

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

**BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER**

**ITA No. 1502/Del/2013
Assessment Year: 2004-05**

G.K. Consultants Limited, vs Income Tax Officer,
302, G.K. House, Ward 12(2),
187-A, Sant Nagar, New Delhi.
East of Kailash,
New Delhi.
(Appellant) (Respondent)

Appellant by: Shri P.C. Yadav
Respondent by: Shri Satpal Singh, Sr. DR

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal has been preferred by the assessee against the order of the CIT(A)-IX, New Delhi dated 9.1.2013 in Appeal No. TR-14/11-12 for AY 2004-05.

2. Ground No. 1 and 13 of the assessee are general in nature which need no adjudication. In ground no. 2, 3 & 4, the assessee is challenging the action of the AO u/s 148 of the Income Tax Act, 1961 which reads as under:-

“2) Under the facts and circumstances of the case and in law, the learned CIT (A), has erred in affirming the jurisdiction of the AO under section 147, and ignoring that there was neither any satisfaction of the AO nor quantification of escaped assessment at the time of recording of reasons.

3) The CIT (A) has failed to appreciate that the AO has solely relied on the vague and scanty report of investigation wing for assuming jurisdiction of 147.

4) The Ld CIT(A) has further failed to appreciate that allegations made in the report of investigation wing, were solely based on the statement of one Sh Subodh Gupta which statement was retracted in due course before the investigation wing itself

3. Briefly stated, the facts giving rise to this appeal are that the assessee is a company engaged in the business of consultancy, investments, finance and trading in shares. The assessee company filed its return of income for the year under consideration on 31.10.2014 and the same was processed u/s 143(1) of the Act. It is also pertinent to note that initially the assessee company was incorporated as private limited company and later on it was converted into public limited company on 15.9.1995. The assessee company is a non-banking finance company duly registered with RBI and listed on various stock exchanges such as DSE, BSE, CSE and ASE. A survey was conducted by investigation wing of the department on Shri Subodh Gupta, CA on 30.10.2003 and during the course of survey statement recorded on

oath, Shri Subodh Gupta admitted that his company is involved in providing bogus accommodation entries to various entities. Subsequently, Shri Subodh Gupta vide letter dated 4.11.2003 retracted from his above statement recorded on oath on 30.10.2003 and informed the revenue authorities i.e. DDIT that the statement was recorded under coercion and threat which is contrary to the record seized during the course of survey proceedings.

4. The AO vide notice dated 10.12.2007 assumed jurisdiction reassessment u/s 147, 148 of the Act alleging that the assessee is providing accommodation entries to various concerns. In response to the above notice, the assessee vide its letter dated 9.1.2008 informed that the original return filed on 31.10.2004 may be considered as a return filed in pursuance to notice u/s 148 of the Act. In response to the reasons recorded, the assessee company filed its objections contending that the assessment is reopened without application of mind on the basis of surmises and conjectures. The AO dismissed the objections of the assessee. Aggrieved with the order of the AO, the assessee preferred an appeal before the CIT(A) challenging the reassessment on various grounds which was also dismissed by the CIT(A) vide his order dated 9.1.2013. Aggrieved with the order of the CIT(A), the assessee company has preferred this appeal.

Ground no. 2, 3 & 4

5. Apropos these grounds, we have heard argument of both the parties and carefully perused the entire record including paper book, written submissions filed by the assessee and legal propositions and citations relied by the revenue authorities and the appellant assessee.

6. Ld. Counsel of the assessee submitted that the assessee has challenged the jurisdiction of the AO u/s 147 mainly on three following grounds:-

- i) No reason has been recorded in the case of present assessee company as perusal of the reasons recorded would show that the entire allegations were made against Shri Subodh Gupta and not against the assessee. To support this contention, the counsel of the assessee has placed his reliance on the decision of **Hon'ble Supreme Court in the case of CIT vs K. Adinarayana Murty (1966) 65 ITR 607(SC)** wherein it has been held that under the scheme of the Income Tax Act, the "individual" and the "Hindu undivided family" are treated as separate units of assessment and if a notice u/s 34 of the Act is wrongly issued to the assessee in the status of an individual and not in the correct status of a Hindu undivided family, the notice is illegal and proceedings taken under that notice are ultra vires and without jurisdiction. Ld. Counsel of

the assessee has drawn our attention towards reasons recorded and submitted that 'reason to believe' entertained by the AO was not in respect of the assessee appellant company as it is evident from the expression "his income" used by the AO in the reasons recorded.

- ii) Ld. Counsel of the assessee further contended that no action of reassessment is permissible on the basis of retracted statements of Shri Subodh Gupta. Ld. Counsel of the assessee has placed reliance on the decision of **Hon'ble Karnataka High Court in the case of CIT vs Dr. R. N. Thippa Shetty reported as 322 ITR 525 (Karnataka)** and on the recent decision of **Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs Sunrise Tooling System Pvt. Ltd.** dated 22.1.2014 in ITA 399/2013 and submitted that no action of reassessment is permissible on the basis of retracted statement of Shri Subodh Gupta.
- iii) The next ground/argument of ld. Counsel of the assessee is that no action of reassessment u/s 147 of the Act is permissible for framing protective assessment in the absence of substantive assessment till the date of assumption of jurisdiction u/s 147 of the Act. To support this contention, ld. Counsel of the assessee has

placed reliance on the decision of **ITAT, Mumbai in the case of M.P. Ramachandaran vs DCIT 129 TTJ 190 (Mumbai)**.

7. Replying to the above, ld. Departmental Representative (DR) supported the orders of the authorities below and submitted that there exists link between the material which was before the AO at the time when reasons for reopening of assessment were recorded and when the reassessment proceeding was made. Ld. DR further submitted that the link between the material gathered by the investigation wing and the assessee company not only established at the stage on which notice u/s 148 of the Act was issued but also in the course of reassessment proceedings. Ld. DR also pointed out that the information received from the investigation wing of the department was not general and vague but the same was very specific and pertained to the transaction with the assessee company. The DR supported the action of the AO for initiation of proceedings u/s 147 and 148 of the Act and submitted that the AO was justified in forming a prima facie belief that the income chargeable to tax had escaped assessment on the basis of information received from Investigation wing of the Department and, therefore, he had reason to believe that the income chargeable to tax had escaped assessment. The DR finally contended that the AO had rightly assumed jurisdiction u/s 147 of the Act to reopen the assessment.

8. On careful consideration of above contentions and submissions of both the parties, at the outset, we observe that the AO initiated and proceeded to reopen the assessment of the assessee appellant company by recording following reasons:-

“A report on the survey u/s 133A of the I. T Act conducted on 30. 10.2003 (falling under the Financial Year relevant to the A.-y. 2004-05) in the case of Shri Subodh Gupta, CA by the Addl. DIT (Investigation), Unit-III, New Delhi was received by this office. Perusal of the report reveals that Shri Subodh Gupta is a Director of M/s G.K. Consultant Pvt. Ltd. Further, perusal of the report reveals that in reply to Q. No. 24, Shri Subodh Gupta accepted that his companies do not possess any of the statutory records which are a mandatory requirement to be maintained. They are for all purposes managed by him for furnishing accommodation entries to his clients. There is practically no capital of these companies which are only managed to accommodate others by rotating funds through them. He stated that for all this effort his income in the transactions is only 0.5% to 1.5% of the entry amount. The report indicates the various transactions held by M/s G.K. Consultants Pvt. Ltd., however, the quantum of transactions income generated thereon has not been quantified.

The assessee had filed return of income for A. Y. 2004-05 on 01.10.2004 declaring an income of Rs. Nil claiming itself to be engaged in the business of consultancy, investments, finance and trading in shares, IT related business and such other allied business. The assessee had not disclosed any income from the accommodation entries. Thus, there is clear cut escapement of income. ”

9. From the above contentions of both the parties, we also observe that admittedly, the survey was conducted on Shri Subodh Gupta, CA on 30.10.2003 by the investigation wing of the department and during the course of survey, statement of Shri Subodh Gupta was recorded on oath which was retracted by Shri Subodh Gupta vide his letter dated 4.11.2003 (PB page no. 62 & 63). From careful perusal of the reasons recorded by the AO prior to issuance of notice u/s 148 of the Act, we clearly observe that the AO proceeded on the basis of statement of Shri Subodh Gupta recorded during the course of search proceedings on 30.10.2003 which was retracted on 4.11.2013 by a letter submitted to the department. From the reason recorded, we also observe that the AO proceeded to make protective addition on the basis of retracted statement of Shri Subodh Gupta. We also observe that the AO proceeded to make protective addition on the basis of retracted statement of Shri Subodh Gupta and at the same time, we also observe that at the time of recording reasons, no substantive assessment or addition was made, neither in the case of Shri Subodh Gupta nor in any other case, till and on the date of assumption of jurisdiction u/s 147 of the Act.

10. The main facts recorded in the reasons indicate that all allegations have been made against Shri Subodh Gupta in the second part of reasons recorded without assigning any specific allegation and quantifying the

quantum of transactions, the AO has simply mentioned that the assessee had not disclosed any income from the accommodation entries, therefore, this is a clear cut escapement of income. In this situation, we clearly observe that the target of the AO in the reasons recorded was Shri Subodh Gupta, CA and not the assessee company.

11. Coming to the legal proposition and citations relied by the assessee, we observe that in the case of CIT vs R.N. Thippa Shetty (supra), speaking for High Court of Karnataka, their lordships held that if the very basis on which reopening was ordered did not exist, then there was no question for reopening of the case on the basis of withdrawn/retracted statement. The relevant observations of Hon'ble High Court read as under:-

“It is further pertinent to mention here that once the statements said to have been recorded u/s 132(4) of the Act were withdrawn, then there existed no material on record to warrant reopening of the case against the assessee u/s 148 of the Act. If the very basis on which reopening was ordered did not exist, there was no question for reopening of the case. This material aspect of the matter has not been considered by the AO, who proceeded to direct reopening of the case, without there being any legally admissible evidence available on record. Thus the very issuance of notice u/s 148 of the Act is found to be illegal and absolutely without jurisdiction.”

12. Ld. Counsel of the assessee has also placed reliance on the decision of ITAT, Mumbai in the case of **Suresh K. Jajo vs ACIT (2010) 39 SOT 514 (Mumbai)** wherein following the decision of the coordinate bench of ITAT,

Mumbai in the case of **M.P. Ramachandaran vs DCIT (2009) 32 SOT 592**

(Mumbai), it has been held that there may be substantive assessment without any protective assessment but there cannot be protective assessment without there being a substantive assessment. The relevant observations and findings of the Tribunal in the case of M.P. Ramachandran vs DCIT (supra) read as under:-

“Though from the reasons recorded by the A.O., it comes up that he had taken the steps for including this amount in the reassessment with a view to protect the interest of Revenue, but he had not specifically spelt out his mind that the addition was to be made on protective basis. It is another matter that while passing the order u/s.143(3) r.w.s. 147 addition of Rs.527.85 lakhs was made on protective basis. Be that as it may, we shall proceed to decide the matter with the presumption that the AO reopened the original assessment made u/s 143(3) on this count for the purpose of making the disallowance of advertisement expenses on protective basis. Protective assessment cannot be independent of substantive assessment. Thus protective assessment is always successive to the substantive assessment. There may be a substantive assessment without any protective assessment, but there cannot be any protective assessment without there being a substantive assessment. In simple words there has to be some substantive assessment/addition first which enables the AO to make a protective assessment/addition. Substantive addition/assessment is made in the hands of the person in whose hands the AO prima facie holds the opinion that the income is rightly taxable. Having done so and with a view to protect the interest of the Revenue, if the AO is not sure that the person in whose hands he had made the substantive addition rightly, he embarks upon the protective assessment. Thus the protective assessment is

basically based on the doubt of the AO as distinct from his belief which is there is the substantive assessment. Obviously there is no place for 'doubt' in the scheme of reassessment, as it has to be belief of the AO about the escapement of income, which is the foundation for assessment or reassessment u/s 147. Even if for a moment we agree with the Id. DR that the protective addition is different from substantive addition and hence the reassessment proceedings be upheld, we find that ultimately the same conclusion will follow if the substantive addition is struck down at a place where it was made. In such a scenario the protective addition will get converted into substantive addition in the reassessment. That will also run contrary to the format of reassessment, being to tax an income which has escaped assessment. In that case again it will tantamount to reopening assessment on the basis of an item of income or disallowance, which has already been made in block assessment of the assessee, thereby leaving no income escaping assessment. Under these circumstances we are satisfied that having made addition of Rs.527.85 lakhs in the block assessment, the Assessing Officer was not justified in forming the belief, either on substantive or protective basis, that the same income has escaped assessment in the instant year. CIT VS. Wipro Finance Ltd. (2008) 10DTR (Kar) 281 relied on.”

13. In the case of Suresh K. Jajo vs ACIT, ITAT, Mumbai reiterated the same legal proposition and held as under:-

“In the present case, the observations of the AO while completing assessment for asstt. Year 2001-02 cannot be said to be an expression of his intention to make a protective assessment of the capital gain as long term capital gain. It is an assessment pure and simple. Firstly, the words used by the AO do not express his intention that the long-term capital gain is being brought to tax by way

of protective assessment. Secondly, there is no substantive assessment already made treating the capital gain as short term capital gain. Therefore, there can be no protective assessment. Thirdly, there has been a demand (without any limitation that it should not have been recovered) raised pursuant to the above assessment which also shows that the said assessment is not a protective assessment.”

14. In the present case, from the reasons recorded by the AO as reproduced hereinabove, we observe that the AO went on to initiate reassessment proceedings u/s 147 and 148 of the Act on the basis of retracted statement of Shri Subhash Gupta without making any further inquiry and investigation. From bare reading of reasons recorded, we also observe that the AO went on to reopen the assessment with a genuine intention to make protective addition pertaining to the accommodation entries alleged to be provided by the appellant company and at the same time, we notice that on a specific query from the Bench, ld. DR was unable to show us that there was a substantive assessment/addition either in the case of Shri Subodh Gupta or in the case of anybody else on the date of assumption of jurisdiction u/s 147 of the Act.

15. In view of above, we clearly hold that the AO had to initiate reassessment proceedings u/s 147 and 148 of the Act only on the basis of retracted statement of Shri Subodh Gupta, CA without making any further inquiry or investigation. We also hold that the AO proceeded to reopen the

assessment of the assessee company for making protective assessment/addition but no substantive assessment existed on the date of assumption of jurisdiction u/s 147 of the Act neither in the case of Shri Subodh Gupta nor in the case of any body else.

16. Ld. Counsel of the assessee placing reliance on the decision of **Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs Dhingra Metal Works (2010) 328 ITR 384 (Delhi)** and submitted that even on the basis of the statement made by the assessee during the course of survey, the AO could not have made addition as the said statement cannot be said to be conclusive and it is open to the person who has made the admission in the statement to show that the same is incorrect. Ld. Counsel of the assessee further submitted that in the present case, the statement of Shri Subodh Gupta was recorded in his individual capacity and not as a director of the assessee company which was also retracted only after four days on 4.11.2003, therefore, the AO was not justified in assuming jurisdiction for initiation of proceedings u/s 147 and in issuing notice u/s 148 of the Act.

17. The counsel of the assessee has also placed reliance on another decision of **Hon'ble Jurisdictional High Court of Delhi in the case of Signature Hotel vs ITO (2011) 338 ITR 51 (Del)** and submitted that the AO must have "reason to believe" that an income chargeable to tax has escaped

assessment and it is mandatory for the AO that the “reason to believe” are required to be recorded by the AO and if the belief is not bona fide or based on vague, irrelevant and non-specific information, then the same cannot be regarded as material evidence which prima facie establishes escapement of income, more so, when the AO did not apply his own mind to the information to arrive at the belief as to whether or not any income had escaped assessment, then initiation of proceeding and notice u/s 147 and 148 of the Act deserves to be quashed. Ld. Counsel of the assessee has drawn our attention towards reasons recorded by the AO and submitted that the AO has proceeded to make protective assessment without any substantial assessment on the basis of retracted statement of Shri Saurabh Gupta recorded during the course of survey without making any further investigation and inquiry and without applying his own mind to the material and evidence available before him at the time of recording reasons and assuming jurisdiction u/s 147 of the Act for issuance of notice u/s 148 of the Act.

18. Ld. DR replied that the AO proceeded to initiate proceeding of reopening of assessment u/s 147 of the Act and for issuing notice u/s 148 of the Act on cogent and justified basis because Shri Subodh Gupta, CA who was also a director in the assessee company made a statement that he

provided accommodation entries to the various entities through an assessee and other companies managed and controlled by him, therefore, the AO rightly assumed jurisdiction u/s 147 of the Act for issuing notice u/s 148 of the Act.

19. On careful consideration of above contention, we are of the view that there may be a substantive assessment without any protective assessment but there can not be any protective assessment/addition without a substantive assessment/addition, meaning thereby there has to be some substantive assessment/addition first which enables the AO to make a protective assessment/addition. In the present case, the AO proceeded to make protective assessment by way of reopening of assessment of the assessee appellant company without being a substantive assessment on the date of assumption of jurisdiction u/s 147 of the Act which is not permissible as per decision of ITAT, Mumbai in the case of M.P. Ramachandaran vs DCIT (supra) and Suresh K Jajo vs ACIT (supra).

20. On the basis of following discussion and submissions and contention of both the parties, we also observe that the statement of Shri Subodh Gupta CA was recorded during the course of survey in his personal capacity and which was retracted on 4.11.2003 and retracted statement recorded during the survey cannot be a basis of assumption of jurisdiction u/s 147 of the Act.

Respectfully following the decision of Hon'ble Karnataka High Court in the case of CIT vs Dr. R.N. Thippa Shetty, we are inclined to hold that if the very basis on which reopening was ordered did not exist, then there was no question of reopening the assessment and thus, notice u/s 148 of the Act deserves to be held as illegal and without jurisdiction.

21. From the reasons recorded and reproduced hereinabove, we observe that the AO has not made any specific allegations against the assessee appellant company. The entire contents of the reasons recorded are pertaining to statement of Shri Subodh Gupta and the AO proceeded to initiate proceedings for reopening of assessment u/s 147 of the Act and for issuance of notice u/s 148 of the Act without making any further inquiry and investigation about material which was before him at the time of assumption of jurisdiction u/s 147 of the Act and issuing notice u/s 148 of the Act.

22. On the basis of foregoing discussion, we reach to a conclusion that the AO assumed jurisdiction to initiate and reopen reassessment u/s 147 of the Act on the basis of retracted statement of Shri Subodh Gupta which was recorded during the survey on Shri Subodh Gupta in his individual capacity and the AO also proceeded to make a protective assessment/addition without any substantive assessment/addition and without making any further

investigation and inquiry about the material and information before him at the time of recording reasons.

23. Accordingly, we have no hesitation to hold that the AO assumed jurisdiction for reopening of assessment u/s 147 of the Act and for issuing notice u/s 148 of the Act on wrong premise and without any justified, cogent and legal reason. We, therefore, further hold that there existed no good or sufficient ground or reason for reopening of the case and issuance of notices u/s 148 of the Act against the assessee company. We also hold that the condition precedent for valid initiation of reassessment is not being satisfied as the belief that income chargeable to tax has escaped assessment does not exist on the date of assuming jurisdiction u/s 147 of the Act. Therefore, all subsequent proceedings including issuance of notice u/s 148 of the Act were illegal and bad in law. Accordingly, ground no. 2, 3 and 4 of the assessee are allowed and we hold that the CIT(A) has erred in confirming the action of the AO for assuming jurisdiction u/s 147 of the Act and issuing notice u/s 148 of the Act to the assessee for reopening of assessment and, thus, all proceedings u/s 147 and 148 of the Act to the assessee including notices are hereby quashed.

Remaining ground nos. 5 to 12 of the assessee

24. Since by earlier part of this order, we have quashed the entire proceedings u/s 147 and 148 of the Act, by accepting legal contentions and grounds of the assessee, therefore, other grounds of assessee on merits do not survive for adjudication and we dismiss the same without adjudicating them on merits.

25. In the result, the appeal of the assessee is allowed on the legal grounds.

Order pronounced in the open court on 27.6.2014.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Sd/-
(CHANDRAMOHAN GARG)
JUDICIAL MEMBER

DT. 27th JUNE 2014
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. Commissioner of Income Tax(A)
4. CIT. 5. DR

By Order

Asstt. Registrar