

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri P.M.Jagtap, Vice-President** and
Shri S.S.Godara, Judicial Member

ITA No.674 & 675/Kol/2011 Assessment Year:2002-03

Shri Manoj Kumar Dhupelia Nilhat House, 6 th Floor, 11 R.N. Mukherjee Road, Kolkata-700 001 [PAN No.ADSPD 4099 F]		
Smt. Rupal Dhupelia C/o Manoj Dhupelia & Co. Nilhat House, 6 th Floor, 11 R.N. Mukherjee Road, Kolkata-700 001 [PAN No.ADSPD 3509 N]	<u>बनाम /</u> <u>V/s.</u>	Dy. Commissioner of Income Tax, Central Circle-III, 18, Rabindra Sarani, Poddar Court, 5 th Floor, Kolkata-01
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By assessee	Shri S.K. Tulsiyan. Advocate & Shri. Bhoomija Verema, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Dhrubajyoti Roy, JCIT-DR
सुनवाई की तारीख/Date of Hearing	06-01-2020
घोषणा की तारीख/Date of Pronouncement	15-06-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These two assessee's appeals for assessment year 2002-03 arise against the Commissioner of Income Tax (Appeals)-Central-II, Kolkata's order(s); both dated 04.03.2011, passed in case Nos. 154 & 153/CC-III/ CIT(A)C-II/10-11;respectively

involving proceedings u/s 147 r.w.s. 143(3) of the Income Tax Act, 1961; in short ‘the Act’

Heard Shri S.K.Tulsiyan and Shri Bhoomija Verma advocate(s) / learned authorized representatives appearing for assessees and Shri Dhrubajyoti Roy, JCIT representing the Revenue. Case file(s), voluminous paper books coupled with additional submissions and judicial precedents, stand duly perused.

2. We find at the outset that both assessees have raised their identical twin substantive grounds inter alia challenging correctness of both the lower authorities action initiating sec. 148 r.w.s. 147 proceedings culminating in undisclosed income from bank accounts addition(s) of ₹2,30,71,880/- each, on various legal and factual aspects, respectively.

3. Mr. Tulsiyan submits that these two assessees have also raised their two additional substantive grounds as follows:-

*“1. That on the face of the assessee’s denial, since the Revenue failed to discharge its onus to prove that he was one of the beneficiaries of M/s Ambrunova Trust or that he made any investment in LGT Bank, the Ld. AO /CIT(A) erred in adding his alleged “**proportionate share of benefit**” in the Bank balance as on 31.12.2001 as his income from other source apparently u/s 69 of the I.T. Act.*

2. That without prejudice to the assessee’s denial of any connection with Ambrunova Trust or LGT Bank since the Department has not proved that the sum of USD 24,06,604 was invested in LGT Bank during the FY 2001-02, the Ld. AO/ CIT(A) erred in holding that a sum of Rs.2,30,71,881 is assessable in the hand of the Assessee in Asst. Year 2002-03 apparently u/s 69 of the IT Act.”

4. Learned departmental representative has strongly opposed admission of assessee’s foregoing additional substantive grounds at this belated stage. His case is that the Assessing Officer as well as CIT(A) have afforded adequate opportunities of hearing during re-assessment and lower appellate proceedings; respectively. Mr. Roy fails to dispute that hon’ble apex court’s decision in *National Thermal Power Corporation. Ltd. vs. Commissioner of Income-tax* (1998) 229 ITR 383 (SC) and *All*

Cargo Global Logistics Ltd. vs. DCIT (2012) 137 ITD 26 (Mum) (SB) hold that this tribunal can very well entertain an additional ground going to root of the matter provided all the relevant facts form part of records. We adopt the very reasoning herein as well to decline Revenue's foregoing technical objection. The assessee's twin additional substantive ground(s) stand admitted therefore.

5. Learned counsel next took us to Assessing Officer's re-opening reasons recorded in whilst initiating u/s 148 / 147 proceedings in former assessee's case as follows:-

"Sub: Reasons for re-opening u/s 148 of the I.T. Act for A.Y. 2002-03

Ref: Your letter dated 19/06/2009

Please refer to the above,

The reasons for re-opening of your case for A.Y. 2002-03 is as under:-

'I have the information in my possession that MANOJ DHUPELIA of 19A, Sarat Bose Road, Kolkata-20 and having office address at 6th Floor, Nilhat House, R.N. Mukherjee Road, Dalhousie, Kolkata-700001, is one of the beneficiaries in AMBRUNOVA TRUST.

The AMBRUNOVA TRUST maintained an account with the LGT Bank IN LIECHTENSTEIN and the balance thereon as on 31/12/2001 was US \$ 24,06,604.90.

I have also information in my possession that MANOJ DHUPELIA of 19A, Sarat Bose Raod, Kolkata-700020 and having Office address at 6th Flor, Nilhat House, R.N. Mukherjee Road, Dalhoussie, Kolkata-700001 is also one of the beneficiaries in MARLINE Management S.A., another trust.

In view of the above, I have the reason to believe that the income of the assessee to the extent of his share as per the relevant trust deeds in the above two trusts having aforementioned balances as on 31/12/2001 escaped assessment due to failure on the part of the assessee to disclose full and true income for A.Y 202-03 within the meaning of section 147 of Income Tax Act. 1961.

Issue notice u/s. 148 of the I.T. Act. prior sanction of CIT Kol-XII, Kolkata has already been obtained vide No.CIT-XII/Kol/Tech./147/08-09/1490 dated 30/03/2009."

The factual position is very much identical in latter appeal as well.

6. Mr. Roy once again sought our permission to highlight a very significant aspect that this tribunal's co-ordinate bench's order(s) in assessee's other three family members case namely Shri Mohan, Ambrush, & Ms. Bhavya Manoj Dhupelia vs. DCIT, Mumbai (2014) 54 taxmann.com 146 (Mum-Trib) have already upheld departmental action initiating re-opening proceedings *qua* the very twin trusts set up in LIECHTENSTFIN The department's case therefore is that the instant appeal(s) must also follow the suit since involving identical questions of law and facts.

7. Learned authorized representative clarified at this stage that although it is correct that all these five family members have been held as the alleged beneficiaries of the twin trusts i.e. M/s Ambrunova Trust having maintained an account with the LGT Bank in Liechtenstein and another trust namely Marline Management S.A. with former having account balance of US \$ 2406604.90 on 31.12.2001; the fact also remains that the re-opening reasons recorded by the Assessing Officer while forming belief of the taxable income having escaped assessment are on altogether different footing than other three cases as follows:-

“Reasons for the belief that income has escaped assessment:

In this case, a Tax Evasion Petition has been received from the CBDT. As per the information contained in the said DTEP, the assessee is a beneficiary of Ambrunova Trust. The return of income of the assessee for the AY 2002-03 was perused and it is found that the assessee has neither offered any income with reference to the 'Ambrunova Trust nor any details were disclosed to the effect that the assessee is a beneficiary. The assessee is also a beneficiary in another trust name Marline management S.A. having account in account in LTG Bank. Liechtenstein

- 2. On going through the copy of bank summary in respect of Ambrunova Trust's account in LTG Bank. Liechtenstein, it is observed that there is a credit balance in the said account of USD 24,06,604 as on 31.12.2001, equivalent to Indian Rupees 11,60,99,390/- @ Rs.48.242 per USD.*
- 3. As per the information received on the amounts to the credit of the Trust, the interest accrued is USD 13,500 equivalent to Rs.6,51,267/-. As mentioned above, the assessee is one of the beneficiaries of the Trust along with four others. By taking the assessee's share as 1/5th of the same, the interest accrued to assessee's share works out to Rs.1,30,253/-. The same is not reflected in the Return of Income of the Assessee.*
- 4. In view of the aforesaid facts, I have reason to believe that receipts on account of interest at Rs.1,30,253/- has escaped assessment within the*

meaning of section 147 of the IT Act, 1961. Since no assessment under sub-section (3) of the section 143 or 147 has been made in this case, necessary, permission may kindly be accorded as per the provision of Section 151(2) of the IT Act, 1961 in order to issue notice u/s. 147/148 of the IT Act. A copy of the relevant portion of the TEP is enclosed herewith.

Dated: 26.3.2009.”

Mr. Tulsian's case next invited our attention to the assessee's re-opening reasons (supra) that the concerned Assessing Officer(s) in the instant assessee's cases have set sec. 148 / 147 process in motion on different set(s) of reasons. And that the other three assessee's / family members had also filed sec. 254(2) rectification before the tribunal's co-ordinate bench which stood rejected on 22.06.2015. They then filed civil writ petition Nos. 2601 to 2603 of 2015 before the hon'ble Bombay high court which stood accepted vide order dated 03.03.2016 as under:-

“1. These Petitions challenge a common order dated 22nd June 2015 passed by the Income Tax Appellate Tribunal (Tribunal) under section 254(2) of the Income Tax Act 1961 (the Act). By the impugned order dated 22nd June 2015, the Petitioners' Rectification Applications, seeking to rectify the order dated 31st October 2014 passed under section 254(1) of the Income Tax Act 1961 (the Act) was rejected.

2. We heard the Petitions for some time and we find that the Petitioners have made out an arguable case that the impugned order has failed to deal with the Petitioners' submissions with regard to the rectification of the order dated 31st October 2014. To illustrate the order date 31st October 2014 passed by the Tribunal while rejecting the Petitioners' grievance of breach of natural justice inter alia refers to a letter dated 23rd September 2009 and makes the following observations:

“Even vide letter dated 23/9/2009 the assessing officer showed details

(a) information of trust, (b) details of settler of the trust, (c) purpose of creating trust, (d) copy of trust deed, (e) asset and bank accounts held by the trust in India and abroad and A(f) benefit received by the appellant during the financial years relevant to Assessment Year 2002-03 to 2007-08 (page 21).”

1. However, on perusal of the letter dated 23rd September 2009 it is clear that the Assessing Officer did not furnish any details as indicated in the order of the Tribunal, rather it called for details from the Petitioners, and in turn, by letter dated 14th October 2009 the Petitioners pleaded ignorance of the Trust. The Rectification Application filed by the Petitioners sought to

rectify the aforesaid error apparent on the face of the order. However, the impugned order does not deal with the aforesaid objection of the Petitioners and the order dated 31st October 2014 of the Tribunal passed under section 254(1) of the Act on the above issue. It is the Petitioners' case that there are such other glaring errors in the impugned order. However, looking at the entire controversy in the Petitions, it would be appropriate that the Petitions be disposed of finally at the stage of admission. This is particularly because the Petitions arise from an order rejecting the Rectification Application and admitting the Petition would unduly delay the proceedings.

2. *In the above view, the parties are put to notice that the Petitions are fixed peremptorily on 12th April 2016 at 3.00 p.m. at which stage it may be disposed of finally. In the meantime, there shall be ad-interim relief in terms of prayer clause (d).*

It is further stated that the very hon'ble high court has also admitted the said three assessee's appeal(s) No. 754 to 756 of 2015 against the tribunal's order after framing substantial question of law.

All these clinching factual developments have gone un rebutted from the department side

8. We now advert to the assessee's former substantive ground challenging validity of re-opening. We start with the settled legal proposition, first of all. Case law Calcutta Discount Co. Ltd. Vs. Income Tax Officer (1961) 41 ITR 191 (SC) held long back that a belief of any taxable income having remained unassessable by reasons of an assessee's failure in disclosing all material facts fully and truly must not be based on mere suspicious but on relevant information / material only. Their lordships next judgment Income Tax Officer vs. Lakmani Mewal Das, (1976) 103 ITR 437 (SC) also concluded that there must be some direct nexus or live link between the relevant material coming to an Assessing Officer's notice whilst forming belief of escapement of taxable income from being assessed. Their lordships were further of the view that although it is correct that a court could not go into sufficiency or adequacy of the material and substitute its own opinion for that of the Assessing Officer on the point as to whether re-opening action ought to be initiated or not, it has to be kept in mind that it is not any or every material; however vague and indefinite or distant, remote

and forfeited, which would warrant the formation of belief relating to taxable income having gone unassessed.

9. Their lordship in *Sheo Nath Singh vs. ACIT 972 SCR (1) 175 (SC)* and *S. Naarayanappa and Others Vs. Commissioner of Income Tax, Bangalore, (1967) 63 ITR 219 (SC)* also hold that an Assessing Officer's action forming to belief of any taxable income having escaped assessment is to be based on supportive material only than on a mere suspicious. The very proposition also stand reiterated in *Commissioner of Income Tax-II vs. Multiplex Trading and Industrial Co. Ltd. (2015) 63 taxmann.com 170 (Del)* as well.

10. We keep in mind the foregoing legal position and decline the Revenue's prayer to treat the instant appeal as squarely covered. We wish to make it clear that we are dealing with validity of re-opening reasons at this stage keeping in mind the material available before the Assessing Officer which is found to be totally different than that in case of other three connected family-members / assessees. Case law *Hindustan Leaver Ltd. Vs. R.B. Wadkar (2004) 268 ITR 339 (Bom)* and *(2010) 189 Taxman 1 Prashant S. Joshi vs. Income Tax Officer, Ward-19(2)(4) Mumbai* had that it is only the re-opening reasons recorded by the Assessing Officer which could be considered when formation of belief of a taxable income having escaped assessment is challenged and the same could not be allowed to grow with age and ingenuity by devising new grounds in replies and affidavits not forming part of records whilst the reasons was originally recorded at the first stage. WE thus reject the Revenue's endeavour to import re-opening reasons income other three family members to be read in these two appeals. More so, when the said three family members' assessing authority had relied as "tax evasion petition(s) (supra) as well.

11. Mr. Roy at this stage vehemently submitted that both Assessing Officers in Kolkata & Mumbai have rightly gone by the relevant material on record indicating all these five assessees as beneficiaries of the twin trusts set up in *LIECHIENSTFIN*. He

emphasises that the Assessing Officer(s) have assessed these five assesseees to the extent of 1/5th share each in as beneficiaries going by the trust deed(s).

12. We find no merit in Revenue's foregoing instant argument supporting the Assessing Officer's re-opening reasons. There is hardly any dispute that these assesseees stood assessed u/s 143(3) of the Act at the first instance. It was only in the year 2009 i.e. on 30.03.2009 to be précised that the Assessing Officer issued his sec. 148 notice(s) after forming reasons to believe based on the alleged tangible material that their taxable income in the nature of balance amount of US \$ 246604.09 as on 31.12.2001 had remained unassessed to the extent of 1/5th share each. The Revenue's vehement stand throughout is that the Assessing Officer had proceeded on the basis of the corresponding trust deed(s) pertaining to the foregoing two trusts as well as other relevant documents whilst setting into motion u/s. 148 / 147 mechanism. These two assesseees had filed a common representation before the Assessing Officer on 23.07.2009 denying not only any such undeclared bank account(s) but also categorically stated that they are not beneficiaries of any such family or charitable trust. Learned departmental representative fails to dispute that in spite of the Assessing Officer having recorded his re-opening reasons based on assesseees' alleged shares in trusts assets going by the trust deeds claims, the department itself sought for the very trusts deeds from these assesseees / beneficiaries only. Copy of the relevant clinching corresponding coming from the department to this effect is dated 23.09.2009.

13. Coupled with this, the case file(s) suggests that this tribunal had also directed the department to produce the assessment records as well as the relevant evidence / materials on the basis of which the Assessing Officer formed his reasons to believe that the assesseees' taxable income had escaped assessment. We make it clear that no such evidence or material in the nature of trust deeds has seen light of the day even after a time gap of five years since this tribunal's direction to this effect had been issued on 25.05.2015. We observe in this backdrop that the Assessing Officers' re-opening reasons recorded on the basis of alleged trust deeds of the twin trusts is not

based on this relevant material / evidence since the said trust deeds nowhere formed part of records at the threshold stage. That being the case, we quote the settled legal proposition hereinabove (supra) to conclude that the assessing authority herein had not proceeded as per law whilst initiating sec. 148 / 147 proceedings against these two assessees. The impugned re-opening is held not unsustainable in law therefore.

14. Learned departmental representative has taken us the CIT(A)'s lower appellate discussion that the Revenue has very well proved that one Shri Sandro Prete had represented the former trust and he signed a declaration on 30.05.2001 and 05.03.2002 that the said trust had its an LGT bank account having these five family-members as beneficial owners of the asset thereof. He failed to pin-point any such material on record which could prove the clinching fact indicating these assessees to have ever nominated Mr. Prete as their representative for the purpose of managing the affairs of the above stated trust. Mr. Roy took us to page 46 para 4.2 of the lower appellate discussion that a meeting had to take place in July, 2002 between assessee(s) and Mr. Prete which stood cancelled on account of latter's eye surgery. He seeks to buttress the point that all this sufficiently indicated the relation between the assessees and their alleged authorized representative, Mr. Prete. We are of the opinion that even if there is some e-mail correspondence indicating this assessee to have undergone eye treatment, it nowhere emanates that either Mr Prete was assessee's nominee for managing the trust(s) or Mr. Dhupelia acted as Mr. "Ralps" *qua* affairs of the former trust.

15. There is further no dispute that the Assessing Officer's re-opening reasons have also nowhere specified as to how much of the assessees' taxable income had escaped assessment on account of their failure in disclosing the material facts "**fully & truly**" as stipulated in sec. 147 1st proviso of the Act. The Revenue has strongly contended that these assessees are beneficial owners of the trusts' assets to the extent of 1/5th share each which represented their taxable income remaining unassessed. Section 147 2nd proviso r.w.s u/s 149(1) (c) is also quoted that since the instant appeals pertain to undisclosed overseas assets, the assessees are not entitled to draw any benefit u/s 147 1st proviso. Learned departmental representative fails to dispute that both the

foregoing statutory provisions stood inserted by the Finance Act 2012 w.e.f. 01.07.2012 having prospective effect whereas we are dealing with sec. 148 proceedings involving re-opening reasons recorded in the year 2009 pertaining to assessment year 2002-03 i.e. much earlier than insertion of the amended provision. We also make it clear in view of our observation in preceding paragraphs that there is no material evidence coming from the departmental side that the corresponding twin trusts deeds have formed part of records which could even remotely indicate that these assesseees are beneficial owners of the trusts' assets to the extent of 1/5th share each as on 31.12.2001 we quote (2014) 363 ITR 300 (All) *Mukesh Kumar Gupta vs. Commissioner of Income Tax* that such a re-opening initiated beyond a period of four years from the end of the relevant assessment year is not sustainable in absence of the specified amount of taxable income having escaped assessment being recorded in re-opening reasons

16. There is further no quarrel that sec. 5(1)(a-c) defines total taxable income in case of a resident that the income which is received or deem to be received in India, accrued or arise or is deem to accrue or arise in India and accrues or arises to him outside India during such year. We reiterate that learned lower authorities have assessed these two assesseees *qua* the overseas trust's balance amount to the extent of 1/5th share each u/s 5(1)(c) only. We take into account the very fact and circumstances; and particularly, the clinching aspect of the trust deeds nowhere forming part of records that there is no cogent material indicating the assesseees as having 1/5th share each in the trusts' assets. And also as to whether the trust deeds herein pin-point the trusts as discretionary or specific ones and whether the balance amount therein was to devolve upon them in a vested or contingent manner. We note that once the Assessing Officer has himself not suggested that the impugned sums have been in fact accrued or arisen to them, case law (2008) 174 Taxmann 605 (Gujarat) *Maharaja Shri Jyotindresinji vs. ACIT* as upheld in hon'ble apex court (2014) 45 taxmann.com 552 (S.C) holds that the department's impugned action adding the trust's balance in these two taxpayers' hands does not deserve to be concurred with. The Assessing Officer's re-opening reasons nowhere allege that these

assesseees had any right to receive the alleged 1/5th shares as well. We also quote (2014) STPL (Web) 335 (SC) *Commissioner of Wealth Tax vs. Estate of Late HMM Vikramsinhji* that in a case of discretionary trust, the beneficiary has no more than a hope that the discretion would be exercised in his favour. Hon'ble apex court in *Commissioner of Income Tax vs. Kamalini Khatau* (1994) 209 ITR 101 (SC) also holds that it could not be said that the income; which is left to the discretion, is receivable so as to be assessed in a taxpayer's hands. We apply the very reasoning *mutatis mutandis* and hold that the amount in question in the nature of assesseees' alleged 1/5th share in the trust balance had neither accrued nor arisen so as to be taxed in these two taxpayers' hands. We also quote hon'ble apex court's decision in *Pushalal Mansinghka (P) Ltd. vs. Commissioner of Income Tax* (1964) 66 ITR 159 (SC) that the clinching expression "**accrues or arises**" does not construe actual receipt but only a right to receive. We wish to make it clear that our foregoing detailed discussion sufficiently proves in absence any material on record, these two assesseees did not have right to receive the alleged 1/5th share each in the trust's balance.

17. We observe in view of the foregoing detailed discussion that both the lower authorities have erred in law and on facts in initiating sec. 148 /147 proceedings against these two assesseees culminating in the impugned addition(s) of ₹230,71,880/- each. The impugned proceedings stand quashed therefore. The assessee's identical former substantive grounds alongwith their additional legal grounds (supra) are accepted.

All other pleadings on merits are rendered infructuous.

[A copy of this common order be placed in respective case files.]

18. Before parting, it is noted that the order is being pronounced after the ninety (90) days' of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown day need to be excluded. For coming to such a conclusion, we rely upon the decision of the co-ordinate bench of Mumbai tribunal in the case of DCIT vs. JSW Ltd. in ITA

No.6264/Mum/2018 & 6103/Mum/2018 decided on 14.05.2020 assessment year 2013-14.

In the result, both the appeals are allowed.

Order pronounced in open court on 15/06/2020

Sd/-
(उपाध्यक्ष)
(P.M.Jagtap)
Vice President

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 15/06/2020 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Shri Manoj Kr. Dhupelia Nilhat House, 6th Floor, 11,
R.N. Mukherjee Road, Kolkakta-700 001 / Smt. Rupal
Dhupelia, C/o. Manoj Dhupelia & Co. Nilhat House, 6th
Floor, 11,R.N. Mukherjee Road, Kolkata-700 001
2. प्रत्यर्थी/Respondent-DCIT, Central Circle-III, 18, Rabindra Sarani, Poddar Court
5th Floor, Kolkta-700 001
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।