

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.6797/Del/2013
Assessment Year: 2004-05

M/s. TMS Mercantile (P) Ltd., 26/45, Punjabi Bagh, New Delhi	Vs.	Income Tax Officer, Ward-16(3), New Delhi
PAN :AACCT0579L		
(Appellant)		(Respondent)

Appellant by	Sh. R.C. Rai, Advocate
Respondent by	Sh. Abhishek Kumar, Sr.DR

Date of hearing	07.06.2022
Date of pronouncement	14.07.2022

ORDER

PER SAKTIJIT DEY, JM:

This is an appeal by the assessee against order dated 06.12.2012 of learned Commissioner of Income-tax (Appeals)-19, New Delhi, pertaining to assessment year 2004-05.

2. At the outset, we must observe, this appeal was earlier disposed of vide order dated 04.05.2017 by dismissing the appeal in limine due to non-prosecution. However, subsequently, vide order dated 29.06.2018 passed in M.A. No.400/Del./2017, the

order dismissing the appeal was recalled and the appeal was restored to its original position.

3. In total, assessee has raised seven grounds. At the outset, learned counsel appearing for the assessee did not press ground no. 5. Accordingly, ground no. 5 is dismissed. Ground no. 7, being general in nature, does not require adjudication.

4. In ground nos. 1 and 2, the assessee has challenged the validity of reopening of assessment under section 147 of the Act. Whereas, in ground nos. 3, 4 and 6, the assessee has challenged the merits of addition made under section 68 of the Income-tax Act, 1961 (in short 'the Act'). However, at the threshold, we proceed to deal with the legal issue raised by the assessee in ground no. 1 and 2.

5. For deciding the legal issue raised in ground no. 1 and 2, the relevant facts are, the assessee is a resident company. For the assessment year under dispute, the assessee filed its return of income on 13.10.2004 declaring income of Rs.6715/-. As observed by the Assessing Officer in the impugned assessment order, the return originally filed by the assessee was processed under section 143(1) of the Act and no further notice under section 143(2) was issued during the statutory period. In other words, return of

income filed by the assessee was not subjected to any scrutiny assessment. Subsequently, the Assessing Officer received information from the Investigation Wing of the Department at Delhi that the assessee is a beneficiary of accommodation entry amounting to Rs.5,00,000/- taken from M/s. Maa Shakumbhari Stone Crushers (P) Ltd. Based on such information received from the Investigation Wing, the assessing Officer formed belief that income to the extent of Rs.5,00,000/- has escaped assessment. Accordingly, he reopened the assessment under section 147 of the Act. Though, the assessee objected to the reopening of assessment, however, rejecting the objection of the assessee, the Assessing Officer proceeded to complete the assessment vide order dated 26.12.2011 passed under section 143(3) read with section 147 of the Act.

6. The assessment order so passed was challenged in appeal before learned first appellate authority, inter alia, on the ground that the reopening of assessment under section 147 of the Act is invalid. However, learned Commissioner (Appeals) did not find merit in any of the grounds raised by the assessee. Accordingly, appeal was dismissed.

7. Before us, the substantive submission made by learned counsel for the assessee while challenging the validity of reopening of assessment under section 147 of the Act as well as the assessment order passed under the said provision is to the effect that the approval for reopening of assessment under section 147 of the Act was not granted by the competent authority in terms with sub-section (2) of section 151 of the Act. Learned counsel for the assessee submitted, since in case of the assessee, the original assessment was made under section 143(1) of the Act, the competent authority, who could have granted sanction for issuance of notice under section 148 of the Act, is the Joint Commissioner of Income Tax (JCIT). He submitted, in the present case, sanction for issuance of notice under section 148 of the Act was not granted by JCIT but by Commissioner of Income Tax (CIT). Thus, he submitted, in absence of proper sanction for issuance of notice under section 148 of the Act, the entire proceeding under section 147 of the Act has been vitiated. Therefore, the impugned assessment order passed under section 143(3) read with section 147 of the Act, being invalid, is unsustainable. In support of such contention, learned counsel relied upon the following decisions:

1. 2017 - TIOL - 1750 - HC - Del - IT Yum Restaurants Asia Pvt. Ltd. vs. Deputy Director Of Income Tax and Others
2. 2017 - TIOL - 1784 - HC - Del - IT Yum Restaurants Asia Pvt. Ltd. vs. Deputy Director Of Income Tax and Others
3. 2015 - TIOL - 2368 - HC - Del - IT Pr. CIT vs. G & G Pharma India Ltd.
4. 2017 - TIOL - 1060 - H C- DEL-IT CIT Vs. Meenakshi Overseas Pvt. Ltd.
5. 2017 - TIOL - 1388 - HC - DEL - IT Principal Commissioner of Income Tax Vs. RMG Polyvinyl (I) Ltd.
6. 2017 - TIOL - 2041 - HC - Del - IT Sabh Infrastructure Ltd. Vs. Asst. CIT.
7. 2017 - TIOL - 1748 - HC Del - IT Income Tax Officer Vs. R P Foam Home Pvt. Ltd.
8. 2018 - TIOL - 2260 - ITAT - Del - Bhavya Gold Pvt. Ltd. Vs. Asst. CIT
9. 2017 - 87 Taxmann.com 216 (Delhi-Trib.) Pr. CIT vs. Adamine Construction P. Ltd. Approved by Hon,ble High Court in 2018 - 99 Taxmann.com 44 (HC), Approved by Hon,ble Supreme Court in 2018 - 99 Taxmann.com 45 (SC)
10. 2018 - TIOL - 1236 - IT AT - Del ITO vs. XO Infotech Ltd.
11. 2017 - TIOL - 1725 - ITAT - Del Asst. CIT vs. Elegant Security Services Pvt. Ltd.
12. 2018 - TIOL - 564 - ITAT - Del Topline Buildtech Pvt. Ltd. Vs. Dy. CIT
13. 2017 - 397 - ITR - 0106 (Delhi) Pr. CIT vs. Laxman Industrial Resources Ltd.
14. 2018 - TIOL - 622 - HC - Del - IT Pr. CIT vs. Parnidhi Holdings Pvt. Ltd.
15. Hon'ble ITAT Delhi, ITA no. 453/Del/2016 dated 01.01.2018 ACIT vs. TRN Energy Pvt. Ltd.
16. Hon'ble ITAT Delhi, ITA no. 2534/Del/2018 dated 10.08.2018 Priyatam Plaschem Pvt. Ltd. Vs. ITO

8. Learned Departmental Representative, though agreed that sanction for issuance of notice in terms with section 151 has been granted by the CIT, however, he submitted, since superior authority has granted sanction for issuance of notice under section 148 of the Act, it cannot be said to be invalid.

9. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The facts on record clearly reveal that the original return of income filed by the assessee was not subjected to scrutiny assessment but was processed under section 143(1) of the Act. In other words, before initiation of proceeding under section 147 of the Act for the impugned assessment year, no assessment under section 143(3) of the Act was made. Section 151 of the Act prescribes the authority who can grant sanction for issuance of notice under section 148 of the Act. On a reading of section 151 of the Act applicable to the impugned assessment year, it has to be noted that as per sub-section (1) of section 151 of the Act, in a case, where assessment under section 143(3) read with section 147 of the Act has already been made, an Assessing Officer of the rank of Assistant Commissioner or Deputy Commissioner can issue notice under section 148 of the Act prior to expiry of four years from the end of the relevant assessment year. However, after expiry of four years from the relevant assessment year, for issuance of notice under section 148 of the Act sanction has to be granted by Chief Commissioner of Income Tax or Commissioner of Income Tax or Principal Chief Commissioner of Income Tax or Principal

Commissioner of Income Tax. In all other cases, not falling within sub-section (1) of section 151 of the Act, sanction has to be granted by JCIT.

10. In the facts of the present appeal, admittedly, before initiation of proceeding under section 147 of the Act, there was no assessment made either under section 143(3) or section 147 of the Act. Therefore, assessee's case falls under sub-section (2) of section 151 of the Act. Thus, before issuance of notice under section 148 of the Act, sanction of JCIT was required to be obtained. However, on perusal of the form for recording the reasons for initiating the proceedings under section 148 and obtaining sanction/approval for issuance of notice under section 148 of the Act, a copy of which was submitted before us by learned Departmental Representative, it is very much evident that the Assessing Officer has obtained the approval/sanction of the Commissioner of Income Tax on 28.03.2011 for issuance of notice under section 148 of the Act. Therefore, it is very much clear, the sanction/approval obtained by the Assessing Officer for issuance of notice under section 148 of the Act is not by the competent authority in terms with section 151(2) of the Act. In fact, in the reasons recorded, the Assessing

Officer has clearly stated that he has obtained approval/sanction from the Commissioner of Income Tax.

11. It is a well settled legal principle that when a statutory provision requires a certain act to be done by a particular authority in a particular manner, it should be done by that authority in that manner only. Any other authority, be it higher or inferior, cannot substitute the authority prescribed under the statute. The legal principle on this aspect is very much clear and leaves no room for doubt. In this context, we may refer to the decision of the Hon'ble Jurisdictional High Court in case of Yum! Restaurants Asia Pte Ltd. Vs. DDIT & Ors., 2017-TIOL-1784-HC-DEL-IT. The relevant observations of the Hon'ble Delhi High Court (supra) read as under:

"5. The relevant file has been produced before the Court. There is a single note sheet in the file and it is dated 26th March 2012. The note prepared by Mr. Mazhar Akram, the AO, reads: "No records for AY 2005-06 are traceable. ITD is showing the ROI processed for AY 2005-06. In the light of the reasons recorded in Annexure A, approval for issue of notice u/s Section 148 of IT Act, 1961 is sought." The said note was put up to the Addl. DIT who recorded "put up for approval" with his signature and put up the file to the DIT. The next signature on the file is that of the DIT who states in a single word "Approved".

6. From the above noting on the file it is seen that the Addl. DIT merely "put up for approval" the file and did not himself accord approval of the AO's proposal for reopening the assessment for AY 2005-06.

7. It is contended by Mr. Rahul Chaudhary, learned Senior Standing counsel for the Department, that when the Addl. DIT recorded the words "put up for approval" he, in fact, should be understood to have applied his mind, approved the note of the AO, and only thereafter put up the note for further approval to the DIT. He further sought to explain

that it is only because the original records were not traceable that this course was adopted by the Addl. DIT.

8. The above submission cannot be accepted. Where the original assessment is processed under Section 143 (1) of the Act, and the reopening is sought to be done after the expiry of four years from the end of the relevant AY, the mandatory requirement under Section 151 (2) of the Act is that the approval for the reopening of the assessment should be by an officer of the rank of the Joint Commissioner (in this case, the Addl. DIT) and not other officer including a superior officer. Section 151 (2) of the Act as it stood at the relevant time read:

"(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."

9. The argument that the approval by an officer superior to the Joint Commissioner will satisfy the requirement of Section 151 (2) of the Act, was categorically negated by this court in the aforementioned decision in SPL's Siddhartha Ltd. (supra) which has been followed in Commissioner of Income Tax-8 v. Soyuz Industrial Resources Ltd. (2015) 58 taxmann.com 336 (Del). In SPL's Siddhartha Ltd. (supra), under similar circumstances after noting that the approval had been granted on the file by a superior officer whose approval had been sought, the court observed as under:

"4. The aforesaid noting in the file does not reflect what learned counsel for the Revenue argued. In the first instance, it would be seen that the AO had specifically sought the approval of the Commissioner only. Therefore, it cannot be said that the Joint Commissioner/Additional Commissioner had granted the approval. Further, no doubt, the file was routed through Additional Commissioner. However, he also, in turn forwarded the same to the Commissioner by giving the following endorsement:

"CIT may kindly accord sanction."

5. It is clear that the Additional CIT did not apply his mind or gave any sanction. Instead, he requested Commissioner to accord the approval. It, thus, cannot be said that it is an irregularity curable under Section 292B of the Act."

10. In Commissioner of Income Tax-8 v. Soyuz Industrial Resources Ltd. (supra), the Court explained:

"8. The Revenue's argument seems plausible and even logical because the Commissioner or a Chief Commissioner is unarguably ranked higher in authority than a Joint Commissioner. Yet at the same time, this Court has to give effect to plain words of the statute which unambiguously states that the competent authority in such cases is the Joint Commissioner (and not the Chief Commissioner or the Principal Commissioner). The Revenue's submissions that all such cases, are covered under proviso to Section 147(1), the competent authority for prior approval would be four superior officers, renders Section 151 (2) superfluous. If anything the Court is clear that it is not its job to render, in the process of interpretation, an entire provision academic or Certified True Copy inoperative. This court is of the opinion that accepting the Revenue's position would result in that consequence. The Court also invokes the principle enunciated by the Privy Council in Nazir Ahmad v. Emperor AIR 1936 PC 253: that if the statute mandates that something be done in a particular manner, should be in that manner or not at all. In this case, since the original assessment was completed "other than" the eventualities contemplated in Section 151(1), i.e. it was processed under Section 143(1). Thus, clearly Section 151(2) applied."

11. In view of the clear position in law, the Court has no hesitation in concluding that in the present case, the mandatory requirement under Section 151 (2) of the Act, as it stood at the relevant time, has not been fulfilled and therefore, the reopening of the assessment for the AY 2005-06 by the impugned notice is bad in law."

12. The ratio laid down by the Hon'ble Jurisdictional High Court, as aforesaid, squarely applies to the facts of the present appeal. Merely because the approval/sanction is granted by a superior authority, it will not make the proceeding valid. Though, there are host of other decisions laying down the same legal principle, however, for avoiding multiplicity, we desist from discussing all the case laws. Thus, considering the fact that sanction/approval for issuance of notice under section 148 of the Act has not been

granted by the prescribed authority in terms with section 151(2) of the Act, the notice issued under section 148 of the Act has to be declared as invalid. As a natural corollary, assessment order passed, in pursuance thereof, is also invalid. The said assessment order, being legally unsustainable, has to be quashed. Accordingly, we do so. The impugned order of learned Commissioner (Appeals) is set aside.

13. In view of our decision, as above, various other issues raised by the assessee on the aspect of reopening as well as on merits, having become academic, are not required to be gone into in the present appeal.

14. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 14th July, 2022

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 14th July, 2022.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi