IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' C '

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

I.T. A. Nos.627 & 628/Bang/2014
(Assessment Years : 2008-09 & 2009-10)

M/s. Sobha Suburbia Apartments Owners Welfare Association,
Jakkur, Yelahanka, Bangalore-560 064.
PAN AABAS 8797A .... Appellant.

Vs.

Income Tax Officer,
Ward 6(4), Bangalore. ..... Respondent.

Appellant By : Shri B.S. Balachandran, Advocate.
Respondent By : Shri Vijay Kumar N, Addl.CIT (D.R)

Date of Hearing : 14.09.2016.
Date of Pronouncement : 23.9.2016.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

These appeals by the assessee are directed against two separate orders of Commissioner of Income Tax (Appeals)-III, Bangalore dt.28.1.2014 & 27.3.2014 for the Assessment Years 2008-09 & 2009-10 respectively.

2. The assessee is a resident welfare association and is a non-profit organization set up to maintain the common area of the residential apartments. There are four divisions of the apartment complex viz. **Sobha Emerald-1, Sobha Emerald-2, Sobha Coral & Sobha Jade**. All the accounts of the four apartments are consolidated into the assessee, the welfare association though the accounts are separately maintained for each division and managed by different executive members elected by the members of the residential apartments. The assessee had corpus account transferred from the builder and maintenance charges are being collected from members for maintenance of the said residential apartments and common area. The maintenance charges include electricity charges, water charges, security charges, etc. The assessee keeps the corpus fund in Fixed Deposit with bank and interest is earned from the said deposits made with the bank. The accounts were maintained by the assessee-association and audited accounts are being presented before the members in the Annual General Meeting. The assessee filed its return of income for these assessment years disclosing NIL income. The return of income was processed under Section 143(1) of

the Income Tax Act, 1961 (in short 'the Act'), subsequently the Assessing Officer issued notice under Section 148 to reopen the assessment on the reason that the assessee has claimed the interest from banks as exempt from tax and there is nothing to show that the assessee's claim of exemption is in accordance with the provisions of the IT Act. In the reassessment the Assessing Officer made the addition of the interest amount apart from disallowance of certain expenses for want of deduction of tax at source. The assessee challenged the reassessment of income before the CIT (Appeals). The CIT (Appeals) allowed the claim of expenses however, confirmed the assessment of interest on deposits made with banks. Aggrieved by the order of the CIT (Appeals), the assessee filed these appeals and raised common grounds.

3. The grounds raised for the Assessment Year 2008-09 are as under :

1. The learned CIT(A) has erred in passing an order which is bad in law and on facts and hence liable to be modified.

2. The learned CIT(A) has erred in law and on facts in treating the sum of Rs 4,106,176 being interest on bank deposits as outside the ambit of mutuality

The appellant further craves to adjudicate upon the following grounds for the first time before the Honourable ITAT which werenot raised before the lower authorities. These grounds are purely legal grounds requiring no further examination of facts and therefore, it is humbly prayed that these grounds be admitted based on the decision of Honourable **Supreme Court** in the case of **National Thermal Power Corporation – 229 ITR 383**.

3. The learned Assessing Officer("AO") has erred in law in initiating the proceedings under section 147 of the Act.

4. The learned AO has erred in law and on facts in issuing notice under section 148 which was beyond jurisdiction as no new tangible material came in the possession of the AO on the basis of which reassessment proceedings were initiated.

5. The learned AOhas erred in law and on facts in not allowing the expenses incurred by the appellant from the interest received on bank deposits.

It is humbly requested that theabove grounds raised for the first time before the Honourable Tribunal be allowed to be adjudicated upon otherwise the appellant shall suffer irreparable loss.

The Appellant further submits that each of the above grounds is independent and without prejudice to one another.

4. Ground Nos.3 & 4 are additional grounds challenging the validity of reopening of assessment. The assessee also filed a petition for admission of the additional grounds.

5. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The ld. AR of the assessee has submitted that the additional grounds are purely legal in nature and does not require any examination of new facts. Therefore the additional grounds may be

admitted based on the decision of the Hon'ble Supreme Court in the case of **NTPC Ltd. Vs. CIT** 229 ITR 383 (SC).

5. On the other hand, the ld. DR has submitted that since the assessee has not explained the reason for not raising this ground before the authorities below therefore the additional grounds raised by the assessee at this stage are not to be admitted.

6. Having considered the rival submissions as well as careful perusal of the record, we find that the assessee has challenged the validity of reassessment on the ground that the initiation of proceedings under Section 148 is bad in law as the Assessing Officer was having no jurisdiction as no tangible material came to the possession of the Assessing Officer except the return of income filed by the assessee. There is no dispute that the additional ground is purely legal in nature and has to be decided on the basis of the facts already recorded in the assessment order as well as in the impugned order of the CIT (Appeals) and therefore no fresh facts are required for adjudication of these additional grounds. Accordingly in view of the judgment of Hon'ble Supreme Court in the case of NTPC Ltd. (supra) when the issue raised in

the additional grounds goes to the root cause of the issue, the same is admitted for adjudication.

VALIDITY OF INITIATING PROCEEDINGS U/S. 148 OF THE ACT.

7. The ld. AR of the assessee has submitted that the Assessing Officer has reopened the assessment only on presumption that the interest on deposits is not exempt income whereas no tangible material was available or came to the notice of the Assessing Officer subsequent to the completion of assessment under Section 143(1) of the Act to form the belief the income assessable to tax has escaped assessment. Therefore the reopening of the assessment is not permissible to examine the claim of exemption. The ld. AR has referred to the reasons recorded by the Assessing Officer and submitted that the reasons are based only on the return of income filed by the assessee and therefore the basis of reopening is nothing but a change of opinion of the Assessing Officer on the material already available with the Assessing Officer in the shape of return of income. The ld. AR has relied upon the judgment of Hon'ble Delhi High Court in the case of **CIT Vs. Orient Craft Ltd.** 354 ITR 536 (Del) and submitted that when there is no whisper in the reasons recorded by

the Assessing Officer of any tangible material coming into the possession of the Assessing Officer after the order under Section 143(1)(a) then the reassessment is based only on reappraisal of the information already on record. Thus the reopening is invalid as held by the Hon'ble High Court of Delhi. The ld. AR has relied upon the decision of Kolkata Bench of this Tribunal in the case of **ACIT Vs. Royal Bank of Scotland N.V.** (2011) 138 TTJ 698 (Kol) and submitted that the decisions of Hon'ble High Court on the point is binding in nature. The ld. AR has then relied upon the decision of Hon'ble High Court of Bombay in the case of **Indivest Pte. Ltd. Vs. Addl. Director of Income Tax** (2013) 350 ITR 120 (Bom) and submitted that the Hon'ble Bombay High Court has reiterated the proposition that in the absence of any tangible material, notice issued for reopening does not fulfil the requirement as laid down in the judgment of Hon'ble Supreme Court in the case of **CIT vs. Kelvinator of India Ltd.**(2010) 320 ITR 561(SC). The ld. AR has also relied upon the decision of co-ordinate bench of this Tribunal dt.9.10.2015 in the case of **Smt. C P Prameelamma Vs. ITO** in ITA No.369/Bang/2014.

8. On the other hand, the ld. DR has submitted that when there is no assessment in the case of the assessee and the return of income was processed under Section 143(1) then it cannot be said that the reopening is based on change of opinion. He has further submitted that the principle of mutuality does not apply on the interest income on fixed deposit with banks as held by the Hon'ble Supreme Court in the case of **Bangalore Club Vs. CIT & Anr.** 350 ITR 509. He has relied upon the orders of the authorities below.

9. We have considered the rival submissions as well as the relevant material on record. As we have discussed the relevant facts in the foregoing paras that the interest income in question was received on the corpus amount deposited with the banks. It is not disputed by the Assessing Officer that the corpus amount includes the contribution made by the members and was used for the welfare of the members and in other words for specific purposes of maintenance of the residential building and common area. Therefore the use of the corpus fund/contributions made by the members along with the interest income was for the purpose of objects of the association to maintain the building

and common area has not been disputed. Once there is no denial of fact that the amount in question to be spent only for specific purpose and cannot be used for any purpose other than the common welfare and common benefit of the members of the association then the principle of mutuality cannot be out rightly ruled out. The Hon'ble Supreme Court in the case of Bangalore Club Vs. CIT & Anr. (supra) has enumerated various conditions and aspects of the principle of mutuality which denotes that the principle of mutuality relates to the notion that a person cannot make a profit from himself. This concept has been extended to defined groups of people who contribute to a common fund by the group for a common benefit. Any amount surplus to that needed to pursue the common purpose is said to be simply an increase of the common fund and as such neither considered income nor taxable. The first condition as observed by the Hon'ble Supreme Court to invoke the principle of mutuality requires that there must be a complete identity between contributors and participators. At this stage it is pertinent to mention that the Assessing Officer has not disputed the complete identity of the members and the residential welfare association. The second condition is

that it requires the action of the participators and the contributors must be in furtherance of mandate of association. It is not disputed that the amount of contribution received from the members and deposited the same with the bank along with the corpus fund resulting earning of interest income is to be utilized only for the purpose of welfare association. The third condition is that there must be no scope of profit by the contributor from the fund made by them. This could only be expended or return to themselves. We find that it is not the case of the Assessing Officer that the assessee had violated this condition that the interest income was not to be expended for the specific purpose of maintenance of building and common area and common welfare of the members of the association. Analyzing the fact of the present case in the light of the concept of mutuality as laid down by the Hon'ble Supreme Court in the case of **Bangalore Club Vs. CIT & Anr.** (supra), we find that prima facie it cannot be held that the interest income on the corpus fund and contributions of the members deposited with bank has violated any condition resulting taking it out of the ambit of principle of mutuality. Once the applicability of principle of mutuality cannot be ruled out

rightly then the claim of exemption of such interest income by the assessee cannot be said to be the bogus claim or absolutely impermissible. When there is a possibility of two views and the assessee has a bona fide belief and reason to claim the interest income as exempt by applying the principle of mutuality then until and unless a new tangible material come to the possession or knowledge of the Assessing Officer to indicate that the claim of the assessee is not permissible, the reopening on the basis of reappraisal of the record and material submitted by the assessee along with the return of income is not permissible. The Assessing Officer has reopened the assessment by recording the reasons for the Assessment Year 2008-09 as under :

2008-09

01.06.2011

The assessee filed the return of income for the assessment year 2008-09 on 02/09/2009 showing NIL income. The return of income was processed u/s.143(1) and the same has resulted in a refund of Rs.4,98,040/-.

2. It is seen from the return of income in schedule E1 the assessee has claimed the sum of Rs.41,06,176/- as interest income exempt. Further, as per form No.16A enclosed to the return of income the assessee has received this sum as interest on deposits from Banks. There is nothing on record to show that the assessee's claim of exemption is in accordance with the provisions of the IT Act 1961. The assessee has not furnished any details, explanation or evidences in support of the claim of exemption of income. This needs verificataion.

3. In view of the above situation, I have reason to believe that income chargeable to tax of Rs.41,06,176/- has escaped assessment for the assessment year 2008-09 within the meaning of explanation (2) of sub-section (b) of section 147 of IT Act 1961.

4. Accordingly a notice u/s.148 is issued.

We find that identical reasons were recorded for the Assessment Year 2009-10. From the reasons recorded by the Assessing Officer for reopening of assessment it is manifest that the Assessing Officer has formed belief only on the basis of the return of income and particularly Schedule E1 filed by the assessee along with the return of income. Thus the Assessing Officer was not having in his possession any new tangible material or information which was not available with the Assessing Officer at the time of processing the return under Section 143(1) of the Act. Further in the reasons recorded by the Assessing Officer, there is nothing to indicate as to how the claim of exemption of interest income is a bogus or impermissible claim. Thus the reopening is based on the presumption of the Assessing Officer that the interest income claimed as exempt from tax is not exempt. Even the Assessing Officer himself made a reference in reasons recorded that it needs verification. This statement

of the Assessing Officer in the reasons recorded makes it clear that the Assessing Officer was not certain about the claim and even the opinion formed about the income assessable to tax has escaped assessment was not based on any tangible material. The provisions of Section 148 cannot be used for a fishing and roving enquiry but it can be based only when the Assessing Officer reached to the conclusion that the income assessable to tax has escaped assessment. When the Assessing Officer himself was not certain whether the interest in question is assessable to tax or not and it requires verification then how the opinion could be formed that the said income has escaped assessment. The Hon'ble Delhi High Court in the case of CIT Vs. Orient Craft Ltd. (supra) while dealing with an identical issue where the return of income was processed under Section 143(1) has held in paras 11 to 15 as under :

" 11. The entire law as to what would constitute "reason to believe" was summed up by H.R.Khanna, J, speaking for the Supreme Court in Income Tax Officer v Lakhmani Mewaldas (1976) 103 ITR 437. The following principles were laid down:-

(a) The powers of the Assessing Officer to reopen an assessment, though wide, are not plenary.

(b) The words of the statute are "reason to believe" and not "reason to suspect".

(c) The reopening of an assessment after the lapse of many years is a serious matter. Since the finality of a judicial or quasi-judicial proceedings are sought to

be disturbed, it is essential that before taking action to reopen the assessment, the requirements of the law should be satisfied.

(d) The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjective satisfaction of the assessing authority; the reason be held in good faith and cannot merely be a pretence.

(e) 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 is belief regarding escapement of income.

(f) The fact that the words "definite information" which were there in section 34 of the Act of 1922 before 1948, are not there in section 147 of the 1961 Act would not lead to the conclusion that action can now be taken for reopening an assessment even if the information is wholly vague, indefinite, far-fetched or remote.

12. In Commissioner of Income Tax vs. Kelvinator of Income-tax & Anr. **(supra) the Supreme Court observed as under:-**

"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer."

It was also observed that after 1.4.1989 the Assessing Officer has power to reopen provided there is "tangible material" to come to the conclusion that there is escapement of income. This judgment has laid emphasis on two more aspects: that there can be no review of an assessment in the guise of reopening and that a bare review without any tangible material would amount to abuse of the power.

13. Having regard to the judicial interpretation placed upon the expression "reason to believe", and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to

adopt different standards while interpreting the words "reason to believe" vis-a-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed.

14. Certain observations made in the decision of Rajesh Jhaveri (supra) are sought to be relied upon by the revenue to point out the difference between an "assessment" and an "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where an "intimation" is issued under section 143(1) there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under section 148, the proceedings cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it would appear clear that the court reiterated that "so long as the ingredients of section 147 are fulfilled" an intimation issued under section 143(1) can be subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of an intimation is that the assessing officer should have "reason to believe" that income chargeable to tax has escaped assessment. In our opinion, the said expression should apply to an intimation in the same manner and subject to the same interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (supra) would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation

was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements.

15. In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in CIT vs. Kelvinator (supra). The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-a-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147."

The Hon'ble High Court has declined to accept any distinction between the order passed under Section 143(3) and intimation under Section 143(1) for the purpose of initiating the reopening of assessment under Section 148. Further in the said case the belief was formed by the Assessing Officer that there was escapement of income on going through the return of income filed by the assessee after accepting the return under Section 143(1) without scrutiny. The Hon'ble High Court has held that this is nothing but a review of earlier proceedings and abuse of power by the Assessing Officer. A similar view has been taken by the co-

ordinate bench of this Tribunal in the case of C.P.Prameelamma Vs. ITO (supra) in para 7 as under :

" 07. We have perused the orders and heard the rival contentions. Before adjudicating the merits of the addition made by the AO, it is required to see whether the reopening was rightly resorted to in the circumstances of the case. There is no dispute that assessee was only an agriculturist and was having only agricultural income. There is also no dispute that assessee's husband had shown in his return of income, a sum of Rs.10.77 lakhs as loan received from the assessee. To a question whether assessee's husband had filed a confirmation from the assessee during the course of his assessment proceedings, Ld. AR submitted that it was furnished. This was not contradicted by the Ld. DR. In a case where confirmation of a creditor is filed by a party the AO is having ample powers to verify the correctness of the confirmation. In our opinion, the first course of action that should ordinarily be resorted to, is not issue of a notice u/s.148 of the Act to the concerned creditor. AO never issued summons u/s.131 of the Act to the concerned creditor and obtained a statement on oath. If from such statement he could gather sufficient material to come to a conclusion that there was escapement of income, or even in a case creditor failed to attend the summons, the AO could have resorted to a reopening. No doubt assessee here had not filed a return of income at all. Explanation 2 to Section 147 of the Act deals with a situation where there has been no return of income filed. Explanation 2 is reproduced hereunder :

> *Explanation — 2. For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:--*
>
> *(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;*
>
> *(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;*

It is clear from clause (a) of the above Explanation that there can be deemed or fictional presumption of income escaping tax in a case where no return of income was furnished, only if the total income of such party would have exceeded the maximum amount, not chargeable to tax. In other words where no return has been filed by an assessee and the AO wants to invoke jurisdiction vested upon him u/s.147 of the Act, the reasons mentioned by the AO for reopening should show a logical thought process which would show how he came to a conclusion that the total income of the such person exceeded the maximum amount which was not chargeable to tax. Now if we have a look at the reasons recorded by the AO in the case before us, what is mentioned is that he wanted to verify the source of income for the

advance of Rs.10.77 lakhs given by the assessee to her husband. There is nothing here whatsoever mentioned regarding any lacunae in the confirmation filed by the assessee in the course of her husband's assessment proceedings or regarding any investigation done by the AO that could bring out something which would show an escapement of income. Argument of the Ld. DR is that in a case where assessee has not filed a return at all, the reasons that are to be given for reopening should not be seen with the same eyes as in the case of an assessee who had filed a return of income earlier. Even if we accept this contention, reasons given by the Ld. AO for issue of notice u/s.148 of the Act, does not give even a hint of any escapement of income or tax. As for the reliance placed by the CIT (A) on the Hon'ble Apex Court judgment in the case of GKN Driveshafts (supra), question there was whether reasons had to be furnished to an assessee and his reply disposed off, before concluding the assessment. In our opinion this case will not support the case of the Revenue here. In the circumstances of the case we are convinced that reopening was resorted only on suspicions and the test of relevancy is not satisfied. Ex-consequenti we hold the reassessment invalid."

In view of the facts and circumstances of the case as well as the judgement of Hon'ble Delhi High Court in the case of Orient Craft Ltd. (supra), we hold that the reopening in the case of the assessee for these two assessment years is bad in law and therefore the consequential reassessments are quashed.

10. Since we have quashed the reopening and reassessment therefore we do not propose to go into the merits of the addition made by the Assessing Officer.

11. In the result, the appeals filed by the assessee are allowed.

Order pronounced in the open court on the 23rd day of Sept., 2016.

Sd/-	Sd/-
(S. JAYARAMAN)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

*Reddy gp