आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.2910/Mum/2013
Assessment Year: 2006-07

Motilal R. Todi, Todi Estate, Sunmill Compound, Lower Parel (W), Mumbai-400 013	**बनाम**/ Vs.	ACIT 7(3), Mumbai-
(निर्धारिती /Assessee)		(राजस्व /Revenue)
P.A. No.AADPT9266G		

निर्धारिती **की ओर से /** Assessee by	Dr. K. Shivaram (AR)
राजस्व **की ओर से** / Revenue by	Mr. J. K. Garg (DR)

सुनवाई की तारीख **/ Date of Hearing :**	**26/08/2015**
आदेश की तारीख /**Date of Order:**	**22/09/2015**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

The present appeal has been filed by the assessee against order dated 22.02.2013, passed by the Ld. Commissioner of Income Tax (Appeals)-13, Mumbai {hereinafter called as CIT(A)}, for the assessment year 2006-07, against the order

passed u/s 147 r.w.s. 143(3), by the Assessing Officer (hereinafter called as 'AO'). The Assessee has raised following grounds of appeal:-

"1. The learned CIT (Appeals) erred in confirming action of the A.O. for reopening the assessment without properly appreciating the fact of the case and laws applicable thereto.

2. The learned CIT (Appeals) erred in confirming action of the A.O. for reopening the assessment on the basis of audit objection which is not permissible in law.

3. The learned CIT (Appeals) erred in confirming action of the A.O. as to income earned on transaction in shares of Rs.91 ,28,881/- subject to SIT is taxable under the head "Income from Business or Profession" instead of "Capital Gain" declared by the appellant without properly appreciating the fact of the case and laws applicable thereto.

4. The learned CIT (Appeals) erred in confirming the action of the A.O. to hold the appellant as a "Share Trader" instead of an "Investor" without properly appreciating facts of the case and laws applicable thereto.

5. The learned CIT (Appeals) erred in confirming the action of the A.O. in disallowing expenses of Rs.24,OOO/- u/s 40(a)(ia) of the Act.

6. The appellant prays that income earned from transaction in shares may be directed to be taxed as 'Capital Gain' instead of 'Business Income'.

7. The appellant prays that the above disallowances confirmed may be deleted.

8. The appellant craves leave to add, alter or amend any ground of appeal at the time of hearing or before."

2. The Brief facts are that in this case Assessee had filed return of income on 27-10-2006 u/s 139(1) and original assessment was done by AO u/s 143(3) vide order dated 15.12.2008. Subsequently, this case was reopened u/s 147 and AO framed re-assessment order dated 31.12.2012 u/s 143 read with 147 of the Income Tax Act 1961. Against this, the Assessee filed an appeal before Ld. CIT(A), wherein he challenged the action of the AO of re-opening of assessment u/s 147 and also challenged additions made by the AO on merits. Ld. CIT(A) did not accept the submissions of the assessee with respect to re-opening and therefore, re-opening was upheld by the Ld. CIT(A). On merits also, no relief was given by the Ld. CIT(A) to the assessee.

3. Being aggrieved, the assessee has filed an appeal before the ITAT, wherein the assessee has taken the grounds in respect to reopening, as well as on merits.

4. During the course of hearing, Ld. Counsel of assessee began his arguments by challenging the re-opening done by the AO. Attention of the bench was drawn by him upon the Reasons recorded by the AO and it was submitted that the reopening was bad in law. It was further submitted by him that the Reasons have been recorded without there being any fresh tangible material coming into the possession of the AO. It has been submitted by him that the AO has recorded the Reasons on the basis of same set of material and records which were available at the time of framing of original assessment u/s 143(3). Reliance was placed by the Ld.

Counsel in this regard on the judgment of ITAT Mumbai in the case of HV Transmissions Ltd. in ITA No.2230/Mum/2010 and on the judgment of Delhi High Court in the case of CIT v. Orient Craft Ltd.(2013) 354 ITR 536. It was also submitted that in any case, there was change of opinion on the part of AO while recording impugned Reasons and therefore reopening of the case was invalid on this ground also. It was argued, in nutshell that the reopening is beyond jurisdiction and needs to be quashed.

5. On the other hand, Ld. DR has argued that the Reasons recorded by the AO are valid in the eyes of law. It has been further submitted by him that reopening has been done within the period of four years from the end of the impugned assessment year. It has been further submitted that there was no change of opinion, because in the original proceedings, various aspects were over-looked by the AO and after reconsidering the material available on record, it was noticed by the AO that income has escaped from assessment. Relying upon the judgment of Hon'ble Bombay High Court in the case of Dr. Amin's Pathology Laboratory vs JCIT 252 ITR 673 (Bom), it was also submitted that there being no formation of opinion on the part of the AO in original assessment order, reopening was valid and the same needs to be upheld. On specific query from the Bench to Ld. DR with respect to any fresh material, he could not controvert the submissions of the Ld. Counsel that there was no fresh tangible material coming into possession of the AO before recording the impugned

reasons. However, he reiterated that there was no change of opinion on the part of the AO while recording Reasons for reopening of this case.

6. We have heard both the parties and have gone through the orders of the lower authorities. We have also gone through the 'Reasons' recorded. It was noted by us that perusal of the 'Reasons' recorded, available at page no.21 to 22 of the paper book, indicated that these 'Reasons' have been recorded by the AO on the basis of records available with him since the time of framing of original assessment proceedings u/s 143(3) vide order dated 15.12.2008. These 'Reasons' have been recorded on 22.02.2011. Ld. DR has made an attempt to justify these 'Reasons' on the ground that the issues raised in the impugned reasons were not considered by the AO at the time of original assessment proceedings. Before we proceed further in this regard, we find it appropriate to reproduce the Reasons, as recorded by the AO:

> *"Date :22.02.2011*
>
> *In this case, the assessment for A.Y.2006-07 was completed u/s.143(3) of the I.T. Act, 1961 vide order dated 15.12.2008 of DCIT-7(3),Mumbai, assessing the income of the assessee at Rs.1,03,20,800/- as against the returned income of Rs.1,00,10,778/-.*
>
> *i) Perusal of the records reveal that assessee has derived dividend income to the tune of Rs.14,S8,519r. However, the disallowance with regard to section 1 4A of the I.T. Act has remained to be given effect.*
>
> *ii) The assessee has returned Short Term Capital Gain to the tune of Rs.91,28,881/- and the same has*

been assessed as such. However, examination of the list of details of share transaction under the held "Short Term Capital Gain" reveal the following number of transactions :-

The total-number of transactions of purchase and sales during the year is shown at 334.

On test check of the year's transaction, the- number of transactions at random is as under :-

August 2005	*-122*
January 2006	*-55*
May 2005	*-41*
June 2005	*-53*
July 2005	*-66*
September 2005	*-76*
December 2005	*-53*

Frequency and Pattern of Transaction :-

The frequency and retention of the shares after purchase are invariably within a period of 3 months and many of these transactions of purchase and sales are effected between a period of 2 to 1 5 days.

In addition, there have been trading through Kotak Securities of 41 scrips and no. of shares traded is 45,453/-.

Quantum of Sales :-

The total value of purchase of shares in the 334 transactions effected during the year works out to Rs.6,69,79,280/-. Similarly, the total quantum of sales for the year works out to Rs. 7,61,08,161/-. From the above characteristics with regard to the transaction it appears that prima facie these transactions are in the nature of business and trade and not investment oriented.

Tax effect on this account works out to Rs.27,38,664/-.

iii) Perusal of the Profit and Loss Account and the submissions on record reveal that TDS has remained

to be deducted in accordance with chapter-XVII(A) of the I.T. Act, on professional fees of RS.24,OOO/-. It should be therefore disallowed u/s 40(a)(ia) r.w.s.200(1) of the I.T. Act, 1961.

Therefore I have reason to believe that the income of the assessee chargeable to tax, has escaped assessment for A.Y.2006-07. Proceedings u/s147 of the Act are therefore initiated.

Issue notice u/s 148 of the Act."

6.1. The provisions of section 147 have been enshrined in the statute with a view to enable the AO to assess the escaped income. For this purpose, the AO has been conferred with the requisite powers under the law to reopen an already concluded assessment. On the other hand, the Constitution of our country has attached great sanctity to the concept of finality of litigation. Thus, by making suitable provisions at appropriate places in the statute itself, legislature has ensured that sword of litigation should not be kept hanging on the heads of the litigating parties, be it the Government or the Citizens. That's why, strict provisions with regard to assumption of jurisdiction, especially in cases of already concluded assessments, have been kept on the statute.

6.2. In the Income Tax Act, the provisions of section 147 to 151 of the Act deal with the issues of reopening of the assessment and framing of the re-assessment order by the AO. In these provisions, on the one hand, requisite powers have been given to the AO to carry out the task of bringing to tax the escaped income, but simultaneously, on the other hand, certain fetters have been provided within the frame

work of these provisions to ensure that these provisions are used only in deserving cases and no undue hardship is caused to the taxpayers by reopening their cases, after lapse of so many years. These provisions deal with the issues of determining the nature, scope of powers and obligations assigned by the legislature to the AO with regard to assumption of jurisdiction by the AO, for reopening of the case and for making the assessment of the reopened case. Various courts have held that since these provisions deal with the jurisdictional issues, these have to be followed strictly and applied literally, by the officers for reopening of the assessment and for framing the re-assessment orders. The compliance of the mandatory conditions has to be made by the AO at various stages, as prescribed in these provisions. The compliance of these mandatory conditions has been integrated in these provisions, in a step-wise manner. Many courts of our country have explained, in various cases, significance of these statutory requirements, time to time.

6.3. Thus, taking help from these judgments, relevant provisions of law, fixing obligations upon the AO for making mandatory compliances, in a step-wise manner, for valid assumption of jurisdiction for reopening and reframing of re-assessment order, can be summarized as under:

(i) Availability of the new tangible material indicating escaped income of the assessee, which should have come into possession of the AO, after the passing of

original assessment order, whether u/s 143(3) or 143(1),

(ii) Recording of the 'Reasons' by the AO: 'Reasons' recorded should not be based upon the change of opinion of the Assesing Officer. 'Reasons' should be such that any person of ordinary prudence should be in a position to make a belief about escapement of income on the basis of facts narrated and material referred to, in the 'Reasons' recorded. The 'Reasons' should show that, there is rational nexus and cause & effect relationship between the material sought be relied upon in the Reasons and belief sought to be formed by the AO about escapement of income.

(iii) In case; reopening is sought to be done by the AO after expiry of four years from the end of the relevant assessment year and the original assessment was framed u/s 143(3) then reasons can be recorded only if there was failure on the part of the assessee in disclosure of material of facts, as has been envisaged in first proviso to section 147.

(iv) Before issuing notice u/s 148, the AO has to obtain, on the reasons recorded by him, sanction for reopening of the case, from the competent authority as envisaged u/s 151 viz. Additional Commissioner or the Commissioner of Income Tax, as the case may be. Before granting its sanction, the sanctioning authority

is required to record its satisfaction based upon its independent application of mind, making out a case that as per the facts narrated and material referred to in the 'Reasons' recorded by the AO, a belief can be formed about escapement of income and case sought to be reopened is a fit case for reopening u/s 147.

(v) After obtaining the sanction, the AO is required to issue and serve notice u/s 148 upon the assessee, within the time limit as prescribed u/s 149, to enable him to assume jurisdiction to reopen the assessment.

(vi) The assessee is required to file to return of income, in response to notice u/s 148 and may request for the copy of reasons.

(vii) The AO is bound, as per law, to provide a certified and verbatim copy of Reasons to the assessee.

(viii) The assessee may file its objections before the AO, to the Reasons recorded, if any.

(ix) In pursuance to judgment of Hon'ble Supreme Court in the case of GKN Driveshafts 259 ITR 19 (SC), the AO is obliged to dispose of these objections and intimate the same to the assessee, before proceeding further with the reassessment proceedings.

(x) Thereafter, the AO is obliged under the law to issue and serve notice u/s 143(2) to enable him to make

assessment of the return filed by the assessee in response to notice issued under section 148.

(xi) Framing of the re-assessment order by the AO u/s 147/143(3) after providing adequate opportunity of hearing to the assessee and considering replies and evidences of the assessee, and all other applicable provisions of the Act.

6.4. The aforesaid compliances have to be made by the AO u/s 147 to 151 of Income Tax Act, 1961 read with other relevant provisions of the Act, in a step-wise and chronological manner. Therefore, validity of the reopening proceedings initiated by the AO, can be examined in this step-wise or chronological manner only.

6.5. Thus, coming back to the facts and circumstances of the case before us, we are required to examine the first thing first i.e. whether, in this case, there was any fresh tangible material in the possession of the AO at the time of recording of the 'Reasons'. In case, the first condition is fulfilled, then we are required to examine the compliance of prescribed conditions at the next step, and so on. In case, the first condition itself is not fulfilled, the proceedings become invalid in the eyes of law, there and then, and there would not be any requirement to examine any further. If the case of the AO fails on the first step itself, we would not be required to look into the other subsequent aspects, as proceedings will become invalid in the eyes of law at the very inception.

6.6 . In the present case, it was noticed by us that the case of the assesse is that there was no fresh tangible material in the possession of AO at the time of recording of impugned reasons. A perusal of the 'Reasons' recorded by the AO in this case reveals that at the time of recording of these 'Reasons' the AO had examined original assessment records only and no fresh material had come in the possession of the AO. In response to our specific query also, Ld DR could not point out any fresh material available with the AO at the time of reopening of the case of the assessee. Thus, assertion of the assessee that there was no fresh material with AO for reopening of this case, remained uncontroverted.

6.7. Under these facts and circumstances, let us now examine settled position of law on this issue. It has been held in various judgments coming from various courts that availability of fresh tangible material in the possession of AO at the time of recording of impugned reasons is a *sine qua none*, before the AO can record reasons for reopening of the case. We begin with the judgment of Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC), laying down that for reopening of the assessment, the AO should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the AO cannot assume jurisdiction to reopen already concluded assessment.

6.8. Recently, Hon'ble Delhi High Court in the case of **Pr. CIT vs Tupperware India Pvt. Ltd.**, in its order dt 10-8-15 (ITA no 415/2015) got an occasion to analyse latest position of law on this issue. After discussing many judgments on this issue, it was held that even in the case of original assessment order having been passed u/s 143(1), it is mandatory for the AO to have in its possession, fresh tangible material before reopening of the case.

6.9 In the case of Bombay Stock Exchange Ltd. (writ petition no.2468 dt. 12.06.2014) (89 CCH 118), Hon'ble Bombay High Court observed as under:

> *"5. It is pertinent to note that Respondent No.1 has not set out in the reasons which fact or other material was not disclosed by the Petitioner that led to income escaping assessment. In fact, on going through the reasons, we find that Respondent No.1 has come to the conclusion/belief that income had escaped assessment on the basis of the material already before him and* ***no new tangible material has been relied upon by Respondent No.1*** *to come the said conclusion/belief. This is clear from the use of the words "on perusal of the records it is noticed.....", "further perusal of statement 2 enclosed with the computation of income shows....." and "it is further noticed....." in the impugned notice."*

6.10. In the case of **CIT vs. Orient Craft Ltd. 354 ITR 536,** it was observed by Hon'ble Delhi High Court that in the said

case**,** Reasons for reassessment disclosed that AO reached belief that there was escapement of income "on going through the return of income" filed by assessee after he accepted return u/s. 143(1) without scrutiny, and nothing more. In these facts, it was held by the Hon'ble High Court that it was nothing but review of earlier proceedings and abuse of power by AO. It was further held that since there was no whisper in reasons recorded, of any tangible material which came to possession of AO subsequent to issue of intimation, therefore, it was an arbitrary exercise of power conferred u/s 147. Thus, reopening was held to be invalid on this ground itself.

6.11. In the case of **Mohan Gupta (HUF) vs. CIT 366 ITR 115,** same view has been followed by Hon'ble Delhi High Cout.

6.12. Further, in the case of **CIT vs. K. L. Arora in ITA 118/2014 dated 21-04-2014, Hon'ble Delhi High Court observed as under:**

"This Court is of the opinion that no fault can be found with the Tribunal's order. It is well settled that in order to issue a valid reassessment notice, the AO has to be satisfied on the basis of ***tangible material or information subsequently available*** *to him that the assessee had not made full and true disclosure which led to income escaping assessment at the stage when the original assessment was completed. Short of that a re-appreciation of the* ***existing materials*** *which really amounts to review is impermissible. The Tribunal, in the circumstances of this case was justified in concluding that re-assessment proceedings themselves were not in accordance with law and consequently dismissing the Revenue's appeal. No question of law arises for consideration."*

6.13. In the case of **CIT vs. Shri Atul Kumar Swami** in ITA No. 112/2014 dated 18-03-2014 reported at 52 Taxmann.com 47, Hon'ble Delhi High Court observed as under:

> *".....Reopening of assessment is valid if it is based on tangible material to justify conclusion that there was escapement of income—In instant case note forming part of return clearly mentioned and described nature of the receipt under a non-compete agreement—Reasons for issuance of notice u/s 147 nowhere mentioned that revenue came up with any other fresh material warranting reopening of assessment—Mere conclusion of proceedings u/s 143(1) ipso facto does not bring invocation of powers for reopening assessment—Reopening of assessment was unjustified—Revenue's appeal dismissed."*

6.14. Further reliance can be placed on the detailed judgment in the case of **Madhukar Khosla vs. ACIT 367 ITR 165 (Delhi),** wherein it has been held that the reopening is not permitted under the law unless it is based on fresh tangible material and that if The "***reasons to believe***" are not based on ***new, "tangible materials"***, the reopening amounts to an impermissible review**.** It has been further observed that :

> *"The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible materials", then the*

*reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made (**Kelvinator of India Ltd** [(2010)320 ITR 561 (SC)] and **Orient Craft Ltd** [(2003)354 ITR 536 (Delhi)] followed, **Usha International** [(2012)348 ITR 485 (Del) (FB)] referred)"*

6.15. In the case of **CIT vs Jyoti Devi 218 CTR 264,** Hon'ble Rajasthan High Court held that since Revenue could not point out any information or material which had subsequently come to the notice of the AO to enable him to form the requisite belief that any income liable to be assessed had escaped assessment, therefore, the initiation of reassessment proceedings was not valid.

6.16. Hon'ble Madras High Court in the case of **Bapalal & Co. Exports 289 ITR 37,** held that in the absence of any new material, the AO is not empowered to reopen an assessment irrespective of the fact whether it was made under s. 143(1) or s. 143(3).

6.17. Recently, Mumbai Bench of ITAT in the case **HV Transmissions Ltd.** in I.T.A No. 2230/Mum/2010 held that even though original assessment was made under s. 143(1) and not under s. 143(3), assessee having made full disclosure of its income, AO was not justified in reopening the assessment in the absence of any new material. Hon'ble Bench has relied upon third member judgment from Mumbai Bench

of ITAT in the case **Telco Dadajee Dhackjee Ltd** vs DCIT (ITA No 4613/Mumbai/2013 dt 12-5-2010), in support of this view.

6.18. Similar view has been expressed by Hon'ble Delhi Bench of ITAT in the case of **M/s Nexgen School of Business Vs. Deputy Commissioner of Income Tax, [ITA No. 5609/DEL/2010]** holding that the Assessing Officer was not justified to initiate the reopening proceedings in absence of any new information or material on record since the date of filling and processing of the return of income.

6.19. In the present case, it has already been discussed that admitted facts are that there was no fresh material coming into the possession of the AO, at the time of recording of the 'Reasons'. These facts have not been rebutted by Ld DR also. The case law relied upon by Ld DR in the case of Dr. Amin's Pathology, supra is not applicable on the issue being decided here. The issue that in absence of any fresh material, whether AO can proceed to record Reasons, was not before Hon'ble High Court, therefore Hon'ble High court had decided the issue of Change of opinion in that case. In the case before us, as discussed above, we are not going into that issue. In our considered opinion, at this stage, we need not go into the other aspect i.e. whether there was change of opinion or not. This issue has been aptly clarified by Hon'ble High Court in the case of Madhukar Khosla, (supra), wherein it has been held by their lordships that external facts or material constitute the driver, or the key which enables the AO to

legitimately reopen the completed assessment and in absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. Further, most importantly, it was held by the Hon'ble High Court that it is at the next stage when the question, whether the reopening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "new tangible materials", then there would be no "reasons to believe", and consequently reopening would be an impermissible review. Under these circumstances there would not arise any need to go the next stage to examine the next question, i.e., whether there was "review" or "change of opinion". The condition with respect to availability of "new tangible material" is step anterior to the condition of no "change of opinion" or "review".

6.20 Thus, in view of judgments directly on the issue under consideration, as discussed in paras 6.7 to 6.18, above, reopening done by Ld. AO in the absence of fresh tangible material, is invalid and bad in law. Therefore, the initiation of reassessment proceedings was not valid. Thus, re-assessment order framed in pursuance to invalid reopening is illegal; the same is hereby quashed. Since assessment order has been quashed on jurisdictional ground itself, other grounds are not being adjudicated.

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

Order pronounced in the open court on 22nd September 2015.

Sd/-	Sd/-
(Joginder Singh)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 22/09/2015

*Patel, P.S.*नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**