

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 1020/PUN/2015  
निर्धारण वर्ष / Assessment Year : 2007-08

Agfa India Pvt. Ltd.  
(now merged with Afga Healthcare India Pvt. Ltd.),  
Technosoft Knowledge Gateway,  
2<sup>nd</sup> Floor, B-14, Road No. 1,  
Wagle Industrial Estate,  
Thane (West) – 400604.

PAN : AABCB2567K

.....अपीलार्थी / Appellant

**बनाम / V/s.**

The Assistant Commissioner of Income Tax,  
Circle – 1, Thane

.....प्रत्यर्थी / Respondent

Assessee by : Shri Girish Dave with  
Ms. Kadambari Dave  
Revenue by : Shri Rajeev Kumar

सुनवाई की तारीख / Date of Hearing : 27-07-2017

घोषणा की तारीख / Date of Pronouncement : 15-09-2017

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM :**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-I, Thane dated 30-04-2015 for the assessment year 2007-08.

2. The assessee has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds in appeal :

- “1. *“The order of the learned CIT (A) on aspects agitated in appeal is contrary to the provisions of law and facts of the case and without appreciation of the facts and circumstances of the case in their right perspective.*
2. *The learned CIT(A) erred in confirming the action of the Assessing Officer (‘AO’) of re-opening the assessment under section 147 of the Act.*
3. *The learned CIT (A) erred in not appreciating that considering the facts and circumstances of the case and the law prevailing on the subject, the reassessment proceedings are not in accordance with the law and the provisions of the Act. The appellant therefore submits that the reassessment proceedings be held to be bad in law and struck down.*
4. *The learned CIT(A) erred in dismissing the appeal filed by the appellant as infructuous without considering the merits of the case.*
5. *The learned CIT(A) erred in not holding that considering the facts and circumstances of the case and the law prevailing on the subject, the order under section 143(3) read with section 147 is null and void and needs to be quashed.*
6. *The learned CIT(A) erred in not deciding on merit the addition of INR 11,22,74,613 on account of international transactions entered into by the Appellant with its AEs in respect of the medical imaging diagnostic segment (transfer pricing adjustment).*
7. *Each one of the above grounds of appeal is without prejudice to the other.*
8. *The appellant reserves the right to amend, alter or add to the grounds of appeal.”*

The assessee has also raised additional ground of appeal the same reads as under :

- “1. *The learned Assessing Officer erred in not following the procedure prescribed by the Hon’ble Supreme Court in the case of GKN Driveshafts (India) Ltd. [2002] (259 ITR 19) and other judgments of the Hon’ble jurisdictional High Court resulting into reassessment being bad in law and void ab initio requiring its cancellation.”*

3. Shri Girish Dave appearing on behalf of the assessee submitted that reassessment proceedings u/s. 147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) have been initiated by Assessing Officer in an illegal manner. The ld. AR referred to satisfaction note at page 72 of the paper book. The ld. AR pointed that the Assessing Officer initiated reassessment proceedings on the directions of Joint Commissioner of Income Tax, Range-1, Thane. The provisions of section 147 mandates that reassessment proceedings can be initiated only if the Assessing Officer has ‘reason to believe’ that any income chargeable to tax has escaped assessment. It is the opinion and belief of the Assessing Officer which ignites reassessment proceedings and not the directions of any other superior authority. Further, the ld. AR submitted that the Assessing Officer has violated the law laid down by Hon’ble Supreme Court of India in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. reported as 259 ITR 19. The Hon’ble Apex Court has mandated that after issuance of notice u/s. 148, the proper course of action for the noticee is to file return and if he so desires, seek reasons for issuing notice. The Assessing Officer is bound to furnish reasons within a reasonable time. The assessee is thereafter required to file objections. The Assessing Officer before proceeding with the assessment has to dispose of the objections filed by the assessee by passing a speaking order. In the present case, the notice u/s. 148 was issued to the assessee on 19-01-2012. The assessee vide letter dated 07-02-2012 requested for providing reasons for reopening the assessment. The Assessing Officer without supplying the reasons for reopening, issued notice u/s. 143(2) on 30-07-2012 followed by notice u/s. 142(1) on 11-09-2012. The Assessing Officer provided reasons for reopening on 20-12-2012 i.e. after initiation of reassessment proceedings.

3.1 The ld. AR submitted that the assessee filed objections/submissions against reasons for reopening on 04-01-2013. The Assessing Officer decided the objections of the assessee on 12-03-2013 and immediately on the next day i.e. 13-03-2013 issued show cause notice in respect of Transfer Pricing adjustment. The assessee could barely file reply to show cause notice on 19-03-2013, immediately thereafter, the Assessing Officer passed order u/s. 143(3) r.w.s. 147 of the Act, on 25-03-2013. The sequence of events clearly indicate that the Assessing Officer passed assessment order in reassessment proceedings in violation of the directions of Hon'ble Jurisdictional High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax reported as 296 ITR 90. The Hon'ble High Court has held that in reassessment proceedings where the Assessing Officer does not accept the objections filed by the assessee, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the order on objections, on the assessee. The Hon'ble High Court has granted period of four weeks to the assessee to exhaust the legal remedies available to him against the order of Assessing Officer rejecting objections. In the present case, the Assessing Officer in first instance has initiated reassessment proceedings without supplying the reasons of reopening and thereafter in a hasty manner has issued show cause notice on merits without granting period of four weeks after having rejected the objections of assessee.

3.2 The ld. AR of assessee submitted that the assessee before First Appellate Authority has challenged reopening of assessment u/s. 147. The Commissioner of Income Tax (Appeals) without adjudicating the issue of reopening has decided the appeal of assessee on merits. The Commissioner of Income Tax (Appeals) was duty bound to first decide the

validity of reopening before deciding the issue on merits. To support his submissions, the ld. AR placed reliance on the decision of Delhi Bench of the Tribunal in the case of Ballarpur Industries Ltd. Vs. Income Tax Officer reported as 80 taxmann.com 79. The ld. AR finally contended that the Commissioner of Income Tax (Appeals) has erred in dismissing the appeal of assessee as infructuous as the Commissioner of Income Tax, Thane had invoked the provisions of section 263 and has set aside the assessment order dated 25-03-2013 passed u/s. 143(3) r.w.s. 147 of the Act.

4. On the other hand Shri Rajeev Kumar representing the Department strongly defended the impugned order. The ld. DR submitted that once the assessment order impugned by the assessee in present appeal has been set aside by the Commissioner of Income Tax in revision proceedings, the present appeal filed by the assessee does not survive. The ld. DR further contended that reassessment proceedings were carried out in a fair manner. Proper opportunity of hearing has been granted to the assessee at each stage, therefore, no prejudice is caused to the assessee. The Assessing Officer had sufficient fresh material to initiate reassessment proceedings, therefore, there is no infirmity either at the time of recording satisfaction or the subsequent proceedings. The ld. DR prayed for dismissing the appeal of assessee.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also considered various decisions on which the ld. AR of assessee has placed reliance.

6. In ground Nos. 1 to 5 raised in the grounds of appeal and the additional ground of appeal, the assessee has assailed reopening of assessment u/s. 147 of the Act. The Assessing Officer issued notice u/s. 148 of the Act on 07-02-2012 after recording of satisfaction on 19-01-2012. The copy of satisfaction for initiating reopening of assessment was provided to the assessee vide communication dated 20-12-2012. Before proceeding further it would be necessary to first examine the reasons for initiating reassessment proceedings. The relevant extract of the satisfaction note is reproduced here-in-below :

*“In this case, the Addl. CIT, Transfer Pricing-1(1), Mumbai, by virtue of letter No.Addl.CIT/TP-1(1)/2011-12/788, dated 09.01.2008, has informed the Jt.CIT, Range-1, Thane, on 12.01.2012, that income has escaped assessment during the year in question.*

*The requisite details/bifurcation of the arms length price has been submitted, wherein it is informed that income amounting to more than Rs.11 crores has escaped assessment for both the years, i.e. 2007-08 and 2008-09 since the assessee has purchased goods from its AE's by paying prices far more than the ALP. Thus the assessee has wrongly manipulated the benchmarking of its international transactions relating to its medical imaging activity.*

**The Jt. CIT, Range-1, Thane, as per directions, has informed this office on 13.01.2012 to issue necessary notice. Armed with the Transfer Pricing information, the CIT-1, Thane too, vide letter No.THN/CIT-1/TP/AI/2011-12/2395 dated 16.01.2012, has given directions to take necessary action.**

*Based on the above facts and perusal of the information, it is seen that the assessee has overpaid its AE in transaction of import from AE relating to medical imaging segment. The difference had been worked out after holding the benchmark margin of 4.17%. The communication received from the Addl.CIT, Transfer Pricing-1(1), Mumbai is self explanatory in this aspect. As per requirements by the law, the assessee was required to benchmark each international transaction separately. The assessee has clubbed the international transactions of medical imaging segments with its entity level results wherein income has escaped assessment.*

*Considering the above facts, I have reason to believe that income chargeable to tax has escaped assessment due to the proceedings conducted by the Transfer Pricing Wing within the meaning of sec.147 of the I.T. Act, 1961.*

*Issued notice u/s. 148 of the I.T. Act, 1961.*

Sd/-  
(C.T. MATHEWS)  
ACIT, Circle-1, Thane”

A perusal of satisfaction note shows that the Assessing Officer has issued notice u/s. 148 on the directions of JCIT, Range-1, Thane and CIT-I, Thane.

7. The full bench of Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Kelvinator of India Ltd. reported as 256 ITR 1 has held that one of the pre conditions for reopening is that the Assessing Officer must have 'reason to believe' that income chargeable to tax has escaped assessment. The relevant extract of the observations of Hon'ble High Court in this regard are as under :

*"7. From a bare perusal of the provisions contained in s. 147 of the said Act, as it stood up to 31st March, 1989, it is evident that to confer jurisdiction under s. 147(a) of the Act two conditions were required to be satisfied viz., (i) the AO must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either (a) omission or failure on the part of the assessee to make a return of his income under s. 139; or (b) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. The afore-mentioned requirements of law must be held to be conditions precedent for invoking jurisdiction of the AO to reopen the assessment under s. 147 of the said Act. It is trite that both the conditions afore-mentioned are cumulative. It is also a well settled principle of law that, in the event, it is found that any of the said two conditions is not fulfilled the notice issued by the AO would be wholly without jurisdiction. The expression "reason to believe" finds place both in cls. (a) and (b) of s. 147 of the Act. Sub-s. (2) of s. 148 of the Act mandates that before jurisdiction under s. 147 of the Act is invoked by the AO he is to record his reasons for doing so or before issuing any notice under s. 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the AO could reopen a completed assessment."*

A perusal of above observations of Hon'ble High Court makes it unambiguous clear that 'reason to believe' that income chargeable to tax

has escaped assessment should be of Assessing Officer. It is Assessing Officer's 'reason to believe' that taxable income has escaped assessment that forms bedrock for reopening assessment u/s. 147 of the Act. Directions from JCIT or CIT to issue notice cannot in any manner be construed as Assessing Officer's 'reason to believe' for initiating reassessment proceedings. The provisions of section 147 in unambiguous terms mandates that the 'reason to believe' for reopening assessment should be of Assessing Officer. In other words the Assessing Officer should carryout independent exercise to examine fresh material in his possession to come to a conclusion that the assessment warrants reopening on account of escapement of income. In the present case, a perusal of reasons for initiating reassessment proceedings clearly show that they are against the sprit of provisions of section 147 of the Act. The Assessing Officer has issued notice u/s. 148 on the directions of JCIT and CIT. Therefore, in our considered opinion the notice issued u/s. 148 is bad in law and thus, the subsequent proceedings arising there from are vitiated.

8. Since, we have held that the proceedings u/s. 148 are bad on account of fatal defect at the stage of recording satisfaction itself, submissions made by the ld. AR of assessee in respect of subsequent events have become academic and are thus not dwelled upon.

9. In ground No. 6 of appeal, the assessee has challenged addition of Rs.11,22,74,613/- on merits. Since, the appeal of assessee has been allowed on basic issue of validity of initiation of reassessment proceedings, therefore, this ground has become academic.



10. The ground Nos. 7 and 8 are general in nature, hence require no adjudication.

11. In the result, the impugned order is set aside and the appeal of assessee is allowed.

Order pronounced on Friday, the 15<sup>th</sup> day of September, 2017.

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|--------------------------------------|---------------------------------|
| Sd/-                                 | Sd/-                            |
| (डी. करुणाकरा राव/D. Karunakara Rao) | (विकास अवस्थी / Vikas Awasthy)  |
| लेखा सदस्य / ACCOUNTANT MEMBER       | न्यायिक सदस्य / JUDICIAL MEMBER |

पुणे / Pune; दिनांक / Dated : 15<sup>th</sup> September, 2017

RK

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-I, Thane
4. आयकर आयुक्त / The CIT-I, Thane
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune