IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 6218/DEL/2015
(Assessment Year – 2008-09)

The DCIT, Circle – 18, Jhandewalan, New Delhi **(APPELLANT)**	Vs	SAM Portfolio Pvt. Ltd., 5/5761, Dev Nagar, Karol Bagh, Near Yes Bank ATM, New Delhi – 110 005 (PAN : AAHCS 6810 N) **(RESPONDENT)**

CO No. 403/DEL/2015
(Arising out of ITA No. 6218/DEL/2015)
(Assessment Year – 2008-09)

SAM Portfolio Pvt. Ltd., 5/5761, Dev Nagar, Karol Bagh, Near Yes Bank ATM, New Delhi – 110 005 (PAN : AAHCS 6810 N) **(APPELLANT)**	Vs	The DCIT, Circle – 18, Jhandewalan, New Delhi **(RESPONDENT)**

Assessee by	**Sh. H. K. Chaudhari, CIT-D.R.**
Revenue by	**Dr. Rakesh Gupta, Advocate**

Date of Hearing	**18.02.2020**
Date of Pronouncement	**20.02.2020**

ORDER

PER N. K. BILLAIYA, AM

This appeal by the Revenue and cross objection by the assessee

are preferred against the very same order of the Commissioner of Income Tax (Appeals)-27, New Delhi dated 28.09.2015 pertaining to Assessment Year 2008-09.

2. This appeal and the cross objection are disposed off by this common order for the sake of convenience.

3. Since in the cross objection the assessee questioned the assessment by assuming jurisdiction u/s 147 of the Act and since the assumption of jurisdiction goes to the roots of the matter we decided to proceed to dispose the cross objection first.

4. The cross objections read 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 Ld. AO in framing impugned reassessment order and that too without assuming jurisdiction as per law and without complying the mandatory conditions of section 147 to 151 of the Act.*
>
> 2. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in framing impugned reassessment order u/s*

147/143(3) is beyond jurisdiction, bad in law and against the facts and circumstances of the case.

3. In any view of the matter and in any case, impugned assessment order could not have been passed under the law, more so when original assessment was annulled.

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.

5. The roots for the quarrel lie in the assessment order dated 23.12.2011 framed u/s 143(3) r.w.s. 153C of the Act which is placed at Pages 13 to 20 of the Paper Book.

6. The cause for framing the assessment order was a search and seizure operation u/s 132 of the Act and the survey taken u/s 133A of the Act undertaken at various residential and business premises of Aseem Kumar Gupta & Group.

7. The said assessment order was challenged by the assessee before the CIT u/s 264 of the Act and the CIT was pleased to treat the said assessment order as null and void. The relevant finding of the CIT

reads as under:

> *"The above order of the CIT(A)-XXXII was accepted by the Department and no appeal was filed. Jurisdiction u/s 153C for assessing 6 years preceding the year in which search was initiated can be invoked only when impugned documents are seized u/s 132 or requisitioned u/s 132A. It cannot be invoked in the case of impounding of documents u/s 133A. The very foundation for instituting the proceedings u/s 153C is missing. It has been held by ITAT, Chennai in the case of ACIT vs M.N. Rajaraman (2010) 5 ITR (TRIB) 261 Chennai and High Court of Gujarat in the case of CIT vs Meghmani Organics Ltd. (2014) 221 Taxmann 25 (Guj.) that where the very foundation for instituting the proceedings by A.O. was missing, the consequential action and orders must fail and that assessment made pursuant to such proceedings would have to be annulled. Since in the present cases there is no proper assumption of jurisdiction, the assessments made pursuant to such proceedings are annulled herewith. No submissions have been filed on other grounds. However, since the assessment is being treated as null and void, I do not find it necessary to examine other issues raised by the assessee as these grounds have become infructuous."*

8. This order of the CIT is dated 20.03.2014 and subsequent to this order the AO issued notice u/s 148 of the Act dated 27.03.2014. The reasons for the belief that income has escaped assessment read as under:

10.	*Reasons for the belief that income has escaped assessment:-* *The assessment or the year under consideration was made u/s 143(3) r.w.s. 153C on 23.12.2011 as a total income of Rs.8,60,27,610/- as against returned income of NIL.* *Aggrieved by the above order, the assessee filed revision application u/s 264 of the Income Tax Act, 1961 before CIT, (Central)-II, New Delhi. The assessee challenged assumption of jurisdiction u/s 153C on the grounds, that the satisfaction arrived by the AO is not based on documents found and seized from the premises of other person in whom action u/s 132 is initiated. The CIT, (Central)-II, New Delhi annulled the assessment order on the ground of incorrect assumption of jurisdiction u/s 153C.* *However, the L CIT(Central)-II, has not adjudicated the ground on which the additions were made. Though, the assessee challenged the additions but not submissions were filed before the Ld CIT(Central)-II, New Delhi as to why additions be deleted. In view of the fact, whereas no submission is made by the assessee in respect of the merits on which additions were made, it clearly shows that the assessee had nothing to say on these grounds.* *However, after perusal of the assessment records of the case following issues are found-* *A) Expenditure of Rs.1,05,654/- is required to be*

	disallowed (except the statutory and obligatory expenses of ROC filing Fee & Audit Fees) as the assessee hasn't submitted any evidence to support its claim of expenditures and establish its business purpose. Hence, sum to the tune of Rs.1,05,654/- has escaped assessment. *B) From the perusal of the bank statement it was noticed that there are some cash deposits in the bank accounts of the assessee for which no explanation and/or evidence has been filed to explain their source and to establish their source. Hence, sum to the tune of Rs.11,000/- is required to be treated as unexplained cash deposit, which has escaped assessment.* *C) The assessee company had received Rs.42,00,000/- as share application during the assessment year. The assessee hasn't filed any documentary evidence to establish the identity and capacity of the persons who have allegedly given share application money or to establish the genuineness of these transactions. Hence, sum to the tune of Rs.42,00,000/- is required to be added to the income as it has escaped assessment, on protective basis in interest of revenue.* *D) From perusal of the bank statements and other documents is its seen that there are unexplained deposits other than cash to the tune of Rs.8,17,10,951/-. These deposits are unexplained even after considering the unexplained other*

	liabilities, share capital & share premium. Hence, sum to the tune of Rs.8,17,10,951/- is required to be treated as unexplained other deposits, which has escaped assessment on protective basis in interest of revenue. *It is further stated that assessee was done of the intermediary companies used by Shri Aseem Kumar Gupta for providing accommodation entries as admitted by Shri Aseem Gupta.* *I, therefore, have reasons to believe that this amount of Rs.8,60,27,610/- represents income of the assessee chargeable to tax which has escaped assessment for A.Y. 2008-09. The necessary approval may kindly be accorded to initiate proceedings u/s 147 of the Income Tax Act, 1961 for the A.Y. 2008-09 in view of the provision of section 151(1) of the Income Tax Act, 1961.*

9. It can be seen from the above, the AO has referred to the issues which were considered in the assessment order dated 23.12.2011 framed u/s 143(3) r.w.s. 153C of the Act. As mentioned elsewhere, the said assessment order was declared null and void and thus became non-est. This means that everything has gone back to the stage of the return of income and, therefore, the AO should have proceeded from the stage of the return of income.

10. A careful reading of the aforesaid notice and the reasons for the belief that the income has escaped assessment clearly show that the AO wanted to proceed in the light of the provisions of section 151(1) of the Act. The provision of Section 151(1) of the Act at the relevant point of time read as under:

> *"151. Sanction for issue of notice.- (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 Principal Chief Commissioner or Chief Commissioner or Principal 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."*

11. The reasons for belief if read with the provision of section 151(1) of the Act clearly show that there is no application of mind by the AO nor there is any application of mind by the sanctioning authority. The approval accorded to initiate proceedings is as under:

11.	*Whether the Additional Commissioner of income Tax, Central range-4, New Delhi is satisfied on the reasons recorded by the ACIT, Central Circle-09, New Delhi that it is a fit case for the issue of a notice under section 148*	*Based on reasons recorded above, I am satisfied that it is a fit case for issue of notice u/s 148.* *(Salil Mishra)* *Addl. CIT, Central Range-4, Delhi)*
12.	*Whether the Commissioner of Income tax, Central-II, New Delhi, is satisfied on the reasons recorded by the ACIT, Central Circle – 09, New Delhi that it is a fit case for the issue of a notice under section 148*	*On examination of the case, and the reasons recorded by the AO, I am satisfied that this is a fit case of issue of notice u/s 148* *(A. D. Mehrotra)* *CIT(Central)-II, New Delhi*

12. Neither the Addl. Commissioner nor the Commissioner applied his mind before according sanction. None of the authorities realized that there is no assessment framed u/s 143(3) of the Act on the date of the assumption of jurisdiction. The erstwhile assessment has been declared as null and void as mentioned as well. In our considered opinion

assumption of jurisdiction without any application of mind is bad in law.

13. Moreover, the same reasons have been given for reopening the assessment which were used for framing the assessment u/s 143(3) r.w.s 153C of the Act. The Hon'ble High Court of Punjab and Haryana in the case of Smt. Anchi Devi 218 CTR 0011 has held that AO cannot be allowed to initiate fresh reassessment proceedings on identical facts where the first reassessment proceedings were quashed being barred by limitation. The relevant findings of the Hon'ble High Court read as under:

> *"It may be seen that the AO had no fresh material before him. A perusal of the reasons recorded by him for reopening the assessment proceedings vide notice dt. 22nd March, 2004 shows that the same reasons have been recorded which were stated in the earlier notice served under Section 148 of the Act on the basis of which the assessment was made on 14th Feb., 2003 and which was quashed being barred by limitation. Thus, from the facts itself, it is crystal clear that though the present proceedings were initiated by the AO within the prescribed period of limitation yet it is clear that the same were initiated only to circumvent the earlier order of the Tribunal vide which the assessment dt. 14th Feb., 2003 was held to be time-barred. Thus, the AO cannot be allowed to initiate fresh proceedings on identical facts as the first*

assessment proceedings had failed to result in a valid assessment due to lapse on the part of the IT authority. Resultantly, the appeal is allowed and the order of the Tribunal is set aside."

14. The Hon'ble High Court of Rajasthan in the case of M/s. Rameshwar Prasad Sharma in ITA No.642/2011 dated 04.09.2017 at the occasion to consider inter alia the following substantial question of law.

"1. Whether the tribunal was legally justified in reversing the finding of CIT(A) and annulling the reassessment u/s 147 which was done on the basis of material found during the course of survey and not on the basis of annulled assessment u/s 143(3)?"

15. Hon'ble High Court held as under :

"11. Against this order, the assessee preferred appeal before ld. CIT(A). The proceedings initiated u/s 148 were also challenged. The ld. CIT(A) uphold the reopening of the assessment. However, appeal of the assessee on merit was allowed in part as certain additions were sustained i.e. trading addition by applying n.p. rate at 10.5% confirming the addition of Rs.3,25,000/- in the name of Sh. S.K. Upadhyay and not treating the interest on fixed deposit income as business income. The remaining additions were deleted by ld. CIT(A).

12. The department is in appeal against deleting the additions by ld. CIT(A) and assessee is challenging confirming the reopening the assessment and addition on account of applying n.p. rate of 10.5% and addition made in the name of Sh. S.K. Upadhyay at Rs.3,25,000/-.

14.1 Once an assessment has been completed and the same was subject matter of appeal, therefore, in our considered view on the same issue reassessment cannot be framed after issuing notice u/s 148. Notice u/s 143(2) was not issued in time, therefore, the assessment was annulled and this action of the ld. CIT(A) has been accepted by the department as no second appeal has been preferred against the order of ld. CIT(A). Now taking a recourse of reopening of the assessment cannot be permitted either in the eyes of law or in the facts of the present case. Language of provisions of section 147 which provides:-

"If the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to ***provisions of Section 148 to 153,*** *assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section or recompute the loss or the*

depreciation allowance or any other allowance, as the case may be, for the assessment year concerned."

It has been further provided that no assessment completed u/s 143(3) can be reopened after expiry of four years from the end of the relevant assessment year unless any such income has escaped assessment by reason of failure on the part of the assessee to make a return u/s 139(1). It is further provided that AO may assess or reassess such income other than income involving matters which are subject matter of any appeal, reference or revision which is chargeable to tax and has escaped assessment. After analyzing the provisions of section 147, we are of the view that there was no material with the AO to hold any income has escaped assessment. Original return was filed u/s 139(1) which was subject matter of scrutiny assessment and assessment u/s 143(3) was completed. Huge additions were made, they were challenged before ld. CIT(A) and on legal point it was found that the assessment completed by issuing notice u/s 143(2) issued was barred by limitation. Since, the first assessment was subject matter of appeal before appellate authority, therefore, on the same issue when it was found that assessment has been annulled it cannot be a subject matter of reopening of the assessment. Thee must be some fresh material or new information which authorizes

the AO to issue notice u/s 148. There are so many cases when return had been filed by the respective assessee has been accepted u/s 143(1) on the same material. No notice u/s 148 can be issued as held by various courts. There must be reason to believe and there must be some material before AO to hold that any part of income has escaped assessment.

15. In the present case there was no fresh material at all. The material which was available before the AO was only original assessment order which was annulled. Once an assessment has been annulled then department cannot adopt a recourse to corret their mistake committed originally not issuing notice u/s 143(2) in time.

23. Again such facts are not in the case in hand as the reason were recorded on the basis of annulled assessment only. Therefore, the ratio of this decision is also not applicable on the facts of the present case.

24. Few more cases on which reliance has been placed by ld. D/R i.e. in case of ***Raymond Woollen Mills Ltd. Vs. ITO 236 ITR 34 (SC), Claggat Brachi Co. Ltd. Vs. CIT 177 ITR 409 (SC)*** *and Kalyan Mavji and Co. Vs. CIT* ***102 ITR 287 (SC)****. In all these cases certain information was received during the assessment proceedings and, therefore, notice u/s*

148 was issued and held as valid. However, in the present case no such facts are involved as no information was received during the assessment proceedings. We have also seen various other case laws on which reliance has been placed by ld. D/R and found that these cases are also distinguishable.

25. In view of the above facts and circumstances and in view of the direct decision of Mumbai Bench of the Tribunal in the case of Babu Lal Lath (supra), we hold that reassessment completed was ab initio void and liable to be annulled. Accordingly the same is annulled."

6. We have heard both the sides.

7. Before proceeding with the matter, it will not be out of place to mention that the judgment which sought to be relied upon by the tribunal in the case of Babulal Lath (supra) has not been diluted by any other court. (16 of 16) [ITA-642/2011]

8. Apart from that tribunal while considering the matter has given reason in para no.23-24, after taking into consideration, the Supreme Court decision in ***Raymond Woolen Mills Ltd. Vs. ITO****, 236 ITR 34 (SC), Claggat Brachi Co. Ltd. Vs. CIT* ***177 ITR 409 (SC)*** *and Kalyan Mavji & Co. Vs. CIT* ***102 ITR 287 (SC)*** *which was relied upon by the Mumbai Tribunal in Babulal Lath (supra).*

9. In that view of the matter, we are of the considered opinion the tribunal has rightly held that the matter of re-

assessment u/s 147 was done on the basis of material found during survey subsequent to assessment on 18.3.03. Therefore, we are of the opinion that tribunal rightly decided the issue in favour of the assessee and first issue is required to be answered in favour of the assessee. With regard to second issue in view of finding on issue no.1, this issue is also answered in favour of the assessee."

16. The coordinate bench in the case of Babulal Lath in ITA No.3532/Bom/1994, 83 ITD 0691 has held as under:

"The original assessment had to be quashed by CIT(A) as the proceedings by way of issue of notice under Section 143(2) were initiated beyond time. The reassessment proceeding under Section 147 was initiated by the AO and the total income was assessed at Rs. 21,15,040 as was determined in the original assessment. Thus, it appears that reassessment proceeding was initiated not because any income had escaped assessment to tax but to circumvent the time-barred assessment. Thus, the reassessment proceeding under Section 147 amounts to extending the limitation which the AO is not empowered to. It is trite law that limitation period under Section 143 cannot be extended by an IT authority and it is also quite recognised principle of law that an act, which cannot be done by an authority directly, cannot be done indirectly by him. Fact that the return was pending for disposal cannot constitute a valid reason for reopening the assessment, even under the amended s. 147. Though s. 147, after the

amendment, has widened the powers of the AO to reopen the assessment, still there is intrinsic evidence in the section itself to show that cases where returns validly filed have not been disposed of, have not been brought under the net of the section. This is dear from Expln. 2(b) which says that for the purpose of the section, a case where a return of income has been furnished by the assessee, but no assessment has been made, is to be deemed as a case where income chargeable to tax has escaped assessment, but only if it is noticed by the AO that the assessee has understated the income or claimed excessive loss, deduction, etc. in the return. Thus, though under the new s. 147, the AO can issue a notice of reassessment, even where a valid return filed by the assessee has not been disposed of, the power is hedged in by a condition that there should be a finding that income has been understated in the return or the assessee has claimed excessive loss, deduction, etc. therein. There is no such finding in the present case. On the other hand, by framing an illegal assessment under s. 143(3), which was quashed by CIT(A), it cannot be said that the AO has unearthed understatement of income or excessive claim, etc. in the return. In fact, it is not the case of the AO that Expln. 2(b) is invoked. In the absence of any such finding, the pendency of the return filed by the assessee places a fetter upon the power of the AO to reopen the assessment. The intimation under s. 143(l)(a) if at all issued cannot be equated to an assessment and, therefore, for the purpose of the section, the return could be considered to be

pending when the AO issued the notice under s. 148. The mere pendency of the return cannot constitute "reason to believe" within the meaning of section 147. Therefore, the proceedings under s. 147 were initiated to circumvent the time barred assessment [which was quashed by CIT(A)] and hence they are illegal without jurisdiction and bad in law. As the reassessment was void ab anitio, any additions made by the AO and sustained by the CIT(A) in that assessment automatically stands deleted."

17. The coordinate bench of Chennai in the case of Jaya Publications 123 ITD 0053 has held as under:

"The CIT(A) has set aside the assessment which means that he annulled the assessment, since he has not given any direction to redo the assessment. As such, the AO as no jurisdiction to pass any further order. He is duty-bound to follow the direction of the CIT(A) and he cannot sit over the order of the CIT(A), who is a superior authority. The remedy lies with the Department and he has to file an appeal against the order of the CIT(A) if they have any grievance. In the present case, instead of filing the appeal in time against the CIT(A)'s order the AO made a fresh assessment without jurisdiction and which is against the law on the facts of the case and not sustainable in the eyes of law.-Fu Sheen Tannery & Anr. vs. ITO (2003) 185 CTR (Cat) 76 : (2003) 262 ITR 456 (Cal) relied on"

18. Considering the facts of the case in hand in totality as explained hereinabove in the light of the plethora of judicial decision discussed hereinabove. We are of the considered view that the AO has wrongly assumed jurisdiction in framing the assessment order dated 02.03.2015 u/s 143(3) r.w.s 147 of the Act and such order deserves to be set aside.

19. Since we have quashed the assessment order on the point of law we do not find it necessary to dwell into the merits of the case. Cross Objection of the assessee is allowed and appeal of the revenue is dismissed.

20. In the result, appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced in the Open Court on 20th February, 2020.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(N. K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 20/02/2020

*Priti Yadav, Sr. PS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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