

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

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITA No. 5994/DEL/2015 [A.Y. 2009-10]

The A.C.I.T.
Circle 41(1)
New Delhi

Vs.

Smt. Jagjit Kaur
House No. 09. Opp. Guru Nanak
Public School, West Avenue Road
West Punjabi Bagh, New Delhi

PAN : AGEPK 1858 Q

CO No. 243/DEL/2016
[A/o ITA No. 5994/DEL/2015 [A.Y. 2009-10]]

Smt. Jagjit Kaur
House No. 09. Opp. Guru Nanak
Public School, West Avenue Road
West Punjabi Bagh, New Delhi
PAN : AGEPK 1858 Q

Vs.

The A.C.I.T.
Circle 41(1)
New Delhi

[Appellant]

[Respondent]

Date of Hearing : 09.10.2017
Date of Pronouncement : 16.10.2017

Assessee by : Shri Kapil Goel, Adv

Revenue by : Shri T. Vasanthan Sr. DR

ORDER

This appeal of the Revenue and cross objection of the assessee arises from the order of the ld. CIT(A)- 14, New Delhi vide order dated 10.08.2015 for A.Y 2009-10.

2. The Revenue is challenging the order passed by Commissioner of income tax appeals-14, New Delhi, deleting the additions made by the assessing officer in his order, vide order dated 10/08/2015 passed in appeal number 432/14-15/IT/DEL/15-16. On legal point the Revenue is challenging assumption of jurisdiction under section 148, assessee respondent has filed cross objection, which is objected by revenue to be belated and time-barred. Further, the revenue's grounds challenge deletion of addition made by the commission of income tax appeals. During the previous hearings revenue was called upon to file amended and proper grounds which are there on the case file. Both the sides have advanced their arguments on both the legal and merits of the case.

3. At the outset, learned senior departmental representative made an objection not to hear this appeal on the objection/plea that similar cases are pending in other benches before this Tribunal. I have perused this request but do not find the same in order. Since this is revenue's appeal and pending since long from 2015 and assessee is ready with his legal arguments and in past revenue has sought various adjournments as evident from case records/proceedings sheets, adjournment cannot be granted as prayed by the Ld. departmental representative. Therefore, I reject this request and proceed to decide the matter after

giving detailed hearing to both the sides. I am of the opinion that whatever decision is taken here may be followed in other cases, if facts, so justify.

4. Now, inviting my attention to the other objection which was raised by Ld. departmental representative challenging that assessee's cross objection are time barred and should be dismissed in limine. Ld Sr DR has filed a note in this regard which is taken on record. I have carefully gone through Ld DR's objection in this regard and find the same to be non meritorious. My reasoning in this regard is assessee's cross objection clearly mentions date of receipt of notice of appeal being 23/06/2016 . In this regard during the course of the hearing Ld. counsel for the assessee, Sh Goel has placed on record an affidavit from assessee/Cross objector that said cross objection is filed in time, as when the assessee received notice from this tribunal for 23/06/2016 (copy placed on record), assessee approached the Tribunal for obtaining grounds of appeal in captioned appeal filed by the revenue. When grounds were received, immediately cross objection was filed within 30 days prescribed in the law. After going through the affidavit filed by the assessee during the course of the hearing before me I am persuaded that cross objection is filed well within the time. This

objection of the Department deserves to be rejected for other reason also that registry of this tribunal has never raised search objection. So cross objection filed is treated as valid for purposes of adjudication by this Tribunal. Otherwise also during the course of the hearing assessee has filed an application under rule 27 of ITAT rules so as to support the order of the commission of Income Tax Appeals on legal and jurisdictional reopening ground. This application filed under rule 27 to support the order of Commissioner of income tax appeals is also taken on records which could not be seriously repudiated and contested by the Ld. departmental representative.

5. Firstly, legal grounds are taken which are raised by the assessee in her cross objection and rule 27 application. Assessee has prayed in these cross objections that reopening under section 148 as affirmed by Commissioner of income tax appeals may please be quashed being invalid. Likewise in rule 27 application, following has been prayed:

*“Application under rule 27 of income tax appellate tribunal rules
(out of abundant caution)*

*to support the order of Commissioner of income tax appeals on
ground of section 148 that is validity of reopening proceedings
initiated under section 148 of the income tax act*

On basis of right given to the respondent under aforesaid rule assessee/respondent seeks your honour permission to raise the legal ground of challenging the proceedings under section 148 which was duly raised before Commissioner of income tax appeals white ground No. 1 (B) and (C) which is also adjudicated by the commission of income tax appeals at page No. 9 and 10 of the order passed.

Add page No. 6 and 7 of the CIT appeals order reasons recorded under section 148 are reproduced ipsissima verba (as it is).

From text of the reasons recorded under section 148 in the present case it is clearly visible that same are recorded without any application of mind and simply on basis of order passed by Commissioner of income tax appeals which has been not correlated with the present year facts particularly/explicitly. Only on the basis that in one year certain disallowance and additions are made, present reopening action is made under section 148, without correlating the facts of the year in consideration with the facts of earlier year. Even otherwise it is demonstrated from reasons recorded that without independent application of mind reopening is made under section 148. We rely upon Delhi bench of ITAT decision in case of Thandi Ram Jai Narain (order dated 27/06/2017) for maintainability of application filed under rule 27. As far as invalidity of reopening is concerned, for non application of mind, recent decision in case of Meenakshi overseas reported at 395 ITR 677, RMG Polyvinyl reported at 396 ITR 5, and similar fact -based order passed by Hyderabad bench of ITAT in case of Madhucon order dated 15/07/2015 is strongly relied, the paragraph 10 thereof which is

squarely applicable in present facts is reproduced below for sake of ready reference:

"...10. Therefore, we are of the considered opinion that the Assessing Officer is not bound to blindly follow the order of Hon'ble Tribunal without applying his mind independently to the facts of the case, as to whether the ingredients that are required to be satisfied before initiation of reassessment proceedings are satisfied or not. The Assessing Officer, in this case, had not applied mind of his own at all and proceeded with reassessment proceedings solely based on the order of the Hon'ble Tribunal. It is trite law that the reassessment proceedings are valid in law only when the Assessing Officer applied his mind independently to the information on hand. In the present case, it is not at all discernible as to whether the Assessing Officer had applied his mind independently and arrived at a belief that on the basis of material, which he had before him, income had escaped assessment. The Assessing Officer had not even recorded his satisfaction about the correctness or otherwise of the finding given by the Hon'ble Tribunal. What is recorded by the Assessing Officer as his "reasons to believe" is nothing but reproduction of a portion of order of Hon'ble Tribunal. The Hon'ble Apex Court in Chhugamal Rajpal [1971] 79 ITR 603 held that "the submission of a report is not the same as recording of reasons to believe for issuing a notice.

11. The Assessing Officer has clearly substituted form for the substance and, therefore, the action of the respondent falls foul of the law laid down by the Supreme Court in Chhugamal Rajpal [1971] 79 ITR 603", which is clearly applicable to the facts of this

case. Therefore, the reassessment proceedings cannot be upheld as the condition precedent for exercise of jurisdiction u/s. 147 of the Act is not fulfilled.”

On basis of aforesaid decision which is squarely applicable to present facts will request your honour to accept our application under rule 27 and decide the legal ground of reopening in the favour of the assessee/respondent as reasons recorded without any application of mind.”

6. On careful consideration of rival contentions on tenability of reopening under section 148, I find force in the arguments of Ld. counsel of the assessee. As far as assessee's application under rule 27 is concerned, same is duly supported by various decisions cited by the Ld. counsel of the assessee one of which was passed by this Tribunal in D bench in ITA number 1289/del/2013 in case of Thandi Ram Jai Narain, wherein this Tribunal (authored by me), has held in paragraph 9 of the order that respondent has legal right to support the order of first appellate authority on any ground decided against him even though no independent appeal/cross objection is filed, relying upon another decision of this Tribunal passed in case of Gurinder Kaur reported in 102 ITD 189. Accordingly, the application filed under rule 27 is valid and proceeded to be adjudicated. Before proceeding further, the reasons recorded in present case are reproduced below:

“As per records ITR for A.Y.2008-09 has been filed on 10-09-2009 declaring income of Rs.3,27,854/- which was processed u/s 143(1) on 31-03-2011 on the same income.

On verification of the ITR for the year under consideration it is seen that the Assessee has claimed interest on housing loan Rs.3395802/- and claimed as business expenses in the P & L a/c under the head business or profession. As per ITR no business activities carried out by the Assessee during the year. Only income from rent and other sources has been shown.

Further, the Ld.CIT(A) vide her order no.234/2010-11 dt.30-01-2013 for A.Y.2008-09 has confirmed the addition of Rs.3220478/- made by the AO on account of interest on housing loan, which was claimed by the Assessee as business expenses in her ITR. Therefore, it is established that the Assessee has wrongly adjusted the interest on housing loan against the business profit.

In view of the above facts, I have reasons to believe that income of Rs.3395802/- was remain to the taxed and has escaped assessment. It is a fit case for re-opening the assessment u/s 147 of the IT Act, 1961 for the A.Y.2009-2010.”

7. On careful consideration of the reasons recorded in present case by the assessing officer, it is very clear that there is no live nexus in the reasons recorded and same are done at behest of the order passed

by Commissioner of income tax appeals. There is no independent application of mind. Only factor that certain disallowance has been made in earlier year cannot give *carte blanche* in favour of revenue to reopen the other years, unless in reasons appropriate nexus and correlation is established between the findings relied in the order of Commissioner of income tax appeals and facts prevalent in present case. It is surprising that although said order of Commissioner of income tax appeals is the main heart of the reasons but that heart has left the assessment order when assessing officer has made the final addition. It is surprising as to how when the final addition is made the basis of the reopening being order passed by Commissioner of income tax appeals can be abandoned and aborted like this . As rightly contended by ld. AR before me that there is no fresh tangible material having live nexus so as to support the instant reopening. Reliance was placed by the assessee on Hon'ble Supreme Court decision in case of Lakhmani Mewal Dass reported at 103 ITR 437 is well founded. Further, reliance was placed on recent Hon'ble Delhi High Court decision in case of Meenakshi oversees reported in 395 ITR 577 is also apposite in present facts. Further it cannot be doubted that information contained in the order passed by the Commissioner of income tax appeals can become the basis of a valid reopening provided assessing officer rightly

and correctly records his belief in the reasons as to how on basis of said order income has escaped in period under consideration. As rightly argued by the ld. AR, once the basis and foundation of the reasons is extricated and uprooted, entire exercise fails. In present facts I have carefully compared the reasons recorded and final order passed by the assessing officer, on such comparison there is no coherence in the two. Lack of this coherence has made the reasons defective. When such is the fact position I cannot approve reopening action which is plainly and patently against law. Accordingly the cross objections filed by the assessee and application filed under rule 27 are allowed and reopening is quashed.

8. Although I have quashed the reasons recorded and reopening made by the assessing officer, for sake of completeness, I record my findings on the merits of the case below, which are very well dealt with by first appellate authority by detailed reasoning which could not be countered by Ld. departmental representative before me.

9. The merits of the first addition made by the assessing officer, as deleted by the first appellate authority, relates to amount of 33,95,802/-comprising of rupees 33,47,778/- and rupees for Rs

48,024/, on account of there being no business activity and business income being taken as nil. Ld. assessing officer has discussed the merits of the case in paragraph 3.1 to paragraph 3.5 of the order passed by him (from pages 4 to 7). I have carefully gone through the findings of assessing officer in the assessment order recorded particularly in paragraph 3.4 & 3.5 , on which I am unable to agree with the case of the Department/revenue inasmuch as mere not carrying of business activity inferred out of nil business income is outrightly and patently wrong and incorrect. From long back it is settled legal position that quantum of receipts appearing in credit side of P&L account cannot decide the allowability of the expenditure claimed. In *20 ITR Page 1* it was held that it is not must under income tax law that there is reciprocity between expenditure and income and it is always not must that expenditure made results in positive income. So the reasoning and foundation laid by assessing officer in impugned order is *ex-facie* erroneous and rightly interfered by Commissioner of income tax appeals.

10. Regarding this issue, elaborate and detailed finding contained in order passed by CIT-Appeals is reproduced below for ready reference:

“I have considered the submissions of the appellant as well as the findings of the Ld.AO. keeping into consideration the various case laws of the higher appellate authorities and the Hon’ble Courts held relied on by the Ld.AR and the following facts and circumstances of the appellant’s case. I incline to agree with the contention of the appellant that the Ld. AO is not justified in making addition on account of disallowance of interest expenses incurred to generate the income of FDRs amounting to Rs.33,47,778/- and other expenses of Rs.48,024/-.

(i) On perusal of the documentary evidences filed by the Ld.AR during the course of assessment as well as appellate proceedings, it is evident that the loan of Rs.2.50 crores taken from ICICI Bank is not home loan and is loan against the property. The words “Home Loan” mentioned over the Loan Agreement is as per the Categorization System of the bank. This can be made more clear by the fact that the property mentioned in loan agreement i.e. House No.9, West Punjabi Bagh, West Avenue, Delhi-220026, has already been purchased by S. Sukhbir Singh (Husband of the Assessee) on 25th day of February, 1970 and thus the observation of the Ld.AO being the same property purchased against the loan is factually not correct.

1. The appellant produced the copy of bank statement along with detailed chart for preparation of FDR which clearly reflect that Rs.2.50 crores have been received by her against loan from ICICI Bank under loan against property (LAP) on 05-01-2007 and 5 FDRs were created on 12-01-2007 of Rs.50 lakh each.

2. *Thereafter such FDRs are utilized for purchase of property and jewellery with the clear intention to conduct the business from A.Y.2008-09.*
- (ii) *The most relevant aspect, which is to be seen in this case, is the intension of the Assessee for purchase of jewellery, gold, diamond & property that can be reflected from the facts of the case and the conduct of the Assessee. The Assessee has taken a loan of Rs.2.5 crores for starting his business and as a prudent businessman, she has invested such amount for purchase of jewellery and property. The intension of Assessee clearly reflect from the trading account and profit & loss account declared from the start of his business, i.e.A.Y.2008-09 and shown under the head purchase / closing stock / opening stock of properties and jewellery. The documents produced during the assessment proceeding clearly reveals that loan availed from ICICI Bank is utilized for purchase of jewellery and property w.e.f.01-04-2007. No person shall take loan for investment in any jewellery and property.*
- (iii) *The intention for purchase of particular assets not depend on the nature of the asset, but it depends on the intension of the Assessee for the purpose for which such asset has purchased. In the present case, the Assessee has kept office, raise the loan, made sale and purchase for jewellery and property, spend on stationery and other expenses, which lead to conclude that there is a business conducted by Assessee and the intension to purchase such*

assets are to conduct the business rather than make the investment.

- (iv) The assessee showing the sale and purchase of such jewellery and property under the head business and profession, the Assessee also lose the benefit of indexation, which is available when such assets are shown under the head investment. So the Assessee has loose such benefit of indexation for conducting the business and this conduct clearly reveals the intension of Assessee to purchase such assets for business and profession.*
- (v) It was held by Delhi High Court in the case of CIT vs Smt. Radha Bhai (2005) 272 ITR 264 that the period for retaining of immovable property does not determine the nature but the intension of purchase of such property determined the status and nature of such property. It was further held by Punjab & Haryana High Court in the case of CIT Vs. Sushila Devi Jain (2001) 259 ITR 671 that it was necessary to determine the intention of assessee at the time of purchase of land and property should be considered. Therefore, keeping in view, the ratio of judgements of various courts law of higher authorities and Hon'ble Courts I incline to agree with the contention of Ld.AR and delete the addition of Rs.33,47,778/- made on account of disallowance of interest and other expenses. Hence, the ground of appeal is allowed”*

11. In view of above revenue's first ground of appeal is dismissed.

12. Now turning my attention to next ground wherein first appellate authority has deleted the addition of rupees 8 lacs which was made by assessing officer as unexplained credit in hands of the assessee, on first principle that under reopening scope of the proceedings are confined to the reasons recorded, as rightly canvassed by assessee's counsel. During the course of the hearing my attention was drawn to section 147 of the Income Tax Act, 1961 and explanation 3 thereto wherein on subsequent *coming to notice* after reopening the case, any issue the income in respect of which has escaped assessment, then the same can be included in limited reopening proceedings. I have carefully gone through the contents of the said provision. It is seen that said explanation was inserted by Finance No. 2 act 2009 with retrospective effect from 1/4/1989 so as to give the power to the assessing officer to consider other issues on which reasons are not recorded, while making the assessment under section 147. However from careful perusal of the said explanation following features are noteworthy:

- i) *That only those issues can be considered on which income has escaped assessment;*
- ii) *that only when same comes to assessing officers notice subsequently in the course of the proceedings,*

then only same can be embarrassed reopening proceedings.

13. On careful perusal of facts in light of aforesaid features of the empowering explanation 3 of section 147, I find that neither the issue relating to addition of Rs. 8 lakhs gave rise to any income on which escapement could have occurred and also the same never came to the notice of the assessing officer subsequently as such, during the course of the reopening proceedings. In simple words the fact of loan being taken was apparent and glaring from the day when reopening was initially made therefore same cannot be said to have come to the notice of the assessing officer subsequently during the course of the reopening proceedings within the meaning of explanation 3 to section 147. Further issue on which income has escaped assessment as used in said explanation deserves to be given contextual meaning. In my considered opinion said explanation cannot be used to make the reopening proceedings as *de novo* proceedings for purposes of section 147. No roving and fishing inquiry can be permissible. Giving purposive and objective interpretation to said words in my humble view, on the issue of addition of Rs. 8 lakhs, then there is no income which could be said to have escaped assessment. The reliance placed by assessee's counsel on Hon'ble Delhi High Court decision in case of Ranbaxy 336 ITR 136 is well founded wherein it is held that said explanation to

section 147 cannot be applied to cover other issues once issue on which reopening was made, no addition could have been made on the reasons recorded as held in paragraph 09,10,11 above and accordingly entire reopening shall fail. Accordingly the deletion of addition made by Commissioner of income tax appeals is confirmed for the reasons given above. I do not find it necessary to adjudicate on merits of this addition. Assessee succeeds in its legal ground raised during arguments on rule 27 application that said addition is unlawful and non-meritorious.

14. Last addition on which revenue is aggrieved is Rs. 2,45,000/-, on account of income from undisclosed sources, where also on basis of the reasoning given in paragraph 12 above since reasons and reopening itself is held to be bad and no addition could have been made on the reasons recorded as held in paragraph 09,10,11 above, addition made on other issues on which no reasons were recorded, cannot be sustained. Again the reliance is placed on Hon'ble Delhi High Court decision in case of Ranbaxy reported in 336 ITR 136 which is followed by many other High Court. Accordingly, the appeal of the revenue is dismissed and assessee's cross objection and rule 27 application is allowed.

10. In the result, the appeal of the appeal of the Revenue is dismissed whereas the cross objection of the assessee is allowed.

The order is pronounced in the open court on 16.10.2017.

Sd/-
[B.P. JAIN]
ACCOUNTANT MEMBER

Dated: 16th October, 2017

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi