

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "C" KOLKATA**

Before **Shri Waseem Ahmed, Accountant Member** and  
**Shri S.S.Viswanethra Ravi, Judicial Member**

<b>ITA No.1330/Kol/2013 &amp; ITA No.2699/Kol/2013</b> Assessment Year :2003-04
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Damani & Co. 7A, Kiran Shankar Roy Road, Kolkata-700 001 <b>[PAN No.AACFD 5802 D]</b>	<b>V/s.</b>	ITO, Ward-45(2), 3, Government Place, Kolkata-700 001
ITO Ward-45(2), 3, Govt. Place (W), Kolkata-1	<b>V/s.</b>	M/s Daman & Co. 7A, Kiran Shankar Roy Road, Kolkata-700 001
अपीलार्थी /Appellant		
..		
प्रत्यर्थी/Respondent		

आवेदक/ की ओर से/By Assessee	Shri S.M.Surana, Advocate
राजस्व की ओर से/By Revenue	Shri S.M.Das, JCIT-DR
सुनवाई की तारीख/Date of Hearing	02-06-2016
घोषणा की तारीख/Date of Pronouncement	22-06-2016

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

These cross-appeals by the assessee and Revenue are against the order of Commissioner of Income Tax (Appeals)-XXX, Kolkata dated 20.11.2012. Assessment was framed by ITO Ward-45(2), Kolkata u/s 143(3)(ii) r.w.s 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide her orders dated 30.12.2010 for assessment year 2003-04.

2. Both the appeal are heard together and are being disposed of by way of consolidate order for the sake of convenience. First we take up assessee's appeal. The grounds raised by the assessee per its appeal are as under:-

**"Assessee's appeal in ITA No.1330/Kol/2013"**

1. *For that the assessment order dated 30.12.2010 is void and nullity in the eye of law as there are no recorded reasons to belief that income chargeable to tax has escaped assessment.*
2. *Without prejudice to ground no. 1 stated above, the recorded reasons are invalid and improper and, as such, the assessment framed vide order dated 30.12.2010 is bad in the eye of law.*
3. *For that the entire re-opening proceedings are bad in the eye of law, as such, the assessment order u/s. 143(3) r.w. section 147 dated 30-12.2010 is liable to be quashed in the absence of proper sanction as mandated by section 151.*
4. *For that the re-opening of assessment for A.Y 2003-2004 is bad in law and is beyond jurisdiction inasmuch the assessment has been reopened on mere "change of opinion" on the same set of facts.*
5. *For that the CIT(A) ought to have quashed the entire reopening proceedings since the order was passed by the AO after expiry of the limitation period.*
6. *For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition to the extent of Rs.1,80,000/- out of the total addition of Rs.42,87,937/- made by the AO on account of Commission paid to M/s Kripasant Commercial (P) Ltd.*
7. *For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition to the extent of Rs.10,00,000/- out of the total addition of Rs.33,63,433/- made by the AO on account of Commission paid to M/s Symcom Sales Services (P) Ltd.*
8. *For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition to the extent of Rs.5,00,000/- out of the total addition of rs.22,51,457/- made by the AO on account of Commission paid to M/s Mafex (P) Ltd.*
9. *For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.6,99,975/-*

*made by the AO on account of Commission paid to M/s Dave Commercial Co.*

10. *For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.1,04,84,824.50 made by the AO on account of Commission paid to M/s Umang Credit capital Ltd."*

Shri S.M. Surana, Ld. Authorized Representative appeared on behalf of assessee and Shri S.M. Das Ld. Departmental Representative appeared on behalf of Revenue.

2. The first issue in ground No. 1 to 5 raised by assessee in this appeal against the validity of reopening proceedings u/s 147 of the Act. Facts in brief are that assessee is a Partnership firm and engaged in the commission business. The original assessment was completed u/s 143(3) of the Act on 31.03.2006. During the course of original assessment a query with reference to the commission paid to M/s Umang Credit Capital Ltd. was raised but no reply was received till the completion of assessment under section 143(3) of the Act. However the reply was received by the AO, Circle-3 from M/s Umang Credit Capital Limited on dated 16.10.2008 which categorically denied for having any transaction with the assessee. Accordingly the proceedings under section 147 were initiated by issuing a notice under section 148 of the Act on dated 1.4.2009. The assessee has challenged the validity of proceedings initiated under section 147 of the Act on the ground that the initiation of proceedings are beyond 4 years from the assessment year 2003-04. Ld AR further contended that reopening of the case under section 147 of the Act can be done beyond 4 years if the assessee has failed to make fully and truly disclosure all material facts necessary for assessment. But in the instant case no such fact is mentioned in the letter issued by the AO in the reasons to believe that escapement of income was because of failure on the part of assessee to disclose all necessary facts for assessment. The Id. AR has pointed out that in the absence of compliance of statutory condition render the

initiation of re-assessment proceedings and issuance of notice, consequentially re-assessment order as void bad in law, illegal and without jurisdiction. Ld AR has drawn our attention towards the proviso to Sec. 147 of the Act and submitted that the Assessing Officer miserably failed to show that income chargeable to tax has escaped assessment for AY 2003-04 by reason for failure on the part of assessee to make a return u/s. 139 of the Act or in response to notice issued u/s. 142(1) or Sec. 148 of the Act or to disclose fully and truly or materials facts necessary for its assessment. Ld AR requested the Bench to quash the re-assessment proceedings as made by AO.

On the other hand, Ld. DR strongly supported the order of AO and stated that expenditure claimed by assessee by way of commission to M/s Umang Credit Capital Ltd. was categorically denied, therefore, Assessing Officer was justified and right in initiating the re-opening assessment proceedings u/s 147 of the Act. He has cited judgment of Hon'ble High Court of Madras in the case of *Sword Global India (P) Ltd. Vs ACIT, 60 taxmann.com 73* and order of Coordinate Bench of Cochin Bench in the case of *Konthiyaparambil Coir Rubber Products v. ITO (2015) 54 taxmann.com 220 (Cochin – Trib.)* which are placed on record.

3. We have heard the rival contentions of both the parties and perused the materials available on record. Before us Ld AR submitted orders of various coordinate Benches of ITAT and judgment of Courts which are placed on record. Ld. AR has challenged the initiation of proceedings and issuance of notice u/s 147 r.w.s. 148 of the Act in the case on hand. We find it appropriate to reproduce the reason recorded by AO for initiation of proceedings u/s. 147 of the Act which reads as under :

*Office of the Income Tax Officer, Ward-45(2), Kolkata  
3 Govt. Place, West, Kolkata-1*

*No:ITO, Wd-45(2)/M/S Damani &Co/AACFD5802D/2010-11/427 Dated:25.08.2010*

To  
M/s Damani & Co.  
74 Kiran Shankar Roy Road,

Kolkata-1,

Sub: Proceedings u/s. 147-A.Y. 2003-04-Matter regarding  
Ref; Your letter no. nil dated 23.08.2010  
Please refer to the above.

As required, the Reasons to believe that income has escaped assessment for the A.Y. 2003-04 is as under:-

During the course of scrutiny proceeding U/s. 143(3) for the Asst. Year P22003-04, information was called for from ACIT/DCIT, Circle-3, Kolkata in the matter of payments of sub-commission to M/s Umang Credit Capital limited. Since no information was received before the case gets time barred, assessment was completed on 31-03-2006, without taking any action. Information received on 16-10-2008, during the course of scrutiny proceeding U/s 143(3) for the Asst. Year 2004-05. It appears from the copy of the Trading, Profit & Loss Account of M/s Umang Credit Capital Limited for the Asst. Year 2003-04 that, although the assessee claimed to have paid commission of Rs.1,04,84,824.50 to them during Asst. Year 2003-04, no such receipts of commission shown by M/s Umang Credit Capital Limited in their respective return of income. On the other hand, M/s Umang Credit Capital Limited submitted one letter before ACIT, Circle-3, Kolkata in this matter and denied having any such transaction with the assessee. They filed one affidavit dated 24-12-2007 in this matter and further denied having any such receipts of commissions. However, DCIT, C-3, Kolkata added the amount in the hand of M/s Umang Credit Capital Limited for Asst. Year 2003-04. Considering the above denial of M/s Umang Credit Capital limited, it is clear that it is not established that payments of Rs.1,04,84,824/- by the assessee to M/s Umang Credit Capital Limited is for the purpose of his business/income. Therefore, it is not allowable. I've therefore reason to believe that income has escaped assessment for the Asst. year 2003-04 at least for an amount of Rs.1,04,84,824/-. Hence, the case of the assessee for the Asst. Year 2003-04 is reopened U/s 147, after getting approval from CIT-XV, Kolkata on 31.03.2009.

Sd/- S.Haldar (Sakar)  
Sikha Halder (Sarkar)  
Income Tax Officer, Ward-45(2), Kolkata

As observed that assessee's income was first assessed u/s 143(3) on 31.03.2006 for the AY 2003-04 and further notice under section 148 of the Act was issued by AO on 1.04.2009 which is beyond the expiry of four years from the relevant Assessment Year (2003-04). Therefore, it is the duty of AO to show *prim facie* and establish in the reason recorded that income chargeable to tax has escaped assessment for such assessment year by the reason of failure on the part of assessee to disclose fully and truly all material fact necessary for alleged AY (2003-04). After the logical analysis the contents of the reasons recorded then it is ample clear that there is no allegation or stipulation showing that income chargeable to tax as escape assessment due

to failure on the part of assessee to disclose fully and truly all material fact necessary for assessment. We find the case cited by Ld DR the case of *Konthiyaparambil Coir Rubber Products* (supra) is different from the facts of the present case. The issue for adjudication before the Coordinate Bench of Cochin in the above said case was that whether assessee has disclosed relevant particulars at the time of original assessment but they are found to be untrue on the basis of material discovered on later date by AO, assessment would be validly re-opened u/s. 147 of the Act because in such case assessee would have failed to disclose truly and fully al material necessary for assessment and it would not be a case of mere change of opinion. Similarly the facts of the case *Sword Global India (P) Ltd. (supra)* are different with the case of the assessee. In this case also the issue was not based whether it is mandatory to mention in the reasons to believe that the assessee has failed to disclose all the material facts fully and truly necessary for the assessment in the case of reassessment beyond 4 years. The facts of the case *Sword Global India (P) Ltd. (supra)* are reproduced below :

“Section 147, read with section 10B of the Income-tax Act, 1961 – Income escaping assessment – Non-disclosure of primary facts (Change of opinion) – Assessment year 2007-08 – Whether under section 147 cases having willfully made false or untrue statements at the time of original assessment and when that falsity comes to notice, it is not fair on the part of the petitioner to turn around and say ‘**you accepted my lie, now your hands are tied and you can do nothing**’- Held, yes [Para 23] [In favour of revenue]

Section 151, read with section 148, of the Income-tax Act, 1961 – Income escaping assessment – Sanction for issue of notice (Conditions precedent) – Assessment year 2007-08 – Whether mere non-mentioning of sanction accorded by authority in notice issued under section 148 would in any way be fatal to process of reopening – Held, no [Para 20] [In favour of revenue]

As we observed that the facts of the cases cited by the AO are different from the facts of the case on hand. Therefore such cases shall have no bearing on the instant case.

In the light of the above noted pre-position, we analysis the reasons recorded by AO in the facts of the present case and found amply clear that the AO has not made any specific allegation as mentioned there in that the income escape assessment due to failure on the part of assessee to fully and truly disclose or relevant fact necessary for assessment. In this connection we are putting our reliance in the judgment of Hon'ble Delhi High Court in **ITA No.1108-1109/2010** dated 03.12.2015 in the case of CIT v. Vishishth Chay Vyapark Ltd. wherein para-20 is reproduced below:-

*“20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to Sec. 147. If this condition is not satisfied, the bar would operate and no action under Section 147 could be taken.”*

Accordingly, we are inclined to hold that AO did not assume valid jurisdiction for initiation of proceedings u/s. 147 of the Act by issuing notice u/s. 148 of the Act beyond four years after completion of relevant assessment year as per requirement of First proviso to Sec. 147 of the Act. Hence, we quash the same. Accordingly, legal objection contained in ground 1 to 5 are allowed.

5. As we have quashed initiation of proceedings and issuance of notice u/s 147 r.w.s. 148 of the Act by allowing legal ground of the assessee then remaining grounds No. 6 to 8 of assessee's appeal on merits becomes academic and infructuous. Hence we dismiss the same as having become infructuous.

6. In the result, assessee's appeal is allowed.

**Coming to Revenue's appeal in ITA No.2699/Kol/2013**

7. Since we have already quashed the re-assessment proceedings u/s. 147 of the Act made by AO in favour of assessee on legal grounds in assessee's appeal in ITA No.1330/Kol/2013, hence, grounds raised by Revenue in regard to AY 2003-04 on merits becomes academic and infructuous and we dismiss the same as having become infructuous.

8. In the result, Revenue's appeal is dismissed as become infructuous.

**9. In the result, appeal of assessee is allowed on legal grounds and that of Revenue is dismissed as having become infructuous.**

Order pronounced in the open court 22/06/2016

Sd/-  
(S.S.Viswanethra Ravi)  
(Judicial Member)  
Kolkata,

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp

दिनांक:- 22/06/2016 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. आवेदक /Assessee –Damani & Co. 7A, Kiran Shankar Roy Road, Kolkata-700 001
2. राजस्व /Revenue-ITO Ward-45(2), 3, Govt. Place, Kolkata-700 001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।