

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER

ITA No. 3871/MUM/2015
(Assessment Year : 2003-04)

Smt.Damayanti Ramesh Gada,
A/1, 302 Silver Lead Residency,
Kamatghar Road, Near Oswal,
Bhwandi 421 302, Dist. Thane
PAN: AEOPG2133G

... Appellant

Vs.

The DCIT -1,
Kalyan

.... Respondent

Appellant by : Dr. P. Daniel
Respondent by : Shri Vishwas Jadhav

Date of hearing : 09/12/2015
Date of pronouncement : 29/02/2016

ORDER

The captioned appeal is preferred by the assessee and is directed against the impugned order dated 18/03/2015 of CIT(A)-2 Thane, pertaining to the assessment year 2003-04, which in turn has arisen from an order passed by the Assessing Officer dated 21/12/2010 under section 143(3) r.w.s. 147 of the Income Tax Act, 1961(in short "the Act").

2. In this appeal, the solitary dispute relates to the action of the income tax authorities in treating the sale consideration of shares of Rs.1,70,422/- as 'income from other sources' as against the assessee's claim of the same being liable to be taxed under the head capital gains as sale and purchase of shares.

3. Before me, the Ld. Representative for the assessee has made two fold arguments. Firstly, according to him, the initiation of proceedings under section 147/148 of the Act by issuance of notice was bad in law and, therefore, the impugned assessment was liable to be quashed. Secondly, it has been also contended that on facts, the action of the Assessing Officer is not sustainable.

4. In brief, the relevant facts are that in the return of income filed by the assessee on 27/01/2004, total income of Rs.1,46,560/- was declared which, inter-alia, included long term capital gain of Rs.1,63,697/-, which was claimed as exempt u/s. 54F of the Act. Subsequently, a notice under section 148 of the Act was issued by the Assessing Officer on 26/03/2010 for reopening the assessment on the ground that a search action conducted in the case of M/s. Mahasagar Securities Pvt. Ltd. revealed that the said concern was carrying out fraudulent billing activities and providing bogus speculation profits, long term and short term capital gains, etc. The name of the assessee was found to be appearing in the said transactions. In response to the notice issued under section 148 of the Act, assessee stated that the return filed by him originally on 27/01/2004 be treated as a return filed

in response to notice under section 148 of the Act. In the ensuing assessment, the Assessing Officer referred to the investigations carried out in the case of one Mr. Mukesh Choksi, who was stated to be controlling various concerns engaged in fraudulent billing activities, including, M/s. Mahasagar Securities Pvt. Ltd. The assessee had declared long term capital gain of Rs.1,63,697/- on purchase and sale of shares of two concerns, namely, M/s. Buniyad Chemicals Ltd.& M/s. N.E. Electronics Ltd. It was observed that the purchase of said shares was through M/s. Mahasagar Securites Pvt. Ltd. On being asked to justify the transactions, assessee made detailed submissions by pointing out that the delivery of the shares was physically taken and the investee companies transferred the shares in the name of the assessee and subsequently the shares were sold after a period of more than 12 months and accordingly, justified the declaration of long term capital gain. The statement of the assessee was also recorded by the Assessing Officer in the course of the assessment proceedings. The Assessing Officer considered the statement of Mr. Mukesh Choksi, one of the directors of M/s. Mahasagar Securities Pvt. Ltd., which was recorded by the Investigation Wing. The Assessing Officer primarily relied on the report of the Investigation Wing in the case of Mr. Mukesh Choksi, whereby it was concluded that fraudulent transactions were carried out by the said group. On this basis, assessee's transaction of purchase and sale of shares were held to be fictitious accommodation entries and thus, sale consideration of the shares of Rs.1,70,422/- was added to the returned income as 'income from other

sources'. The CIT(A) has also affirmed the said action of the Assessing Officer.

5. Before me, the Ld. Representative for the assessee pointed out that under identical circumstances, the Mumbai Tribunal in the case of Shri Hirachand Kanuga vs. DCIT, ITA No.4261&4262/Mum/2012 dated 27/02/2015 has found the initiation of proceedings under section 147/148 of the Act to be bad in law. The Ld. Representative for the assessee pointed out that similar proceedings in the case of assessee's other family member, Shri Ramesh Prechand Gada vide ITA No.3872/Mum/2015 dated 30/11/2015 for assessment year 2003-04 has also been quashed by the Tribunal under identical circumstances.

5.1 Ld. Representative for the assessee pointed out that the reasons recorded for initiation of proceedings under section 147/148 of the Act in the instant case are in verbatim similar to those recorded by the Assessing Officer in the case of Shri Hirachand Kanuga(supra). It was also pointed out that approval for initiation of proceedings granted by the Addl. Commissioner of Income Tax as required in terms of section 151(2) of the Act is also common to the approval in the case of Shri Hirachand Kanuga(supra), and a copy of such approval dated 26/3/2010 has been placed on record. The aforesaid points were brought out by the Ld. Representative for the assessee to substantiate that under the identical circumstances the Tribunal in the case of Shri Hirachand Kanuga(supra) found the initiation proceedings under section 147/148 of the Act to be invalid. Apart therefrom, the Ld. Representative for the assessee also referred to certain decisions of the Tribunal, wherein the transactions in the same investee companies

have been found to be genuine and the stand of the Assessing Officer has been disregarded. In this context the following decisions have been relied upon:-

- (i) ITAT's decision in the case of Shri Mukesh Ratilal Marolia (2006) 6 SOT 247 (Bom).
- (ii) ITAT's decision in the case of Smt. Amina L. Rangari, ITA No.7543/M/2011 dated 04/09/2015
- (iii) ITAT's decision in the case of M/s. SDB Estate Pvt. Ltd., ITA No.584/M/2015 dated 15/04/2015.
- (iv) ITAT's decision in the case of Smt. Durga Devi Mundra, & Shri Mahesh Mundra, ITA No.1175/Mum/2012 & ITA No.1176/Mum/2012 dated 01/06/2012
- (v) ITAT's decision in the case of Shri Sachin M. Morarkhia, ITA No.1122/Mum/2012, dated 01/06/2012.
- (vi) ITAT's decision in Shri Ravindra Kumar Toshniwal, ITA No.5302/Mum/2008 dated 24/02/2010.

5.2 It was pointed out that in all the aforesaid decisions primary stand of the Assessing Officer was based on the investigations in the case of Mr. Mukesh Choksi, which is also the stand of the Revenue in the present case. Furthermore, it was pointed out that the decision of the Tribunal in the case of Shri Mukesh Ratilal Marolia(supra), under similar circumstances have been approved by the Hon'ble Bombay High Court vide its order dated 7/11/2011 in Income Tax Appeal 456 of 2007 and the Special Leave to Appeal(Civil) No.20146 of the Revenue before Hon'ble Supreme Court has also been dismissed vide order dated 27/1/2014. For all the aforesaid reasons the orders of the lower authorities have been assailed.

6. On the other hand, Ld. Departmental Representative appearing for the Revenue defended the orders of the authorities below while not

disputing any of the factual matrix brought out by the Ld. Representative for the assessee.

7. I have considered the rival submissions carefully. In so far as the initiation of the proceedings under section 147/148 of the Act is concerned, I find that the reasons recorded for reopening dated 26/03/2010, in the present case are identical to those recorded by the Assessing Officer in the case of Shri Hirachand Kanuga(supra) as well as in the case of Shri Ramesh Premchand Gada (supra). In the present case too, the original return was only subject to a processing under section 143(1) of the Act, which was the fact situation in the case of Shri Hirachand Kanuga (supra) also. Section 147/148 of the Act was invoked in the present case under identical circumstances to that considered in the case of Shri Hirachand Kanuga(supra). The Tribunal found that the initiation of proceedings under section 147/148 of the Act was bad in law. Secondly, the Tribunal also found that the approval granted by the Addl. Commissioner of Income Tax dated 26/3/2010 was also not within the prescription of section 151(2) of the Act. The relevant discussion in this regard, contained in the order of the Tribunal dated 27/02/15(supra) is as under:-

"8.3. Proceeding further in so far as approval u/s. 151(2) of the Act is concerned, following has been placed before us which needs to be mentioned specifically.

"OFFICE OF THE ADDL. COMMISSIONER OF INCOME- TAX

RANI MANSION, 2nd Floor, Murbad Road, Kalyan (W)

No.KYN/Addl.CIT/147/Approval/2009-10/2233 Date: 26/03/2010

The Deputy Commissioner of Income-Tax,

Circle-1, Kalyan

Sub : Proposal for initiating proceedings u/s 147 in group cases of beneficiaries of Mahasagar Securities Pvt. Ltd. (now Alag Securities Pvt. Ltd.) share scam –reg.

Ref: Statement dated 11/12/2009 u/s 131 of Shri M.C. Chowksi by DDIT, Mumbai.

Please refer to the above.

On perusal of the proposals for initiating proceedings u/s 147, you are hereby directed to issue notice u/ 148. The proposals in the following cases are approved:

- (1) Mr. Gaütamchand M. Kanunga*
- (2) Mr. Gautamchand M. Kanunga (HUF)*
- (3) Mr. Hirachand M. Kanunga (HUF)*
- (4) Mr. Hirachand M. Kanunga*
- (5) Miss Sonam G. Kanunga (Minor) through Shri Gautamchand M. Kanunga*
- (6) Miss Lavina V. Kanunga (Minor) through Shri Vimalchand M. Kanunga*
- (7) Master Kenil G. Kanunga (Minor) through Shri Gautamchand M. Kanunga*
- (8) Master Nilesh H. Kanunga (Minor) through Shri Hirachand M. Kanunga*
- (9) Smt. Manjula H. Kanunga*
- (10) Miss. Deepika H. Kanunga (Minor) through Shri Hirachand M. Kanunga*
- (11) Miss. Simran H. Kanunga (Minor) through Shri Hirachand M. Kanunga*

- (12) Smt Damayanti Ramesh Gada
(13) Shri. Ramesh Premchand Gada
(14) Shri. Alhad P. Kashikar
(15) Smt. Nilima A. Kashikar
(16) Shri Abhay P. Kashikar
(17) Smt. Geeta A. Kashikar
(18) Smt. Neelam M. Goyal
(19) Vimal Jain
(20) Naresh Jain
(21) Milan Salot
(22) Milan Salot (HUF)

Sd/-

(SUBHASH BAINS)

Addl. Commissioner of Income Tax,

Range – 1, Kalyan.”

8.4. Let us first consider the relevant part of the provisions of Sec. 151 of the Act.

(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.]”

9. A simple reading of the provisions of Sec. 151(1) with the proviso clearly show that no such notice shall be issued unless the Addl. 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.

10. In the present case the letter which is placed on record shows that the Addl. Commissioner has simply sanctioned the proposal for initiating proceedings u/s. 147 in group cases of beneficiaries of Mahasagar Securities P. Ltd. Nowhere the Addl. CIT has recorded his dissatisfaction. The Hon'ble Supreme Court in the case of Chhugamal Rajpal Vs S.P. Chaliha & Others 79 ITR 603 observed that the important safeguards provided in Sec. 147 and 151 were lightly treated by the Income-Tax Officer as well as the Commissioner.

11. 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.

12. *Hon'ble Delhi High Court in the case of United Electrical Co. Pvt. Ltd. Vs CIT 258 ITR 317 has held that "the proviso to sub-section (1) of section 151 of the 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".*

13. *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 vis-à-vis provisions of Sec. 151 are bad in law and the assessment has to be declared as void ab initio."*

7.1 The aforesaid discussion reveals that the sanction accorded by the Addl. Commissioner of Income Tax dated 26/3/2010 was not in accordance with the requirements of section 151(2) of the Act. In the present case too, the approval granted by the Addl. CIT is a part of a common approval granted in a number of cases vide approval dated 26/03/2010, which includes the case of the assessee as well as the case of Shri Hirachand Kanunga (supra) and Shri Ramesh Premchand Gada

(supra). In this light of the matter, in my view, the decision of the Tribunal in the case of Shri Hirachand Kanuga (supra) holding that the initiation of proceedings under section 147/148 of the Act are bad in law is clearly attracted in the present case too. Therefore, following the said precedent, the order of the CIT(A) is set aside and the impugned assessment order passed in pursuance to the initiation of proceedings under section 147/148 of the Act is quashed.

8. Since I have held that the proceeding initiated under section 147/148 of the Act is bad in law, there is no requirement for going into the merits of the impugned addition.

9. In the result, appeal filed by the assessee is allowed, as above.

Order pronounced in the open court on 29/02/2016

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Dated 29/02/2016

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai