IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

ITA No.880/LKW/2014
Assessment Year:2003-04

Sardar Balbir singh 111A/409, Ashok Nagar Kanpur	v.	Income Tax Officer 2(1) Kanpur
TAN/PAN:AHDPS2014A		
(Appellant)		(Respondent)

Appellant by:	Shri. Swarn Singh, C.A.		
Respondent by:	Shri. O. N. Pathak, D.R.		
Date of hearing:	09	03	2015
Date of pronouncement:	13	03	2015

O R D E R

PER SUNIL KUMAR YADAV:

This appeal is preferred by the assessee against the order of the ld. CIT(A), inter alia, on the following grounds:-

1. That the Ld. C.I.T.(A)-II has erred in law and on facts in not considering and appreciating that the appellant, while filing the return of income, had taken into account the deemed sale consideration as required under section 50C of the Income Tax Act, 1961 for the purpose of computing taxable Capital Gains and had computed Long Term Capital Gain for his l/3rd share in the demised property, therefore, the addition of Rs.3,33,795/- arbitrarily made by the A.O. and sustained by the C.I.T.(A)-II, Kanpur is bad in law and on facts and deserves to be deleted.

2. That the Ld. C.I.T.(A)-II, Kanpur was not justified in ignoring the facts mentioned in the statement of facts forming part of Appeal Memo (Form No.35) filed before him, hence also the impugned order is contrary to the facts on record, principles of natural

justice and equity.

3. That the Ex-parte dismissal of appeal by the Ld. C.I.T.(A)-II without considering and appreciating the facts on record is wholly unjustified insupportable in law and on facts and liable to be quashed.

4. That the authorities below, while completing the assessment and also the appeal ex-parte, have completely ignored the statement of income attached with and forming part of the Return Of Income for the assessment year 2003-2004, hence also the consequent order(s) are illegal and unsustainable.

5. That the authority(ies) below have also erred in law and on facts in treating the alleged addition of Rs.3,33,795/- as Short Term Capital Gain despite the fact that the capital gain was shown in the return of income as long term capital gain and also the same was subjected to special rate of tax applicable to Long Term Capital Gain.

6. That without prejudice to the above Grounds of Appeal the addition made in the income of the appellant amounts to double addition and is wholly arbitrary, unjustified and deserves to be deleted.

7. That any other relief or reliefs as your honour may deem fit in the facts and circumstances of the case, be granted.

2. During the course of hearing of the appeal, the ld. counsel for the assessee has moved an application for admission of additional grounds, which are as under:-

1. That while sustaining the addition of Rs. 3,33,795/-, being long term capital gain, the Ld. CIT(A)-II, Kanpur has erred in law and on facts and failed to appreciate that the notice u/s 148 of the Income Tax Act,1961 dated 30.03.2010 was issued after taking sanction/approval of Commissioner of Income Tax-1, Kanpur instead of Joint Commissioner of Income-tax. Therefore, the assessment order dated 30.12.2010 is without

jurisdiction, illegal, void-ab-initio and liable to be annulled.

2. That the notice issued under section 148 of the Income Tax Act, 1961 by the Ld. AO was without assuming proper jurisdiction, since the sanction was accorded by the Ld. CIT-1, Kanpur instead of JCIT, Kanpur and therefore the impugned notice under section 148 of the Income Tax Act, 1961 itself was illegal and void-ab-initio and hence, the consequent assessment framed u/s 144/148 of the Income Tax Act, 1961 is without jurisdiction, invalid, void ab initio and liable to be annulled.

3. Since the additional grounds raised by the assessee are legal in nature and go to the root of the case, we admit the same.

4. On these additional grounds, the ld. counsel for the assessee has contended that the Assessing Officer has obtained sanction for issuance of notice under section 148 of the Income-tax Act, 1961 (hereinafter called in short "the Act") for reopening of assessment from the ld. Commissioner of Income-tax instead of Joint Commissioner of Income-tax (JCIT). Since the approval was not obtained from the competent authority, notice issued under section 148 of the Act is void ab-initio and the assessment framed consequent thereto is not a valid assessment. In support of this contention, the ld. counsel for the assessee has invited our attention to the order of this Bench of the Tribunal in the case of Jai Prakash Ahuja vs. Income Tax Officer reported in [2014] 48 taxmann.com 86 (Lucknow Trib.), in which it has been held that the provisions of sub-section (2) of section 151 of the Act is to be applied for issuing notice under section 148 of the Act and as per sub-section (2) of section 151 of the Act, the Assessing Officer was required to obtain sanction/approval from the JCIT and if the approval/sanction was obtained from the ld. Commissioner of Income-tax, it is not in accordance with law and in such a situation, the sanction is not valid, therefore, the Assessing Officer could not assume jurisdiction to issue

notice under section 148 of the Act. If the notice is issued without obtaining proper approval from the competent authority, the assessment framed under section 147 of the Act is invalid and deserves to be quashed. Copy of the order of the Tribunal is placed on record.

5. The ld. D.R. has placed reliance upon the order of the Assessing Officer.

6. Having carefully examined the orders of the lower authorities in the light of the rival submissions, we find that undisputedly the relevant assessment year involved is 2003-04 and the notice under section 148 of the Act was issued on 30.3.2010. Copy of notice issued under section 148 of the Act is available at page 6 of the compilation of the assessee. As per provisions of section 151(2) of the Act, the Assessing Officer was required to obtain approval from the JCIT before issuance of notice under section 148 of the Act. But, in the instant case, the approval was obtained from the ld. Commissioner of Income-tax, who is not a competent authority to grant approval. The fate of the assessment framed consequent to the notice issued under section 148 of the Act, without obtaining approval of the competent authority, was examined by this Bench of the Tribunal in the case of Jai Prakash Ahuja vs. Income Tax Officer (supra), in which the Tribunal has held that the assessment framed consequent to the notice issued under section 148 of the Act without obtaining approval from the competent authority is not a valid assessment, as by issuing an invalid notice under section 148 of the Act, the Assessing Officer did not assume valid jurisdiction for completing the assessment under section 143(3) read with section 147 of the Act. The relevant observations of the Tribunal are extracted hereunder for the sake of reference:-

"7. Having given a thoughtful consideration to the rival submissions and from a careful perusal of the orders of the authorities below, material available on record and the judgments referred to by the assessee, it is evident from the reply given by the Department to the assessee in response to the information sought under R.T.I. Act, 2005 that no assessment under section 143(3) of the Act was done for assessment year 2003-04 prior to the re-assessment under section 147 of the Act. It is also an admitted fact that assessment was reopened after four years from the end of the relevant assessment year. Therefore, before issuing notice under section 148 of the Act, the Assessing Officer was required to obtain sanction/approval from the competent authority prescribed under section 151 of the Act. For the sake of reference, provisions of section 151 of the Act is extracted hereunder:-

"151. Sanction for issue of notice.--(1) In a case where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice:

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the 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."

8. Under section 151 of the Act, the authorities are identified who can issue notice for reopening of assessment under section 148 of the Act after forming a belief that income chargeable to tax has escaped assessment. As per sub-section (1) of section 151 of the Act where an assessment is framed under sub-section (3) of section 143 or 147 of the Act, no notice shall be issued under section 148 of the Act by an Assessing Officer who is below the rank of Asstt. Commissioner of Income-tax/Dy. Commissioner of Income-tax unless Jt. Commissioner of Income-tax is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of such notice. In case assessment requires reopening after four years from the end of the relevant assessment year, the Assessing Officer is required to obtain approval/sanction from the Chief Commissioner or Commissioner before issuance of notice under section 148 of the Act.

9. Sub-section (2) of the Act deals those types of cases where assessment was not completed under section 143(3) of the Act or 147 of the Act. In such type of cases, no notice shall be issued under section 148 of the Act by the Assessing Officer, who is below the rank of Jt. Commissioner of Income-tax after expiry of four years from the end of the relevant assessment year unless Jt. Commissioner of Income-tax is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issuance of such notice. It has been categorically mentioned in sub-section (2) of section 151 of the Act that sanction was required by the Assessing Officer from the Jt. Commissioner of Income-tax.

10. In the instant case, undisputedly no assessment was framed under section 143(3) of the Act or 147 of the Act as admitted by the Department in reply to the information sought under the R.T.I. Act. It is also an undisputed fact that the assessment was sought to be reopened after four years from the end of the relevant assessment year i.e. 2003-04, as notice under section 148 of the Act was issued on 31.3.2010. It is also an undisputed fact that sanction/approval was accorded by the ld. Commissioner of Income-tax and not by the

Jt. Commissioner of Income-tax as mentioned in the assessment order by the Assessing Officer.

11. Therefore, it is abundantly clear that provisions of sub-section (2) of section 151 of the Act is to be applied for issuing notice under section 148 of the Act and as per sub-section (2) of section 151 of the Act, the Assessing Officer was required to obtain sanction/approval from the Jt. Commissioner of Income-tax and in the instant case, approval/sanction was obtained from the ld. Commissioner of Income-tax. Therefore, we have no hesitation in holding that the sanction accorded by the ld. Commissioner of Income-tax is not in accordance with law and in such a situation sanction accorded to the Assessing Officer is not valid and hence the Assessing Officer could not assume jurisdiction to issue notice under section 148 of the Act and in that case when the Assessing Officer has issued notice under section 148 of the Act without assuming valid jurisdiction, notice issued under section 148 of the Act is illegal and void ab initio.

12. We have carefully examined the provisions of section 292BB of the Act as referred to by the Revenue and we find that section 292BB of the Act is presumptive section and on the basis of it, it can be presumed that notice required to be served was served upon the assessee if the assessee joins the assessment proceedings. For the sake of reference, we extract the provisions of section 292BB of the Act as under:-

> *"292BB. Notice deemed to be valid in certain circumstances. Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was*
>
> *(a) not served upon him ; or*

(b) not served upon him in time ; or

(c) served upon him in an improper manner :

13. Therefore, provisions of section 292BB of the Act is not applicable in the present facts of the case, as the issue in dispute is with regard to the validity of jurisdiction assumed by the Assessing Officer for issuing notice under section 148 of the Act.

14. We have also carefully perused various judgments rendered on the subject and we find that in the case of CIT vs. SPL'S Siddhartha Ltd. (supra), the Hon'ble Delhi High Court has categorically held that it is an established principle *of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be "independent" and not "borrowed" or "dictated" satisfaction. The relevant observations of the Hon'ble High Court are extracted hereunder:-*

> *"A notice seeking to reopen assessment under section 148 was issued after the expiry of four years from the end of the relevant assessment year. Since four years had elapsed, the Assessing Officer was required to take approval of the competent authority under section 151(1). The Assessing Officer thus issued notice after taking approval of the Commissioner. The objection of the assessee before the Tribunal was that the Assessing Officer had not taken the approval from the Joint Commissioner, instead, approval was taken from the Commissioner who was not competent to approve even when he was a higher Authority inasmuch as section 151 specifically mentions Joint Commissioner as the Competent Authority. This contention of the assessee was accepted by the Tribunal thereby quashing the assessment proceedings.*

It was apparent from records that the Assessing Officer had specifically sought the approval of the Commissioner only. Therefore, it could not be said that the Joint Commissioner/Additional Commissioner had granted the approval. Further, no doubt, the file was routed through Additional Commissioner. However, he also, in turn forwarded the same to the Commissioner. [Para 4]

It is clear that the Additional CIT did not apply his mind or gave any sanction. Instead, he requested Commissioner to accord the approval. It, thus, cannot be said that it is an irregularity curable under section 2925. [Para 5]

Section 116 also defines the Income-tax authorities as different and distinct Authorities. Such different and distinct authorities have to exercise their powers in accordance with law as per the powers given to them in the specified circumstances. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. It is trite that when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and the Court would not expect its being done in some Either manner. [Para 7]

Thus, if authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the doing of the Act authorised under other circumstances than those as defined. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be "independent" and not "borrowed" or "dictated" satisfaction. Law in this regard is now well-settled. [Para 8]

The Apex Court in the case o/Anirudh Sinhji Karan Sinhji Jadeja v. State of Gujarat [1995] 5 SCC 302 has held that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If discretion is exercised under the direction or in compliance with some higher authorities instruction, then it will be a case of failure to exercise discretion altogether. [Para 9]

Therefore, the Tribunal has rightly decided the legal aspect, keeping in view well-established principles law laid down in catena of judgments including that of the Supreme Court. [Para 10]

15. Similar view was also reiterated by the Hon'ble Bombay High Court in the case of Ghanshyam K Khabrani vs. ACIT-1 (supra) by holding that when section 151(2) of the Act mandates satisfaction of Jt. Commissioner of Income-tax for issuance of notice under section 148 of the Act, the reopening of assessment with the approval of the ld. Commissioner of Income-tax is not sustainable. The relevant observations of the Hon'ble Bombay High Court are also extracted hereunder for the sake of reference:-

"The assessment of the assessee for assessment year 2004-05 was sought to be reopened by issuing a notice dated 30-3-2011 beyond a period of 4 years from the end of the relevant assessment year. The reasons on the basis of which the assessment for assessment year 2004-05 was sought to be reopened were founded on a letter dated 11-3-2010 received from the Additional Director of Income-tax (Investigation) to the effect that an amount approximately of Rs. 10 crores was received by the assessee during the financial year 2002-03 corresponding to assessment year 2003-04 but for the assessment year 2003-04, only an addition of Rs. 4.9 crores was made and since an amount of Rs. 5.1 crores remained to be taxed, said amount was

sought to -be taxed as income having escaped assessment for assessment year 2004-05. The assessee challenged impugned notice contending that the Assessing Officer could not have any reason to believe that there was escapement of income for assessment year 2004-05, since even according to the revenue, income which had been received in assessment year 2003-04 had escaped assessment; that the letter of the Additional DIT dated 11-3-2010 was available when the order of assessment for assessment year 2003-04 was passed and, hence, there was absolutely no fresh or tangible material on the basis of which the assessment was sought to be reopened , for assessment year 2004-05; and that under section 151(2) the approval was required to be issued by the Additional Commissioner but in the instant case, the Additional Commissioner had not granted approval, he having forwarded the proposal submitted by the Assessing Officer to the Commissioner.

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On admitted facts no reasonable person duly informed in law could have formed a reason to believe that there was an escapement of income in assessment year 2004-05. The case of the revenue is that an amount of Rs. 10 crores was received by the assessee during the financial year corresponding to assessment year 2003-04 but has not been brought to tax. That being the position, it is impossible to comprehend as to how the assessment for assessment year 2004-05 can be reopened. The proceedings for assessment year 2003-04 are pending in appeal. The revenue is at liberty to seek recourse to its legitimate powers available in law in relation to assessment year 2003-04 where the appeal is pending. The mandatory requirement of section 147 is that there must be a reason to believe that income has escaped assessment. Ex-facie the reasons which were disclosed to the assessee cannot form the basis of a reason to believe that income has

escaped assessment for assessment year 2004-05. Moreover, it is evident that even the letter dated 11-3-2010 of the Additional DIT (Investigation) was much prior to the flnalization of the assessment for assessment year 2003-04 on 27-12-2010. Therefore, this is not a case where there is any tangible material on the basis of which the assessment for assessment year 2004-05 can legitimately be opened. [Para 5]

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 instant case, an assessment had not been made under section 143(3) or section 147 for 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 I 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 instant case, the record before the Court indicates that the Assessing Officer submitted a proposal on 28-3-2011 to the Commissioner (Appeals) through the Additional Commissioner. On 28-3-2011, the Additional Commissioner forwarded the proposal to the Commissioner.

On this, a communication was issued on 29-3-2011 from the office of the Commissioner (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 is not a Joint Commissioner within the meaning of section 2(28C). In the instant case, the Additional Commissioner forwarded the proposal submitted by the Assessing Officer to the Commissioner. The approval which has been granted is not by the Additional Commissioner but by the Commissioner. There is no statutory provision 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. [Para 6]

Once the Court has come to the conclusion that there was no compliance of the mandatory requirements of sections 147 and 151(2), the notice reopening the assessment cannot be sustained in law. [Para 7]."

16. Following the aforesaid judgments of the Hon'ble Delhi and Bombay High Court, the ITAT Delhi Bench in the case of Income Tax Officer vs. Tirupati Cylinders Ltd., New Delhi (supra) has also held that under section 151 of the Act, it was only the Jt. Commissioner or Addl. Commissioner who could grant the approval for issuuance of notice under section 148 of the Act and if the approval is not granted by the Jt. Commissioner or Addl. Commissioner and instead it was granted by the ld. Commissioner of Income-tax, then the same was not an irregularity curable under section 292B of the Act and notice under section 148 of the Act would be invalid and void ab initio. The Tribunal accordingly quashed the assessment after holding that reopening was not done in accordance with the provisions of the Act.

17. Again the same view was taken by the Pune Bench of the Tribunal in the case of Rahul constructions vs. Dy. CIT (supra).

18. Keeping in view the totality of the facts and circumstances of the case and the judgments referred to above, we are of the considered opinion that sanction accorded by the ld. Commissioner of Income-tax to the Assessing Officer for issuance of notice under section 148 of the Act was not proper, therefore, the Assessing Officer did not assume proper jurisdiction to issue notice under section 148 of the Act. Thus, notice issued under section 148 of the Act is invalid and, therefore, assessment framed consequent thereto is invalid and void ab initio. We accordingly quash the assessment framed consequent to illegal/invalid notice."

7. In the light of the aforesaid legal position, we are of the view that in the instant case, since notice under section 148 of the Act was issued without obtaining approval from the competent authority, notice issued under section 148 of the Act is invalid and, therefore, the assessment framed consequent thereto is not a valid assessment and void ab-initio. We accordingly set aside the order of the ld. CIT(A) and annul the assessment.

8. Since the assessment is annulled, we find no justification to deal with the issues raised on merit.

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

Order was pronounced in the open court on the date mentioned on the captioned page.

Sd/-	Sd/-
[A. K. GARODIA]	[SUNIL KUMAR YADAV]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

DATED: 13th March, 2015

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Copy forwarded to:

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

Assistant Registrar