

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

Before Sh. N. K. Saini, Accountant Member

ITA No. 297/Del/2017 : Asstt. Year : 2007-08

Mohan Chandra Dalakoti, C/o Sandeep Sapra, Advocate, C- 763, New Friends Colony, New Delhi-110025	Vs	Income Tax Officer, Ward-1(2), Haldwani
(APPELLANT)		(RESPONDENT)
PAN No. ACXPD1990R		

**Assessee by : Sh. Sandeep Sapra, Adv.
Revenue by : Sh. T. Vasanthan, Sr. DR**

Date of Hearing : 27.06.2017	Date of Pronouncement : 30.06.2017
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ORDER

This is an appeal by the assessee against the order dated 04.10.2016 of ld. CIT(A), Haldwani.

2. Following grounds have been raised in this appeal:

“1) That the Ld. CIT(A) has erred on facts and under the law in holding that reopening of the assessment u/s 147/148 of I.T. Act is justified. The provisions of section 147/148 I.T. Act are not applicable to the facts of Appellant's case and therefore the impugned assessment order deserves to be quashed/annulled.

2) That without prejudice to ground No. 1 above, the Ld. CIT(A) has erred in law and on facts of the case in confirming the following additions/disallowances as made by the AO:

(i) Rs.4,09,640/- addition on account of unexplained expenditure incurred in the marriage of Appellant's daughter.

(ii) Rs.3,37,000/- addition sustained on account of unexplained investment in gold jewellery out of total addition of Rs.5,37,000/-.

(iii) Rs.4,00,000/- addition sustained on account of unexplained investment in FDR out of total addition of Rs.5,01,000/-.

(iv) Rs.10,41,645/- addition on account of unexplained deposits in OD account bearing No. 102 u/s 69A of IT. Act.

(v) Rs.91,999/- addition on account of undisclosed interest income on FDRs.

3) That without prejudice to Ground No. 2 above, the additions as sustained/confirmed by the Ld. CIT(A) are very excessive.

4) That the appellant reserves his right to add, amend/modify the grounds of appeal.”

3. The main grievance of the assessee vide Ground No. 1 relates to the reopening of the assessment u/s 147/148 of the Income Tax Act, 1961 (hereinafter referred to as the Act).

4. Facts of the case in brief are that the assessee filed the original return of income on 28.06.2007 declaring an income of Rs.2,01,650/-. Subsequently, the AO initiated the proceedings u/s 147 of the Act on

26.03.2014 and issued the noticed u/s 148 of the Act. In response, the assessee filed the return of income showing the same income as was shown in the original return of income. The AO framed the assessment at an income of Rs.33,69,534/- by making the various additions. Against the additions made by the AO, the assessee preferred an appeal to the Id. CIT(A) who allowed the relief in part to the assessee and sustained the remaining additions.

5. The assessee also challenged the validity of the reopening before the Id. CIT(A) and submitted as under:

"c) It is common knowledge that wedding expenses of a daughter are met by the family members collectively, and through savings made over a number of years. Hence there was no reason to doubt, leave alone believe, that the entire expenditure of the marriage of the daughter was made by the father out of income of one year.

d) Tangible material: *It is a settled position of law that the power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. In the instant matter there is no tangible material on record, only a suspicion has been recorded. Reference is also drawn to - United Electrical Company (P) Ltd Vs Commissioner of Income Tax & Ors (2202) 178 CTR 0192 Delhi HC (annex 15 of paper book).*

e) Suspicion or to make fishing inquiries: *There can be no reopening on the basis of suspicion or to make fishing inquiries, as has been done in the instant matter. Reference is*

also drawn to: Commissioner of Income Tax Vs. Smt. Maniben Valji Shah (2006) 204 CTR 0249 Bombay HC (annex 16 of paper book) where it has been held- "A bare perusal of the aforesaid notice dated 10th Oct, 1991, clearly indicates that the officer was wanting to know the details with regard to the source of funds with regard to purchase of the said flat for a sum of Rs.2,50,000. Obviously in the above, there is no question of the AO having any basis to reasonably entertain the belief that any part of the income of the assessee had escaped assessment and that such escapement was by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts."

f) Reference is also drawn to a similar decision in the case of Bibhuti Bhushan Ghosh Vs ITO & Ors (1993) 203 ITR 536 (Cal) where it was held that issuance of Notice u/s 148 merely on suspicion and when there was no fresh material or information in the possession of the ITO which would enable him to issue the notice would be improper.

g) All material facts disclosed in return dated 28-6-2007: It is pertinent to take note that the assessee is not required to declare his personal expenses in the return. There is no such column in the return. The return as filed on 28-6-2007 was complete. In the reasons recorded there is no allegation that the assessee has failed to disclose fully and truly all material facts necessary for the assessment for that year. Hence the preconditions prescribed u/s 147 have not been met and the proceedings as initiated are against law. Reference is drawn to - Wel Inttertrade (P) Ltd & Anr Vs ITO (2009) 308 ITR 22 Delhi HC (Annex 18 of paper book)- Assessee having fully and truly disclosed all the material facts necessary for the assessment as required by the AO, the precondition for invoking the proviso to S. 147 was not satisfied and therefore

AO acted wholly without jurisdiction in issuing notice u/s 148 beyond four years period mentioned in S. 147.

2. Affidavit of Deepti Badaula not a conclusive evidence:

a) The learned assessing officer has heavily relied upon the affidavit of Smt. Deepti Badaula, (annex 2 of paper book) daughter of the appellant, filed in the family court against her husband. He has overlooked the fact that contents of the affidavit were general in nature, and in a different context. There was no corroboration of the claims - specially relating to 16 tola Jewellery - by her husband. In fact her husband has categorically denied the claims as per his affidavit dated 15-5-2015 (annex- 3 of paper book) and also before the Utrakhand High Court in writ petition no. 489 of 2012 (annex 4 of paper book). Hence the very basis of the reassessment proceedings stands vitiated.

b) In the instant matter, Smt. Deepti Badaula is not the assessee. Her affidavit cannot be treated as an admission by the assessee. Her affidavit can only be treated as a statement of a third party, which needs to be corroborated before any reliance can be placed on it. It is settled principle of law that Admission at best, is an evidence against the maker but not against others.

c) In the case of Addl CIT vs Miss Lata Mangeshkar (1974) 97 ITR 696 (Bom) (annex 17 of paper book) -additions were made basing on the statement of two persons that they had made payments to her in back as also on the basis of entries made in their books in support thereof. The High Court held that entries in the books of a third party cannot be relied upon to frame the assessment. An addition cannot be sustained unless it is backed by primary or direct evidence. Evidence given by way of oral testimony of a witness without corroboration is unreliable. The noting and statements by the

third parties could be corroborative evidence but in absence of direct evidences, the evidence collected from a third party cannot be believed and cannot be the basis of an addition in the assessment."

6. The Id. CIT(A) asked the remand report from the AO on the submission of the assessee. In response, the AO stated as under:

<i>S. No. of the submissions</i>	<i>My comments</i>
<i>1. (a) and (b)</i>	<i>In the reasons for issuing notice u/s 148 the amount of escaped income is clearly mentioned at Rs. 25 Lakhs.</i>
<i>1. (e) and (f)</i>	<i>The belief of reopening the case was based on the facts supported by the documentary evidence, narrated by Smt. Deepti, daughter of the assessee who lives with the assessee, himself.</i>

7. The aforesaid remand report of the AO was forwarded to the assessee by the Id. CIT(A) for his rejoinder. In response, the assessee submitted as under:

The learned assessing officer has failed to counter the argument of the appellant that the matter has been reopened only on suspicion to make a fishing enquiry.

2. The learned assessing officer has failed to counter the argument of the appellant that there was no tangible material available on record while recording the reasons u/s 147. The information available on the basis of the statement of Deepti Badola was only to the effect that an amount of Rs. 25 lakh was spent on her wedding. There was no such information that the said amount was exclusively spent by her father. It is common knowledge that wedding expenses of a daughter are

met by the family members collectively, and through savings made over a number of years. Hence there was no reason to doubt, leave alone believe, that the entire expenditure of the marriage of the daughter was made exclusively by the father out of undisclosed sources.

3. No response has been given to the written submission no. 1(g) "All material facts disclosed in return dt 28-6-2007." Hence it ought to be held that the learned assessing officer has conceded this argument.

4. The learned assessing officer has failed to counter the argument of the appellant that the Affidavit of Deepti Badaula is not a conclusive evidence. The comments as made are off the point.

5. No reason has come forward to disbelieve that the Jewelry was gifted by grandmother. It is not necessary that all family actions be covered by documentary evidences."

8. The ld. CIT(A) did not find merit in the submissions of the assessee and sustained the action taken by the AO by observing in para 3.2 of the impugned order as under:

"3.2 The contentions of the Appellant and the Report of the AO has been considered. The Appellant has challenged the reopening of his case in these grounds of Appeal. The facts are that he is a retired employee of Nainital District Co-operative Bank Ltd. However, after retirement he was working as Assistant General Manager in Almora Urban Co-operative Bank Ltd. During the Assessment Year under consideration, he has derived income as salary from Almora Urban Co-operative Bank Ltd. and interest income, besides, he has also derived income from agricultural activities and income declared from ' said activities is Rs. 22,000/-. The Appellant

filed return of income for the A.Y. 2007-08 declaring total income of Rs. 2,01,650/-, subsequently, proceedings u/s 147 of the Act was initiated and notice u/s 148 of the Act for the aforesaid assessment year was issued by the A.O. The reasons recorded for reopening of the case u/s 147 are reproduced as under-

"An information in the possession that the assessee has incurred amount of Rs 25 lakhs in the marriage of his daughter Smt. Deepti Badola in the FY 2006-07. As per records of this office the assessee has declared meager total income of Rs.2,01,650.00 for the A.Y. 2007-08 as such source of amount of Rs. 25 lakhs chargeable to tax has escaped assessment for the AY 2007-08."

The facts of the case are that a Tax Evasion Petition was received in the case of Appellant. In the TEP following allegation were leveled;-

- (i) That the Appellant has made expenditure of Rs.25,00,000.00 in the marriage of her daughter Deepty.*
- (ii) Besides, expenditure of Rs. 25,00,000.00, 16 tolas of gold worth Rs.5,37,000.00 was given. (Along with aforesaid TEP, copies of affidavit filed by Smt. Deepty in family court Nainital was also enclosed.)*
- (iii) Investment in properties, FDRs and non-disclosure of interest income from FDRs etc.*

The AO has reopened the case of the Appellant based on the above facts in the TEP. Therefore it is seen the AO did have material or facts that could lead him to the prima facie conclude that there was escapement of income and "reasons to believe" were duly recorded on that basis. In addition the Hon'ble Punjab and Haryana High Court in the case of Jawand Sons vs. CIT reported in 326 ITR 39 (P&H) has held that vide powers after 02.04.89 has been given to the

*Assessing Officer to re-open the assessment even where full facts have been disclosed and the only conditions that Assessing Officer should have reason to believe that income has escaped assessment. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction. The Hon'ble Supreme Court in the case of ITO v. Selected Dalurband Coal Co. (P.) Ltd., [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC) has held by that if the Assessing Officer, for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment, so long as the conditions of section 147 are fulfilled, the Assessing Officer is free to initiate proceedings under section 147. It is observed that the Assessing Officer had the reason to believe that income chargeable to tax had escaped assessment and it had a rational nexus with the material before him alongwith the information with him. In this case, there was a TEP having information of expenditure as well as corroborative information in the form of copy of Affidavit of his daughter given in family court. Therefore, he did have sufficient reasons to believe that income chargeable to tax has escaped assessment and duly recorded the reasons for the same. In this case there is no change in opinion of the Assessing Officer as the matter was never investigated or adjudicated or information on the issue was called or examined by the Assessing officer. Therefore, relying on the various case laws as discussed above and facts and circumstances, the issuance of notice u/s 148 is held to be valid. These grounds of Appeal are therefore **dismissed.**”*

9. Now the assessee is in appeal. The ld. Counsel for the assessee drew my attention towards page no. 48 of the assessee's paper book which are the reasons recorded by the AO for reopening the assessment. It was further submitted that the identical reasons were recorded in the case of the daughter of the assessee Smt. Deepti Badola and his wife Smt. Janki Dalakoti. My attention was drawn towards page nos. 52 to 55 and 56 to 58 of the assessee's paper book which are the copies of the respective assessment orders of the aforesaid persons, passed u/s 143(3)/147 of the Act. It was contended that the AO was not sure about the escapement of income and in whose hands it was to be assessed. Therefore, the reasons recorded were merely on the basis of information without making any independent inquiries/verification by the AO. It was further stated that the reasons had been recorded merely on the basis of some information without specifying the source of information, details/nature of expenditure incurred on the marriage. Therefore, the reasons and the information referred to, was extremely scanty and vague which could not have been held to be tangible material that came to the knowledge of the AO whereby it could have been inferred that the AO could have formed a reasonable belief that the income had escaped assessment. It was contended that the requirement of law is 'reasons to believe' and not 'reason to suspect' and that the reasons recorded indicated that the AO had acted on mere surmises and suspicion for making fishing and roving enquiries. Therefore, the reopening was not valid.

10. The reliance was placed on the following case laws:

- *Pr. CIT Vs Meenakshi Overseas Pvt. Ltd. in ITA 692/2016 order dated 26.05.2017 (Del.)*
- *Signature Hotels Pvt. Ltd. Vs ITO 338 ITR 51 (Del.)*
- *CIT Vs SFIL Stock Broking Ltd. 325 ITR 285 (Del)*
- *Krown Agro Foods Pvt. Ltd. Vs ACIT 375 ITR 460 (Del.)*
- *Rustagi Engineering Udyog Pvt. Ltd. Vs DCIT 382 ITR 443 (Del.)*
- *Sheo Nath Singh Vs ACIT 82 ITR 147 (SC)*

11. In his rival submissions the ld. DR supported the orders of the authorities below and further submitted that the income of the assessee was meager as compared to the expenses incurred in the marriage of his daughter. Therefore, the reopening was valid and the ld. CIT(A) was fully justified in confirming the action of the AO. The reliance was placed on the judgment of the Honøble Supreme Court in the case of Raymond Woollen Mills Ltd. Vs ITO reported at (1999) 236 ITR 34.

12. I have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that the AO while reopening the assessment recorded the reasons which read as under:

“An information in the possession that the assessee has incurred amount of Rs. 25 lakhs in the marriage of his daughter Smt. Deepti Badola in the FY 2006-07. As per records of this office, the assessee has declared meager total income of Rs.2,01,650.00 for the AY 2007-08 as such source of amount of Rs.25 lakhs remains unexplained. Therefore, I have

reason to believe that an amount of Rs.25 lakhs chargeable to tax has escaped assessment for the AY 2007-08.

In view, proceedings u/s 147 of the I.T. Act 1961 is initiated for the AY 2007-08. Accordingly, a notice u/s 148 of the I.T. Act 1961 is issued for the AY 2007-08.

The above notice is being issued after taking approval of Joint Commissioner of Income Tax, Haldwani u/s 151 of the I.T. Act 1961 communicated vide letter F.No.-148/JCIT/HLD/2013-14 dated 25.03.2014. A copy of reasons duly approved by the JCIT, Haldwani is placed on.”

13. It is also noticed from para 2 of the copies of the assessment order dated 30.03.2015 u/s 143(3)/147 of the Act of Smt. Deepti Vadola placed at page nos. 52 to 55 of the assessee's paper book that similar reasons were recorded for reopening the assessment which is clear from the observations of the AO which read as under:

“2. In the course of hearing, the assessee moved an application and sought for the reason for selection of the case which was also provided to the assessee on 09.02.2015. During the course of hearing proceeding, the assessee was asked to explain the source of the expenditure of more than Rs.25.00 lacs & source of the investment in FDRs and 16 Tola gold costing Rs.5.37 lacs which were claimed (as mentioned in the above said affidavit of Smt. Deepty Barola) to have been incurred in the marriage of the assessee. In response to the above query, during hearing of the case, counsel of the assessee submitted that as the assessee's father was main earning member in her family and thus substantial part of the marriage expenditure were incurred by father of the assessee – Shri Mohan Chandra Dalakoti, PAN ACXPD1990 whose

income tax proceeding is also pending in the O/o ITO-1(2), Haldwani on the same issue.”

14. Similarly, in the case of Smt. Janki Dalakoti wife of the assessee, an identical observation is there in para 2 of the assessment order dated 30.03.2015 u/s 143(3)/147 of the Act (copy of which is placed at page nos. 56 to 58 of the assessee's paper book). The relevant portion reads as under:

“In the course of hearing, the assessee moved an application and sought for the reason for selection of the case which was also provided to the assessee on 09.02.2015. Further, during the course of hearing proceeding, counsel of the assessee was asked to explain the source of the expenditure of more than Rs. 25.00 lacs & source of investment in FDRs of Rs.5.01 in the name of her daughter and 16 Tola Gold costing Rs. 5.37 lacs which were claimed (as mentioned in the above said affidavit of Smt. Deepty Barola) to have been incurred in the marriage of daughter of the assessee. In response to the above query, the assessee admitted in her reply that she is a house wife and having no income during the year under consideration, even no movable or immovable property on her name. Further, on the issue of incurred marriage expenditure, version of the assessee is re-produced as such "that in the marriage of my daughter Mrs. Deepty Barola, I have not done any expenditure, all the marriage expenditure has been incurred by my husband Shri Mohan Chandra Dalakoti, PAN-ACXPD1990R whose income tax case proceeding is running on, on the same matter before the Income Tax Officer 2(1), Haldwani.”

15. From the aforesaid observations of the AO and the reasons recorded, it is clear that in all the three cases, the reasons recorded were similar for reopening the assessment.

16. On a similar issue of reopening the assessment u/s 147 of the Act, the Honøble Delhi High Court at New Delhi in ITA No. 692/2016 order dated 26.05.2017 in the case of Pr. CIT Vs Meenakshi Overseas Pvt. Ltd. (supra) has held as under:

“22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow there from.

23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.”

17. In the present case also the reasons recorded were based only on an information which was not specific and the AO did not specify the details/nature of expenditure incurred on marriage and even he was not sure who had incurred the expenditure i.e. the assessee or his daughter Smt. Deepti Badola or his wife Smt. Janki Dalakoti. Therefore, the purported belief that an income had escaped assessment was not based on any direct or circumstantial evidences, so it was in the realm of more suspicion. It is well settled that for reopening the assessment u/s 147 of the Act, there should be reasons to believe and not the reasons to suspect. In the present case, the AO was not sure in whose hands, the income had escaped the assessment. Therefore, considering the totality of the facts as discussed hereinabove, I am of the view that the initiation of the proceedings u/s 147/148 of the Act to reopen the assessment in the hands of the assessee for the assessment year under consideration does not satisfied the requirement of law as the reasons recorded failed to demonstrate the link between the tangible material and formation of the

reasons to believe that the income had escaped in the hands of the assessee. Accordingly, the reopening done by the AO is quashed. Since, the legal issue has been decided in favour of the assessee, therefore, no findings are being given on other issues raised by the assessee.

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

(Order Pronounced in the Court on 30/06/2017)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 30/06/2017

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR