2010
Assessment Year: 2004-05**

Dr. Keki H. Gharda, 48 Hill Road, Bandra (W), Mumbai - 50 PAN: AACPG31533E	Vs.	Deputy Commissioner of Income Tax 9(1), M.K. Road, Aayakar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

**ITA No.6656/M/2013
Assessment Year: 2004-05**

Deputy Commissioner of Income Tax 9(1), R.No.223, Aayakar Bhavan, M.K. Road, Mumbai - 20	Vs.	Dr. Keki H. Gharda, 56, Jer Mansion, W.P. Varde Road, Bandra (W), Mumbai - 400 050 PAN: AACPG31533E
(Appellant)		(Respondent)

Present for:

Assessee by : Shri P.J. Pardiwalla, A.R. &
Ms. Vasanti Patel, A.R.

Revenue by : Shri A. Ramachandran, D.R.

Date of Hearing : 16.08.2016

Date of Pronouncement : 23.09.2016

ORDER

Per Sanjay Garg, Judicial Member:

Out of the above tilted two appeals one has been by the assessee against the order of the Commissioner of Income Tax (Appeals) [(hereinafter referred to as the CIT(A)] dated 03.03.10 agitating the confirmation of quantum additions made by the Assessing Officer (hereinafter referred to as the AO) and the other by the Revenue against the order of the Ld. CIT(A) dated 06.09.13 agitating the deletion of the penalty levied by the AO under section

271(1)(c) of the Act. First we take up the assessee's appeal i.e. ITA No.2418/M/2010.

ITA No.2418/M/2010 (Assessee's Appeal)

2. The assessee, in this appeal, has taken three effective grounds of appeal. In the first ground, the assessee has challenged the reopening of the assessment by the AO under section 147/148 of the Act. In the second ground, the assessee has challenged the action of the AO in treating the compensation received on account of relinquishment of tenancy rights as deemed dividend under section 2(22)(e) of the Act as against 'Capital gains' offered by the assessee in his return of income. The assessee has taken the third ground agitating the action of the Ld. CIT(A) in not specifically directing the AO to allow deduction under section 80L of Rs.12,000/-.

3. The brief facts of the case are that the assessment was originally completed under section 143(3) of the Act. In the return of income as originally filed, the assessee had declared income under the head 'Capital Gains' arising from the relinquishment of tenancy rights. The said income declared under the head 'Capital Gains' had been assessed as such in the assessment completed under section 143(3) dated 29.09.06. Subsequently, reassessment proceedings were initiated by issue of notice under section 148 of the Act. The reason recorded by the AO for initiating reassessment proceedings was that on examination of records, it was observed that the assessee never possessed any tenancy rights. Hence, the notice under section 148 was issued stating that substantial revenue had escaped assessment.

4. In appeal before the Ld. CIT(A), the assessee contended that relevant queries had been raised by the AO regarding the tenancy rights during the assessment proceedings under section 143(3) of the Act and that no new information had come into the knowledge or possession of the AO and that the reopening was done merely on the basis of change of opinion. The Ld. CIT(A), however, rejected the above contention of the assessee observing that

as per the scheme of the amended provisions of section 147, the AO need merely a reason to believe that income has escaped assessment provided the four year time limit has not expired. If the AO has formed a prima facie opinion that assessee did not possess tenancy rights at that stage that belief, even only on assumption, was sufficient to reopen the assessment and it would be subsequently open to the assessee to prove or disprove the correctness or otherwise of the assumption. He, therefore, held that at the stage of issue of notice under section 148, the correctness or sufficiency of the material was not very relevant. He, therefore, upheld the validity of the reopening of the assessment. Being aggrieved by the above finding of the Ld. CIT(A), the assessee has come in appeal before us.

5. So far as the ground regarding the validity of reopening of the assessment is concerned, the Ld. Counsel for the assessee has invited our attention to the original assessment order dated 29.09.06 passed by the AO under section 143(3) of the Act. The Ld. Counsel has further invited our attention to the copy of notice issued under section 148 of the Act for reopening of the assessment and further reasons recorded by the AO for reopening of the assessment. The said reasons for the sake of convenience are reproduced as under:

“On examining records it is observed that the assessee was not the tenant for which it disclosed long term capital gain of Rs.3,91,80,750/- as relinquishment of tenancy right as he does not possess any tenancy rights. Therefore, substantial revenue has escaped assessment.

Therefore, the income chargeable to tax has escaped assessment for A.Y. 04-05 within the meaning of section 147 of the I.T. Act, 1961.”

6. The Ld. A.R. has further invited our attention to the letter/notice dated 07.09.06 issued under section 142(1) of the Income Tax Act in relation to the original assessment proceedings carried out under section 143(3) of the Act. He, in this respect, has invited our attention to clause (4) of the said notice wherein it has been directed to the assessee by the AO to produce copy of

relinquishment of tenancy rights and explain since when the property was in the possession of the assessee as tenant. The Ld. Counsel has further invited our attention to letter dated 26.09.06 vide which the assessee had explained the nature of tenancy rights and the amount of compensation received towards relinquishment of tenancy rights. The Ld. Counsel for the assessee has further invited our attention to page 31 to 36 of the paper book which is the record relating to the wealth tax assessment order for the assessment year 1990-91. He has invited our attention to page 34 i.e. annexure 'A-2' which is the computation/valuation of immovable property as on 31.03.90 wherein the immovable property of Gharda Chemicals Ltd. has been valued at Rs.59,625/-. On the right side the name of tenants who have occupied the said property has also been mentioned wherein the name of assessee Dr. Keki H. Gharda is duly mentioned, the area occupied by him has been mentioned as 2634 sq. ft. and against which a rent of Rs.5664 has been shown to be received and a sum of Rs.2126/- has been shown as paid toward municipal tax. The Ld. Counsel, therefore, has contended that the case of the Revenue is that the story about the tenancy rights of the assessee in the property in question is a device adopted by the assessee in the year 1995 when the landlord/tenant of the property M/s. Gharda Chemicals Ltd. had entered into redevelopment agreement of the property. That to lessen the tax liability, the assessee company had shown one of its directors Dr. Keki H. Gharda as a tenant in some portion of the property, for which a compensation on relinquishment of rights was agreed to be paid to the assessee Dr. Keki H. Gharda vide agreement dated 01.09.1995. The Ld. Counsel, thus, has stressed that from the records above, it is very much evident that the agreement of 1995 was not an afterthought. The assessee was shown as tenant in the wealth tax return of A.Y. 1990-91 itself. The Ld. Counsel has further contended that even when an issue had been examined by the AO and after getting explanation of the assessee in this respect, the AO had passed the scrutiny assessment order under section 143(3) of the Act, then without coming into his knowledge any additional fact or information, the subsequent

reopening based on the same reason was nothing but the change of opinion. He, in this respect, has relied upon the decision of the Hon'ble Supreme Court in the case of "Kelvinator India Ltd." (2010) 228 CTR(SC) 488 and of the Hon'ble Bombay High Court in the case of "Direct Information (P) Ltd. vs. ITO" (2011) 15 taxman.com 63 (Bombay).

On the other hand, the Ld. D.R. has strongly relied upon the findings of the lower authorities and has stressed that the reopening of the assessment even from the knowledge gathered from the records by the AO was valid in this case.

7. We have heard the rival contentions and have also gone through the records. Undisputedly, no new fact or information had come to the knowledge of the AO to form belief that the income in this case had escaped assessment. As noted above, the AO had formed the belief stating that on examination of records, it was observed by him that the assessee was not the tenant for which he had disclosed long term capital gains on account of compensation received for relinquishment of tenancy rights. However, it is also a fact on the file that specific queries were raised by the AO vide letter dated 07.09.06 regarding the tenancy rights of the assessee in the property and the assessee was asked to explain since when the property was in his possession as tenant and also to produce the copy of deed of relinquishment of tenancy rights. The assessee has also proved on the file that the factum of assessee being tenant in the property was not an afterthought version or a colourable device rather in the wealth tax return for the assessment year 1990-91 i.e. prior to the signing of the deed of relinquishment of right/development rights in the year 1995, the assessee was very much shown as a tenant in the property in question. It has not been pointed out by the AO in the reasons recorded for reopening of the assessment as to what new fact or information had come into his knowledge to form the belief that income of the assessee had escaped assessment. The AO, during the original scrutiny assessment proceedings under section 143(3) of the

Act, had thoroughly examined the issue, put the queries to the assessee and thereafter had allowed the claim of the assessee. Without any new fact or information coming into his knowledge and without stating any specific reason merely saying that from the records it is observed that the assessee was not tenant, in our view, is nothing but the change of opinion on the part of the AO. As per the provisions of section 147 of the Act, the AO is authorized to reopen the assessment proceedings, if he has reason to believe that any income chargeable to tax has escaped assessment. The courts of law time and again have held that such a reason to believe that the income of the assessee has escaped assessment should be based on some tangible material which comes to the knowledge of the AO. An assessment cannot be reopened under section 147 of the Act on the basis of mere suspicion. A perusal of the reasons recorded reveals that assessment has been reopened on the assumption that assessee was not the tenant in the property without referring to any specific document, evidence or information. There is no dispute to the well settled proposition that reason to believe must have a material bearing on the question of escapement of income. It does not mean a purely subjective satisfaction of the assessing authority, such reason should be held in good faith and cannot merely be a pretence. Furthermore, the reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of belief regarding escapement of income. The powers of Assessing Officer to reopen an assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied

does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court. The entire law as to what would constitute "reason to believe" has been summed up by Supreme Court in *Income Tax Officer v Lakhmani Mewaldas* (1976) 103 ITR 437.

8. In this case, the original assessment u/s 143(3) of the act had already become final. The AO therefore was precluded from review of the assessment which had already become final. The addition by the AO in respect of compensation received on relinquishment of tenancy rights was nothing but the review of the already finalized assessment that too without any material evidence available to the AO to form such a belief in this respect. The Hon'ble Supreme Court in the case of "*CIT vs. Kelvinator of India Ltd.*" has held that we must keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. As observed above, the reopening and reassessment in this case was nothing, but, the review u/s 143(3) of the Act in the garb of the provisions of section 147 of the Act, which was not permissible in view of the law laid down by the Hon'ble Supreme Court in the case of "*CIT vs. Kelvinator of India Ltd.*" (supra). Identical view has also been taken by the Hon'ble Jurisdictional Bombay High Court in the case of "*Direct Information (P) Ltd.*" (supra) as relied upon by the Ld. Counsel.

9. The facts of the case in hand when seen in the light of the legal proposition as laid down by the Hon'ble Supreme Court and by the Hon'ble jurisdictional Bombay High Court as discussed above, the reopening in this case is to be held as illegal and bad in law.

10. Since we have held the very reopening of the assessment as bad in law, hence the consequential additions made by the AO have no legs to stand.

Hence, without going into the merits of the additions made by the AO consequent to the reopening of the assessment, the appeal of the assessee is allowed on the ground of the validity of the reopening of the assessment.

11. Now coming to the appeal of the Revenue i.e. ITA No.6656/M/2013.

ITA No.6656/M/2013 (Revenue's Appeal)

12. The Revenue has come in appeal agitating the action of the Ld. CIT(A) in deleting the penalty levied by the AO relating to the additions made by the AO pursuant to the reopening of the assessment. While deciding the appeal of the assessee, since we have already held the very reopening of the assessment was bad in law and accordingly deleted the consequential additions, hence under the circumstances there is no reason left for the sustaining of the penalty levied in consequences of such additions made pursuant to the reopening of the assessment. The appeal of the Revenue has, thus, become infructuous and the same is accordingly dismissed.

Order pronounced in the open court on 23.09.2016.

**Sd/-
(B.R. Baskaran)
ACCOUNTANT MEMBER**

**Sd/-
(Sanjay Garg)
JUDICIAL MEMBER**

Mumbai, Dated: 23.09.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.