



IN THE INCOME TAX APPELLATE TRIBUNAL
"E" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA no.2157/Mum./2011
(Assessment Year : 2001-02)

Shri Sharad D. Sampat
458/38, 3rd Floor, Room no.49
L.K. Bhatia Housing Society
Chira Bazar JSS Road, Mumbai 400 002
PAN – ACAPS6511Q

..... Appellant

v/s

Income Tax Officer
Ward-14(1)(3), Mumbai

..... Respondent

Assessee by : Shri N.M. Porwal
Revenue by : Shri Rakesh Kumar Agrawal

Date of Hearing – 16.02.2016

Date of Order – 29.02.2016

ORDER

PER SAKTIJIT DEY, J.M.

This appeal by the assessee is directed against the order dated 6th January 2011, passed by the learned Commissioner (Appeals)-25, Mumbai, for the assessment year 2001-02. Grounds raised by the assessee, as per concise ground of appeal, are as under:-

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in confirming following additions made by the Assessing Officer

to the total income of the appellant.

(a) ₹ 62,749 – on account of unexplained commission income.

(b) ₹ 7,82,106 – on account of unexplained source of acquisition of foreign exchange;

(c) ₹ 1,91,840 – on account of unexplained source of acquisition of US\$ 4360;

(d) ₹ 125 – on account of unexplained source of acquisition of Bangladeshi Taka 500;

(e) ₹ 75,000 – on account of unexplained source of acquisition of cash seized.

2. CIT(A) erred in confirming commission at ` 500 per ₹ 1 lakh with respect to transfer of funds as against the market rate of 10 paise per US\$ agreed and confirmed by the Appellant in the statement recorded.

3. CIT(A) erred in not appreciating that:-

(a) The reasons were recorded on ^{10¹h} December, 2008 after issuance of notice u/s. 148 dated 28th March, 2008 which is contrary to Section 148(2) of the Income-tax Act, 1961.

(b) Copy of the reasons recorded dated ^{10¹h} December, 2008 was received by the Appellant on ^{29th} December, 2008 although the Appellant had asked for copy of the same on 10th December, 2008 much prior to the passing of the Assessment Order dated 24th December, 2008.

(c) Copy of the reasons recorded refers operations carried out by the Department in the case of Shri Bharat D. Sampat and not in the case of the Appellant Shri Sharad D. Sampat.

(d) The AG has not taken sanction prior to the issuance of notice u/S. 148 of the R. CIT u/s. 151 since the notice was issued beyond the period of four years.

(e) *In this case the AG had not come to a prima facie conclusion based on the material available that the income has escaped assessment.*

(e) *The reason to believe is not the same thing as reason to suspect.*

(f) *The reasons to believe is not the same thing as reasons to suspect.”*

2. As ground no.3 is on legal and jurisdictional issue, we propose to deal with the same at the outset.

3. Briefly stated the facts are, assessee is an individual. For the assessment year under dispute, assessee filed his return of income on 7th January 2002, declaring total income of ₹ 83,383. On the basis of information obtained, as a result of search conducted on the assessee by FEMA authorities on 29th September 2000, the Assessing Officer having reason to believe that income chargeable to tax for the impugned assessment year has escaped assessment re-opened the same under section 147 by issuing notice under section 148 of the Act on 28th March 2008. In response to the said notice, assessee submitted his reply on 28th April 2008, requesting the Assessing Officer to treat the return of income filed originally to be the return in response to notice under section 148. Subsequently, in course of assessment proceedings, in response to the statutory

notice issued under section 142(1) and 143(2) dated 18th November 2008, assessee made his submissions against the additions proposed to be made by the Assessing Officer. Along with the said submissions, assessee also filed a revised computation of income offering additional income of ₹ 55,550 on account of commission earned on forex transaction which according to assessee's own admission was not offered as income earlier. Assessee also submitted a separate letter on the very same day i.e., 10th December 2008, requesting the Assessing Officer to communicate the reasons for re-opening the assessment. The Assessing Officer, after considering the submissions of the assessee, was not convinced with the same. He observed that assessee has not supported his submissions through corroborating documentary evidence. Accordingly, he completed the assessment making the following additions aggregating to ₹ 11,67,370.

"(a) ₹ 62,749 - on account of unexplained commission income.

(b) ₹ 7,82,106 - on account of unexplained source of acquisition of foreign exchange;

(c) ₹ 1,91,840 - on account of unexplained source of acquisition of US\$ 4360;

(d) ₹ 125 - on account of unexplained source of acquisition of Bangladeshi Taka 500;

(e) ₹ 75,000 – on account of unexplained source of acquisition of cash seized.”

4. Being aggrieved by the assessment order so passed, assessee preferred appeal before the learned Commissioner (Appeals) challenging the assessment order, inter-alia, on the issue of re-opening under section 147 as well as on the merits of the additions made.

5. The first appellate authority, however, did not find merit in any of the grounds raised by the assessee and ultimately passed the impugned order dismissing the appeal.

6. Learned A.R. submitted, assessee on 10th December 2008, had requested the Assessing Officer to communicate the reasons for re-opening the assessment. He submitted, the said letter was acknowledged by the Assessing Officer on 11th December 2008. However, reasons for re-opening the assessment were not communicated to the assessee before completion of assessment on 24th December 2008, and the reasons recorded were served on the assessee only on 29th December 2008. He, therefore, submitted the assessment order passed under section 143(3) r/w section 147 is invalid as the assessee was not communicated the reasons for re-

opening the assessment for enabling him to raise objections before the Assessing Officer against the proceedings initiated under section 147 of the Act. In support of such contention, assessee relied upon the decision of the Hon'ble Jurisdictional High Court in CIT v/s Videsh Sanchar Nigam Ltd., [2012] 340 ITR 66 (Bom.) the decision of Hon'ble Supreme Court in GKN Driveshafts India Ltd. v/s ITO, [2003] 259 ITR 19 (SC), and the decision of the Tribunal, Mumbai Bench, in Tata International Ltd. v/s DCIT, [2012] 52 SOT 465 (Mum.). Further, learned counsel submitted, the reasons communicated to the assessee on 29th December 2008, is in variance with the reasons recorded at the time of re-opening of assessment under section 147 which is evident from the reasons subsequently communicated to the assessee on 16th January 2014. He submitted, while the reasons communicated on 29th December 2008, speaks of search communicated by FEMA authorities in case of Bharat D. Sampat, in the reasons originally recorded, name of assessee is mentioned. He submitted, when this fact was pointed out to the Assessing Officer / Departmental Authorities, they advised the assessee to ignore the reasons communicated on 29th December 2008, of-course, orally. He submitted, for this reason also, the assessment order passed under section 143(3) r/w section 147 is

invalid. The third ground of challenge is, prior to issuance of notice under section 148, no sanction from the prescribed authority was taken as per section 151. Thus, learned counsel submitted, basic conditions of section 147 having not been complied, the assessment order passed under section 143(3) r/w 147 should be quashed.

7. Learned Departmental Representative vehemently opposing the contention of the A.R. submitted, assessee while complying to the notice issued under section 148 did not ask for communication of reasons recorded for re-opening the assessment. Only in the course of assessment proceedings, assessee on 10th December 2008, submitted a letter requesting for communicating the reasons. On receipt of the aforesaid letter of the assessee, the Assessing Officer on very same day issued a letter to the assessee communicating the reasons recorded for re-opening the assessment. Learned Departmental Representative submitted since the assessment in case of the assessee was required to be completed by 31st December 2008, as otherwise it would have become time barred, the Assessing Officer was compelled to complete the assessment on 24th December 2008, after communicating the reasons to the assessee and on the basis of submissions / compliance made by the assessee during the

assessment proceedings. Learned Departmental Representative submitted, assessee all along was conscious of the reasons on which the assessment was re-opened as not only he participated in the assessment proceedings, but in compliance to the statutory notices issued under section 143(1) and 143(2) of the Act assessee has responded to the queries made by the Assessing Officer. Learned Departmental Representative submitted, in these circumstances, if at all there is any procedural irregularity in not communicating the reasons that will not invalidate the assessment proceedings as the assessee participated in the assessment proceedings and was given full opportunity to explain his case. He, therefore, submitted, if the bench feels that due to non-communication of reasons recorded before completion of assessment there is violation of rules natural justice, the matter can be restored back to the Assessing Officer for enabling the assessee to raise objection against the validity of re-opening and the Assessing Officer can dispose of the same by complying to the rules of natural justice. In this process, the procedural irregularity would be removed. For such proposition, he relied upon the decision of the Hon'ble Jurisdictional High Court in *Rabo India Finance Ltd. v/s DCIT*, [2011] 346 ITR 81 (Bom.). Learned Departmental Representative disputing the claim of the

assessee that reasons were communicated to the assessee only on 29th December 2008, submitted, the Assessing Officer as per record has communicated the reasons to the assessee vide letter dated 10th December 2008, and once the letter was issued by the Assessing Officer prior to completion of assessment it is deemed that Assessing Officer has communicated the reasons to assessee.

8. We have patiently heard the parties and perused the material available on record. At the outset, certain facts need to be reiterated. As could be seen from the materials on record, the Assessing Officer on 28th March 2008, recorded reasons for re-opening of assessment for the impugned assessment year and sent the same for approval of the ACIT, in terms of section 151 of the Act. On the very same day, the ACIT granted approval for issuance of notice under section 148 and notice under section 148 was issued by the Assessing Officer on 29th March 2008. Therefore, the contention of the learned A.R. that no sanction was taken prior to issuance of notice under section 148 does not stand. The next issue arises for consideration is whether the assessment order passed under section 143(3) r/w section 147 is invalid for non-communication of reasons recorded prior to completion of assessment. As could be seen, in response to the notice under

section 148, dated 29th March 2008, the assessee submitted its compliance vide letter dated 28th April 2008. However, a perusal of the said letter a copy of which has been submitted in the paper book would demonstrate that in the said letter the assessee had only requested the Assessing Officer to treat the return of income filed originally as a return in response to notice issued under section 148. Nowhere in the said letter, assessee had requested the Assessing Officer to communicate the reasons for re-opening. Assessee vide letter dated 10th December 2008, had requested the Assessing Officer to communicate the reasons for re-opening the assessment. However, as claimed by the assessee, reasons recorded for re-opening the assessment was served on the assessee only on 29th December 2008. In this context, the assessee has referred to the copy of envelope submitted in paper book. However, the Department has disputed the aforesaid claim of the assessee by stating that the letter communicating the reasons for re-opening of assessment was issued on 10th December 2008 and the postal cover referred to by the assessee, with certainty, cannot be said to be containing the letter issued by the Assessing Officer communicating the reasons for re-opening the assessment as such envelop could also have contained the assessment order passed by the Assessing

Officer. It is further contended by the learned Departmental Representative that once the letter communicating the reasons were issued by the Assessing Officer on 10th December 2008, the conditions of section 147 are complied. However, we are not able to accept the aforesaid contention of the learned Departmental Representative. As is evident the assessee vide letter dated 10th December 2008, requested the Assessing Officer to communicate the reasons for re-opening the assessment which was submitted before the Assessing Officer on 11th December 2008. This fact is evident not only from the endorsement of the Assessing Officer in the body of the letter but also from the fact that the last date of hearing for the assessment proceedings was on 11th December 2008. Therefore, when the letter was submitted before the Assessing Officer on 11th December 2008, the Assessing Officer could not have issued the letter communicating the reasons on 10th December 2008. Thus, there is some doubt with respect to Department's claim that Assessing Officer issued the letter communicating the reasons on 10th December 2008. Further, learned Departmental Representative could not effectively rebut assessee's claim that the reasons for re-opening of assessment was served on him only on 29th December 2008, after completion of

assessment proceedings. Therefore, to that extent, there is violation of rules of natural justice as the assessee was deprived of opportunity to raise objections against the re-opening of assessment under section 147 of the Act in the absence of reasons recorded. At the same time, it must be observed, assessee is also not free from blemishes. As stated earlier, notice under section 148 was issued to the assessee on 28th March 2008. In compliance to the said notice, vide letter dated 28th April 2008, the assessee did not call for the reasons recorded for re-opening of the assessment. Only in the course of assessment proceedings on 11th December 2008, assessee requested the Assessing Officer to communicate the reasons recorded. As the assessment was getting time barred by end of December 2008 and sufficient time was not left with the Assessing Officer to allow opportunity to assessee to raise objections and dispose off the same, he had no other alternative but to complete the assessment without giving an opportunity to the assessee to raise objection after communicating the reasons. In our view, assessee on receipt of the notice under section 148 of the Act should have immediately called for the reasons recorded for re-opening of assessment if he intended to object to the validity of the proceedings initiated.

9. As far as the decision relied upon by the learned A.R. though we agree with the proposition laid down therein that communication of reasons recorded for enabling the assessee to raise objection is *sin-qua-non* for a valid assessment under section 143(3) r/w section 147 but at the same time such principle has to be applied looking into the facts and situations of each case. In case of GKN Driveshafts India Ltd. (*supra*), the Hon'ble Supreme Court has observed that after receiving notice under section 148, the proper course of action for the assessee is to file a return of income and if he so desire to seek reasons for issuing notices. If after receipt of reasons recorded, the assessee files objections for issuance of notice, the Assessing Officer is bound to dispose of the same by passing a speaking order. If we apply the principle laid down by the Hon'ble Supreme Court as aforesaid to the facts of the present case, it is to be seen that the assessee while complying to the notice under section 148 has not sought communication of reasons recorded for re-opening of assessment. In case of Videsh Sanchar Nigam Ltd. (*supra*) also the facts are different as even after repeated requests by the assessee reasons recorded were furnished to assessee only after completion of assessment. In case of Tata International Ltd. (*supra*) also the assessee in response to the notice

issued under section 148 submitted its reply seeking reasons for re-opening of the assessment.

10. However, in the present case, assessee had admittedly sought the reasons for re-opening of assessment only in course of assessment proceedings on 11th December 2008 and not earlier. As observed earlier, since the assessment was getting time barred by end of December 2008, quite possibly the Assessing Officer without affording an opportunity to the assessee to raise objections on the reasons recorded for re-opening the assessment proceedings completed the assessment. Though, we are of the view that non-communication of the reasons for re-opening for enabling the assessee to raise objection is in violation of rules of natural justice but considering the peculiar facts and circumstances of the case to be fair to both the assessee and the department, we are inclined to restore the matter back to the file of the Assessing Officer for the purpose of affording the assessee an opportunity to raise objections against the re-opening of assessment considering the fact that assessee is now in possession of the reasons recorded for re-opening the assessment. We have come to the aforesaid decision being guided by the ratio laid down in case of GKN Driveshafts India Ltd. (supra) and Rabo India Finance Ltd. (supra). Only after

disposing of assessee's objection the Assessing Officer will proceed to complete the assessment. It goes without saying the Assessing Officer must afford reasonable opportunity of being heard to the assessee and pass a speaking and reasoned order dealing with all the submissions made by the assessee.

11. As far as the contention of the learned A.R. that reasons communicated to the assessee in letter dated 10th December 2008, is at variance with the reasons originally recorded at the time of re-opening of the assessment, after examination of record, we do not find the same to be valid as according to us the reasons communicated to the assessee vide letter dated 10th December 2008, is almost identical to the reasons recorded at the time of re-opening of assessment which was communicated to the assessee, as claimed by the learned A.R. on 16th February 2014, except for the fact that in place of "*Sharad D. Sampat*", the name appears as "*Bharat D. Sampat*". This, according to us, is a mere typographical / error. We hold such view because, as evident on record, the transactions referred to in both the reasons are not only identical but has also been owned up by the assessee not only in the statement recorded by the ADIT (Inv.) on 17th December 2007, a copy of which is at Page-30 of the paper book, but also in the

submissions made by the assessee in course of assessment proceedings vide letter dated 10th December 2008, a copy of which is available at Page-8 of the paper book.

12. Before parting, we may observe, though both the sides were also heard on merit of the additions made but considering the fact that we have restored the matter back to the file of the Assessing Officer on the legal issue the issues relating to the additions made by the Assessing Officer are also restored back to his file to be considered denovo only after disposing of the objections of the assessee against the re-opening of assessment. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee in the matter.

13. In the result, appeal stands allowed for statistical purposes.

Order pronounced in the open Court on 29.02.2016

Sd/-
RAMIT KOCHAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 29.02.2016

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai