

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

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 580/Del/2014
Assessment Year: 2003-04

Limelight Towers (P) Ltd.
F-8, Okhla Industrial Area,
Phase-I, New Delhi
(PAN: AAACL2094C)
(Appellant)

Vs

ACIT, Central Circle-2,
New Delhi

(Respondent)

Appellant by : Sh. Salil Aggarwal, Adv. & Sh. Shailesh Gupta, CA.
Respondent by : Sh. Yatendra Singh Singh, Sr DR

Date of hearing: 19.11.2015
Date of pronouncement: 11.12.2015

ORDER

PER O.P. KANT, A.M.:

The present appeal by the assessee is directed against the order dated 28.11.2013 of learned Commissioner of Income Tax(Appeals)-VI, New Delhi, for the assessment year 2003-04, raising following grounds of appeal:

1. *That the order passed u/s 250 of the Income-Tax Act, 1961 is wrong, bad in law and against the facts and circumstances of the case.*
2. *That the Learned CIT (Appeals) should have allowed the appeal as the assessment completed u/s 147 on the basis of reopening by issue of notice U/S 148 was wrong and bad both in law and on facts.*
3. *That both CIT (Appeals) and Assessing officer have erred in law and on facts in making an addition of Rs 10,50,000/-in total income treating the share application money as unexplained cash credit U/S 68 of I.T Act 1961 in respect to the following shareholders:*
 - i. *Pista Devi , C-277/3 Gali No 13 Bhajan Pura, Delhi*
 - ii. *Omega Ventures Pvt. Ltd*
 - iii. *Top Light Trade Links Pvt. Ltd*

It is contended that both the learned AO and CIT (Appeals) have erred in law and on facts in ignoring the material on record substantiating the credits from the shareholders.

4. *The above ground of appeal are without prejudice to one and another.*
5. *Your appellant craves, leave, to add, alter, amend, and/or forego any of the grounds of appeal at the time of hearing.*

2. At the time of hearing, the learned counsel for the assessee Sh. Salil Agarwal submitted that according to Section 151(2) of the Act, for reopening of any assessment beyond four years of the relevant assessment year other than the assessment completed under Section 143 or Section 147 of the Act, approval of Joint Commissioner of Income-tax is required, if the Assessing Officer is below the rank of Joint Commissioner of Income-tax, however, in the present case, the approval/ permission has been obtained from the Commissioner of Income Tax after recording his satisfaction. A copy of satisfaction note recorded by the Commissioner of Income-tax was placed by the assessee on page no. 83 and 84 of the paper book. Mr Salil Agrwal submitted that since the approval was granted by the Commissioner of Income Tax, the assessment was without jurisdiction and re-assessment order passed by the Assessing Officer, was therefore *abintio* void. Mr Agrwal, submitted that the though this ground was not taken before the lower authorities but the ground being legal in nature, the assessee might take the ground at any stage of appellate proceedings. In support of his claim, he relied on the judgments of the supreme court in the case of NTPC Ltd Vs CIT reported at 229 ITR 383 and in the case of CIT Vs Mahalaxmi Mills Ltd reported in 66 ITR 710. The learned Senior Departmental

Representative, on the other hand, submitted that the assessee cannot be allowed to take new ground which he has not taken before the lower authorities and he opposed the admission of the ground, but he could not controvert that the new ground raised was purely legal in nature. It is well settled law that legal ground can be raised at any time before the appellate authorities as per the ratio laid by the Hon'ble Supreme Court in the case of NTPC Ltd Vs CIT(supra) , therefore, we admit the ground raised by the assessee.

3. The facts in brief are that the assessee filed its return of income on 02.12.2003 declaring loss of Rs. 40,189/- which was processed under Section 143(1) of the Income-tax Act, 1961 (for short 'the Act') on 30.01.2004. A search and seizure under Section 132 of the Act was carried out at the premises of the assessee on 01.06.2006. Notice under Section 153A of the Act was issued on 29.11.2007 and in response to the same, the assessee filed its return of income declaring loss of Rs. 40,189/- on 11.02.2008. Thereafter, the assessment under Section 143(3)/153A of the Act was completed on 12.12.2008 making addition of Rs. 10,50,000/- on account of unexplained cash credit under Section 68 of the Act. The assessee filed an appeal before the Commissioner of Income Tax (Appeals), who allowed the appeal of the assessee holding that no addition could be made to the income of the assessee under Section 153A of the Act, which was not based on the books of account, documents or evidence found or seized during the search. Subsequently, the case of the

assessee was reopened under Section 147 of the Act by issuing notice under Section 148 of the Act on 30.03.2010. The objections raised by the assessee for reopening of the assessment under Section 147 of the Act were rejected by the Assessing Officer and addition of Rs. 10,50,000/- in respect of unexplained cash credits was made. Aggrieved, the assessee filed an appeal before the learned Commissioner of Income Tax (Appeals) raising various grounds. The assessee contended before the learned Commissioner of Income Tax (Appeals) that the very basis of recording the reason to believe was based on the wrong facts and merely not producing the lenders could not be the basis for issuance of notice under Section 148 of the Act. The learned Commissioner of Income Tax (Appeals) rejected the legal grounds taken against reopening of the assessment and also confirmed the additions made by the Assessing Officer on merit of the case. Aggrieved, the assessee is before us with the present appeal.

4. In respect of the additional ground raised, the learned counsel of the assessee submitted that approval of the Commissioner has been obtained in the case as against approval of the Joint/ Additional Commissioner of Income-tax required as per section 151(2) of the Act, therefore, the reassessment order being without jurisdiction must be quashed. He relied on the decisions of the Tribunal in the case of Sh. Vipin Kumar Khanna, in ITA No. 3637 & 3388/Del/2013, dated 21.10.2014, wherein the reopening of the assessment has been quashed as

the approval contemplated under Section 151(2) was not complied with by the Revenue. On the other hand, the Senior Departmental Representative submitted that approval obtained from an authority higher than prescribed would not cause any prejudice to the assessee, and therefore, reassessment proceedings should be held as valid.

5. We have heard the rival submissions and perused the material on record. It is evident from the page 83 and 84 of the paper book that approval for reopening of the case has been obtained from the Commissioner of Income-tax. It is also evident that the original assessment in the case was completed u/s 143(1) of the Act by the Assessing Officer of the rank below to the Joint Commissioner of Income Tax Act. As the notice has been issued after four years from the relevant assessment year, so as per the provisions of the section 151(2) of the Act, the approval from the Joint/ Additional Commissioner was required to have obtained, but obtained from the Commissioner of Income-tax. The relevant part of the section 151(2) is reproduced 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.*

(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 Principal Commissioner or Commissioner or the Principal Chief Commissioner or 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.”

(emphasis supplied)

6. Thus, it is not in dispute that approval has been obtained for re-opening of the assessment from the Commissioner of Income Tax as against approval required from the Joint/Addl. Commissioner of Income Tax as per law. In the circumstances above, the case in hand is fully covered by the decision of Tribunal in the case of Sh. Vipin Kumar Khanna(supra). In the said decisions, the Tribunal has relied on the decision of the Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. SPL's Siddartha Ltd., reported in 345 ITR 223(Delhi). The relevant paras of the aforesaid decision of the Tribunal are reproduced as under :

“3.1 The assessee has challenged the validity of the reopening of assessment u/s 147 of the Act by issue of a notice u/s 148 of the Act on 29.3.2011, on the ground that the approval contemplated u/s.151(2) was not complied with. He argued that from the AO's order, it is clear that the prior approval of the Ld.CIT, Central I, New Delhi was taken and whereas the approval should have been obtained from the JCIT and not from the CIT under the Act. He relied on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. SPL's Siddartha Ltd. (supra) reported in 345 ITR 223(Delhi). He further submitted that on identical facts in the assessee's own case, for the AY 2001-01 to 2002-03, the Tribunal vide order dt. 28.6.2000 decided in favour of the assessee on the very same facts and grounds.

3.2. The Ld.D.R. submitted that the ACIT had also affixed his signature in approval and hence there is no defect and that the requirements of the Act are fulfilled. He contested the contentions of the Ld.Counsel for the assessee.

4. *After hearing rival submissions, we find that it is only the Commissioner who has granted approval for the reopening in this case on 30.3.2007. This Bench of the Tribunal had on identical facts in the assessee's own case in ITA nos. 1730/Del/2012 to 1732/Del/2012 for AYs 2000-01 to 2002-03 had held as follows.*

"5. We have carefully considered the arguments of both the sides and perused the material placed before us. The photocopy of the reasons recorded for AY 2000-01 is placed at page 15 of the assessee's paper book. A copy of the same is being enclosed as Annexure-1 to this order. Admittedly, in other two years, i.e. AY 2001-02 & 2002-03 also, the facts are identical and similar approvals have been taken. Copies of the same are placed at pages 10 and 46 respectively in Volume-2 of the assessee's paper book. However, for the sake of brevity, the same are not appended herewith. From the above, it is evident that first the Assessing Officer has recorded the reasons for reopening of assessment. Thereafter, the Additional CIT simply signed the same and forwarded to the CIT. The CIT examined the above recording of reasons and then mentioned "Approval is accorded for reopening assessment of Sh. Vipin Khanna for A. Y. 2001-02".

6. That sub-section (2) of Section 251 reads as under:-

"(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]. "

7. Thus, as per proviso to Section 151(2), approval of joint Commissioner is required. We find that the identical

issue has been considered by Hon'ble jurisdictional High Court in the case of SPL's Siddhartha Ltd. (supra), wherein their Lordships held as under:-

"Held, that under section 151 of the Act; it was only the joint Commissioner or Additional Commissioner, who could grant the approval for issue of notice under section 148. The approval was not granted by the joint Commissioner. Instead, it was taken from the Commissioner of Income-tax. This was not an irregularity curable under section 2928. The notice was not valid. "

8. In our opinion, the ratio of the above decision of Hon'ble jurisdictional High Court would be squarely applicable to the case of the assessee. No contrary decision on these facts has been brought to our knowledge. We, therefore, respectfully following the above decision of Hon'ble jurisdictional High Court, hold that the assessment reopened with the approval of ITA 3637/Del/2013 ITA 3388/Del/11) AY 2004-05 Sh. Vipin Kumar Khanna, New Delhi Commissioner of Income-tax, whereas the statute required the approval of the joint Commissioner of Income-tax, is not valid. We, therefore, quash the reopening of assessment for these three years under consideration. Since the reopening of assessment itself has been quashed. the consequential assessment orders passed for the above three years are also quashed.

9. As we have already quashed the assessment orders. the various grounds of appeal raised by the assessee against the additions made by the Assessing Officer need no adjudication."

4.1. Consistent with the view taken therein, we quash the reopening as bad in law."

7. In view of the aforesaid discussion and respectfully following the decision of the Tribunal in the case of Sh.Vipin Kumar Khanna(supra) being a binding precedent, we quash the re assessment proceedings. As we have already quashed the reopening proceedings, we are of the opinion that adjudication of other

grounds would be an academic exercise and hence, the same have become infructuous.

7. In the result, appeal of the assessee is allowed.

The decision is pronounced in the open court on 11th December, 2015.

**Sd/-
(DIVA SINGH)**

JUDICIAL MEMBER

Dated: 11th December, 2015.

RK/-

Copy forwarded to:

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

Sd/-

(O.P. KANT)

ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi