

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,जी,मुंबई ।

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

**Before Shri Saktijit Dey, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.5926/Mum/2009
Assessment Year: 2001-02**

Muller & Philpps (India) Ltd. 221, Unique Indl. Estate Off Veer Savarkar Marg Prabhadevi Mumbai-400025.	<u>बनाम/</u> Vs.	ITO 2 (2)(2) 5 th Floor, Aayakar Bhavan, Mumbai-
(Assessee)		(Revenue)
P.A. No.AAACM324N		

निर्धारिती की ओर से / Assessee by	Dr. K. Shivaram & Miss Nilam Jadhav (AR)
राजस्व की ओर से / Revenue by	Shri Vachaspati Tripathi (DR)

सुनवाई की तारीख / Date of Hearing :	13/10/2015
आदेश की तारीख / Date of Order:	28/10/2015

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-II, Mumbai {(in short Ld. CIT(A)} dated 24.08.2009 for the assessment year 2001-02, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) r.w.s. 147 of the

Act. The assessee has filed revised grounds of appeal which are reproduced hereunder:

“ I. Re-opening is bad in law:

- 1. The notice u/s.148 dated 17.02.2006 is issued merely on change of opinion.*
- 2. The copy of reasons recorded for reopening of assessment was not provided during the course of asst. proceeding in spite of specific request made by the assessee, therefore, the opportunity to raise objection against the reopening not provided. The date of recording the reason is also not known. The recording of reason should be prior to the date issue of notice u/s.148.”*

II. On merits:

- 3. The Ld. CIT(A) erred in upholding the order of Assessing officer treating the receipt of Rs.6 crores on account of transfer of trade mark ‘cuticora’ as ‘sale of business’ and taxing the same as capital gain.*
- 4. The Learned CIT(A) failed to appreciate that the transfer of trade mark was before 31.03.2001 i.e. prior to the amendment in sec. 55(2) of the Act and that the said receipt is exempt from tax.*

2. The arguments have been made by Dr. K. Shivaram & Miss Neelam Jadhav, Authorized Representative (in short ‘AR’), on behalf of the assessee and Shri Vachaspati Tripathi Departmental Representative (in short ‘DR’), on behalf of the Revenue.

3. Ground No. I (2): In this ground, Ld. Counsel has challenged the reopening of the assessment and framing of the impugned reassessment order, firstly on the ground that reasons have not been recorded, much less in accordance with law and certified copy of the same has not been provided to the assessee, during the course of reassessment proceedings, despite the specific and repeated requests made by the assessee to the AO, during the course of assessment proceedings.

3.1. During the course of hearing before us, a copy of synopsis has been filed by the Ld. Counsel, wherein, various pages of the paper book filed by the assessee and paper book filed by the department have been referred to. With the help of these paper books, it has been argued by Ld. Counsel that during the course of assessment proceedings the assessee has been making request to the AO, to provide the copy of reasons, but same was not provided to the assessee. It was further submitted that on the earlier occasions, Hon'ble Bench directed the Ld. DR to produce the assessment records, same was produced, and on the basis of perusal of assessment records, it was found by the Hon'ble Bench that there was no copy of 'Reasons', in the assessment records. Accordingly, an interim order was passed by the Hon'ble Bench, directing the Revenue to file a suitable affidavit in support of its claim, if so desired. Thereafter, in pursuance to the directions of the Hon'ble Bench, an affidavit was filed by the AO on behalf of the Revenue, along with few other documents, as part of

departmental paper book, wherein certain facts were deposed on oath. In response to the same, subsequently, a counter affidavit was filed by the assessee, pointing out various contradictions, fallacies and inconsistencies in the affidavit of the AO as well as other records placed on record by the department, before the Hon'ble Bench. It was argued by the Ld. Counsel that after long drawn exercise and exchange of affidavit, counter affidavit and other documents, now the final facts have emerged on the surface. Now, the admitted case of the department is that Reasons are not available in the assessment records and that no copy of Reasons was furnished to the assessee during the course of impugned reassessment proceedings. It was argued by the Ld. Counsel that in view of these facts and circumstances, position of law is now well settled on the basis of various judgments wherein it has been held that without recording the reasons prior to the issuance of notice u/s 148 and without providing a copy of the same to the assessee, the AO cannot make valid reopening of the assessment and cannot frame reassessment order. Reliance has been placed in this regard on the judgment of Hon'ble Bombay High Court in the case of **CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.)**, **Tata International Ltd. Vs. DCIT [2012] 52 SOT 465 (Mum.)**, Synopsys International vs. DDIT ITA no.549/Bang/2011 dt. 10.12.2012 (Bang.)(Trib.), CIT vs. Rajindra Roshin & Turpentine Industries (2008) 305 ITR 161 (P&H) (162) and Rajoo Engg. vs Dy. CIT (2008) 218 CTR 53(Guj). It was thus argued that the reopening is without mandate of law and

resultant reassessment order is null and void and should be held as such.

3.2 On the other hand, Ld. DR has placed reliance on the affidavit filed by the department. It has been submitted by the Ld. DR that admittedly no 'Reasons' are available in the assessment record, but copy of same is available in the computer. It has been further submitted that during the course of assessment proceedings, the relevant issue was discussed with the counsel by the AO, which would be evident from this fact that the assessee has submitted reply on the merits of the issue involved, and therefore, it can be presumed that assessee was communicated the gist of the issues involved in the Reasons, on the basis of which reopening was done by the AO. It was further submitted that the 'Reasons' might have been misplaced and therefore, benefit of doubt should be given to the Revenue and reopening should be upheld even if copy of Reasons is not available in the file and certified copy of the same was not provided to the assessee by the AO.

3.3 In reply, Ld. Counsel has vehemently opposed arguments of the Ld. DR on various grounds. It has been stated by him that in the affidavit filed by the revenue, it has been nowhere stated that 'Reasons' were misplaced. Our attention was drawn on page 29 of the paper book filed by the department which contains order sheet entries recorded by the AO. On the basis of these entries, it was argued by the Ld. Counsel that there is no mention of either recording of reasons or providing

copy of the same to the assessee, or even communicating the same to the assessee, in any manner. It has been submitted that notice was issued to the assessee u/s 143(2). In response to which, the then counsel of the assessee attended before the AO and at that time the then Ld. Counsel of the assessee was informed by the AO to file submissions on some of the issues as were raised by the AO, by way of order sheet entries, for the first time. It was finally argued that the assessee has repeatedly requested for the copy of the 'Reasons' during the course of assessment proceedings and if these would have been recorded by the Ld. AO, then, these would have definitely been provided to the assessee, and therefore, it is now well established that neither any 'Reasons' were recorded nor the same were recorded to the assessee, at any time. Therefore, reopening being contrary to law, the same should be held as invalid and impugned reassessment order should be quashed.

3.4. We have gone through the submissions made and also the material placed before us by both the sides in the form of paper books. We find that in this case, on earlier occasions, long drawn exercise has been done to thrash out the facts properly. The suitable directions have been given by the Bench to produce the records, and then to file the affidavits in support of the respective claims of the parties. The records were produced, and were examined by the Bench, and then detailed noting was made by the Hon'ble Bench vide order sheet dated 21.09.2011, and the same is reproduced for the sake of ready reference:

ITA No.5926/M/09
A.Y.2002-02
ITAT, G Bench Mumbai

21.09.2011

Shri. Pavan Ved. Learned CIT DR is present for revenue.

Shri. K. Shivram. Learned counsel is present for the assessee.

In this case, learned CIT. DR was directed by the Bench at the time of hearing fixed on 4.1.2011 to produce the reasons recorded by the A.O. for reopening the assessment by the next date of hearing fixed on 10.1.2011. Although, the learned CIT DR produced the assessment record on 10.1.2011, he could not produce any document evidencing the recording of reasons by the A.O. He, however, sought sometime to comply with the direction given by the Bench on 4.1.2011. The learned CIT, DR now submits that even though there are no reasons recoded by the A.O. in writing available on records, the same are available on computer as informed by the A.O. He submits that the department is in a position to file a print out of the same taken from computer in compliance with the direction of the tribunal. Keeping in view this new stand taken by the learned CIT DR which was not taken earlier and having regard to the fact that reasons recorded by the A.O. are not available in the assessment record, we direct the learned CIT DR to file an affidavit of the concerned A.O. stating all the relevant facts like when reasons were recorded, why copy thereof is not placed, whether there was audit of this case and query raised by audit party, etc. He is also directed to give a copy of the said affidavit to the other side well in advance before the next date of hearing. Accordingly, case is adjourned to 5.12.2011.

Sd/-

*(R.S. Padvekar)
(Judicial Member)*

Sd/-

*(P.M. Jagtap)
(Accountant Member)*

3.5. In response to the above said directions, an affidavit was filed by the AO (i.e. Ld. DCIT), dated 12.02.2014 and contents of the same are reproduced herein for the sake of ready reference:

"I, Mudit Srivastava, DCIT-2(2), Mumbai, do hereby solemnly affirm as under:

1. That I took over the charge of DCIT-2(2), Mumbai, on 08.06.2012.

2. In the charge handing over note, my predecessor had mentioned the following "A case file of Muller & Phipps India Ltd A Y 2001-02 is handed over to you which should be kept in personal custody. Further a computer file containing reasons for reopening is saved in the computer of Room no. 545 of ACIT 2(2). For protecting the same, the computer should be secured with a password."

3. That the reasons recorded by the A.O. for reopening the assessment are not available in physical form on record.

*4. That a soft copy of the reasons recorded for reopening the assessment in the case of M/s. Muller & Phipps (India) Ltd. for A.Y. 2001-02 exists in the computer kept in the office of the DCIT-2(2), Mumbai, at R.No. 545 of Aayakar Bhavan, bearing file name 'Muller & Phipps (I) Ltd-2001-02.doc'. A printout of the file containing reasons recorded for reopening the assessment in this case dated 17.02.2006 is annexed to this affidavit as **Exhibit-A**.*

5. That the properties of the said computer file bearing filename 'Muller & Phipps (I) Ltd-2001-02.doc' indicate that it was last modified on 17.02.2036 i.e. the date of recording the reasons for reopening as per the printout annexed as Exhibit-A. A printout of the screen showing the properties of the computer file named 'Muller & Phipps (I) Ltd-2001-2.doc' is annexed to this affidavit as **Exhibit-B**.

Whatever stated above is true and correct to the best of my knowledge and belief.

(Mudit Srivastava)

Deputy Commissioner of Income Tax-22”

3.6. In response to the affidavit filed by the AO, a counter affidavit has been filed by the assessee and the contents of the same are also reproduced for the sake of ready reference:

“AFFIDAVIT IN REPLY

I Mr. Utsav Dhupelia aged about 67 years, director of the M/s Muller and Phipps India Ltd having office at Ground Floor, Unique Industrial Estate, off Veer Savarkar Marg, Prabhadevi, Mumbai-400025 do hereby state as solemnly affirmation as under:

- 1. I have perused the affidavit of Shri Mudit Srivastava DCIT-2(2) Mumbai dated 12-2-2014.*
- 2. At the outset I state that the affidavit filed by the Ld. DCIT is a self serving document and hence cannot be taken on record in order to prove recording of reasons at the time of reopening of assessment. The section 148 of the Act does not recognize such recording of reasons*

on computer without there being a copy available on assessment record.

3. As regard "para 1", no comments is required.

4. As regard "para 2", I say that the handing over note to be produced in the original for the consideration of the Hon'ble Bench.

5. I further say that whether the concerned officer has given such office note in all matters or only in the matter of the Mullar and Phipps India Ltd, should be examined.

6. I say that 'para 3' records the correct fact and for the present matter nothing further should be looked into. Once the assessment records do not contain the reasons recorded it cannot be supplied from third sources as this will lead to reading down the section 148 of the Act. Further this will further lead to mall practice of supplying reasons back door.

7. I say that 'para 4' records a new fact for the first time and should not be admitted in evidence unless the same is proved beyond reasonable doubt. I will like to get the computer data verified from computer expert to reveal the correct facts. I will also like to cross examine the officer in regards to the content of his affidavit.

8. I further deny the content of 'para 5 and put the officer to strict proof thereof.

9. I further say that the above mentioned attachment of the computer screen shot of the ITO's computer screen. It shows the following file properties.

File created 30.09.2011

File modified 17.02.2006

File accessed 28.6.2013

10. As per the affidavit submitted by Officer it states that the file was last modified on 17.02.2006 whereas from the above information which shows that the original file as created on 30.09.2011 How can the file which is created on 30.09.2011 be modified on 17.02.2006 ?

In any of the file generation methods, the date of file creation will always come first followed by the last updated or the modified date.

Thus, there seems to be apparent discrepancy showing the file creation date as 30.09.2011 while modification of the file is made on 17.2.2006. Thus it is possible that the file is created in 2011. i.e. much later than the date of recording the reasons of reopening i.e. 17.2.2006.

At this juncture it may be brought to your Honours notice that the first order passed by the Hon'ble Tribunal in the above matter was on 10.01.2011 wherein the Tribunal recorded the finding of facts that the asst. record produced by Ld DR did not contain the copy of reasons recorded.

11. I further say that the date of the computer can be easily manipulated in order to change or set any desired date any file can be created, accessed and modified on any date provided that the same actions have been carried by changing the computer system date.

12. I further say that the creation of such file having above mentioned date attributes is possible by changing the computed date settings.

13. I state that the alleged copy of reasons recorded dated 17.2.2006 enclosed in their affidavit, is not signed by Mr. S.C. Sarangi the then Asst. Comm. Of Income Tax Cir. 2(2), which is mandatory requirement of the law. Further, the assessment order is passed by Mr. Uday Hardikar, ITO 2(2)(2), Mumbai.

14. I am making this affidavit to put the true facts on records and whatever is stated in paras 1 to 13 are true and correct to best of my knowledge and belief.

-sd-

Solemnly affirmed at Mumbai (Deponent)

This 17th day of May 2014”

3.7. Further, in response to the counter affidavit, the AO has given its comments by way of order dated 30th July 2014 and we find it appropriate to reproduce the same also, hereunder:

“To,

The CIT(DR)

ITAT-XII, G Bench

Mumbai

Respected Madam,

Sub: Comments on the Affidavit in Reply filed by the assessee in the

case of M/s Muller & Phipps (1) Ltd. for AY 2001-02 - Reg.

Kindly refer to the above matter.

2. Comments on the Affidavit in reply filed by the assessee dated 17.05.2014 during the proceedings before the Hon'ble ITAT in the above mentioned case are submitted as below:

Para 1: *No comments are required.*

Para 2: *The affidavit submitted by the Id. DCIT is a statement of facts of the case. The affidavit submits that a soft copy of reasons recorded for reopening the assessment exists in the computer. It is*

submitted that as per the Information Technology Act 2000, electronic records are legally recognised.

Para 3: *No comments are required.*

Para 4: *Handing Over Note is being produced in original.*

Para 5: *It is a usual practice to give a note on the important ongoing matters pertaining to a charge in the Handing Over Note, when the charge is handed over to the succeeding officer. Accordingly, the said case was mentioned in the Handing Over Note. Remarks have been given for several other ongoing matters, as can be seen from the Handing Over Note.*

Para 6: *The reasons for reopening are not available in physical form now does not mean that they were not placed in the file at any point of time.*

Para 7: *The computer file may be verified by a computer expert. The assessee may cross examine.*

Para 8: *The same may be verified from a computer expert, if the Hon'ble bench so desires.*

Para 9: *No comments are required.*

Para 10: *There is no discrepancy. An elementary knowledge of computers is required to understand this point. The date of file creation refers to the date it is created in that particular memory location. This creation may be by means of copy-paste from another location. The date of last modification refers to the **last modification done in any of the contents of the file**. Thus, in a case where a file is created on a particular memory location at a certain time and date, and subsequently it is copied in another location, the time and date of creation in the case of*

the copied file will be seen as subsequent to the time and date of last modification. This is a common feature of the Windows Operating System and can be checked by anyone. A printout of the official help community of Microsoft Windows on this issue is attached herewith, wherein the same is explained by professionals. In case of any further doubt on this elementary feature of Windows system, the same may also be confirmed from a computer expert.

Para 11: *The same may be verified by a computer expert.*

Para 12: *The same may be verified by a computer expert.*

Para 13: *The said copy is only a printout of the computer file. This fact is clearly stated in the Affidavit itself. Therefore, it is not a signed copy.*

Para 14: *No comments are required. 3. Submitted for your kind consideration.*

3. Submitted for your kind consideration.

Yours faithfully,

Sd/-

(Saurabh Sharma)

ACIT Circle 2(2), Mumbai”

3.8. Detailed arguments have been made by both the sides on the above said documents and also on various other documents placed in the paper books filed by both the sides. After analysing the whole factual situation, we find that at this stage, we need not go too much deeper into the allegations and counter allegations made by both the sides. We can decide this issue on the basis of those facts only on which there is

consensus of both the parties. The undisputed facts, which emerge now after aforesaid exhaustive exercise, on which there is unanimity on the part of both the sides, are that, **one-** no 'Reasons' are available in the assessment record, and **two-** there is nothing on record to show that certified copy of verbatim 'Reasons' was ever provided to the assessee, despite the request made by the assessee before AO, more than once. In view of these facts, Ld. Counsel has vehemently argued that it clearly indicates that no 'Reasons' were recorded infact and therefore, these could not have been provided to the assessee. It has been submitted further that had the 'Reasons' been recorded by AO, these would have definitely been provided to the assessee. This vital argument of the Ld. Counsel could not be displaced by the Ld. DR.

3.9 In the aforesaid given facts of the case, as have been brought out on the records, we are also not in position to reject aforesaid argument of the Ld. Counsel. We find that under these facts, the position of law is clear. It has been held by Hon'ble Supreme Court in the case of **GKN Driveshaft** 259 ITR 19, that it is mandatory on the part of the AO to provide the copy of the reasons to the assessee and to meet the objections filed by the assessee thereto, if any, before the AO can frame the reassessment order. It is further noted that Hon'ble Bombay High Court in the case of **CIT v. Videsh Sanchar Nigam Ltd. (supra)** has held that in case reasons are not furnished by the AO to the assessee, before completion of reassessment proceedings, reassessment order cannot be

upheld. It is further noted that SLP filed by the Revenue against the order of Hon'ble Bombay High court, has been rejected by Hon'ble Supreme Court. Similar view has been taken by Hon'le Mumbai bench of ITAT in the case of **Tata International Ltd. vs DCIT, supra** and also in few other judgments as have been relied upon by Ld. Counsel before us. We further derive support of our view from a latest judgment of Hon'ble Bombay High Court in the case of **CIT vs. Trend Electronic** in ITA No.1867/2013 order dated 16th September 2015. In this case, Hon'ble Jurisdictional High Court, following its earlier decision in the case of *Videsh Sanchar Nigam Ltd. (supra)*, held that law laid down by Hon'ble Supreme Court in the case of *G.K.N. Driveshafts (India) Ltd*, is clear and mandatory for implementation and it is to be strictly followed by the AO before farming the reassessment order. It was further held that rule with regard to furnishing of reasons by the AO is to be followed strictly, as the power given to the AO for reopening of a completed assessment under the Income Tax Act, is an exceptional power and whenever Revenue seeks to exercise such power, it must strictly comply with the pre-requisite conditions i.e. 'Reasons' must be recorded and these recorded 'Reasons' must be furnished to the assessee, when sought for, so as to enable the assessee to object to the same, during the course of assessment proceeding. Thus, in absence of 'Reasons' provided by the AO to the assessee, the reassessment order shall be bad in law. The recording of 'Reasons' and furnishing of the same has to be strictly complied with, as it is a jurisdictional issue. This requirement

is very salutary as it ensures that reopening is not done in a casual manner. In addition to that, in case reopening has been done on some misunderstanding/misconceptions, then, the assessee is given opportunity to point out that reasons to believe, as recorded in the 'Reasons', do not warrant reopening, before the assessment proceedings are commenced. The AO can dispose all these objections, and if satisfied with the objections, the impugned reopening notice issued u/s 148 of the Act can be withdrawn; otherwise it can be proceeded with further. In issues, such as this, where jurisdictional issue is involved, the same must be strictly complied with by the authority concerned.

3.10. Similar view has been reiterated by Hon'ble Karnataka High Court in the case of **Kothari Metals (writ appeal no.218/2015, order dated 14th August 2015**, wherein it has been held that the question of non-furnishing the 'Reasons' for reopening an already concluded assessment goes to very root of the matter, and that the assessee is entitled to be furnished the 'Reasons' for such reopening and that if 'Reasons' are not furnished to the assessee, then the proceedings for the reassessment can not be taken any further, and reopening of the assessment would be bad in law.

3.11. No contrary judgment has been brought to our notice by Ld. DR. Thus, respectfully following the mandate of Hon'ble Supreme Court and Hon'ble Jurisdictional High Court in the aforesaid cases, we hold that reopening of this case, in the

given facts and circumstances of the case, is invalid and therefore, consequent reassessment order as framed by the AO is also illegal and the same is hereby quashed. Thus, ground no. I(2) is allowed.

4. Since, we have decided this appeal on the legal ground itself, holding the impugned reassessment order as invalid, we are not going into merits of the case and other grounds, and accordingly Grounds No. I (1) and II (3) and II(4), are not being adjudicated.

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

Order pronounced in the open court on 28th October 2015.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28/10/2015

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**