आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "सी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE S/SHRI B.R.MITTAL,(JM) AND RAJENDRA (AM)
सर्वश्री बी.आर.मित्तल, न्यायिक सदस्य एवं राजेन्द्र, लेखा सदस्य के समक्ष

आयकर अपील सं./I.T.A. No.6582/Mum/2011
(निर्धारण वर्ष / Assessment Year:2004-05)

Assistant Commissioner of Income Tax,16(3), Room No.206, 2nd floor, Matru Mandir, Tardeo Road, Mumbai-400007	बनाम/ Vs.	M/s C.Mahendra Exports, 1204, Panchratna , Opera House, Mumbai-400004.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Cross-Objection No.150/Mum/2012
In I.T.A. No.6582/M/2011

M/s C.Mahendra Exports, 1204, Panchratna , Opera House, Mumbai-400004.	बनाम/ Vs.	Dy. Commissioner of Income Tax,16(3), Room No.206, 2nd floor, Matru Mandir, Tardeo Road, Mumbai-400007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAFC2878E		
(अपीलार्थी /Cross-Objector)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Revenue by :	Ms.C.Tripura Sundari
प्रत्यर्थी की ओर से/Respondent by :	Shri Reepal G.Tralshwala

सुनवाई की तारीख / Date of Hearing : 12.8.2013
घोषणा की तारीख /Date of Pronouncement : 21.8.2013

आदेश / O R D E R

Per B.R.Mittal, JM:

The Department has filed this appeal for assessment year 2004-05 against order of ld. CIT(A), Mumbai dated 7.6.2011 on the following grounds :

> "1. The ld. CIT(A) erred in deleting the addition of Rs.31,73,329/- towards labour charges claimed to be paid to Shri Dhirubhai Sambhubhai Diyora;
>
> 2. The ld. CIT(A) has failed to appreciate the fact that Shri Dhirubhai Sambhubhai Diyora neither had any experience of job work nor did he have any infrastructure for the same;
>
> 3. The ld. CIT(A) erred in observing that Shri Dhirubhai Sambhubhai Diyora got done the job work through two other persons. Shri Dhirubhai Sambhubhai Diyora could not give any details of these persons such as their address, details of factories etc;
>
> 4. The ld. CIT(A) has failed to appreciate that the diamonds are very high priced goods and their processing require highly technical and precise work and therefore, it is impossible that the assessee would give these diamonds for processing to a person (Shri Dhirubhai Sambhubhai Diyora) with no experience and infrastructure and that persons would further give this work to some persons whose whereabouts were not knows to him"

2. Assessee has also filed Cross-objections disputing the validity of initiating re-assessment proceeding.

3. The relevant facts giving rise to this appeal are that the assessee filed its return of income on 1.11.2004 declaring total income of Rs.15,64,94,120/-. AO made assessment order u/s 143(3) of the Income Tax Act, 1961 (the Act) at a total income of Rs.15,83,70,100/- vide assessment order dated 28.12.2006. Thereafter, AO initiated re-assessment proceedings and the reasons recorded for re-opening of the assessment dated 20.9.2007 are placed at page 33 of the paper book which reads as under :

> **"Re-opening of assessment for AY 2004-05**
>
> **Received an intimation in the case of M/s C.Mahendra Exports arising out of protective assessment made in the case of Shri Dhirubhai Sambhubhai Diyora for assessment year 2004-05, from ITO, Ward 9(1), Surat,**
>
> **Report/intimation sent by the ITO is sufficient enough to invoke the provisions of section 147(b). Issue notice u/s 148 of the IT Act"**

4. Assessee disputed initiation of re-assessment proceedings vide letter dated 18.11.2008, copy placed at pages 34 to 42 of the paper book. AO disposed of all the objections of the assessee and completed assessment u/s 143(3) r.w.s.147, dated 2.12.2008 by disallowing labour charges of Rs.31,73,329/-. Being aggrieved, assessee filed appeal before the First Appellate Authority.

5. L.d CIT(A) confirmed the action of AO of re-opening of the assessment order u/s 147 of the Act. However, ld. CIT(A) deleted the addition made by AO on account of

claim of labour charges. Hence, department is in appeal disputing the deletion of the addition made by AO on account of claim of labour charges and whereas assessee has disputed by way of Cross-objection the validity of initiation of re-assessment proceedings.

6. Since the cross-objections filed by assessee go to root of validity of assessment order passed by AO, we have heard ld. Representative of the parties on the reasons recorded by AO to initiate re-assessment proceeding. Ld. AR submitted that at the time of making the original assessment u/s 143(3) dated 28.12.2006, the AO examined claim of labour charges. He submitted that assessee is maintaining books of accounts regularly which are audited and the audit report was filed along with return of income. Assessee also deducted TDS on the job work charges carried out by Shri Dhirubhai Sambhubhai Diyora and the assessee also filed TDS returns etc. disclosing the relevant information at the time of original assessment proceedings. He referred the contents of letter dated 18.11.2008 placed at pages 34 to 42 of paper book. He submitted that re-assessment proceedings has been initiated merely for making roving inquiry and there is no mention in the reasons recorded that the income chargeable to tax has escaped assessment because of failure of the assessee and/or not disclosing the relevant details. Nor any tangible material which has come to the notice of AO to reopen the assessment as per reasons recorded.

7. On the other hand, ld. DR supported the action of AO and submitted that AO has mentioned in the assessment order the reasons to satisfy that the income chargeable to tax has escaped assessment on account of claim of bogus labour charges. Ld. DR submitted that it is a fact that the reasons are not properly recorded but if the said reasons are considered in the light of the assessment order, the satisfaction of the AO that the income chargeable to tax has escaped assessment is fulfilled.

8. We have carefully considered submissions of ld. representatives of parties and orders of authorities below as well as the reasons recorded by the AO (supra).

9. We observe that from the contents of letter filed by the assessee disputing the initiation of re-assessment proceedings that the assessee, at the time of making original assessment, filed requisite details of labour charges claimed by the assessee in the profit and loss account. Assessee also filed confirmation letters to whom labour charges were paid during the financial year relevant to the assessment year under consideration. Thus, assessee made full disclosure of the labour charges paid at the

time of original assessment made by AO. The ld. DR has also not disputed the fact that the assessee filed tax audit report along with the return of income. Further, assessee also deducted TDS on the job-work charges carried out by Shri Dhirubhai Sambhubhai Diyora and assessee filed TDS return with the department thereby disclosing relevant information. Thereafter AO completed assessment. At the time of hearing, ld. DR conceded that reasons recorded by AO to initiate re-assessment proceedings are not self-contained as no satisfaction of escaping of income has been recorded by AO in the reasons recorded to initiate the re-assessment proceedings. The Hon'ble Apex Court has held in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561(SC) that **we must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. It was held that after 1-4-1989, Assessing Officer has power to "reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.**

10. The Hon'ble Gujarat High Court has also held in the case of **Gujarat Power Corpn. Ltd. V/s ACIT (2013) 350 ITR 266 (Guj) that once the Assessing Officer examines a certain claim of the assessee in the original assessment proceedings, raises queries, receives replies, but thereafter makes no additions or disallowances, without giving reasons, it would not be permissible to reopen the assessment even within four years on very same grounds. It was also held that if the Assessing Officer, after scrutinizing the claim during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It was also held that in the assessments of larger corporations in the modern day, involve large number of complex claims, voluminous material, numerous exemptions and deductions. That if the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry.**

Therefore, the Hon'ble Gujarat High Court observed interalia at page 295 of the report as under :

> **"We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion, whether or not in the final order he gives his reasons for not making the addition."**

We are of the considered view that the above decision of the Hon'ble Gujarat High Court squarely apply to the facts of the case before us and therefore, initiation of re-assessment proceedings cannot be said to be valid.

11. However, in respect of the contention of ld. DR that the AO has given adequate reasons in the assessment order and if the reasons recorded are considered in the context of the reasons given by AO in the assessment order, the reasons recorded can be said to be self contained. We do not find merit in the said contention. In this regard, we refer the case of Hon'ble Patna High Court of **CIT V/s Agarwalla Bros. [1991] 189 ITR 786 (PAT.)** which directly apply to the above contention of ld. DR. In the said case it was held by Their Lordships that the recording of the reasons is a pre-requisite to the assumption of jurisdiction by the Income-tax Officer for initiating the proceedings. It is only the recorded reasons which can indicate as to why the Income-tax Officer was made to believe that income has escaped assessment for the relevant assessment year. The Income-tax Officer is not authorised to refer to any other reason even if it can be otherwise inferred and/or gathered from the records. The Hon'ble Calcutta High Court in the case of **Berger Paints India Ltd. V/s ACIT (2004) 266 ITR 462) (Cal)** held that not only exist reasons for formation of the belief that income has escaped the assessment but there must also be a rational connection or relevant bearing with the materials for formation of the belief. The Amritsar Bench of the Tribunal in the case of **Pyramid Software & Technologies V/s DCIT, Circle, Jammu [2007] 105 ITD 305 (ASR.)** has held that the material, which comes to the notice of AO must be specifically evident, direct and not unspecific or vague. It is held that basis for initiating re-assessment proceedings is to be judged solely on the basis of reasons recorded by AO. AO cannot support re-opening of assessment by collecting the material or by making the inquiry subsequently after the date of initiation of proceedings. The Hon'ble Allahabad High Court has held in the

case of **Dass Friends Builders (P.) Ltd V/s DCIT (2006) 280 ITR 77 (All)** that under section 147 of the Act words "has reason to believe" and not "reason to suspect". Therefore, reasons to believe for the purpose of section 147 does not mean "reasons to suspect". ITAT, Delhi Bench (Third Member) in the case of **ACIT V/s Star Ferro Alloys (P.) Ltd. [2004] 90 ITD 63 (DELHI)(TM)** has held that proceedings u/s 147 of the Act could not be resorted for making roving inquiries.

12. Considering the reasons recorded by AO in the present case, we are of the considered view that initiation of re-assessment proceedings by the AO is not in accordance with law. Therefore, the assessment made by AO cannot be said to be valid. Hence, assessment order is quashed. Accordingly, Cross-Objections filed by the assessee are allowed.

13. Since, we have held that the assessment order is not valid, the grounds of appeal taken by the department disputing deletion of the addition made by the AO do not require adjudication as the addition do not survive. Hence grounds of appeal taken by the department are dismissed.

14. In the result, the Cross-objections filed by the assessee are allowed and whereas appeal of the department is dismissed.

Order pronounced in the open court on 21st Aug, 2013
आदेश की घोषणा खुले न्यायालय में दिनांकः 21st Aug, 2013 को की गई ।

Sd/-	sd/-
(राजेन्द्र/RAJENDRA)	(बी.आर.मित्तल/B.R.MITTAL)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 21/ 08/2013
व.नि.स./ SRL , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार**/** BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai