IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'SMC-1', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.1941/Del./2016
Assessment Year: 2009-10

Shri Budhu, C/o- Akhilesh Kumar, Advocate, Chamber No. 206-207, Ansal "Satyam", RDC Raj Nagar, Ghaziabad	**Vs.**	ITO, Ward-1, Shamli
PAN :BYDPB3106Q		
(Appellant)		**(Respondent)**

Appellant by	Shri Akhilesh Kumar, Adv.
Respondent by	Shri Prakash Dube, Sr.DR

Date of hearing	10.12.2020
Date of pronouncement	23.12.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 01/01/2016 passed by the Ld. Commissioner of Income-tax (Appeals), Muzaffarnagar [in short 'the Ld. CIT(A)'] for assessment year, 2009-10 raising following grounds:

1. *Because, notice issued u/s 148 of Act is beyond jurisdiction being without any 'reason to believe' and ' satisfaction' of AO or of the superior authority who accorded approval in a mechanical*

manner, in as much as, that same is merely on the basis of AIR information to conduct roving enquiries and hence subsequent proceedings are void-ab-initio and consequent order illegal.

2. *Because, without prejudice to above and as an alternative learned commissioner of income tax erred, in sustaining the addition of Rs. 18.59 lakhs made u/s 68 of the Act, being the amount deposited in the bank ignoring the fact that provisions of s. 68 are not applicable to assessee and addition is against the said provision of law.*
3. *Because, learned commissioner of income tax also erred, in sustaining the said addition despite admitting that statement relied for the same is recorded behind the back of assessee even after admitting that the said witness not produced for cross-examination and he further erred in appreciating the sequence of events and rule of preponderance of probability, hence order is perverse.*

Therefore, ;n terms of above grounds, it is hereby prayed that the notice u/s 148 and assessment framed may kindly be quashed though only as an a relative it is also prayed that the additions of Rs. 18,59,000/- may kindly be quashed."

2. Briefly stated facts of the case are that assessee, an individual, was engaged in agricultural activity during the relevant year. In the case of the assessee, an information was received through annual information return (AIR) that the assessee had deposited ₹ 23,59,000/- in his saving bank account maintained with the Punjab National Bank, Shamli (Uttar Pradesh). On being asked by the Assessing Officer, the assessee submitted explanation of source of deposit, however, the AO was not satisfied with the explanation of the assessee. In view of the information, the Assessing Officer issued a notice under section 148 of the Income-tax Act, 1961 (in short 'the Act') on 18/01/2013. The assessee filed return of income on 20/11/2013, declaring agriculture income of ₹ 66,000 and interest income of ₹ 10,361/- along with copy of receipt of advance of ₹ 25 lakh and copy agreement to sale of land. After filing return of income, the

assessee was provided reasons recorded for issuing notice under section 148 of the Act. The objections filed by the assessee against the reasons recorded were also addressed by the Assessing Officer. The assessment under section 147 read with section 143(3) of the Act was completed on 31/03/2014, after making addition of ₹ 20 lakh. The Ld. CIT(A) vide impugned order upheld the addition to the extent of ₹ 18.59 lakhs. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. Before us, the Learned Counsel of the assessee submitted orally that ground No. 1 of the appeal may be admitted as additional ground raised by the assessee. According to him this ground being legal in nature and no investigation of the fresh facts is required, it is admissible in view of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Company limited versus CIT 229 ITR 383.

4. We have heard submission of the parties on the issue of admission of the additional ground. The Hon'ble Punjab & Haryana High Court in the case of VMT Spinning Co. Ltd. Vs. CIT & Anr., reported in 389 ITR 326 (P&H) has held that for raising the ground, the assessee can seek leave of the Tribunal orally also. The relevant finding of the Hon'ble High Court is reproducing as under:

> *"Rule 11 in fact confers wide powers on the Tribunal, although it requires a party to seek the leave of the Tribunal. It does not require the same to be in writing. It merely states that the appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal. In a fit case it is always open to the Tribunal to permit an appellant to raise an additional ground not set forth in the memorandum of appeal. The safeguard is in the proviso to Rule 11 itself. The proviso states that*

the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground. Thus even if it is a pure question of law, the Tribunal cannot consider an additional ground without affording the other side an opportunity of being heard. We venture to state that even in the absence of the proviso it would be incumbent upon the Tribunal to afford a party an opportunity of meeting an additional point raised before it.

Moreover, even though Rule 11 requires an appellant to seek the leave of the Tribunal, it does not confine the Tribunal to a consideration of the grounds set forth in the memorandum of appeal or even the grounds taken by the leave of the Tribunal. In other words the Tribunal can decide the appeal on a ground neither taken in the memorandum of appeal nor by its leave. The only requirement is that the Tribunal cannot rest its decision on any other ground unless the party who may be affected has had sufficient opportunity of being heard on that ground."

5. The learned DR was given sufficient opportunity of being herd on the issue being affected party.

6. The ground raised being purely legal in nature and all the facts in relation to the ground available on record and no investigation of the fresh facts is required. Accordingly, in view of the decision of the Hon'ble Supreme Court in the case of NTPC Ltd (supra), the additional ground raised by the assessee is admitted.

7. In the additional ground, the assessee has contested that notice issued under section 148 of the Act is beyond jurisdiction being without any 'reason to believe' and 'satisfaction' of the Assessing Officer. The Learned Counsel of the assessee filed a paper-book containing pages 1 to 74 and referred to copy of reasons recorded available on page 5 of the paper-book. According to him in the reasons recorded the Assessing Officer has mentioned that further investigation was required to find out the actual source of the cash deposits. The learned Counsel

submitted that no notice under section 148 can be issued merely for investigation/roving inquiries. In support of his contention, he relied on following decisions:

1. *PCIT Vs. Manzil Dinesh Kumar Shah [2018] 95 Taxmann.com 46 (Guj.)*
2. *Krupesh Ghanshyambhai Thakkar Vs. DCIT (2017), 77 taxmann.com 293(Guj.)*
3. *Pr. CIT Vs. Meenakshi Overseas (2017), 82 taxmann.com 300 (Delhi)*
4. *CIT Vs. Smt. Manibein Valji Shah (2006), 204 CTR (Bom.)249*

8. Further, he submitted that mere deposit in bank account cannot lead to a reason to believe that income has escaped to tax. He also referred to page 2 of the paper-book and submitted that letter dated 16/01/2012 issued to the assessee asking to explain source of deposits was without any authority of law.

7. The Learned DR, on the other hand, submitted that the Assessing Officer has validly initiated the proceeding under section 148 of the Act.

8. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the case validity of the notice issued has been challenged on the grounds of reasons to believe not in accordance with law. To adjudicate the issue, the 'reasons to believe' recorded by the Assessing Officer are reproduced as under:

3. The reasons for, action u/s. 148 of the I.T. Act is given as under-
"In this case, as per AIR information available with the department, you deposited in cash Rs.23,59,000/- in your saving bank account during F.Y. 2008-09 relating to A.Y. 2009-10. Notices u/s. 133(6) of the I.T. Act, 1961, dtd. 04.04.2012 and 06.08.2012 were issued. In

compliance to the above referred notice, you filed your written reply alongwith documents as required, which are placed on record. As the contention of the assessee cannot be relied upon, further investigation is required to find out the actual source of cash deposit made during the relevant previous year. I have, therefore, reasons to believe that the income chargeable to tax to the extent of Rs. 23,59,000/- has escaped assessment by omission on your part to disclose fully and truly all material facts necessary for assessment."

9. We note that Hon'ble Gujarat High Court in the case of Manzil Dinesh Kumar Shah (supra) has held that no roving enquiry could be allowed under the guise of reopening of the assessment. The relevant finding of the Hon'ble High Court is reproduced as under:

"7. It is equally well settled that the notice of reopening can be supported on the basis of reasons recorded by the Assessing Officer. He cannot supplement such reasons. The third principle of law which is equally well settled and which would apply in the present case is that reopening of the assessment would not be permitted for a fishing or a roving inquiry. This can as well be seen as part of the first requirement of the Assessing Officer having reason to believe that income chargeable to tax has escaped assessment. In other words, notice of reopening which is issued barely for making fishing inquiry, would not satisfy this requirement.

8. With this background, we may revert to the reasons recorded by the Assessing Officer. Information from the Value Added Tax Department of Mumbai was placed for his consideration. This information contained list of allegedly bogus purchases made by various beneficiaries from Hawala dealers. Assessee was one of them. As per this information, he had made purchases worth Rs.3.21 crores (rounded off) from such Hawala dealers during the financial year 201011. According to the Assessing Officer, this information 'needed deep verification'.

9. If on the basis of information made available to him and upon applying his mind to such information, the Assessing Officer had formed a belief that income chargeable to tax has escaped assessment, the Court would have readily allow him to reassess the income. In the present case however, he recorded that the information required deep verification. In plain terms therefore, the notice was being issued for such verification. His later recitation of

the mandatory words that he believed that income chargeable to tax has escaped assessment, would not cure this fundamental defect.

10. Learned counsel for the Revenue however urged us to read the reasons as a whole and come to the conclusion that the Assessing Officer had independently formed a belief on the basis of information available on record that income in case of the assessee had escaped assessment. Accepting such a request would in plain terms require us to ignore an important sentence from the reasons recorded viz. 'it needs deep verification'.

11. Before closing, we can only lament at the possible revenue loss. The law and the principles noted above are far too well settled to have escaped the notice of the Assessing Officer despite which if the reasons recorded fail the test of validity on account of a sentence contained, it would be for the Revenue to examine reasons behind it."

10. It is evident from the reasons recorded that at the stage of issue notice under section 148 of the Act, the Assessing Officer was suspicious on the source of the cash deposits and, therefore, he wanted to investigate further to find out the actual source of the cash deposits. At the stage of issue of notice, the Assessing Officer was not sure whether income had escaped to tax or not. No notice under section 148 of the Act can be issued merely on such suspicion. There has to be a reasonable material before the Assessing Officer on the basis of which a reasonable person can make requisite belief. In the instant case, there is lack of reasonable material to form a reasonable belief that income has escaped tax. Under the circumstances, the action of the Assessing Officer of reopening assessment in exercise of the power under section 148 of the Act cannot be sustained. Accordingly, we quash the re-assessment proceeding initiated in the case of the assessee. As the reassessment has already been quashed, we are not adjudicating on the merit of the addition.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 23rd December, 2020.

Sd/-	***Sd/-***
(BHAVNESH SAINI)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 23rd December, 2020.

RK/-(D.T.D.S.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi