

**अपीलीय अधिकरण, मुंबई न्यायपीठ मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL “ D ” BENCH, MUMBAI**

सर्वश्री आई.पी.बंसल, न्यायिक सदस्य. एवं श्री राजेन्द्र, लेखा सदस्य के समक्ष

**BEFORE SHRI I.P. BANSAL, JM AND RAJENDRA, AM**

आयकर अपील सं./I.T.A. No.4999/MUM/2010

(निर्धारण वर्ष / Assessment Year : 2002-03)

The ITO 25(3)(3), C-11, R.No.304, Pratyaksh Kar Bhavan, Bandra Kurla Complex, Bandra(E), Mumbai 400051	<b>बनाम/</b> <b>Vs.</b>	Shri Rupkumar Balchand Rohra, 402, Millinium Paradise, Neptune, EMP-28, Thakur village, Kandivali (E), Mumbai 400 101.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AFBPR 5573H		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
अपीलार्थी ओर से/ <b>Appellant by:</b>		Shri Sanjeev Jain
प्रत्यर्थी की ओर से/ <b>Respondent by :</b>		Shri Farrokh Irani

सुनवाई की तारीख / **Date of Hearing** : 10/10/2013

घोषणा की तारीख / **Date of Pronouncement** : 10/10/2013

**आदेश / O R D E R**

**PER I.P.BANSAL,J.M:**

This is an appeal filed by the revenue. It is directed against the order passed by Ld. CIT(A)-35 Mumbai dated 30/03/2010 for the assessment year 2002-03. Grounds of appeal read as under:

*“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of `26,99,739/- made by the AO on account of LTCG without remanding the issue back to the file of the AO for the purpose of finding out the whereabouts of the original MOU and for taking opinion of the signature expert.*

*2. The appellant prays that the order of the Ld. CIT(A) on the above ground be set-aside and that of the AO be restored.”*

2. Before the appeal was argued by Ld. DR, it was submitted by Ld. AR that before Ld. CIT(A) the assessee had challenged the validity of reassessment proceedings as well as merits of the addition. He submitted that the issue regarding validity of reassessment has been decided by Ld. CIT(A) against the assessee and on merits he has granted relief to the assessee. The assessee did not prefer either cross appeal or cross objection. However, taking resort to Rule 27 the assessee want to support the order of Ld. CIT(A) granting relief to the assessee to contend that Ld. CIT(A) has wrongly upheld the validity of reassessment proceedings. He submitted that such course of action can be adopted by the assessee and such position of law is well settled and accepted by the Mumbai Tribunal vide its order dated 29/12/2005 in ITA No.3257/Mum/2002 in the case of ITO vs. M.L. Industries. He has submitted a copy of the said decision before us and a copy was also given to Ld. DR.

3. Reading from the aforementioned order of the Tribunal in the case of ITO vs. M.L. Industries(supra) it was submitted by Ld. AR that in that case also the issue on merits regarding addition of Rs. 9,43,618/- was decided by Ld. CIT(A) in favour of assessee and issue regarding validity of reassessment proceedings was decided against the assessee and it was the contention of the assessee before the Tribunal that taking resort to Rule 27 assessee may be permitted to say that Ld. CIT(A) was wrong in upholding the validity of reassessment proceedings. He in this regard referred to the observations of the Tribunal in para 4 to 7, which for the sake of convenience are being reproduced below:

*“4. In the appeal before the CIT(A), the assessee had taken o sets of grounds; one set of grounds against the reopening of the assessment u/s 147 and the other set of grounds against the merit of the additions made by the assessing authority. While disposing of the first appeal, the CIT(A) upheld the legality of the reopening of the assessment u/s 147 and, at the same time, granted relief to the assessee on merit. The assessee has neither filed an appeal against the order of the CIT(A) nor filed any cross objection in the light of the appeal filed by the Revenue. Revenue is aggrieved by the quantum relief granted by the QT(A) and that is why they have come in appeal before us.*

*5. In this scenario, Shri K Gopal, the learned counsel appearing for the assessee contended that he is seeking the right available to the assessee under Rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963, and therefore, revives assessee's objection to the reopening of the assessment made by the assessing authority u/S*

147. The learned counsel submitted that even though the assessee was successful in first appeal on merits of the case, the assessee's around relating to the reopening of assessment was dismissed by the CIT(A), against which point, the assessee has not filed any appeal or cross objection. but the learned counsel submitted that by virtue of Rule 27, the assessee is still bestowed with the right to support the order of the CIT(A) on the basis of the ground of reopening which has been otherwise decided against the assessee.

6. We considered this argument very seriously. The relevant Rule 7.7 of Income-tax (Appellate Tribunal) Rules, 1963 reads as under:

***“Respondent may support order on grounds decided against him (underline provided by us)***

***27. The respondent though he may not have appealed, may support the order appealed against on any of the grounds decided against him.”***

7. We do agree with the learned counsel appearing for the assessee that the assessee is permitted to revive the ground of reopening of the assessment which was dismissed by the CIT(A), in the course of defending its case and defending the order of the CIT(A). Therefore, we have to examine whether the assessing officer was justified in law in reopening the assessment u/s 147.”

4. We have heard both the parties. Ld. DR after going through the aforementioned decision and Rule 27 did not object to such request of Ld. AR that the issue regarding validity or otherwise of reassessment proceedings can be taken by the assessee during the course of this hearing. Therefore, we admit such claim of the assessee and proceed first to decide this issue as the same touches to the jurisdiction of AO to assess the assessee by way of re-assessment. If it is held that reassessment proceedings were not validly carried out then we may not be required to go into the merits of the case.

5. Arguing the contention of the assessee regarding invalidity of reassessment proceedings Ld. AR submitted that re-assessment proceedings are invalid on the ground that these proceedings have been initiated on obtaining approval from Commissioner of Income Tax on 31/3/2009. According to Ld. AR as per provisions of section 151 of the Income Tax Act, 1961 (the Act), if the assessment which is not earlier framed under section 143(3), after expiry of four years, an approval will be required from Joint Commissioner of Income Tax. He in this regard referred to the provisions of section 151 of the Act, which read as under:

***“[Sanction for issue of notice.***

**151.** (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.]”*

Referring to the aforementioned provision it was submitted by him that where the assessment earlier frame is otherwise than section 143(3) or 147 then notice of reassessment, if issued by an officer below the rank of Joint Commissioner of Income Tax, after the expiry of four years from the end of the relevant assessment year then the notice under section 148 has to be issued only in the circumstances when Joint Commissioner of Income Tax is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notices.

6. Adverting to the facts of the present case it was submitted by Ld. AR that assessment in the present case originally was never made under section 143(3) or under section 147. The impugned assessment year is A.Y 2002-03. Four years from the end of the relevant assessment year will expire on 31/3/2007. He has also submitted before us copy of the letter dated 30/3/2009 issued by Commissioner of Income Tax-25, Mumbai granting approval to the Additional Commissioner of Income Tax, Range 25(3) for the issue of notice under section 148, the contents of such letter are as under:

*“Office of the Commissioner of Income-tax-25,  
C-II, 2 Floor, Pratyaksha Kar Bhawan,  
Bandra Kurla Complex, Bandra (East),  
Mumbai 400 051.*

*No.CIT-25/Approvat u/s. 151/ 2008-09*

*Date: 31/03/2009*

*The Addl. Commissioner of Income-tax,  
Range 25(3), Mumbai.*

*Sub : Reopening of assessment U/s 147 of the I. T. Act. 1961 in the  
case of Shri Rupkumar Batchand Rohra for the A.Y. 2002-03  
PAN : AFPPR5573H - reg.*

*Please refer to the above.*

*The approval u/s. 151(1) of the Income Tax Act, 1961 for issue of notice u/s 148 of the I. T. Act, 1961 is hereby granted in the case of Shri Rupkumar Balchand Rohra for the A.Y. 2002-03 for the reasons reported by the .T.O. 25(3)(3, Mumbai in his proposal dated 31/03/2009.*

*Sd/-*

*(DILIP KUMAR)*

*Commissioner of Income tax 25,  
Mumbai.”*

7. On aforementioned facts, it was submitted by Ld. AR that assessment proceedings have to be held to be invalid in view of the decision of Hon'ble Bombay High Court in the case of Ghanshyam K. Kabrani vs. ACIT , 346 ITR 443 (Bom). In the said case by way of proceedings under Article 226 of the constitution, the assessee had challenged legality of the notice inter-alia on the ground that approval under section 151 was obtained from Commissioner instead of Additional Commissioner of Income Tax. As against that it was the case of the revenue that since approval was granted by Commissioner of Income Tax it should be taken as compliance with the provisions of section 151 of the Act. It was the case of the assessee that provisions of section 151(2) are mandatory which requires sanction from Joint Commissioner of Income Tax and as the approval was taken from CIT the initiation of proceedings itself was bad in law. Our attention was invited to the following observations of their Lordship from the said decision:

*"The second ground upon which the reopening is sought to be challenged is that the mandatory requirement of section 151(2) has not been fulfilled. Section 151 requires a sanction to be taken for the issuance of a notice under section 148 in certain cases. In the present case, an assessment had not been made under section 143(3) or section 147 for the assessment year 2004-05. Hence, under sub-section (2) of section 151, no notice can be issued under section 148 by an Assessing Officer who is below the rank of Joint Commissioner after the expiry of 4 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. The expression "Joint Commissioner" is defined in section 2(28C) to mean a person appointed to be a Joint Commissioner of Income-tax or an Additional Commissioner of Income-tax under section 117(1). In the present case, the record before the court indicate that the Assessing Officer submitted a proposal on March 28, 2011, to the Commissioner of Income-tax (1), Thane, through the Additional Commissioner of Income-tax Range (I), Thane. On March 28, 2011, the Additional Commissioner of Income-tax forwarded the proposal to the Commissioner of Income-tax and after recording a gist of the communication of the Assessing Officer stated that :*

*"As requested by the Assessing Officer, necessary approval for issue of notice under section 148 may kindly be granted in the case, if approved."*

*On this a communication was issued on March 29, 2011, from the office of the Commissioner of Income-tax (1) conveying approval to the proposal submitted by the Assessing Officer. There is merit in the contention raised on behalf of the assessee that the requirement of section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the issuance of a notice under section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in section 2(28C). The Commissioner of Income-tax is not a Joint Commissioner within the meaning of section 2(28C). In the present case, the Additional Commissioner of Income-tax forwarded the proposal submitted by the Assessing Officer to the Commissioner of Income-tax. The approval which has been granted is not by the Additional Commissioner of Income-tax but by the Commissioner of Income-tax. There is no statutory provision here under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner. In a similar situation the Delhi High Court in CIT v. SPL's Siddhartha Ltd. (ITA No. 836 of 2011 decided on September 14, 2011)-since reported in [\[2012\] 345 ITR 223](#) (Delhi) held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court.*

*In view of the findings which we have recorded on submissions (i), (ii) and (iv), it is not necessary for the court to consider submission (iii) which has been urged on behalf of the assessee. Once the court has come to the conclusion that there was no compliance with the mandatory requirements of sections 147 and 151(2), the notice reopening the assessment cannot be sustained in law.*

*For these reasons, we are of the view that the petitioner would be entitled to succeed. Rule is made accordingly absolute by quashing and setting aside the impugned notice dated March 30, 2011. There shall be no order as to costs."*

8. Thus it was pleaded by Ld. AR that according to the established facts of the present case, approval has been granted by Commissioner of Income Tax instead of Joint Commissioner of Income Tax which is authorized to grant approval under the provisions of section 151 and in view of the aforementioned decision of Hon'ble Jurisdictional High Court the issuance of notice under section 148 should be held to be non-sustainable in law.

9. On the other hand, on the aforementioned issue Ld. DR relied upon the order of Ld. CIT(A) vide which reassessment proceedings have been held to be valid.

10. We have heard both the parties and their contentions have carefully been considered. The validity or otherwise of reassessment proceedings were challenged before Ld. CIT(A) by way of additional ground. The issue taken before us regarding jurisdictional defect under section 151 was not raised before Ld. CIT(A). However, it is duly recorded in the order of Ld. CIT(A) that the AO had obtained the approval of Commissioner of Income Tax on 31/3/2009. In support the assessee had also filed a letter issued by Commissioner of Income Tax, which is reproduced in the above part of this order. Therefore, there remains no dispute on the fact that re-assessment proceedings have been initiated on the approval received by the AO from Commissioner of Income Tax and the said approval was not given of Additional Commissioner / Joint Commissioner of Income Tax. There is also no dispute that the approval has been issued after a period of four years from the end of the relevant assessment year. If these facts are undisputed, then in accordance with aforementioned decision of Hon'ble Jurisdictional High Court it has to be held that the reassessment proceedings based on an approval granted by Commissioner of Income Tax instead of Additional Commissioner / Joint Commissioner of Income Tax are required to be held to be invalid. The relevant portion of

aforementioned decision has already been reproduced. Relying thereon, we decide this issue in favour of assessee.

10.11.2013 So as it relate to issues raised by revenue in its appeal we hold that , they have become infructuous in view of our findings that reassessment proceedings itself are invalid as assessment done in pursuance thereto will be non-est.

11. In the result, the appeal filed by the revenue is dismissed though on different ground which does not form part of grounds of appeal submitted by the revenue.

Order pronounced in the open court on 10 /10/2013 .

आदेश की घोषणा खुले न्यायालय में दिनांक: 10/10/2013 को की गई ।

Sd/-

Sd/-

राजेन्द्र (RAJENDRA)

आई.पी.बंसल (I.P.BANSAL)

लेखा सदस्य /ACCOUNTANT MEMBER

न्यायिक सदस्य /JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 10/10/2013

व.नि.स.Vm , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
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