

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT

ITA No.6611/Del/2016
Assessment Year : 2006-07

Indu Arts,
A-292, Shastri Nagar,
Delhi.

Vs. ACIT,
Circle 19(1),
New Delhi.

PAN: AAAFI2137E

(Appellant)

(Respondent)

Assessee by : Shri C.S. Aggarwal, Sr. Advocate
Deptt. By : Shri Amrit Lal, Sr.DR

Date of Hearing : 05.06.2017
Date of Pronouncement: 07.06.2017

ORDER

This appeal by the assessee is directed against the order passed by the CIT(A) on 03.11.2016 in relation to the Assessment Year 2006-07.

2. The only issue raised in this appeal is against the addition of Rs.2,36,875 made by the Id. CIT(A) enhancing the income of the assessee.

3. Succinctly, the factual matrix of the case is that the assessee filed its return declaring total income of Rs.8,73,180/-. Scrutiny proceedings were completed and an assessment order u/s 143(3) was passed. While finalizing the assessment for the immediately succeeding assessment year, i.e., 2007-08, the Assessing Officer observed that the figure of opening stock as on 01.04.2006 was not tallying with the inventory as on 31.03.2006. The assessee had shown an opening stock amounting to Rs.22,57,055/- on 01.04.2006 which, in the opinion of the Assessing Officer, should have been shown as closing stock as on 31.03.2006. The audit report did not depict the figure of closing stock. Initiating the reassessment proceedings, the Assessing Officer held that the assessee understated its closing stock to the tune of Rs.22.57 lac for the extant year. The assessee argued before the Assessing Officer that the addition made for the assessment year 2007-08, because of difference between the opening stock and closing stock, was deleted by the Id. first appellate authority. The Assessing Officer did not accept the contention by opining that the second appeal was being filed by the Revenue. He, therefore, made an addition of Rs.22.57 lac in the instant assessment. The Id. CIT(A) deleted the addition of Rs.22.57 lac by noticing that the Tribunal in the assessee's own case for the assessment years 2006-

07 and 2007-08 has held that there is no discrepancy in the quantitative details in respect of the items and there was no excess stock. He, however, issued notice of enhancement on the ground that there were some discrepancies in the quantitative details filed by the assessee. Such discrepancies were translated into an addition of Rs.2,36,875/- after adding the necessary mark-up. The assessee is aggrieved against such enhancement made by the Id. CIT(A).

4. I have heard the rival submissions and perused the relevant material on record. It is observed that the Assessing Officer initiated reassessment proceedings only on the premise that income of the assessee escaped assessment to the tune of Rs.22.57 lac, being, the difference in the opening stock of succeeding year and closing stock of the current year. This was the sole reason and the only addition made in the assessment, computing total income at Rs.31.30 lac as against the returned income at Rs.8.73 lac. It is clear that the addition of Rs.22.57 lac has been deleted by the Id. CIT(A) and admittedly no appeal has been preferred before the tribunal against such deletion. In other words, the deletion of the addition in the first appeal has attained finality.

5. Thus, the question which looms large on the canvass is whether the CIT(A) can make enhancement of income on account of discrepancy in the quantitative details. In making such an enhancement, the Id. CIT(A) has held that his power is coterminous with that of the Assessing Officer and, thus, he is competent to make a new addition. There is not and cannot be any doubt about the fact that the powers of CIT(A) are coterminous with that of the Assessing Officer. The Hon'ble Supreme Court in *CIT vs. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC)*, has held that: 'the AAC has plenary powers in disposing of an appeal. The scope of his power is coterminous with that of the ITO. He can do what the ITO can do and also direct him to do what he has failed to do.' This golden rule has been reiterated in several judgments including by the Hon'ble Supreme Court in *Jute Corporation of India vs. CIT and Anr. (1991) 187 ITR 688 (SC)*. The principle which, therefore, emerges is that the power of CIT(A) is absolute and extends to all such things which the Assessing Officer can do. However, there is an inherent limitation of this principle, which is, that the CIT(A) cannot do what the Assessing Officer in the original assessment could not have done. In simple words, if the Assessing Officer could have made a particular addition etc., which he failed to do, the CIT(A) would be

intra vires making such addition while disposing of the appeal filed against the assessment order. *Per contra*, if the Assessing Officer has not made a particular addition etc., which he was not entitled to as per law, the CIT(A) cannot equally exercise his power to make such an addition etc. With this salutary principle in mind, let us see if the action of the Id. CIT(A) in making the addition of Rs.2.36 lac can be sustained?

6. The Assessing Officer made a solitary addition of Rs.22.57 lac in the assessment under section 147 which was the only basis for initiating the reassessment and the same got finally deleted in the first appeal. At this juncture, it is relevant to note the mandate of the section, which provides that : `If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section...'. A bare perusal of the above provision divulges that the AO, in the course of assessment pursuant to notice u/s 148, can make two types of additions, viz., first, the addition for which he

formed reason to believe about the income chargeable to tax escaped assessment (hereinafter also called the 'foundational addition') and second, any other addition which comes to his notice subsequently in the course of the proceedings under this section (hereinafter also called the 'other addition'). It is trite that the 'other addition' can stand only if the 'foundational addition' is made by the AO. The logic appears to be simple and plain. Reassessment can't be made at the drop of a hat. There must be valid reasons with the AO on the basis of which a belief is formed that some income chargeable to tax escaped assessment. Jurisdiction to proceed with the assessment is acquired by the AO only by virtue of such belief. It is another thing that after validly acquiring the jurisdiction, the AO can make other additions as well. Thus the making of a 'foundational addition' is *sine qua non* for making 'other addition'. Reason behind this is not far to understand, being, prohibiting the Assessing Officer from needlessly exercising the power to reassess, by initiating the assessment proceedings on a fallacious ground and then making other additions as well. To put it simply, the Assessing Officer cannot proceed with the reassessment if the grounds mentioned in the re-assessment notice are non-existent. That is why, it has been held in several cases that no 'other addition' can be made

unless the 'foundational addition' is made. The Hon'ble jurisdictional High Court in *Ranbaxy Laboratories Ltd. VS. CIT (2011) 336 ITR 136 (Del)* has held that the AO has jurisdiction to reassess income other than the income in respect of which proceedings under s. 147 were initiated but he is not justified in doing so when the very reasons for initiation of those proceedings ceased to survive. The Hon'ble Bombay High Court in *CIT vs. Jet Airways (I) Ltd. (2011) 331 ITR 236 (Bom)*, has also reiterated the same proposition by holding that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue was not included in the notice. However, if, after issuing a notice u/s 148, the Assessing Officer accepts the contention of the assessee and holds that the income, of which he has initially formed a reason to believe that it had escaped assessment, has, as a matter of fact, not escaped assessment, it is not open to him to assess some other income. Similar view has been taken by the Hon'ble Rajasthan High Court in *CIT vs. Shriram Singh (2008) 306 ITR 343 (Raj)*.

7. The position which follows from the above discussion is that the Assessing Officer can make 'other addition' in the reassessment proceedings, provided, the 'foundational addition' is made. When this proposition is taken to a next level, no different consequences will emerge, if the 'foundational addition' is itself finally deleted in an appeal. In such a scenario, the 'other addition' made by the Assessing Officer would automatically cease to stand in isolation. This view has been affirmed by the Hon'ble jurisdictional High Court in *CIT vs. Adhunik Niryat Ispat Ltd. (2011) 63 DTR 212 (Del)*. In that case, the return filed by the assessee for the asst. yr. 1999-2000 declaring income @ Rs. 1,22,460 was processed under s. 143(1) of the IT Act. However, notice was issued under section 148 of the Act subsequently, on the information received from the Director of IT (Inv.), New Delhi, to the effect that the assessee had accepted the accommodation entries from M/s I.G. Properties (P) Ltd., M/s Parivartan Capital & Financial Services (P) Ltd. and from M/s Victoria (P) Ltd. in the garb of share capital. The AO passed the reassessment order making additions of Rs. 31 lacs on account of unexplained share capital including the capital subscribed by the aforesaid three applicants on the basis of which the assessment was reopened. However, during the assessment

proceedings, the AO also made certain additions of the credits received from M/s Adhunik Niryat, M/s Mahadev Metals, M/s Royal International and M/s Single Finshare India Ltd., albeit the assessment was not reopened on that basis. The assessee filed an appeal against these additions. The CIT(A) confirmed the additions of Rs. 31 lac which was the basis for reopening reassessment, but deleted the other addition. Both the assessee as well as the Revenue preferred appeals against the orders of CIT(A). Appeal of the assessee was allowed by the Tribunal thereby deleting the addition of Rs. 31 lac. Against this order, no appeal was preferred by the Revenue. Thus, the reasons which persuaded the AO to reopen the reassessment proceedings and on the basis of which additions were made were not found valid or justifiable as those additions were deleted by the Tribunal. Appeal of the Revenue was dismissed. In further appeal, the Hon'ble High Court upheld the order of the tribunal by holding that : *'Since the grounds for reopening the reassessment do not exist any longer and no additions were ultimately made on that account, the additions in respect of other items which were not part of "reasons to believe" cannot be made.'* On going through the *ratio decidendi* of the above judgment, it is vivid that if the

`foundational addition' is finally deleted in appeal, then `other addition' also can't stand.

8. At this stage, it is pertinent to note the effect of insertion of Explanation 3 to Section 147 by the Finance (No.2) Act, 2009 w.r.e.f.

1.4.1989, which reads as under : -

`Explanation 3.— For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under subsection (2) of section 148.'

9. The Memorandum explaining the provisions of the Finance Bill, in this regard, reads as under :

`The existing provisions of section 147 provides, inter alia, that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess such income after recording reasons for re-opening the assessment. Further, he may also assess or reassess such other income which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section. Some Courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent. With a

view to further clarifying the legislative intent, it is proposed to insert an explanation in section 147 to provide that the assessing officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148. This amendment will take effect retrospectively from 1st April, 1989 and will, accordingly, apply in relation to assessment year 1989-1990 and subsequent years. [Clause 57]

10. It is palpable that the Explanation has not enhanced the scope of the provision. It simply embodies the position more clearly, which is already embedded in the opening part of section 147 providing that the AO may: 'assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section'. The foregoing legal position about not continuing with the 'other additions', if none of the 'foundational additions' is either made or finally sustained, has not been watered down by the insertion of Explanation 3. Ambit of the Explanation is confined only to making 'other addition' and not sustaining the 'other addition', when the 'foundational addition' is not made or finally deleted.

11. Reverting to the facts of the instant case, it is found that the Assessing Officer made the 'foundational addition' of Rs.22.57 lac which came to be

finally deleted in the first appeal. In the absence of such an addition, neither the Assessing Officer nor for that purpose, the Id. CIT(A), exercising his coterminous power, could have made the 'other addition'.

12. The situation can be viewed from another angle as well. The Assessing Officer initiated reassessment proceedings and made addition of Rs.22.57 lac. When the Id. CIT(A) held that the addition of Rs.22.57 lac was not sustainable, it meant that the jurisdiction of the Assessing Officer was lacking in initiating the reassessment proceedings. As a consequence of his deletion of the addition, not only the assessment order but all the proceedings flowing therefrom had the effect of becoming null and void. As such, he could not have gone ahead with any other issue and made enhancement of income. Making an enhancement in such circumstances would mean that though the jurisdiction of the Assessing Officer in initiating the reassessment was lacking, still, the assessment would be valid and *ex consequenti*, the addition would be sustainable. This, in my considered opinion, is a totally illogical and unsound proposition. I, therefore, order to delete the addition of Rs.2.36 lac and odd made by the Id. CIT(A).

13. In the result, the appeal is allowed.

The decision was pronounced in the open court on 07th June, 2017.

Sd/-

(R.S. SYAL)
VICE PRESIDENT

Dated: 07th June, 2017.

dk

Copy forwarded to

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

Dy. Registrar, ITAT, New Delhi