INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC-2": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 7583/Del/2019
(Assessment Year: 2007-08)

Shanker Tradex Pvt. Ltd, 3552, 105-10, Ravi Raj Market, Chawri Bazar, New Delhi PAN: AAICS8635G	Vs.	ITO, Ward-23(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Manorath Tyagi, Adv
Revenue by:	Shri R. K. Gupta, Sr. DR
Date of Hearing	04/11/2020
Date of pronouncement	10/11/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by assessee against the order of Commissioner of income tax (appeals) – XXV, New Delhi dated 22 August 2019 for assessment year 2007 – 08 dismissing the appeal of the assessee filed before him against the order of the income tax Officer, Ward 23 (1), New Delhi dated 30th 11 2017 passed u/s 263/147/144 of the income tax act 1961 assessing the total income of the assessee at ₹ 2,057,600/– against the returned income filed by the assessee on 31st of March 2015 of ₹ 21,600

2. The assessee has raised the following grounds of appeal in ITA No. 7583/Del/2019 for Assessment year 2007-08:-

"1. Because the action is under challenge on facts & law that the CIT(A) has erred and is in violation to the principles of natural & substantial justice for a decision in accordance with law.

1.1. Because the action for concluding the reassessment is being challenged, since the 'approval' has not taken from the designated authority & is in violation of section 151(2) & additionally the sanctioning authority is not having 'charge' over the 'records' while granting the said approval.

1.2. Because the action for initiation, continuation and conclusion of reassessment proceedings is being challenged on facts & law.

1.3. Because the action for initiation of reassessment proceedings is un-reasonable since while recording reasons, there is non-application of mind and less independent application of mind & merely relying upon the

investigation report by AO, further reasons recorded are vague, lacking tangible material/reasonable cause & justification.

1.4. Because the action is being is challenged on facts & law for challenging that the reassessment order passed u/s 147/143(3) was illegal or nullity in the eyes of law, then, whether the AO had a valid jurisdiction to pass the impugned order u/s 263/147/144 to the non-est reassessment order.

2. Because the action is being challenged on facts and law for making addition of Rs. 20,00,000/- u/s 68 of I.T. Act. 1961 on account of share application/capital is incorrect.

3. Because the action is being challenged on facts and law for making disallowance of commission expenses of Rs. 36,000/-."

3. Brief facts of the case shows that assessee is a company. The assessment history shows that assessment order u/s 147 read with Section 143 of the Income Tax Act was passed by the ITO, Ward 23 (1), New Delhi on 31/3/2015 accepting the returned income of ₹ 21,600 filed by the assessee. In fact the assessment was reopened u/s 147 based on the information received from the office of CIT –III, New Delhi that the assessee was one of the beneficiaries of accommodation entries provided by the group concerns where assessee is one of the beneficiaries for a sum of ₹ 20 lakhs. Despite this information the assessing officer went on to complete the assessment u/s 143 (3) read with Section 147 of the income tax act at the returned income filed by the assessee company and no addition was made on account of alleged accommodation entry of ₹ 20 lakhs.

4. Subsequently the case of the assessee was subjected to revision u/s 263 of the income tax act by the principal Commissioner of income tax, Delhi – 08 wherein he held that the order passed by the learned assessing officer is erroneous and prejudicial to the interest of the revenue. The main reason for the revision was that relevant copies of the seized material relating to the assessee were not considered by the assessee and therefore the order is erroneous and prejudicial to the interest of revenue. This order u/s 263 of the act is not subjected to challenge before us.

5. Consequent to this order the learned assessing officer passed an order read with Section 263/147/144 of the income tax act wherein he has made an addition of ₹ 20 lakhs to the total income of the assessee u/s 68 of the act and further made an addition of ₹ 36,000/– towards the rate of commission for obtaining accommodation entries and thereby the total income of the assessee was assessed at ₹ 2,057,600/– against the assessed income u/s 147 read with Section 143 (3) dated 31/3/2015 of ₹ 21,600.

6. The assessee preferred an appeal before the learned CIT – A against the above order of the learned assessing officer which was decided by him on 22/8/2019 dismissing the appeal of the assessee. Therefore assessee is aggrieved with that order has preferred an appeal before us.

7. The learned authorised representative adverting to ground number 1.1 of the appeal stated that while concluding the reassessment, the proper approval u/s 151 (2) has not been taken from proper authority and therefore the original order passed u/s 147 of the act on 31 March 2015 is bad in law. He submitted that though this is the appeal against the order passed by the learned Commissioner of income tax- A in order passed by the learned assessing officer in pursuance of the order u/s 263 of the income tax act wherein it was held that the original order passed u/s 143 (3) read with Section 147 of the act is erroneous and prejudicial to the interest of revenue. He submitted that even in this appeal where the basic foundation of the assessment order which was held to be erroneous and prejudicial to the interest of the revenue by the learned CIT – A can be challenged by assessee at any stage of the assessment/appellant proceedings for that year. For this proposition he submitted that the aforesaid issue is legal in nature as the original order passed was illegal or nullity in the eyes of law then the assessing officer does not have a valid jurisdiction to pass the impugned order u/s 143(3) rws 263 read with Section 147/144 of the income tax act and that order is also void assessment order.

8. He submitted that assessee has filed the return of income declaring total income of ₹ 21,600 19/10/ 2007. This return was processed u/s 143 (1) of the act. This case was reopened by the assessing officer by obtaining the prior approval of the COMMISSIONER OF INCOME TAX and notice u/s 148 of the Act on 25/3/2014 was issued and served on the assessee. The assessee submitted the letter dated 9/6/2014 asking the AO to consider the original return filed as a return filed in response to the above notice. Subsequently, after examining the requisite details, the learned assessing officer passed an order on 31/3/2015 u/s 143 (3) read with Section 147 of the income tax act accepting the returned income of the assessee. He placed on record such assessment order at serial number 18 of the paper book.

9. Thereafter he referred to the provisions of Section 151 of the income tax act and the submitted that when the returned income is not assessed u/s 143 (3) of the act the permission/approval/ sanction is not required to be taken from the CIT which is taken by the learned assessing officer but from Joint Commissioner Of Income Tax. He therefore submitted that the original assessment order passed by the learned assessing officer u/s 143 (3) read with Section 147 of the income tax act on 31st of March 2015 is a nullity. He submitted that when the original order stated above passed is a nullity wherein the approval is taken from CIT instead of Joint Commissioner Of Income Tax, as all subsequent proceedings, including the order u/s 263 of the act and the subsequent order passed by the learned assessing officer u/s 143 (3) read with Section 147 and 263 of the income tax act is

also a nullity. He therefore submitted that when the foundational order itself is a nullity subsequent addition to the income also does not survive accordingly.

10. The learned departmental representative vehemently objected to the submission of the learned authorised representative stating that it is an appeal against the order of the learned CIT – A which has been passed in appeal filed by the assessee against the order passed by the learned assessing officer pursuant to the order of principal Commissioner of income tax u/s 263 of the income tax act wherein it has been held that the order passed by the learned assessing officer on 31st of March 2015 u/s 143 (3) read with Section 147 of the income tax act is erroneous and prejudicial to the interest of revenue, a lot of water has flowed down after that and now assessee cannot say that in the reopening proceedings the proper approval has not been taken.

11. To this assessee submitted that this is not the plea which has been taken before the coordinate bench for the first time but was also taken before the learned CIT – A. He referred to paragraph number 4 of the appellate order wherein this argument is mentioned. He also referred that in additional ground taken before the learned CIT – A at page number 5 of his order is also evident. He further referred to paragraph number 5 at page number 8 of the order of the learned CIT- A wherein it is held that in the case of the appellant the approval of the CIT has been taken instead of Additional Commissioner Of Income Tax, wherein the approval of the Additional Commissioner Of Income Tax is implicit therefore there is no infirmity in the process of approval obtained by the learned assessing officer. Accordingly the jurisdictional issue raised by the appellant are dismissed. He therefore submitted that this is not the issue which has been taken before the tribunal for the first time but the learned CIT – A has already adjudicated upholding it to be proper. Therefore the assessee is aggrieved and hence this ground is taken before the coordinate bench.

12. He further submitted that the issue is squarely covered in favour of the assessee by the following judicial precedents:-

"Sanction of commissioner instead of JCIT renders reopening is void : 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 . Ghanshyam K. Khabrani v. ACIT (2012) 346 ITR 443 (Bom)(HC) DSJ Communication Ltd. .v. DCIT (2014) 222 Taxman 129 (Bom.)(HC) Purse Holdings India P. Ltd. v. ADDIT(IT)(2016) 143 DTR 1(Mum.)(Trib.) Yum ! Restaurants Asia Pte Ltd v. Dy. DIT (No.1) (2017) 397 ITR 639 (Delhi)"

13. We have carefully considered the rival contentions and perused the order of the learned assessing officer passed u/s 147 read with Section 143 (3) of the act on 31st of March 2015 wherein it is specifically mentioned that the income of the assessee was not assessed u/s 143 (3) of the act but the return was processed only u/s 143 (1) of the act. It was further mentioned in that order itself that the approval/ sanction of the CIT was obtained for reopening of the assessment. In the present case the reopening has been made prior to 1 June 2015 therefore the provision as it existed then are as Under:-

> [21][**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 [22][by an Assessing Officer, who is below the rank of Assistant Commissioner [23][or Deputy Commissioner], unless the [24][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 [24a]**[***Principal Chief Commissioner or***]** Chief Commissioner or [24a]**[***Principal 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 [24][Joint] Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the [24][Joint] Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.]
>
> [25][*Explanation.*—For the removal of doubts, it is hereby declared that the Joint Commissioner, the [25a]**[***Principal Commissioner or***]** Commissioner or the [25a]**[***Principal Chief Commissioner or***]** 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.]

14. Therefore, apparently the sanction should have been taken by the learned assessing officer for reopening of the assessment u/s 147 of the act from the rank of the joint Commissioner of income tax according to Section 151 (2) of the act. Apparently such approval has not been taken but has been taken from CIT. Identical issue arose before the honourable Delhi High Court in **Yum Restaurants Asia Pte Ltd. V DCIT** [2018] 99 taxmann.com 423 (Delhi)/[2017] 397 ITR 639 (Delhi) wherein it has been held as Under:-

> **"3.** One of the grounds urged in the present petition is that since the original assessment was processed under section 143(1) of the Act, and since the reopening was after the expiry of four years from the end of the relevant assessment year, the approval for the reopening of the assessment had to be granted, in terms of section 151(2) of the Act, by an officer of the rank of Joint Commissioner, which in this case was the Additional Director of Income-tax (Addl. DIT). However, in the present case the approval was granted under section 151(2) by the Director of Income-tax (DIT) who was an officer superior to the

Addl. DIT. It is accordingly contended by the petitioner that the impugned notice under section 148 of the Act and all proceedings pursuant thereto are bad in law.

4. On the previous date, i.e., August 30, 2017, this court noted that the petitioner was placing reliance on the decision of the court in *CIT* v. *SPL's Sidhartha Ltd.* [2012] 17 taxmann.com 138/204 Taxman 115 (Mag.)/345 ITR 223 (Delhi) and urged that even if such approval had been granted, as in the present case, by the officer superior, i.e., the DIT, it would not cure the defect. The learned counsel for the Department sought time to produce the relevant file.

5. The relevant file has been produced before the court. There is a single note sheet in the file and it is dated March 26, 2012. The note prepared by Mr. Mazhar Akram, the Assessing Officer, reads : "No records for assessment year 2005-06 are traceable. ITD is showing the ROI processed for the assessment year 2005-06. In the light of the reasons recorded in annexure A, approval for issue of notice under section 148 of the Income-tax Act, 1961 is sought". The said note was put up to the Addl. DIT who recorded "put up for approval" with his signature and put up the file to the DIT. The next signature on the file is that of the DIT who states in a single word "approved".

6. From the above noting on the file it is seen that the Addl. DIT merely "put up for approval" the file and did not himself accord approval of the Assessing Officer's proposal for reopening the assessment for the assessment year 2005-06.

7. It is contended by Mr. Rahul Chaudhary, learned senior standing counsel for the Department, that when the Addl. DIT recorded the words "put up for approval" he, in fact, should be understood to have applied his mind, approved the note of the Assessing Officer, and only thereafter put up the note for further approval to the DIT. He further sought to explain that it is only because the original records were not traceable that this course was adopted by the Addl. DIT.

8. The above submission cannot be accepted. Where the original assessment is processed under section 143(1) of the Act, and the reopening is sought to be done after the expiry of four years from the end of the relevant assessment year, the mandatory requirement under section 151(2) of the Act is that the approval for the reopening of the assessment should be by an officer of the rank of the Joint Commissioner (in this case, the Addl. DIT) and not other officer including a superior officer. Section 151(2) of the Act as it stood at the relevant time read :

"(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."

9. The argument that the approval by an officer superior to the Joint Com missioner will satisfy the requirement of section 151(2) of the Act, was categorically negated by this court in the aforementioned decision in *SPL's Siddhartha Ltd.* (*supra*) which has been followed in *CIT* v. *Soyuz Industrial Resources Ltd.* [2015] 58 taxmann.com 336/232 Taxman 414 (Delhi). In *SPL's Siddhartha Ltd.* (*supra*), under similar circumstances after noting that the approval had been granted on the file by a superior officer whose approval had been sought, the court observed as under (page 226 of 345 ITR) :

"The aforesaid noting in the file does not reflect what learned counsel for the Revenue argued. In the first instance, it would be seen that the Assessing Officer had specifically sought the approval of the Commissioner only. Therefore, it cannot be said that the Joint Commissioner/Additional Commissioner had granted the approval. Further, no doubt, the file was routed through the Additional Commissioner. However, he also, in turn forwarded the same to the Commissioner by giving the following endorsement :

'Commissioner of Income-tax may kindly accord sanction.'

It is clear that the Additional Commissioner of Income-tax did not apply his mind or gave any sanction. Instead, he requested the Commissioner to accord the approval. It, thus, cannot be said that it is an irregularity curable under section 292B of the Act."

10. In *Soyuz Industrial Resources Ltd.* (*supra*), the court explained :

"8. The Revenue's argument seems plausible and even logical because the Commissioner or a Chief Commissioner is unarguably ranked higher in authority than a Joint Commissioner. Yet at the same time, this court has to give effect to plain words of the statute which unambiguously states that the competent authority in such cases is the Joint Commissioner (and not the Chief Commissioner or the Principal Commissioner). The Revenue's submissions that all such cases, are covered under proviso to section 147(1), the competent authority for prior approval would be four superior officers, renders section 151(2) superfluous. If anything the court is clear that it is not its job to render, in the process of interpretation, an entire provision academic or inoperative. This court is of the opinion that accepting the Revenue's position would result in that consequence. The court also invokes the principle enunciated by the Privy Council in *Nazir Ahmad* v. *Emperor*, AIR 1936 PC 253 : that if the statute mandates that something be done in a particular manner, should be in that manner or not at all. In this case, since the original assessment was completed 'other than' the eventualities contemplated in section 151(1), i.e., it was processed under section 143(1). Thus, clearly section 151(2) applied."

11. In view of the clear position in law, the court has no hesitation in concluding that in the present case, the mandatory requirement under section 151(2) of the Act, as it stood at the relevant time, has not been fulfilled and therefore, the reopening of the assessment for the assessment year 2005-06 by the impugned notice is bad in law.

12. For the aforementioned reasons, the notice dated March 28, 2012 issued by the Assessing Officer to the petitioner under section 148 of the Act and the order dated January 25, 2013, passed by the Assessing Officer rejecting the petitioner's objections thereto are hereby quashed."

15. Therefore, respectfully following the decision of the honourable Delhi High Court in the above matter we hold that as no proper approval has been taken in accordance with the provisions of Section 151 of the income tax act by the learned assessing officer at the time of issuing 147 of the act, all the proceedings subsequent to that point makes all the orders passed by the respective revenue authorities as Nullity. In view of this we allow ground

number 1.1 of the appeal of the assessee and consequently quashed the order passed by the learned assessing officer.

16. Accordingly appeal of the assessee is allowed on this issue keeping all other issues and unadjudicated .

Order pronounced in the open court on 10/11/2020.

-Sd/-	-Sd/-
(H.S.SIDHU)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 10/11/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi