

Shri Narayan Das Tolani vs. ITO, 3(1), Bhopal I.T.A.No. 834/Ind/2016 A.Y.2007-08

आयकर अपीलिय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर
**IN THE INCOME TAX APPELLATE TRIBUNAL,
 INDORE BENCH, INDORE**

श्री सी.एम.गर्ग ,न्यायिक सदस्य

तथा

श्री ओ.पी.मीना ,लेखा सदस्य के समक्ष

**BEFORE SHRI C. M. GARG, JUDICIAL MEMBER
 AND
 SHRI O.P. MEENA, ACCOUNTANT MEMBER**

आ.अ.सं /I.T.A. No. 834/Ind/2016		
निर्धारण वर्ष/ Assessment Year: 2007-08		
Shri Narayandas Tolani, Prop. Of M/s. Jaichand Nanakram, 280, One Tree Hills, Bairagarh, Bhopal	vs.	ITO, 3(1), Bhopal
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN: ABTPT6860F		
अपीलार्थी की ओर से/Appellant by		Shri P.K.Jain, CA
प्रत्यर्थी की ओर से/Respondent by		Shri Mohd. Javed, DR
सुनवाई की तारीख/Date of hearing		21.02.2017
उद्घोषणा की तारीख/Date of pronouncement		28.02.2017

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

This appeal is filed by the assessee against the order of Id. Commissioner of Income tax (Appeals)-II, Bhopal [hereinafter

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referred to as the CIT (A)] dated 22.03.2016. This appeal pertains to Assessment Year 2007-08 as against appeal decided in respect of assessment order dated 29.12.2009 passed u/s. 143(3)/147 of Income Tax Act, 1961(hereinafter referred to as "the Act) by the ITO Ward 3(1) Bhopal [hereinafter referred to as the AO].

2. Ground nos. 1, 2 & 3 are not pressed. Hence, the same are dismissed as not pressed.

3. Ground no. 4 reads as under :-

“That the Hon'ble CIT-(Appeals-II), Bhopal, has erred under the law in giving directions u/s 150(1) to the AO to take necessary action in terms of the report of the DVO or otherwise in respective Assessment Years i.e. 2004-05, 2005-06 and 2006-07 for taxation of Rs. 6,22,034/- and Rs. 3,00,000/- respectively which is not permissible under the law and contravenes prevailing legal standards.”

4. Facts of the case are that the assessee is proprietor of M/s. Jaichand Nanakram dealing in utensils and thermo ware etc. The return of income was filed for the assessment year 2007-08 on 02.11.2007 at a total income of Rs. 1,43,580/-. A survey u/s 133A of the Income-tax Act, 1961, was conducted at the business premises of the assessee on 13.03.2007, in which the assessee surrendered undisclosed income stating that the assessee would declare the income surrendered by him, but assessee retracted and

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did not disclose the same in his return of income. A survey was also conducted at the business premises of the assessee by the Sales Tax Authorities on 14.02.2007. As per the Sales Tax Order, the sales for the year were assessed at Rs. 64,99,442/-. The assessee was found to have made an under declaration of sales by Rs. 16,90,251/-.

5. During assessment proceedings, the house property was referred for valuation to the DVO u/s 142A of the Act who submitted the valuation report stating undisclosed investment in construction as under :-

S.No.	Period of construction	Expenditure as stated by the assessee (Rs.)	Assessed cost of construction (Rs.)	Difference (Rs.)
1.	2003-04	11,42,000	15,66,118	4,24,118
2.	2004-05	2,58,000	3,53,743	95,743
3.	2005-06	2,75,000	3,77,173	1,03,173
	Total	16,75,000	22,97,034	6,22,034

After rejecting the objections raised by the Valuer of the assessee, the addition of Rs. 6,22,034/- was made to the returned income of the assessee in the assessment of assessment year 2007-08 on account of undisclosed investment in the construction of the house. In addition to above, the AO made additional addition of Rs. 3 lakhs

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on account of expenditure/investment in furniture, interiors, furnishings, elevation for the assessment year 2007-08.

6. The matter carried to the ld. CIT(A) and the ld. CIT(A) has deleted the additions by observing as under :-

“12.4 I have considered the facts of the case and the written submission of the appellant. There is merit in the submission of the assessee that the difference in the cost of construction as assessed by the DVO and as shown by the assessee had to be assessed in the respective assessment years A.Y.2004-05, 2005-06 and 2006-07. The action of the AO of making addition of the sum of Rs. 6,22,034/- in A.Y.2007-08 cannot be justified. The addition is, accordingly, deleted in the assessment year 2007-08.

The AO is directed u/s 150(1) of the Act to take necessary action in terms of the report of the DVO in the respective assessment years, i.e. A.Ys. 2004-05, 2005-06 and 2006-07.”

“13.4 I have considered the facts of case and the written submissions of the assessee. As mentioned in the assessment order, during the course of his statement recorded during survey, the appellant stated that a sum of Rs. 16,00,000/- was spent on the furnishing, elevation and interiors of the house which was over and above the cost of construction. While completing the assessment, the AO has made an addition of Rs. 3,00,000/- on this account. Upon due consideration of the matter, it is held that the addition of Rs. 3,00,000/- has been rightly made over and above the addition on account of the difference in the cost of construction.

During appeal, it has been submitted by the appellant in his written submissions that the addition of Rs. 3,00,000/- ought to have been considered/made in A.Y. 2006-07. I find merit in this

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part of the submissions of the ld. AR The addition of Rs. 3,00,000/- is accordingly deleted in A.Y. 2007-08.

The AO is directed u/s 150(1) of the Act to make the above addition in assessment year 2006-07.

The ground of appeal is disposed of as above.”

7. Being aggrieved, the assessee has filed this appeal before the Tribunal. The ld. Authorized Representative of the assessee submitted that the ld. CIT(A) has erred in giving direction to the AO for the assessment years 2004-05, 2005-06 and 2006-07, which not subject matter of appeal before him. The ld. AR took us through the provisions of Section 251 and submitted that according to section 251, the ld. CIT(A) may confirm, reduce, enhance for annulling the assessment or may conduct enquiry as he may think fit for the year under appeal, but he cannot give any direction for the assessment years, which are not in appeal before him. In support of this contention, the ld. AR placed reliance on the decision of Indore Bench of Tribunal in the case of M/s. Om Prakash Bagdia, Ujjain vs. ACIT, Ujjain, (2005) 4 ITJ 106 (Indore Tribunal) (copy placed on record), wherein it was held that the ld. CIT(A) while directing the AO to issue notice u/s 148 after recording reasons shown by him as transgression of his jurisdiction and above all when an issue is

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regarding the validity of report of DVO and the assessment order based on the same, has already been decided by the Tribunal in other assessment years, wherein also the same DVO's report was relied for making the assessment. The ld. Authorized Representative of the assessee further relied on the decision of Lilasons Industries Limited vs. ACIT, Bhopal, (2016) 29 ITJ 261 (Indore Trib.) dated 30.06.2016 (copy filed), wherein relying on the plethora of judgments, it was observed as under :-

“20. We have heard the rival contentions of both the parties. We have also gone through the case laws relied upon by the ld. Authorized Representative for the assessee. We find that the gist of the plethora of judgments quoted above is that where any assessment year was not before the ld. CIT(A), no findings can be given in respect of such cases. We find that in the case of Pt. Hazari Lal, 39 ITR 265 (All.), it was made clear that the AAC was only competent to record the finding that the sum, which was in question in the appeal before him, was not income relevant to the assessment year 1947-48, which was in appeal in that case. The question whether this income accrued or was earned in the previous year relevant to the assessment year 1946-47 (i.e. the year not in appeal), was not before him for decision, nor was it a point on which it was essential for him to record a finding before appropriately deciding appeal before him. We also observe in the case of Mathuradas B. Mohta, 56 ITR 269 (Bom.), relying on Supreme Court in ITO vs. Murlidhar Bhagwan Das 52 ITR 335, wherein it was held that the jurisdiction of the AAC under section 31 of the 1922 Act was strictly confined to the assessment order of that particular year under appeal. The AAC no doubt was competent to hold whether a particular item or a particular amount was income of that assessment year, but he had no jurisdiction further to

decide in that appeal the appropriate year in which the said income would fall. We also observe that in the case of Nathalal Dhanjibhai 59 ITR 615 (Guj), wherein it was held that a finding, therefore, could only be that which was necessary for the disposal of an appeal in respect of the assessment of a particular year. Hon'ble Supreme Court observed that the AAC might hold on the evidence that the income shown by the assessee was not the income of the relevant year and thereby exclude that income from the assessment of the year under appeal. We find that in the case of Dave (Mrs. RH) 140 ITR 1035 (Cal), where assessee's land was acquired by Government in May 1961 but compensation was received and assessed in assessment year 1971-72 as income from other sources. Ld. CIT(A) while deleting the impugned addition on the ground, inter-alia, held that relevant capital gains had already been taxed in assessment year 1962-63 when land was acquired, directed ITO to bring it to tax in current assessment year. Such directions of the ld. CIT(A) were held to be unsustainable. We find that in Onkar Nath, 64 ITR 347 (All.), Hon'ble Allahabad High Court held that the law gives the AAC the power to give direction that a certain sum which was deleted from the assessment of the firm should be assessed in the hands of a partner as his individual income. For the assessment year 1957-58, the ITO made an addition which included certain sum introduced in the head office cash book in November 1955. On appeal, the AAC deleted the addition of said sum on the ground that the said sum was outside the financial year 1956-57, relevant to the assessment year in question. The Court further observed that in the instant case the AAC was dealing with the propriety of the assessment for assessment year 1957-58. He found that the said sum did not relate to that year. That finding was sufficient to dispose of the item. He would not record a definite finding that this very item represented income of the assessee from an undisclosed source for assessment year 1956-57. We find that in the instant case the assessment year involved before the ld. CIT(A) was A.Y. 2011-12. The observations made for assessment years 2010-11 and 2009-10 would be out of the jurisdiction of the ld. CIT(A), as before him no such assessment year was pending. As the issue is squarely

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covered by Hon'ble Supreme Court and the Hon'ble High Court judgments, we hold that the directions of the ld. CIT(A) to take remedial action in the A.Y. 2010-11 and 2009-10 is uncalled for and liable to be expunged. We direct accordingly.”

8. Thus, it was contended that observation made by the ld. CIT(A) for assessment years 2004-05 to 2006-07 are without jurisdiction of the ld. CIT(A), as these were not pending before him.

9. The ld. AR further placed reliance on the following decisions :-

- (i) CIT vs. T. A. Krishnaswamy reported in (2008)02 DTR (Mad) 0143.
- (ii) Mrs. R.H. Dave vs. CIT, (1983) 140 ITR (Cal) 1035.
- (iii) Abdul Wahid Gehlot vs. ITO, (2005) 93 TTJ 0232 (Jodhpur Trib.)
- (iv) Kishan Chand Harish Chand vs. ACIT, I.T.A.No. 255/JP/1996.

10. The ld. AR further relied on the judgment of Hon'ble M.P. High Court in the case of Computer Science Corporation India (P) Limited vs. Addl. CIT & Ors, (2014) 99 DTR (MP) 383. The ld. AR stated that in the case of Computer Science Corporation India (P) Limited vs. Addl. CIT & Ors,(supra) the Hon'ble Jurisdictional High Court has held as under :-

“Section 251, read with section 10A of the Income-tax Act, 1961 - Commissioner (Appeals) - Powers of (Subject matter of appeal) - Assessment year 2007-08 - Commissioner (Appeals) upheld disallowance of deduction under section 10A to assessee for relevant year and also directed Assessing Officer to take remedial action for withdrawal of claim for subsequent assessment years 2008-09 to 2011-12 - Assessee claimed that direction pertaining to assessment years 2008-09 to 2011-12, years which were not subject matter of appeal were without jurisdiction - Whether directions contained in impugned order pertaining to subsequent assessment years shall not be construed to be of binding nature and it will be open for Assessing Officer to proceed with assessment proceedings in accordance with law uninfluenced by said impugned observations/directions contained in impugned order - Held, yes [Para 7][In favour of assessee]”

11. The ld. Authorized Representative of the assessee, therefore, requested that the directions issued for making addition of Rs. 6,22,034/- and Rs. 3 lakhs in A.Y. 2004-05 to 2006-07 may be expunged.

12. On the other hand, the ld. DR submitted that the ld. CIT(A) has found that certain unexplained investment reflected in DVO's report were pertaining to assessment years 2004-05 to 2006-07 as reproduced by the AO in the table given in the assessment order. Therefore, the ld. CIT(A) has accepted the contention of the assessee that the same cannot be added for the assessment year under

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appeal. Hence, it was deleted. However, the ld. CIT(A) had directed the AO to tax the said unexplained investment in the assessment year 2004-05 to 2006-07 as per provisions of Section 150(1) of the Act. The ld. DR contended that it is within the power of the ld. CIT(A) to direct the AO for taking any action of which addition has been disputed and is subject matter of appeal before him. It was submitted that the AO can invoke the provisions of Section 150(1) of the Act to assume jurisdiction u/s 147 of the Act for which the ld. CIT(A) has given the reasons and directions in the said order. In support of his view, the ld. DR also placed reliance on the decision of Coordinate Bench of Bangalore Tribunal in the case of Mrs. Suvina Krupal vs. ITO, Ward 1, Medikeri, I.T.A.Nos. 336 & 337/Bang/2014 (A.Ys. 2003-04 & 2004-05) dated 29.06.2015 (copy of order was filed), wherein it was observed as under :-

“5.3.4 From the above, in our view, it is evident that the ld. CIT(A) has given a clear finding that the unexplained investment in the residential property fall in three years relevant to assessment years 2003-04 to 2005-06. The ld. CIT(A) has also rendered a finding that the addition to be made on account of unexplained investment in the said property may be divided among the three assessment years and had also held that the relevant portion of the unexplained investment i.e. Rs. 12,15,417/- is taxable in assessment year 2005-06. In view of the above, we agree with the ld. CIT(A) that the

facts of the assessee's case are distinguishable from the decisions cited by the assessee; that the ld. CIT(A) had rendered a clear 'finding in the matter and that, therefore, in the facts and circumstances of the case on hand, the AO has correctly assumed jurisdiction u/s 147 of the Act by invoking the provisions of Section 150(1) of the Act. Consequently, the grounds raised at S.Nos. 1 o 5 for both assessment years 2003-04 and 2004-05 are dismissed.

13. We have considered the facts, rival submissions and perused the material available on record. It is seen that the AO has obtained valuation report from the Departmental Valuer. This valuation report clearly shows that the investment in the construction of house property was spread over during the period from assessment year 2004-05 to 2006-07. However, the AO considered the same for A.Y. 2007-08, whereas the ld. CIT(A) has directed u/s 150(1) of the Act to take necessary action in terms of report of the DVO in the respective assessment years i.e. A.Y. 2004-05 to 2006-07. The assessee has challenged the findings of the ld. CIT(A) on this account stating that it is the beyond the power of the CIT(A) to give such direction for the assessment years which are not subject matter of appeal before him. The Ld. Counsel for the assessee also placed reliance in the case of M/s. Om Prakash Bagdia, Ujjain vs. ACIT, Ujjain, (2005) 4 ITJ 106. (Indore Trib.),

(Indore Trib.) and Computer Science Corporation India (P) Limited vs. Addl. CIT & Ors, (2014) 99 DTR (MP) 383, which supports his contention. To appreciate the provisions in proper perspective, it would be relevant to reproduce Sections 150(1) and 150(2), which read as under :-

“150. Provision for cases where assessment is in pursuance of an order on appeal, etc.

(1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision¹ or by a court in any proceeding under any other law].

(2) The provisions of sub- section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub- section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject- matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken.

14. In view of Section 150(2) of the Act, the provisions of sub section (1) of Section 150 of the Act is not applicable in respect of the assessment year in which the assessment, reassessment or

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recomputation could not have been made at the time of order, which was subject matter of appeal passed by reason of any other provisions limiting the time within which the action for reassessment or recomputation should be taken. The provision of Section 149 of the Act provides that notice u/s 148 can be issued within the maximum period of six years from the end of the relevant assessment year in case where the income chargeable to tax exceeds Rs. 1 lakh. In the case before us, we find that the relevant assessment years are 2004-05, 2005-06 and 2006-07 for which direction u/s 150(1) have been issued. Therefore, for the purpose of issue of notice u/s 148, the period of 6 years from the end of relevant assessment year i.e. 2004-05, 2005-06 and 2006-07 expires on 31.03.2010, 31.03.2011 and 31.03.2012 respectively, whereas the ld. CIT(A) has passed the appeal order on 22.03.2016. Therefore, the AO could have taken any action as per limitation provided u/s 150(2) on the basis of the order of the ld. CIT(A) dated 22.03.2016 for invoking Section 150(1) of the Act, if the order of appeal was passed on or before 31.03.2012. Thus, we are of the considered opinion that the AO can pass an order u/s 150(1) of the Act, provided the appellate/original order was passed within the

period of limitation available for reopening the relevant assessment. In this case, on the date of appellate order i.e. 22.03.2016, the limitation period for taking action in accordance with the directions of CIT(A) u/s 150(1) had expired. Therefore, the direction issued by the ld. CIT(A) to take action for assessment years 2004-05 to 2006-07 by issuing notice for reopening of assessment for aforesaid years is barred by limitation. This view is supported by the decision of Third Member Bench in the case of Emgeeyar Pictures (P) Limited vs. Dy. CIT, Media Circle-I, Chennai (Chennai – Trib.) (TM). If we read sub Section (2) of Section 150, it provided that sub Section (1) thereof will not apply to a case of assessment, reassessment or recomputation of income, if it related to assessment year in respect of which assessment, reassessment etc. could not have been made at the time when the order, which was the subject matter of appeal, reference or revision was made, by reason of the time limits fixed u/s 153 for making the reassessment, it would be seen that sub section (2) of Section 150 does not refer to Section 153. It only refers to “ any other provisions limiting the time within which any action for assessment, reassessment or recomputation may be taken. The word “taken”

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refers only to initiation of proceedings and not to completion. The time limit for initiation of such proceedings are contained in Section 149 & 150 while the time limit for completion of such proceedings are mentioned in sub Section (2) & (3) of Section 153 just as Section 150 is the proviso to Section 149, sub Section (3) of Section 153 is a proviso to sub section (2) thereof. We find that the plain language of sub-section (2) of Section 150 clearly restricts the application of sub-section (1) of Section 150 to enable the authorities to reopen the assessments which have not already become final on the expiry of the period of limitation prescribed u/s 149(2) of the Act.

15. In the light of above discussion in respect of provisions of Section 150(1) and (2) of the Act and relying on various judicial pronouncements as relied on by the ld. Authorized Representative of the assessee as well as discussed as above by us and the decision of Jurisdictional High Court in the case of Computer Science Corporation India (P) Limited (supra), we are of the considered opinion that the directions issued by the ld. CIT(A) u/s 150(1) of the Act for the assessment years 2004-05 to 2006-07 are barred by limitation legally and not permissible considering the facts of the

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present case. Accordingly, the same are directed to be expunged and deleted.

16. In the result, the appeal of the assessee on this ground is allowed.

17. In the result, the appeal of the assessee is partly allowed.

The order pronounced in the open court on 28th Feb.,2017.

Sd/-

(सी.एम.गर्ग)

न्यायिक सदस्य

(C.M.GARG)

JUDICIAL MEMBER

Sd/-

(ओ.पी.मीना)

लेखा सदस्य

(O.P.MEENA)

ACCOUNTANT MEMBER

दिनांक /Dated : 28th February , 2017

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