

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष  
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 854/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

The Assistant Commissioner of Income Tax,  
Central Circle-2(2), Pune.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Kakade Infrastructure Pvt. Ltd.  
1205, Kakade Capital, Shirole  
Road, Near P. Jog Classes,  
Shivaji Nagar, Pune-411005.  
PAN : AADCK5852G

.....प्रत्यर्थी / Respondent

Revenue by : Shri Rajeev Kumar &  
Dr. Vivek Aggarwal

Assessee by : Shri Harikrishan

सुनवाई की तारीख / Date of Hearing : 12.06.2018

घोषणा की तारीख / Date of Pronouncement : 20.06.2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM**

This appeal by the Revenue is directed against the order of  
Commissioner of Income Tax (Appeals)-12, Pune dated 30.03.2015 for the  
assessment year 2010-11.

2. The brief facts of the case as emanating from records are: The assessee-company is a promoter, builder and infrastructure developer. The assessee filed return of income for the impugned assessment year on 15.10.2010 declaring total income of Rs.8,69,03,293/-. The case of the assessee was selected for scrutiny under CASS. Accordingly, statutory notice u/s. 143(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') was issued to the assessee on 29.08.2011. Statement of Shri Sanjay Kakade, Director of assessee-company was recorded u/s.131 of the Act on 21.01.2011 i.e. prior to the filing of the return of income wherein he admitted that purchases to the tune of Rs.3,46,00,000/- pertaining to the year were not genuine. He agreed to pay tax on bogus purchases. However, while filing return of income u/s.139(1) of the Act, the assessee did not honour his declaration. During pendency of scrutiny assessment proceedings, the Assessing Officer issued notice u/s.148 of the Act to the assessee on 02.03.2012 after recording reasons for reopening. In response to the notice u/s.148 of the Act, the assessee filed return of income on 10.01.2013 declaring income of Rs.12,32,71,031/-. Thereafter, Assessing Officer finalized the assessment by making further addition of Rs.48,89,61,225/-on account of non genuine purchases, unproved purchases and negative cash. The Assessing Officer passed assessment order dated 28.03.2013 u/s. 143(3) r.w.s. 148 of the Act.

3. Aggrieved by the assessment order, the assessee filed appeal before Commissioner of Income Tax (Appeals) challenging additions on merits and validity of the notice issued u/s.148 of the Act. The Commissioner of Income Tax (Appeals) after examining facts of the case and various decisions held that notice issued u/s.148 of the Act during pendency of scrutiny assessment proceedings is void ab-initio and illegal. Consequently, the

assessment order passed u/s.143(3) r.w.s. 148 of the Act was quashed by the Commissioner of Income Tax (Appeals).

4. Against the order of Commissioner of Income Tax (Appeals), the Revenue is in appeal before the Tribunal. The Revenue in appeal has raised following grounds assailing the findings of Commissioner of Income Tax (Appeals) :

*“1. In the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the AO framed reassessment order whereas the order passed by the AO is to be treated as passed u/s.143(3) of the IT Act, as original assessment proceedings subsist, even if the subsequently initiated reassessment proceedings are held to be void. The Ld. CIT(A) did not give any finding regarding the invalidity of the original assessment proceedings .Therefore, he erred in quashing the order framed by the AO.*

*2. The Ld. CIT(A) failed to appreciate that in none of the judgement cited by the Ld. CIT(A), it has been held that the original assessment proceedings will become invalid or void, even if subsequently initiated proceedings are held to be bad in law.*

*3. Without prejudice to the above, the Ld. CIT(A) failed to appreciate that it was incumbent on the AO to complete the assessment proceeding by considering all the material available with him including the enhanced income declared by the assessee in the returns filed subsequently.*

*4. Without prejudice to the above, the Ld. CIT(A) erred in quashing the assessment order by relying upon certain case laws even though the facts of such judgments being relied upon were different from the facts of the instant case and hence their ratio is not applicable to the instant case.*

*5. The order of Ld. CIT(A) may be vacated and that of the Assessing Officer be restored.*

*6. The appellant craves leave to add, alter, amend, and modify any of the above grounds of appeal.”*

5. Shri Rajeev Kumar representing the Department submitted that though in the title of assessment order dated 28.03.2013, it is mentioned that the order has been passed u/s.143(3) r.w.s. 148 of the Act, the order is , in fact, passed u/s. 143(3) of the Act. The ld. DR admitted that notice u/s.148 of the Act was issued to the assessee during pendency of scrutiny

assessment proceedings, however, the ld. DR vehemently asserted that assessment order dated 28.03.2013 is arising out of scrutiny assessment and not re-assessment proceedings. Merely, for the reason that in the title of assessment order reference of section 148 would not invalidate the assessment order. Mentioning of the wrong section in the title of the assessment order is not fatal error. The mistake is rectifiable. The ld. DR pointed that Shri Sanjay Kakade, Director of assessee-company in his statement recorded u/s. 131 of the Act on 21.01.2011 admitted bogus purchases to the tune of Rs.3,46,00,000/-. However, while filing return of income, assessee did not mention bogus purchases. During assessment proceedings, assessee filed fresh computation declaring bogus purchases in returned income. Therefore, the Assessing Officer while computing total income has mentioned the amount of returned income as Rs.12,32,71,031/- which includes the amount declared in the return of income filed u/s.139(1) of the Act plus the amount declared in the statement recorded u/s. 131 of the Act on 21.01.2011. The ld. DR contended that the Assessing Officer rightly included the additional income offered by the assessee in his statement as part of returned income. To support his submissions, the ld. DR placed reliance on following decisions:

*i) Smt. Daxaben Kiritbhai Vs. Income Tax Officer, in ITA No.462/Ahd/2006 for assessment year 2002-03 decided on 31.03.2011.*

*ii) Dr. Pratap Singh Vs. Director of Enforcement, reported in 155 ITR 166 (SC)*

*iii) Pooran Mal Vs. Director of Inspection, reported in 93 ITR 505 (SC)*

6. Per contra, Shri Hari Krishan appearing on behalf of the assessee vehemently defended the order of Commissioner of Income Tax (Appeals). The ld. AR submitted that it is an undisputed fact that notice u/s. 148 of the Act was issued to the assessee during pendency of scrutiny assessment

proceedings. It is well a settled law that when assessment proceedings are pending the notice issued u/s. 148 of the Act, for initiation of re-assessment proceedings is invalid. In support of his submissions, the ld. AR placed reliance on the following decisions.

*i) Trustees of H.E.H the Nizam's Supplement Family Trust Vs. CIT, reported as 242 ITR 381 (SC)*

*ii) Ador Technopack Ltd. Vs. Dr.Zakir Hussein, Deputy Commissioner of Income Tax & Ors., reported as 271 ITR 50 (Bombay).*

6.1 The ld. AR pointed that assessment order dated 28.03.2013 was passed in consequence of notice u/s. 148 of the Act. This fact is evident from the computation of total income wherein the Assessing Officer specifically mentioned "*Income as per return of income filed on 10.01.2013: Rs.12,32,71,031/-*". The assessee had declared the same amount in return of income filed on 10.01.2013 in response to notice issued u/s.148 of the Act. Hence, stand of the Department that in the title of the assessment order section 148 has been wrongly mentioned *holds no water*. The Assessing Officer while passing assessment order dated 28.03.2013 was fully aware and conscious to the fact that the order is being framed in consequence to notice u/s.148 of the Act. Therefore, in the title of the order, he categorically mentioned that the order is passed u/s.143(3) r.w.s. 148 of the Income Tax Act, 1961 and while computing total income, he starts with "*Income as per return of income filed on 10.01.2013.*"

6.2. The ld. AR submitted that in view of the ratio laid down by the Hon'ble Supreme Court of India, the Commissioner of Income Tax (Appeals) has rightly quashed the assessment order and has held notice u/s. 148 to be invalid and void ab-initio. The ld. AR further pointed that after having realized the mistake, the Assessing Officer passed another assessment order

u/s.143(3) r.w.s. 147 on 22.12.2017 on the basis of same notice dated 02.03.2012 issued u/s.148 of the Act and return of income filed by assessee in response to the said notice on 10.01.2013.

7. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. We have also considered various decisions on which the ld. AR had placed reliance. It is an undisputed fact that reassessment proceedings were initiated by the Assessing Officer against the assessee during pendency of scrutiny assessment proceedings. For the sake of clarity, dates and events are reproduced herein below:

Dates	Events
15.10.2010	Return of income filed by assessee u/s. 139(1) of the Act of Rs.8,69,03,293/-
29.08.2011	Notice u/s. 143(2) issued by the Assessing Officer.
02.03.2012	Notice u/s. 148 of the Act issued by the Assessing Officer.
10.01.2013	The assessee filed return of income in response to the notice u/s. 148 of the Act declaring total income of Rs.12,32,71,031/-
28.03.2013	Assessment order u/s. 143(3) r.w.s. 148 of the Act passed by the Assessing Officer.

A perusal of the list of dates and events clearly shows that the Assessing Officer initiated re-assessment proceedings when scrutiny assessment proceedings were still pending. If the Assessing Officer was of the view that the assessee has failed to disclose any income in the return of income, he could have made addition of the same in scrutiny assessment proceedings itself rather than issuing notice u/s.148 of the Act. The submissions of the ld. DR that assessment order is passed under section 143 (3) of the Act and section 148 has been wrongly mentioned in the title of

the order is without merit. The computation of income by Assessing Officer in assessment order clearly indicates that the assessment has been framed on the return of income filed by the assessee in response to the notice issued u/s.148 of the Act. The plea of the Revenue in ground No. 1 of appeal to treat the assessment order as passed u/s.143(3) is an attempt to cover up the folly of Assessing Officer in initiating reassessment proceedings during the subsistence of assessment proceedings. The ground No. 1 of appeal lacks merit.

8. The Hon'ble Supreme Court of India in the case of Trustees of H.E.H the Nizam's Supplement Family Trust Vs. CIT (supra.) has held:

*“It is settled law that unless the return of income already filed is disposed of, notice for reassessment under section 148 cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated.”*

9. The Hon'ble Bombay High Court in the case of Ador Technopack Ltd. Vs. Dr.Zakir Hussein, Deputy Commissioner of Income Tax & Ors (supra.) has held as under:

*“Turning to the facts of the present case on hand, when the order of assessment, though in part was set aside and the finding that the underassessment was required to be enquired into and reassessment is required to be done has become final and conclusive, the question of entertaining reasonable belief that the income chargeable to tax has escaped assessment, in our considered opinion, does not arise much less when the assessment proceedings are still pending. Thus, it is not open for the Assessing Officer to invoke powers under sections 147 and 148 of the Act. In others words, so long as the assessment proceedings in respect of certain income subsist, the income cannot be said to have escaped assessment. Such proceedings, if initiated, will have to be held as invalid, ab-initio void and illegal.*

*It is thus, clear that the concept of reason to believe comes in the picture if the income chargeable to tax has escaped assessment. So long as the assessment is pending, the assessing authority cannot have any such reason to believe that income chargeable to tax for the assessment year in question has escaped assessment. Income cannot be said to have escaped assessment within the meaning of this section*

*if the assessment proceedings in respect of that income and /or issue are still pending and have not yet culminated in a final order. This question came up for consideration before the Supreme Court in the case of Ghanshyamdas Vs. Regional Assistant CST [1964] 51 ITR 557. Relying on the decision of Calcutta High Court in the case of Lachhiram Basantlal, In re [1931] ILR 58 Cal.909; AIR 1931 Cal 545 and of the Judicial Committee in Sir Rajendranath Mukherjee Vs. CIT [1934] 2 ITR 71 (PC), it was laid down that if assessment proceedings have been initiated, income cannot be said to have escaped assessment until a final order of assessment is passed on the pending proceedings. Income cannot be said to have escaped assessment when the assessment proceedings are still pending.”*

**[ Emphasized by us]**

10. Thus, in view of the above facts of the case and decisions discussed above, we find no infirmity in the order of Commissioner of Income Tax (Appeals) in holding notice issued u/s.148 to be invalid. Hence, we uphold the findings of Commissioner of Income Tax (Appeals) in quashing the assessment order. Accordingly, grounds raised by the Revenue in appeal are dismissed being devoid of merit.

11. We have considered the decisions on which the ld. DR has placed reliance, however, we find that all the decisions are distinguishable and has no relevance to the core issue before us. Hence, the decisions cited by the ld. DR would not support the case of Revenue in any manner.

12. In the result, appeal of the Revenue is dismissed.

Order pronounced on Wednesday, the 20<sup>th</sup> day of June, 2018

Sd/-  
(अनिल चतुर्वेदी /ANIL CHATURVEDI)  
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-  
(विकास अवस्थी /Vikas Awasthy)  
न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 20<sup>th</sup> June, 2018  
SB

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-12, Pune.
4. The CIT (Central), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.