

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)**

**BEFORE SHRI LALIET KUMAR, JUDICIAL MEMBER
AND
SHRI B.R.R.KUMAR, ACCOUNTANT MEMBER
ITA No.2570/Del./2015
(ASSESSMENT YEAR : 2002-03)**

Omega Biotech Ltd. Vs. D-10, Kavi Nagar, Industrial Area, Sector-17 Ghaziabad PAN : AAACO3488R (APPELLANT)	Vs.	ITO Ward-13(4) New Delhi (RESPONDENT)
---	-----	--

ASSESSEE BY : Sh. Vinit Kumar Bindal, CA & Ms. Sweety
Kothari CA
REVENUE BY : Shri P.V Gupta, Sr. DR

Date of Hearing : 11.04.2019
Date of Order : 12 .04.2019

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

This appeal is preferred by the assessee against order dated 27.02.2015 passed by the Ld. CIT (Appeals)-7, New Delhi for assessment year 2002-03 on the following grounds reads as under :-

- I. *The CIT(A) erred in law and on facts in upholding the reassessment order passed u/s 147 and notice issued u/s 148 as valid ignoring the fact that the notice u/s 148 has been issued merely on the basis of the information received from Investigation Wing. Thus, the assessment so made should be cancelled.*
- II. *The CIT(A) erred in law and on facts in confirming the addition of Rs. 12,50,000/- for the amount received towards the share capital from five limited companies ignoring the facts, evidences and submissions placed on record. Thus, the addition so made should be deleted.*
- III. *The appellant craves the leave to add, substitute, modify, delete or amend all or any ground of appeal either before or at the time of hearing.”*

2. The Ld. CIT(A) decided the issue of the Jurisdiction u/s 148 of the ACT against the assessee by citing the following reasons paragraph 5.4 to 5.7.

“5.4 The issue was again examined by the apex court in the case of Assistant Commissioner of Income tax v Rajesh Jhaveri Stock Brokers (P.) Ltd (SC) wherein it was held as under:

"16. Section 147 authorises and permits the AO to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification, if the AO has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established

fact of escapement of income. At the .stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have firmed a requisite belief whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction.

17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution Under the old provisions of section 147 separate clauses (a) and (b) laid down the circumstances under which income escaping assessment ,for the past assessment years could be assessed or reassessed to confer jurisdiction under section 147(a) two conditions were required to be satisfied, firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or

failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under section 148 read with section 147(q). But under the substituted section 147 existence of only the first condition suffices. In other words if the AO for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment

18. So long as the ingredients of section 147 are fulfilled, the AO is free to initiate proceeding under section 147 and, failure to take steps under section 143(3) with the AO powerless to initiate reassessment proceedings even when intimation 143(1) had been issued."

5.5 The Hon'ble Courts in the judgments mentioned above have clearly held that formation of belief by the AO is within the realm of subjective satisfaction and it is not necessary for the AO to conclusively prove the escapement of income before

initiating proceedings u/s 147. Therefore, it is held that the AO had reasons to believe that income had escapement assessment and he was within his competence to invoke the powers contained in section 147 to initiate reassessment of the income of the appellant.

5.6 As per Section 147:

“For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.”

5.7 It is thus clear that the AO can assess such income for which 147 has been used and any other income which comes to his notice subsequently in the course of proceedings. In view thereof, proceedings u/s 148 are perfectly in order. The ground of appeal is thus ruled against the appellant.”

3. Feeling aggrieved by the decision on legal grounds as well as on merits, the assessee has preferred the present appeal before us for the grounds mentioned hereinabove.
4. At the outset the Ld. AR for the assessee had submitted that the reopening done by the Assessing Officer is not in accordance with law , as there was no independent application of mind by the Assessing Officer and the Assessing Officer had merely relied upon report of the Investigation Wing of the department. It was submitted that the assessee was permitted to take this legal ground at the second round of application and for that purposes he had relied upon the decision of Special Bench as well as the **High Court Hemal Knitting Industries vs. ACIT (2010) 127 ITD 160 (Chennai) (TM)** reads as under :

“As there was a difference of opinion between the Members of the Division Bench who heard this appeal, the same was referred to the Third Member by the Hon'ble President under sec.255(4) of the Income-tax Act, 1961 (the Act) to resolve the same. The point of difference referred to the Third Member was as follows :

"Whether, on the facts and in the circumstances of the case, is it open to the assessee to challenge the validity of reassessment proceedings before the Tribunal in the second round of litigation,

when in the first round, the Tribunal had remanded the order for limited purpose?"

5. In the matter of **investments Corp. Ltd. Vs. CIT (1992) 194 ITR 548 (Bom) (556)** wherein paragraph 23 to 28 it was held as under :-

"23. We, therefore, hold that a ground by which the jurisdiction to make assessment itself is challenged can be urged before any authority for the first time

24. This, however, does not solve the problem before us. All the cases referred to by us above are the cases dealing with same round of litigation In the case before us, the new ground was raised for the first time not in appeals arising out of the same proceedings. It was taken in collateral proceedings. Reassessment under section 147 was made on August 27,1959. More or less a consent order was obtained in appeal there against as a result of which the order of reassessment stood set aside for the purpose of giving an opportunity to the assessee to prove the genuineness of certain cash credits. The grounds questioning jurisdiction to reassess was not raised even in the second round of proceedings before the Income-tax Officer who completed reassessment afresh on March 28,1970. No such grounds was taken originally in dispute

was taken at the same time of hearing before the Appellate Assistant Commissioner, In view of the latest decision of the Supreme Court in the case of Jute Corporation of India Ltd., it cannot be disputed that the assessee could have raised this ground before the Appellate Assistant Commissioner in his appeal against the first order of reassessment. The pertinent question is whether the new ground could be taken in reassessment proceedings after remand. This takes us another aspect of the question, namely, whether the assessee could have taken such a ground before the Income-tax Officer himself in these proceedings because if he could have done so, the power of the Appellate Assistant Commissioner being coterminous, it would be open to him to do so before the Appellate Assistant Commissioner as well. The other aspect would be whether being a ground challenging the very jurisdiction to make reassessment, such a ground could be taken before any authority and any stage of the proceedings. In this context, it will be necessary in the first instance to ascertain the scope of fresh assessment to be made by an Income-tax Officer when the Appellate Assistant Commissioner sets aside the assessment and directs the Income-tax Officer to make fresh assessment with some directions. The legal position does not appear to be very clear on the subjects. One view is that while making a fresh

assessment, the Income-tax Officer has, subject to the Appellate Assistant Commissioner's directions, the same powers which he had while making the original assessment. He is entitled to disregard his own previous findings. He can take not account materials not previously existing and tax income not originally assessed. Likewise, it may be open to the assessee to raise objections to the assessments or to the quantum which he had not raised originally before him or the Appellate Assistant Commissioner. The other view is that the Income-tax Officer, is while passing orders in pursuances of the orders of the appellate authority, required to consider only those matter about which there was a dispute before the appellate authority and directions had been given. Even where the appellate order does not contain such specific directions, under certain circumstances, it may have to be read as remitting the case only on the issued in appeal and, in that event also, the Income-tax Officer cannot re-examine other issues. Consequently, the assessee may not be able to raise contentions which were not raised him in he original proceedings.

25. However, in this case, it is not really necessary to go into this questions. The impunged ground raised before the Appellate Assistant Commissioner admittedly goes to the very root of the Income-tax Officer's jurisdiction to make

reassessment.

26. In our view, the jurisdiction of the Income-tax Officer to initiate reassessment proceedings under section 34 of the Act depends solely on the existence of the conditions precedent prescribed by law and the jurisdiction defect, if any, cannot be made good by relying on the order of remand passed by the Appellate Assistant Commissioner. In fact, the Appellate Assistant Commissioner has no jurisdiction under section 31 of the 1922 Act to issue directions to the extent of conferring jurisdiction upon the Income-tax Officer which he is not lawfully seized of. This view was taken by the Madras High Court in the case of N. Naganatha Iyer v. CIT [1966] 60 ITR 647. The said decision was followed by the Gujarat High Court in CIT v. Nanalal Tribhovandas [1975] 100 ITR 734. We are in respectful agreement with the view taken by the Madras Gujarat High Court in this regard. If it is found that the Income-tax Officer had no jurisdiction to make an order of reassessment, it is irrelevant that the jurisdiction of the Income-tax Officer to reassess was not challenged at any of the earlier stages. The assessee was entitled to challenge the jurisdiction of the Income-tax Officer to initiate reassessment proceedings before the Appellate Assistant Commissioner in the second

round of proceedings even though he had not raised it earlier before the Income-tax Officer or in the earlier appeal. The Calcutta High Court has taken the view in the case of CIT v. Shree Ganesh Jute Mills Ltd [1977] 109 ITR 562 that any new ground, not necessarily a ground pertaining to jurisdictional aspect, could be taken for the first time before the Appellate Assistant Commissioner in the second round of proceedings. But, for the present we need not go that far. We leave this question open.

27. In the light of the discussion above, we answer the question in the negative and in favour of the assessee.

28. No order as to costs.”

6. On the basis of above it was submitted that the assessee is not precluded in raising legal ground even in the second round of litigation before the CIT(A) as well as before the Tribunal.

7. In view of the decisions and discussion **Hemal Knitting Industries vs. ACIT & Investment Corpn. Ltd. vs. CIT (supra)**, we are of the opinion that the assessee can take the legal ground in the second round of litigation, despite it was not taken in the first round of limitation.

8. Present appeal is the 2nd round of the litigation before the tribunal on the above noted grounds . In the 1st round of the litigation the Tribunal vide order dated 31st of December 2009 had remanded back the matter to the file of the assessing officers with a direction to examine the nature of credit and to satisfy whether the credit is properly explained not. The assessee was also directed to justify the identity and creditworthiness of the creditor and genuineness of the connection.

9. In the remand proceeding the assessing officer had called upon the Assessee to discharge the burden in terms of the Decision of the tribunal , however the AO was not convinced with the explanation given by the Assessee , hence confirmed the additions. The AO at page 1 of the assessment order had recorded that “the reopening was done pursuant to recording of the reasons by the assessing officer on the basis of information received from investigation Wing “. The Ld. AR for the assessee has

drawn our attention to the reasons recorded for reopening and in the said reasons it was mentioned that :

“Reason recorded for reopening

The Investigation Wing, New Delhi has sent details information. As per information, the assessee company’s name appears in the list of beneficiaries who have obtained accommodation entries from the following parties:

<i>Beneficiary Name</i>	<i>Beneficiary Bank Branch</i>	<i>Value of entry taken</i>	<i>Date on which entry taken</i>	<i>Name of account holder of entry giving account</i>	<i>Bank from which entry given</i>
<i>Standard Chartered Bank</i>	<i>Connaught Place</i>	<i>2,50,000/-</i>	<i>12, January, 2002</i>	<i>Enpol (P) Ltd.</i>	<i>Jai Laxmi Co-operative Bank</i>
<i>Standard Chartered Bank</i>	<i>Connaught Place</i>	<i>2,50,000/-</i>	<i>12, January, 2002</i>	<i>Amba Alloys (P) Ltd.</i>	<i>Jai Laxmi Co-operative Bank</i>
<i>Standard Chartered Bank</i>	<i>Connaught Place</i>	<i>2,50,000/-</i>	<i>12, January, 2002</i>	<i>Landmark Communication (P) Ltd.</i>	<i>Jai Laxmi Co-operative Bank</i>
<i>Standard Chartered Bank</i>	<i>Connaught Place</i>	<i>2,50,000/-</i>	<i>12, January, 2002</i>	<i>Saurabh Petrochem (P) Ltd.</i>	<i>Jai Laxmi Co-operative Bank</i>
<i>Standard Chartered Bank</i>	<i>Connaught Place</i>	<i>2,50,000/-</i>	<i>12, January, 2002</i>	<i>Profan Finance & Investments</i>	<i>Jai Laxmi Co-operative Bank</i>

Since the assessee has received entries, I have reason to believe that income of the assessee to extent of Rs.

12,50,000/- has escaped assessment for which action u/s 148 of the Income Tax Act is initiated for the A.Y. 2002-03."

10. The Ld. CIT(A) decided the issue of the Jurisdiction u/s 148 of the ACT against the assessee by citing the following reasons paragraph 5.4 to 5.7.

"5.4 The issue was again examined by the apex court in the case of Assistant Commissioner of Income tax v Rajesh Jhaveri Stock Brokers (P) Ltd (SC) wherein it was held as under:

"16. Section 147 authorises and permits the AO to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification, if the AO has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have

firmed a requisite belief whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the AO is within the realm of subjective satisfaction.

19. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed to confer jurisdiction under section 147(a) two conditions were required to be satisfied, firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under section 148 read with section 147(q). But under the substituted section 147 existence of only the first condition suffices. In other words if the AO for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment.

20. So long as the ingredients of section 147 are fulfilled, the AO is free to initiate proceeding under section 147 and, failure to take steps under section 143(3) with the AO powerless to initiate reassessment proceedings even when intimation 143(1) had been issued."

5.5 The Hon'ble Courts in the judgments mentioned above have clearly held that formation of belief by the AO is within the realm of subjective satisfaction and it is not necessary for the AO to conclusively prove the escapement of income before initiating proceedings u/s 147. Therefore, it is held that the AO had reasons to believe that income had

escapement assessment and he was within his competence to invoke the powers contained in section 147 to initiate reassessment of the income of the appellant.

5.6 As per Section 147:

“For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.”

5.7 *It is thus clear that the AO can assess such income for which 147 has been used and any other income which comes to his notice subsequently in the course of proceedings. In view thereof, proceedings u/s 148 are perfectly in order. The ground of appeal is thus ruled against the appellant.”*

11. Feeling aggrieved by the decision on legal grounds as well as on merits, the assessee has preferred the present appeal before us for the grounds mentioned hereinabove.

12. It was submitted by the Ld LD AR before us that there was no independent application of mind by the assessing officer before issuance of notice under section 148 and the assessing officer had merely copied the information received from the investigation Wing without independently applying his mind. It was submitted that assessing officer is required to form opinion based on the

tangible material that the has escaped assessment and further submitted if the reason for reopening is solely based on information received from the investigation Wing of the Department, than the reasons for reopening must show that the assessing officer had independently examined information and applied his mind to the said information and thereafter formed his opinion . Ironically same was not been done in the present case by the AO and therefore reopening done by the assessing officer is liable to be set-aside. The assessee relied upon judgment of Delhi High Court in the matter of Dharamveer Singh Rao Vs ACIT 2017 TIOL 2447. In the said matter it was held that the satisfaction based on the borrowed satisfaction is no satisfaction in the eyes of law and hence the assessment made by assessing officers based on such satisfaction is liable to set aside. Further the assessee relied upon the decision in the matter of Sarthak securities 329 ITR 110, wherein in the identical facts the High Court has quashed the notice under section 148 of the act.

13. On the other hand the Ld. DR, had submitted that the reasoning given by the lower authorities is correct and the issue is not required to be decided against the revenue as there is proper application of mind by the lower authorities.

14. We have heard the rival contention of the parties and perused the material available on record and the Judgments relied upon by the parties before us. The reasons for reopening are given in the paperwork by the assessee and the content of which are reproduced herein above which clearly shows that the assessing officer at the time of issuance of notice under section 148 had only considered the report of the investigation. It is incumbent upon the assessing officer to apply independently mind and examine the information came to him from the investigation Wing and after examining the correctness and reliability of the information independently the assessing officer was required to issue the noticed under

section 148 to the assessee. In the present case needful was not done.

Therefore we have no other option but to hold that the notice issued under section 148 was not in accordance and law and hence proceeding based on this satisfaction are required to set aside. We also find that the verbatim of the satisfaction written in the case of Sarthak Securities Co. Pvt. Ltd., and in the case of the assessee are similar and devoid of any iota of “satisfaction” derived by the Assessing Officer. We also draw our strength from the decision of Sarthak Securities Co. Pvt. Ltd. vs. Income Tax Officer- Ward 7(3) 2010-TIOL-726-HC-DEL-IT regarding the issue of notice under section 148 and satisfaction of the AO thereof, wherein it was held as under :

“23. The obtaining factual matrix has to be tested on the anvil of the aforesaid pronouncement of law. In the case at hand, as is evincible, the assessing officer was aware of the existence of four companies with whom the assessee had entered into transaction. Both the

orders clearly exposit that the assessing officer was made aware of the situation by the investigation wing and there is no mention that these companies are fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicate independent application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive proof is not germane at this stage but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to apply”.

In view of the above , that the satisfaction recorded by the Assessing Officer and the reason for reopening was not in accordance with law and therefore, the assessment order passed by the Assessing Officer required to be set aside. Since, we allow ground 1 of the assessee appeal.

As we have allowed ground 1 of assessee appeal, all other grounds are not adjudicated as become academic. Consequently, the appeal of the assessee is allowed.

Order pronounced in open court on this 12th April, 2019.

**Sd/-
(B.R.R.KUMAR)
ACCOUNTANT MEMBER**

**Sd/-
(LALIET KUMAR)
JUDICIAL MEMBER**

**Dated 12 /04/ 209
BR**

Copy forwarded to
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XXVI, New Delhi.
5 CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**

Date of dictation	11.04.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

TAXPUNDIT.ORG