

**THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH "A-SMC", HYDERABAD**

**BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

**ITA No.202/Hyd/2017  
Assessment Year: 2009-10**

Shri Venu Gopal Karavadi, Hyderabad.	vs.	ITO, Ward - 4(2), Hyderabad.
PAN- BDBPK1736J		

(Appellant)

(Respondent)

Assessee by :	Shri K.A Sai Prasad
Revenue by :	Shri B. Suresh Babu

Date of hearing :	25-04-2018
Date of pronouncement :	27-04-2018

**ORDER**

**PER SHRI B. RAMAKOTAIAH, AM:**

This is an appeal by Assessee against the order of Ld. CIT(A)-1, Hyderabad dated 06.10.2016. Apart from the issues originally contested in appeal i.e addition u/s Sec. 68 of the IT Act of two deposits of Rs. 4.45 lakhs and Rs. 7.5 laksh in two banks, Assessee also raised the additional grounds that initiation of proceedings u/s 147 of the IT Act ceased to survive as the officer has not made any additions on the issue on which the reasons for reopening are based, hence, A.O is not justified in making the addition on other issues. We have heard Ld. Counsel and Ld. DR

2. Briefly stated, the proceedings were initiated by issuance of notice u/s 148 of the IT Act to Assessee on 20.12.2013. Assessment records show that the case was

reopened u/s 147 of the IT Act due to non-adoption of sale consideration as per the market value u/s 50C of the IT Act. During the F.Y 2008-09, Assessee sold a property for a consideration of Rs. 65 lakhs whereas the market value was determined at Rs. 75,71,200/-. A.O was of the opinion that the deference long term capital gain of an amount of Rs. 10,71,200/- has escaped long term capital gain tax as per provisions of Sec. 50C of the IT Act. In the course of assessment proceedings, Assessee submitted that he has purchased a house for Rs. 64,65,418/- before due date of filing the return u/s 139 of the IT Act and produced proof for purchase of new house, therefore, the long term capital gain got exemption u/s 54 of the IT Act. However, A.O went on to examine the deposits in the bank accounts and after asking Assessee to explain the same, made an addition of Rs. 8,95,000/- to the income returned.

3. Before Ld. CIT(A), Assessee explained the sources of the above funds but Ld. CIT(A) dismissed on the ground that there is no genuineness in the submissions of Assessee, hence the present appeal.

4. The additional ground being legal in nature was admitted and it goes to the root of the matter. As seen from the reasons for reopening the assessment, the assessment was reopened on the reason that long term capital gains has escaped assessment under the provisions of Sec. 50C of the IT Act and in the assessment order there is no addition on the so called escapement of income and this aspect was

accepted by A.O, as Assessee entitled for a deduction u/s 154 of the IT Act. Therefore, since the very reason for reopening of assessment has not resulted in any addition in assessment order, A.O was precluded in making the addition on the other issues. On similar facts, the Coordinate Bench of (SMC) in the case of Shri Venkata Siva Reddy, Nellore Vs ITO in ITA No. 962/Hyd/2017 dated 22.11.2017 has considered and held as under:

*"8. After considering the orders of authorities and principles of law, I am of the opinion that the orders of AO and CIT(A) cannot be sustained. The issues contested by assessee can be categorized under the heads:*

*i. Whether reopening u/s. 147 is correct when the time to issue a notice u/s. 143(2) is open?*

*ii. Whether the assessment made on the issue without making any addition of the so called escaped income is correct?*

*iii. Whether the non-disposal of assessee objections by a speaking order is correct in law?*

*8.1. The facts indicate that the assessee filed return of income on 26-07-2013 for AY. 2012-13, even though belatedly as to the time prescribed u/s. 139(1), but within the time provided u/s. 139. On receipt of return, AO has time to issue notice u/s. 143(2)/142(1) for a period of six months i.e., upto 31-01-2014. However, AO choose to reopen the assessment on the reason of income escaping assessment on 12-12-2013, when the assessment proceedings have not even been started. On the issue whether the proceedings u/s. 147 are correct when a notice u/s. 143(2) could have been issued was considered by the Co-ordinate Bench. The Co-ordinate Bench in the case of M/s. Eenadu Relief Fund Vs. DDIT(E)-II in ITA No. 434/Hyd/2010 dt. 13-01-2011 (quoted before the Ld.CIT(A) in written submissions) by assessee, held as under:*

*"9.3. Return filed for the assessment years 1994-95 on 28.3.1996 and the same was processed u/s 143(1). Later 148 Notice was issued on 18.6.1996 though time available for issue of notice u/s 143(2) was upto 31.3.1997.*

9.4. In the case of CIT Vs. Qatalys Software Technologies Ltd. (308 ITR 249), the Madras High Court held that reopening is improper when the time limit is available to issue notice u/s 143(2). As seen from the above, in the case of K M Pachayappan (304 ITR 264) and Qatalys Software Technologies Ltd. (308 ITR 249) Madras HC by placing reliance on the judgement of SC in the case of Rajesh Jhaveri (supra) held that the assessing officer was barred from initiating reassessment proceedings u/s 147 when the time for issuance of notice u/s 143(2) had not expired. However, taken a different view in the case of ITO Vs. K M Pachiyappan (311 ITR 31) (Mds.) upheld that the assessing officer in initiating the proceedings u/s 147 in similar circumstances. However, it appears that the important distinction in fact of these two cases namely time available for issue of notice u/s. 143(2) had not expired in the case of K. M.Pachiappan (311 ITR 31) has not placed before the Madras High Court. Further, the Tribunal in the case of Super Spinning Mills Ltd. Vs. Addl. CIT Tribunal Tax reported (3rd Member) (Chennai) held that:

“The department wants to interpret the expression 'no assessment has been made' in clause (b) of Explanation 2 to 8.147 to mean that it also includes situation where assessment u/s 143(3) is till possible but not yet made. If this interpretation is to be accepted, it will set at naught the fundamental principles underlying s.147 and which principles have been followed till date. These principles are applicable even to the extended meaning given to them term 'escaped assessment' in the amended provision. The above clause is intended to cover the following two situations (i) where a return is filed and non action is taken either u/s. 143(1) or u/s. 143(3) and the time limit for issuing notice u/s. 143(2) has expired (ii) where a return is filed and is processed u/s. 143(1) and the time limit for issuing notice u/s. 143(2) has expired. It does not envisage a situation where a return is filed and the time limit for issue for issue of notice u/s. 143(2) has not expired. Unless the return filed by the assessee is scrutinized by the assessing officer he cannot come to the conclusion of any escapement. If the assessing officer issues notice u/s. 143(2), the quite obviously he would scrutinize the return and frame the assessment u/s. 143(3). Subsequently, he may notice escapement and issue

*notice u/s. 148 Besides this, in the above two situations also he will have to look into the return to see whether there is escapement or not. If he notices any escapement, it can be called an escapement only if it is notice after the proceedings u/s. 147. In that event he will have to issue notice u/s. 143(2). In nutshell, (a) the proceedings are said to have commenced once the return is filed, and (b) the proceedings terminate when (i) the return is processed u/s. 143(1) and the time to issue notice u/s. 143(2) is over (ii) assessment is made u/s. 143(3) or, (iii) the assessment is no longer possible u/s. 143(3). Processing u/s. 147 can be initiated only after the earlier proceedings have terminated as mentioned above. Order u/s. 147 r/w.s. 143(3) was therefore liable to be quashed.*

*10. In view of the above discussions, we are inclined to hold that unless the return filed by the assessee is scrutinized by the assessing officer u/s. 143(3), we cannot come to the conclusion of any escapement, the assessing officer cannot initiate proceedings u/s 147 when the time for issuance of notice 143(3) has not expired. The case law relied by the assessee's counsel laid down the same proposition of law. Accordingly, we allow the first ground of the appeal of the assessee by holding that this reopening of assessment by issue of notice u/s 148 dated 17.10.2007 is bad in law".*

*Thus, on the facts of the case and principles of law, the reopening is ab initio void.*

*8.2. Explanation 3 to the provisions of [section 147](#) of the Act, empowers AO to assess or reassess such escaped income, based on the reasons on which the assessment is reopened and also any other escaped income which has come to his notice during the course of assessment proceedings. Explanation 3 to the provisions of [section 147](#) of the Act never intend the AO to continue the reassessment proceedings even though the reasons based on which the notice u/s. 148 has been issued ceased to exist. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the AO to independently assess only that income which comes to his notice subsequently in the course of the proceedings under that section as having escaped assessment. Hence, the action of the AO in continuing the*

reassessment proceedings, even though the reason for which the notice issued u/s. 148 of the Act ceased to exist, by citing the Explanation 3 to the provisions of [section 147](#) of the Act is not correct. Thus the assessment made u/s. 143(3) r.w.s.147 of the Act is without jurisdiction and bad in law. The reopening of the assessment, as per the reasons recorded for that purpose, was only in relation to reconciliation of receipts as per 26AS and computation of in-come and hence following the decisions of Bombay High Court in the case of Jet Airways (Supra), the assessment made by the AO u/s. 143(3) w.r.t. 147 of the [IT Act](#) with reference to other issues alone is without jurisdiction. Reliance can also be placed in the case of Ranbaxy Laboratories Ltd., Vs. CIT 336 ITR 136 (Delhi), in the case of Assistant Commissioner of Income Tax Vs Major Deepak Mehta [344 ITR 641] (Chhattisgarh).

8.3. The AO having been satisfied that there is no discrepancy in gross turnovers, he could have dropped proceedings. The law on the issue is very clear. The Hon'ble jurisdictional High Court in the case of CIT-III Vs. Swarna Andhra IJMII Integrated Township Development Private Limited (supra) has considered the similar facts and held as under:

"It appears that the learned Tribunal has found that the reasons recorded for reopening the assessment has no nexus with the income ultimately assessed under [Section 147](#) of the Income Tax Act, 1961. The finding of the learned Tribunal is reproduced hereunder:

"Thus, it is very much clear that the reassessment has been made for assessment of income other than the income escaping assessment as per the reasons recorded for formation of belief while initiating proceeding under [Section 147](#) of the Income Tax Act, 1961."

Mr. B.Narasimha Sarma, learned Counsel for the appellant, says that upon reading of Explanation-3 to [Section 147](#) of the Income Tax Act, the learned Tribunal should not have concluded as aforesaid, as the Explanation-3 has got retrospective effect.

We are of the view that the Explanation-3 to [Section 147](#) of the Income Tax Act on the given facts and circumstances of the case does not apply. Moreover, in which case and when Explanation-3 would be applicable has been decided by various High Courts, namely, Bombay High Court in case of CIT Vs. Jet Airways (I) Ltd., (331 ITR 236); Delhi High Court in case of Ranbaxy

*Laboratories Ltd. Vs. CIT (336 ITR 136); Chhattisgarh High Court in case of ACIT Vs. Major Deepak Mehta (3441TR 641) and Gujarat High Court in case of CIT Vs. Mohmed Juned Dadani. In view of the consistent decision of these High Courts, we are not in a position to take a different view and the learned Tribunal has followed the consistent view of those High Courts. Even, we find that independent of the decision of those High Courts that the Explanation-3 will be applicable in case where live issue, which was subsisting at the time of original assessment and if such issue has escaped the determination of the Assessing Officer, can be a ground for reopening. Any new issue that has cropped up subsequently on new set of facts, the aforesaid Explanation has no application. We think that the Explanation-3 has not really diluted cardinal object of [Section 147](#) of the Income Tax Act for reopening. The Explanation-3 has been given a retrospective effect with an idea there are so many assessment orders, which were passed earlier without deciding the issue subsisting at the time of original assessment. This Explanation has held to be reopened in those cases".*

*Thus, on this reason the assessment completed by the AO on other issues has become bad-in-law.*

*8.4. As seen from the satisfaction recorded, the case was reopened by the AO on the reason that there was a difference of Rs. 3,30,017/- in the gross receipts reflected in the Form No:26AS and in the Computation of income with regard to Gross Receipts received from Commissioner, Tirupati Municipality and therefore the AO was of the opinion that there was reason to believe that income, chargeable to tax has escaped assessment. Once the difference in the gross receipts from Commissioner, Tirupati Municipality was duly reconciled by furnishing the rectified Form No.26AS downloaded from the Income Tax Dept. website, the reason to reopen ceased to exist. Further, the reasons recorded for reopening of assessment laid more stress on reconciliation of gross receipts and but not on escapement of any income and therefore there was no belief that there was any escapement of any income and hence the entire order passed u/s. 143(3) r.w.s 147 of the Act is without jurisdiction. Reliance can be placed in the case of Meheria Reid & Co Vs ITO (2013) 81 DTR (Kol) (Trib) 386 wherein it has been held as under:*

*"In the instant case, assessment has been reopened on the ground that there is discrepancy between professional income declared by the assessee and the professional income as per TDS Certificates and that it*

*requires verification to find out whether any taxable income has escaped assessment. There is nothing in the reasons to indicate that there is escapement of income. A variation in these two figures does not necessarily lead to escapement of income. Mere need to verify the discrepancy does not bring the matter within the scope of the cases in which reassessment proceedings can be validly initiated. There is subtle, though significant, distinction between reason to believe and reason to suspect- while the former is good enough to hold that income has escaped assessment and initiate suitable remedial measures in respect thereof, the latter can, at best, be the ground to verify and examine the matter further. Mere fact that matter needs to be verified and examined further can never be a reason good enough to believe that income has escaped assessment and to invoke the reassessment proceedings. Therefore, the very initiation of reassessment proceedings on the facts of the instant case was devoid of legally sustainable merits - Reassessment quashed."*

*Similar view was taken by the ITAT, Hyderabad in the case of M/s. Vason Electors Private Limited Vs. Assessee (ITA No. 456/Hyd/2012)".*

5. Respectfully following the principle laid down therein including the Jurisdiction High Court as referred above, I am of the opinion that the proceedings completed by A.O have become bad in law, therefore, I have no hesitation in setting aside the order of A.O and CIT(A) on this issue and allowing Assessee's additional ground.

6. Even though there is merit in Assessee's contention with regard to the addition made, this need not be adjudicated as a very assessment is held to be bad in law. In view of that, the grounds pertaining to the merits of the addition not considered as they have become academic in nature. Assessee's grounds are allowed.

7. In the result appeal filed by Assessee is allowed.

Pronounced in the open court on 27<sup>th</sup> April, 2018.

**Sd/-**  
**(B. RAMAKOTIAH)**  
**ACCOUNTANT MEMBER**

Hyderabad, Dated: 27<sup>th</sup> April, 2018.

KRK

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- 2) ITO, Ward-4(2), Hyderabad.
- 3) CIT(A) -1, Hyderabad.
- 4) The Pr.CIT-1 Hyderabad.
- 5) The Departmental Representative, I.T.A.T., Hyderabad.
- 6) Guard File