

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.4259/M/2012
Assessment Year: 2003-04**

Shri Gautamchand Kanuga, House No.439, Flat No.1, Sumita Building, Gokulnagar, Kasarali, Bhiwandi PAN: ABGPK 2083A	Vs.	DCIT, Circle – 1, Kalyan, 1 st Floor, Mohan Plaza, Wayale Nagar, Khadakpada, Kalyan (W)
(Appellant)		(Respondent)

**ITA No.4260/M/2012
Assessment Year: 2003-04**

Shri Gautamchand Kanuga (HUF), Bhiwandi House No.439, Flat No.1, Sumita Building, Gokulnagar, Kasarali, Bhiwandi PAN: ABGPK 2083A	Vs.	DCIT, Circle – 1, Kalyan, 1 st Floor, Mohan Plaza, Wayale Nagar, Khadakpada, Kalyan (W)
(Appellant)		(Respondent)

Present for:

Assessee by : Dr. P. Daniel, A.R.
Revenue by : Shri H.M. Wanare, D.R.

Date of Hearing : 01.10.2015
Date of Pronouncement : 08.01.2016

ORDER

Per Sanjay Garg, Judicial Member:

These are appeals by the assessee as an individual and as HUF preferred against two separate orders both dated 09.03.2012 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2003-04. As the facts in the case of individual and the HUF are identical, these appeals were heard together and disposed of by this common order. For the sake of convenience, facts have been taken from the case of individual in ITA No.4259/M/2012.

2. The main grievance of the assessee is against the reopening of the assessment under section 147 of the Act. The reopening in this case was done by the Assessing Officer (hereinafter referred to as the AO) on the information received from investigation wing to the effect that a search operation was carried out in the case of M/s. Mahasagar Securities Pvt. Ltd. and its group concerns on 25.11.09 and that during the course of search action, it was found that M/s. Mahasagar Securities Pvt. Ltd. and its group concerns were engaged in fraudulent billing activities and in the business of providing bogus speculation profit/loss, short term/long term capital gain/loss etc. The name of the assessee was also listed in the list of beneficiaries extracted from the computer data of Shri Mukesh Chokshi, the Director of said M/s. Mahasagar Securities Pvt. Ltd. The assessment of the assessee was, thus, reopened which was originally processed under section 143(3) of the Act. The AO accordingly in the reopened assessment proceedings held that the purchase and sale transactions of the shares carried out by the assessee was bogus and he accordingly taxed the entire sale consideration of shares of Rs.44,22,227/- under the head 'Income from other sources'. Being aggrieved, the assessee preferred appeal before the Ld. CIT(A).

3. The Ld. CIT(A) confirmed the additions so made by the AO.

4. Before us, the Ld. A.R. of the assessee has stated that the issue is squarely covered with the decision of the Tribunal in the case of Shri "Hirachand Kanuga vs. DCIT" in ITA Nos.4261 & 4262/M/2012 vide order dated 17.02.15 (one of us, Ld. A.M, being the Author of said decision). He has stated that the facts and issues under consideration are identical in all respects with the above case wherein the assessment was reopened in the case of "Hirachand Kanuga" in his individual capacity as well as in relation to his HUF. The Tribunal, considering the facts and circumstances of the case, has held the reopening was bad in law.

5. We have gone through the said decision. It is pertinent to mention here that the reopening in the case of assessee was done on the identical information and in respect of the same list of beneficiaries wherein the name of the assessee as well as name of Mr. Hirachand Kanuga appeared as beneficiaries. Even we find that the Tribunal has discussed about the satisfaction recorded by the Additional Commissioner of Income Tax on the reasons recorded by the AO wherein the Tribunal has reproduced the letter dated 26.03.10 of the Additional Commissioner of Income Tax showing that the permission was granted by the Additional Commissioner in respect of 22 assesseees wherein the name of the assessee and his HUF appeared at Sl. Nos.1 & 2 in the said list and whereas the name of Hirachand Kanuga HUF and Mr. Hirachand Kanuga in individual capacity appeared at Sl. Nos.3 & 4. The Tribunal has given a categorical finding that the Additional Commissioner has simply sanctioned the proposal of initiating the proceedings under section 147 and he has nowhere recorded his satisfaction on the reasons recorded for reopening of the assessment. Further, the Tribunal has also discussed about the merits of the reopening of the assessment and formation of belief by the AO for the said reopening and thereafter relying upon the decision of the Hon'ble Delhi High Court in the case of "Sarathak Securities Co. Pvt. Ltd." 329 ITR 110 has held that the reopening was bad in law. The relevant findings of the co-ordinate bench of the Tribunal for the sake of completeness are reproduced as under:

"6. Before us, the Ld. Counsel for the assessee once again strongly challenged the validity of the reassessment proceedings. The first proposition of the Ld. Counsel was that the reasons recorded by the AO are without application of mind. It is the say of the Ld. Counsel that the reopening is based on the report received from the Investigation Wing and there is no independent application of mind by the AO. In support of his contention, the Ld. Counsel placed reliance on the decision of the Hon'ble Delhi High Court in the case of Sarathak Securities Co. P. Ltd. 329 ITR 110.

6.1. The second proposition put forth by the Ld. Counsel is that there is no proper sanction/approval as per the provisions of Sec. 151(2) of the Act. In support of this contention, reliance was placed on the decision of the Tribunal Mumbai Bench in the case of Shri Amarlal Bajaj in ITA No. 611/M/04.

6.2. The last proposition made by the Ld. Counsel is that the assessment has been framed in haste without allowing the time after rejection of objection. It is the say of the Ld. Counsel that once the AO rejects the objection filed by the assessee, then in such a case the AO should not proceed further in the matter for a period of 4 weeks. Reliance was placed on the decision of the Hon'ble Jurisdictional High Court in the case of Asian Paints Ltd. 296 ITR 90 and Aroni Commercials Ltd. 362 ITR 403.

7. Per contra, the Ld. Departmental Representative strongly supported the orders of the authorities below. It is the say of the Ld. DR that the assessment was reopened on the basis of tangible material evidence in the form of report received from the Investigation Wing, Mumbai and therefore it cannot be said that there is no application of mind. The Ld. DR continued by stating that proper approval was given by the Joint CIT/Addi. CIT and therefore it is incorrect to say that the reopening was without any sanction. Thirdly the DR stated that the assessee dragged the assessment proceedings to the fag-end of the period of limitation and therefore the AO cannot be blamed for passing the assessment order in haste. The Ld. DR concluded by saying that the reassessment proceedings were valid and the Ld. CIT(A) has rightly upheld the findings of the AO.

8. We have given a thoughtful consideration to the rival submissions. We have carefully perused the orders of the authorities below and the relevant documentary evidences brought on record. Let us first see the reasons for reopening the case u/s. 147 which read as under:

"1. *The assessee had filed return of income for A.Y. 2003-04 on 16.10.2003 declaring total income of Rs. 5,95,080/-*

2. A search action was conducted in the case of MIs. Mahasagar Securities Pvt. Ltd (now Alag Securities Pvt. Ltd.) on 25.11.2009 by the DDJT (Inv) Unit-1(4), Mumbai.

3. During the course of search it was found that MIs. Mahasagar Securities Pvt. Ltd., and its group concerns were engaged in fraudulent billing activities and in the business of providing bogus speculation profits or loss on commodity trading, long term and short term gains or/loss introducing share application money.

4. During the course of search from the seized computer data, a list of clients/beneficiaries who have taken entries from the above company have been extracted.

5. The name of the assessee is found to be appearing in the said transactions in the list mentioned in the computer data extracted from the above company during search.

6. In view of the above and considering the findings and modus operandi found during search operation, there is a reason to believe that the income to the extent as relevant to be worked out has escaped assessment within the meaning of Sec. 147 of the I.T. Act, 1961 and hence a notice u/s. 148 of the LT. Act, 1961 is issued."

8.1. A perusal of the reasons mentioned hereinabove clearly suggest that there is no application of mind. In our considered opinion, formation of belief that income has escaped assessment is a condition precedent. We find that the facts of the present case are identical to the facts of the case decided by the Hon'ble Delhi High Court in the case of Sarthak Securities Co. P. Ltd (supra) wherein also the original return was processed and intimation was sent u/s. 143(1) of the Act accepting the return. The notice u/s. 148 of the Act was issued by the AO alleging that he has reason to believe income chargeable to tax for the assessment was 2003-04 has escaped assessment within the meaning of Sec. 147 of the Act and accordingly required the assessee to file the return for the assessment year in consideration. The assessee submitted the return of income as filed earlier should be treated as the return in compliance with the notice under reference. The assessee also requested to provide a copy of the reasons recorded it/s. 148(2) and the approval for issuance of notice. While furnishing the reasons, the ITO also initiated reassessment proceedings by issuing formal notice. On a writ petition, the Hon'ble High Court held as under:

"Held, allowing the petition, that the formation of belief was a condition precedent as regards the escapement of the tax pertaining to the assessment year by the Assessing Officer. The Assessing Officer was required to form an opinion before he proceeded to issue a notice. The validity of reasons, which were supposed to sustain the formation of an opinion, was challengeable. The reasons to believe were required to be recorded *by the Assessing Officer. Once the ingredients of section 147 were fulfilled, the Assessing Officer was competent in law to initiate the proceedings under section 147. The Assessing Officer was aware of the existence of the four companies with whom the assessee had entered into transaction. Both the orders showed that the Assessing Officer was made aware of the situation by the investigation wing and there was no mention that these companies were fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicated independent application of mind. Though conclusive proof was not germane at this stage the formation of belief must be on the base or foundation or platform of prudence which a reasonable person was required to apply. From the perusal of the reasons recorded and the order of rejection of objections, the names of the companies were available with the authority and their existence was not disputed. The assessee in its objections had stated that the companies had bank accounts and payments were made to the assessee through banking channel. The identity of the companies was not disputed. Under these circumstances, the initiation of proceedings*

under section 147 and issuance of notice under section 148 of the Act were to be quashed."

8.2. As mentioned elsewhere, the facts of the case in hand so far as the issue of notice and the reasons for the issue of notice u/s. 148 are concerned are identical to the facts of Sarthak Securities (supra), therefore, in the light of the judicial decision discussed hereinabove, the issuance of notice u/s. 148 of the Act has to be quashed.

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, Kulyan (W)*

No. KY N/Addl. CIT/I 47/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. Gaiitamchand M. Kanunga*
- (2) Mr. Gautamchand M. Kanunga (HUF)*
- (3) Mr. Hirachand M. Kanunga (HUF)*
- (4) Mr. Hirachand M. Kanunga*
- (5) Miss Sonamn G. Kanunga (Minor) through Shri Gautamnchand M. Kanunga*
- (6) Miss Lavina V. Kanunga (Minor) through Shri Vimaichand M. Kanunga*
- (7) Master Kenil G. Kanunga (Minor) through Shri Gautamnchand M. Kanunga*
- (8) Master Nilesh H. Kanunga (Minor) through Shri Hirachand M. JKanunga*
- (9) Sint. Manjula H. Kanunga*
- (10) Miss. Deepika H. Kanunga (Minor) through Shri Hirachand M. Kcmnunga*

- (11) Miss. Simnran H. Kanunga (Minor) through Shri Hirachand M. Kanunga
- (12) Smm' Damayanti Ramesh Gada
- (13) Shri. Ram esh Premnchand Gada
- (14) Shri. Alliad P. Kashikar
- (15) Smm'. Nilima A. Kashikar
- (16) Shri Abhay P. Kashikar
- (17) Sint. Geeta A. Kashikar
- (18) Sint. Nee/am M. Goyal
- (19) VimaiJain
- (20) Naresh fain
- (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.

14. Proceeding further, a perusal of the assessment order show that the AO has supplied the reasons recorded on 15.11.2010. The assessee filed his objection on 25.11.2010. The objections filed by the assessee were rejected on 14.12.2010 and the assessment order was made on 24.12.2010. Thus the AO did not wait for four weeks from the date of the rejection of the objections and thereby violated the principles enunciated by the Hon'ble Jurisdictional High Court in the case of Asian Paint Ltd. (supra) wherein the Hon'ble High Court has observed as under:

"Reassessment-Notice u/s. 148- Objections by assessee-If the AO does not accept the objections filed by the assessee against reopening of assessment, he is not to proceed further in the matter for a period of four weeks from the date of service of order rejecting the objections on the assessee —Above procedure is to be followed strictly in all such cases of reopening of assessment."

15. The Hon'ble Jurisdictional High Court in the case of Aroni Commercials Ltd. (supra) has made the following observations:

"It is axiomatic that the law declared by the High court is binding on all authorities functioning within the jurisdiction of the Court. It is not open to the AO to feign ignorance of the law declared by the court and pass orders in defiance of it. The Bombay High Court in Asian Paints Vs DCIT (2008) 296 ITR 90 (Born) has clearly laid (down) that when an assessment is sought to be reopened u/s. 148 of the Act and the objections of the assessee have been overruled by the AO, then in such a case the AO will not proceed further in the matter for a period of four weeks from the date of receipt of the order rejecting the objections of the assessee."

16. The AO has undoubtedly flaunted the procedure laid down by the

Hon'ble Jurisdictional High Court thereby making the issuance of notice u/s. 148 of the Act bad in law.

16.1. Having said all that considering the facts of the case from any angles in the light of our detailed discussion hereinabove, in our considered opinion, the reassessment proceedings based on the notice issued u/s. 148 is bad in law. We, therefore, set aside the findings of the Ld. CIT(A) and quash the reassessment order made u/s. 143(3) r.w. Sec. 147 of the Act.

16.2. As we have quashed the reassessment order, we do not find it necessary to go into the merit of the case.

17. In the result, the appeal filed by the assessee is allowed.”

6. Since the facts and issues involved in the captioned appeals are identical and hence for the sake of consistency, respectfully following the above decision of the co-ordinate bench of the Tribunal, **the appeals of the assessee are hereby allowed** and consequently the reopening of the assessment is hereby set aside and the additions so made in the reopened assessment proceedings are hereby ordered to be deleted.

Order pronounced in the open court on 08.01.2016.

Sd/-
(N.K. Billaiya)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 08.01.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.