

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

BEFORE SHRI N.V. VASUDEVAN, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.998/Kol/2015

(निर्धारणवर्ष / Assessment Year: 1989-90)

I.T.O, Wd-48(3), Kolkata	Vs.	Santosh Kumar Sureka
1 st Floor, 3, Govt. Place(west), Kolkata – 1.		105/34/1, Girish Ghosh Road, Liluah, Howrah – 711 204.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AMAPS 1884 Q		
(Appellant)	..	(Respondent)

Appellant by :Shri Soumyajit Dasgupta, Addl. CIT

Respondent by:S.M. Surana, Advocate.

सुनवाईकीतारीख/ **Date of Hearing** : **21/11/2017**

घोषणाकीतारीख/**Date of Pronouncement** : **17/01/2018**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Revenue, pertaining to Assessment Year 1989-90, is directed against an order passed by the CIT(A)-14, Kolkata, in Appeal No.92/CIT(A)-XXX/Cir-46/2011-12, dated 30.03.2015, which in turn arises out of an order passed by the Assessing Officer u/s 147/143(3) of the I.T. Act, 1961 (hereinafter referred to as the 'Act'), dated 31.03.2005.

2.The grounds of appeal raised by the Revenue are as follows:

"1. On the facts and in the circumstance of the case, Id. CIT(A)-14, Kol erred in concluding that the reopening of assessment of the appellant itself was bad in law and the assessment is ab initio void on that score alone.

2. On the facts and in the circumstance of the case, Id. CIT(A)-14, Kol erred in concluding that the addition of Rs.29,11,337/- made by the Assessing Officer towards unexplained investment by the assessee, in purchases in prop. Concern M/s Sureka Castings &Engg. Co., before the ownership of the prop. Concern changed hands on 05.09.1988 when it was purchased by Shree G.S. Sureka, was not justified.

3. The Id. CIT(A)-14, Kol erred in deleting the addition of Rs.2,91,133/- made by the Assessing Officer, towards profit out of the supply of goods to Railways at an estimated rate of 10% of total value of the order."

3. Although, in this appeal, the Revenue has raised the grounds based on technical reasons and as well as on merits, but at the time of hearing, the main grievance has been confined to the issue of validity of reopening of assessment u/s 147/148 of the Act and Revenue raised the ground that reopening was valid and not void ab initio.

4. The brief facts apropos this issue are that in this case originally the assessment was made u/s 144/147 vide order dated 26.03.2001 on a total income of Rs.32,26,710/-. In the assessment u/s 144/147, the addition on account of unexplained investment of Rs.29,11,337/- was made and a sum of Rs.2,86,634/- added back as profit from M/s Sureka Castings and Engg. Co. The assessee went in appeal before Id. CIT(A) against the assessment order. The CIT(A) confirmed the addition. Aggrieved by the order of the CIT(A), the assessee went in further appeal before Hon'ble ITAT. The Hon'ble ITAT by its order in ITA No.1611/Kol/2002 dated 12.12.2003, set aside the order and restored the same to the Assessing Officer. The Hon'ble ITAT had the occasion to hold that both the authorities i.e. Assessing Officer as well as CIT(A) made the addition in the hands of the assessee for want of evidence and mentioned in its order that the issue require adjudication on the basis of materials which may be produced by the assessee before the Assessing Officer.

4.1 Accordingly, the Assessing Officer, to frame the assessment under section 147/143(3)/254, has issued notice to the assessee asking to explain the source of investment in respect of goods which were supplied to Indian Railways for which the sale consideration of Rs.29,11,337/- was deposited in the bank account of the Bank of Rajasthan. The assessee, in response to the said notice of the Assessing Officer, filed a letter dated 21.02.2005, but failed to explain all the points mentioned in the notice. Later, a search & seizure operation took place in the case of G.S. Sureka, brother of the assessee. During the course of search, a bank account with the Bank of

Rajasthan bearing A/c No.1447 was found. The bank account was in the name of Sureka Castings &Engg. Co. In that account an amount of Rs.29,11,337/- was found deposited. It was found that Sureka Castings &Engg. Co. was purchased by G.S. Sureka in Sept.1988 and the account was opened by him as proprietor of M/s. Sureka Castings &Engg. Co. In the assessment of G.S. Sureka, the amount of Rs.29,11,337/- was treated as undisclosed income in his hands, as no explanation could be offered in respect of that deposit. Then, G.S. Sureka went in appeal before the Id. CIT(A) against that order. The CIT(A) in his order dated 21.09.1993 confirmed the addition. Thereafter, Shri G.S.Sureka, went in appeal before the Hon'ble ITAT. The Hon'ble ITAT in its order in ITA No.626, 627 & 628 set aside the order for the A.Y1989-90 (along with the order for the assessment years 1988-89 and 1990-91) and restore the same to the assessing officer. While coming to its findings the Hon'ble ITAT had the occasion to hold that the various documents like the sale deed dated 05.09.1988, judgment of the Assistant District Judge in the title suit No.35 of 1991, the statement of Bank Account, cash flow statement, copies of the pay in slip for depositing the cheques were submitted before the Id. CIT(A) but were not considered. Therefore, the Tribunal set aside the assessment in the case of G.S. Sureka.

4.2In the said assessment, in the case of G.S. Sureka, the Assessing Officer came to conclusion that an agreement dated 05.09.1988, with Shri S.K. Sureka, proprietor of Sureka Castings &Engg. Co., who entered into an agreement for transferring the concern (Sureka Castings &Engg. Co.) to G.S. Sureka (brother of assessee). The Sureka Castings &Engg. Co. prior to 05.09.1988 has executed contract for supply of Railway Sleeper and CI castings for which amounts were due to be received. The realization made from the Railways and debtors were deposited in the bank account with the Bank of Rajasthan by G.S. Sureka who also discharged his liabilities to the creditors by paying amounts out of the above amount. On the basis of the above observation and on the basis of verification made with the Railways,

the AO accepted the explanation of G.S. Surekha in respect of the sum of Rs.29,11,337/- and recomputed the total income.

4.3 Subsequently, the assessing officer initiated proceedings under section 147 of the I.T. Act, in respect of the assessee as income has escaped assessment in this case. The Assessing Officer came to the conclusion that the assessee under consideration was the proprietor of Sureka Castings & Engg. Co. before it was transferred to G.S. Sureka (brother of assessee) on 05.09.1988. The amount of money deposited in the Bank of Rajasthan amounting to Rs.29,11,337/- was a due amount from Indian Railways on supply of material prior to 05.09.1988 and which was done by the assessee as a proprietor of Sureka Castings and Engg. Co.

4.4 In the reassessment proceedings, the assessee has not explained the source of this investment of Rs.29,11,337/-. Therefore, the Assessing Officer added back the entire amount to the total income of the assessee, as income from unexplained investment. The profit of this sale was taken at 10% and the total profit was calculated at Rs.2,91,134/-, because the assessee has estimated an amount of Rs.4,500/- as profit hence the same was deducted and the balance amount of Rs.2,86,634/- (Rs.2,91,134- Rs.4,500) was taken as the undisclosed profit from his business.

5. Aggrieved by the addition made by the Assessing Officer, the assessee filed an appeal before the Id. CIT(A), who has deleted the addition made by the Assessing Officer. The CIT(A) noted that the assessee disputed the action of the Assessing Officer to reopen assessment u/s 147 as well as the reasons recorded for such proceedings which were vague, non-existing, and beyond the belief required to be satisfied while initiating proceedings u/s 147 of the Act. The CIT(A), first of all, had gone through the reasons recorded for initiation of the proceedings u/s 147 of the Act, which were as under:

“In view of findings in the case of G.S.Sureka for the A.Y 1989-90, this case is reopened u/s 147 as because of the disclosure of receipts from Rly Authorities income has escaped assessment. The details noting are in the notes attached to the assessment order in the case of G.S Sureka for the A.Y 1989-90. Issue notice u/s 148.”

Based on the above mentioned reasons recorded, the assessee explained to the Id. CIT(A) that no reason, at all, was recorded except reference to the note in the final assessment order of Shri G.S. Sureka (brother of assessee). It was further submitted that if the assessment order of the said G.S. Sureka (brother of assessee) was looked into, there was no finding that the income was belonged to Sri Santosh Kr. Sureka, the assessee under consideration. The assessee further submitted before the CIT(A) that the said reference to the notes cannot satisfy the requirement of the recording of the reasons in the case of the assessee. It was contended that there should have been independent recording of reasons to reopen the assessment in the case of the assessee. These notes were not part of the reasons, nor were treated as such, which was proved from the fact that when the copy of the reasons recorded were asked for, only the copy of the order sheet was given and that there was no finding at all, in the assessment order of G.S. Sureka that the income belonged to S.K. Sureka, so that, the same could have been disputed by G.S. Sureka. The assessee further submitted that Shri Santosh Kumar was not a party to the said assessment order and that no such finding can be given against Santosh Kumar unless he was heard. It was further submitted before the CIT(A) that such finding even in a note without examining or allowing the assessee(Santosh Kr. Sureka) any opportunity of hearing, cannot be a finding at all. Therefore, the assessee submitted before the CIT(A) that the notes in the assessment order of G.S. Sureka cannot be part of the reasons recorded. The assessee also placed reliance on the judgment in the case of Kar Vijayalakshmi Oil Industries vs. I.T.O 155 ITR 748 wherein it was held that notes cannot amount to recording of reasons. It has been held that “A

'note' even when the same is prepared by the very same officer and even placing the most charitable construction on the same, cannot be elevated to or treated as the recording of the reasons under section 148 of the Act, which is a statutory requirement. The notes prepared by the ITO cannot be treated as one recording his reasons as required by section 148 of the Act.

5.1 After going through the submissions of the assessee, the Id. CIT(A) held that it is well-known position that the reasons for reopening are required to be recorded by the Assessing Officer before issuing notice u/s 148, by virtue of the provisions of section 148(2), at the relevant time. Only the reason so recorded can be looked at for sustaining or setting aside a notice issued u/s 148. Since, reasons recorded by the Assessing Officer were not as per the provisions of section 147/148 of the Act, therefore, the Id. CIT(A) treated the assessment order made by AO as null and void and deleted the addition made by the Assessing Officer and allowed the appeal of the assessee.

6. Not being satisfied with the order of CIT(A), the Revenue is in appeal before us. The DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, the Id counsel for the assessee has defended the order passed by the Id CIT(A) and relied on the submissions made before the CIT(A).

7. Having heard the rival submissions and perused the materials available on record, we note that the assessment in the case of assessee was reopened on the basis of the findings in the assessment order of Shri G.S. Sureka (Brother of assessee). It appears to us that there is no finding that the particular addition originally made in the hands of Shri G.S. Sureka, was called for in the hands of the assessee or that the assessee was the real owner of the said income. It is apparent from the assessment order that there was no material discussed, as to the result of enquiries from Railway authorities. The Assessing Officer in the notes mentioned that the payment was made by Railway to the assessee but the contrary finding in the

assessment order was that he deposited the cheque into the bank account, withdrew the money and then paid to the sundry creditors.

7.1 We note that assessee has challenged the validity of reopening of assessment stating that reasons were not recorded properly and the said issue is covered in favour of the assessee by the judgment of Hon'ble Calcutta High Court in the case of Equitable Investment Co.(P) Ltd. vs. ITO 174 ITR 714 (Cal) wherein it was held that where a notice issued u/s 148 of the I.T. Act, 1961, after obtaining the sanction of the CIT, is challenged, the only document to be looked into for determining the validity of the notice is the report on the basis of which the sanction of the CIT has been obtained. The Income Tax Department cannot rely on any other material apart from the report. Therefore, the notes in the file of Sri Santosh Kr. Sureka cannot be relied on to justify the reasons recorded. The notes prepared by the ITO cannot be treated as one recording his reasons as required by section 148 of the Act. After going through the submissions of the assessee, the Id. CIT(A) held that it is well-known position that the reasons for reopening are required to be recorded by the Assessing Officer before issuing notice u/s 148 by virtue of the provisions of section 148(2) of the Act, at the relevant time. Only the reason so recorded, can be looked at for sustaining or setting aside a notice issued u/s 148 of the Act. Based on the above factual position, we are of the view that the notes prepared by the Assessing Officer in his order sheet should not be considered as reasons recorded u/s 148 of the Act. The Section 148 of the Act, states, that Income Tax Authority are required to form an opinion on the basis of information and Income Tax Authority are required to record reasons before proceeding to issue notice u/s 148 (2) of the Act. The Assessing Officer should record in detail, the source of information on the basis of which he has formed his belief reasonably, which has led to the conclusion that there has been escapement of income. In the assessee's case under consideration the reopening was made based on the 'Notes' prepared by the assessing officer

which is not 'a reason to believe' as per the requirement of section 147/148 of the Act.

7.2 It is to be noted here that when a statute requires something to be done in a particular manner, it has to be done in that manner. The provisions of section 151(2) of the Income Tax Act, 1961, provides that where an assessment has been made under section 143(3), a notice under section 148 cannot be issued by an Assessing Officer, who is below the rank of the Assistant Commissioner or the Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by the Assessing Officer that there it is a fit case for the issuance of a notice. If there is no mention of the approval of the Joint Commissioner as required u/s.151 (2) of the Act. Thus, it follows from the above that sufficient compliance u/s.151 is absent in the case thereby rendering the notice issued to be invalid. We note that in assessee's case under consideration, the assessing officer used the 'order sheet notes' as reasons recorded under section 147/148 which is not a tangible material for reason to believe.

Considering the factual position explained above, we are of the view that in assessee's case under consideration no reasons were recorded as per the requirements of u/s 147/148 of the Act. Therefore, reopening u/s 147/148 was without jurisdiction and illegal and, therefore, we dismiss the appeal filed by the Revenue. Since, we dismiss the appeal of the Revenue, based on the validity of reopening of assessment under section 147/148 of the Act and we consider the reopening, as invalid, therefore, we do not adjudicate the grounds raised by the Revenue on merits.

3.11. In the result, the appeal filed by the Revenue, is dismissed.

Order is pronounced in the open court on 17/01/2018.

Sd/-

(N.V. VASUDEVAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कोलकाता /Kolkata; दिनांक Dated 17/01/2018

[RS SPS]

Sd/-

(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant –I. T. O, Wd-48(3), Kolkata
2. प्रत्यर्थी/ The Respondent-Santosh Kumar Sureka
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.