

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

ITA No. 1952/Kol/2013
Assessment Year: 2008-09

Assistant Commissioner of Income Tax, Circle-2, Hooghly.....Appellant

Swapan Kumar Mondal.....Respondent

Uttarayan

Station Road

Chinsurah R.S.

Dist. Hooghly

PIN - 712 102

[PAN : AEDPM 6336 A]

Appearances by:

Shri Subash Agarwal, Advocate, appeared on behalf of the assessee.

Shri Saurabh Kumar, Addl. CIT, D/R. appearing on behalf of the Revenue.

Date of concluding the hearing : April 18th, 2018

Date of pronouncing the order : July 13th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This is an appeal filed by the revenue directed against the order of the Commissioner of Income Tax (Appeals)-XXXVI, (hereinafter the 'Ld. CIT(A)'), dt. 31/01/2013, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2008-09.

There is a delay of 73 days in filing of this appeal. After perusing the petition filed for condonation of delay, we are convinced that the revenue was prevented from sufficient cause from filing the appeal in time. Hence the delay is condoned and appeal admitted.

2. The assessee is an individual is in construction business. He filed his return of income electronically on 30/09/2008, declaring total income of Rs.6,91,788/-, for the Assessment Year 2008-09. A survey operation u/s 133A of the Act, was conducted in the premises of M/s. Mondal Construction Company Ltd., the sole proprietary concerned of the assessee, on 24/01/2008. Notice u/s 148 of the Act, was issued on 26/05/2011, reopening the assessment u/s 147. The Assessing Officer at para 3 of his order states that, the assessee has voluntarily disclosed Rs.59,99,647/- under the head

miscellaneous income, but at the same time, he claimed Future and Options loss (share amounting to Rs.60,51,655/-). This loss was disallowed for the reasons given in the assessment order and the total income assessed at Rs.67,43,445/-

2.1. Aggrieved, the assessee carried the matter in appeal.

3. The ld. First Appellate Authority, held that the reopening of assessment is bad in law. He squashed the assessment proceedings and did not deal with the merits of the issue.

4. Aggrieved the revenue is before us in appeal.

5. We have heard the rival contentions. The copy of the reasons recorded are stated by the ld. CIT(A) at para 4.2. page 8 of his order. This is extracted for ready reference:-

"4.2 I have carefully considered the submissions of the Ld. A/R of the applicant and also perused the assessment order and the records. I find that the assessment was made u/s 143(1) and thereafter notice was issued u/s 148. Reasons recorded for reopening of assessment made as per below :-

"25/05/2011 the "a" s letter dtd. 16.03.2011 has been perused. However, the same is not acceptable. The assessee has disclosed an amount of Rs. 59,99,647/- during the survey which is to be taxed as per provisions contained in section 68 to 69D of the I T Act and the same cannot be set off with the other heads /other income. Therefore, it is apparent that Rs. 59,99,6471- has escaped assessment I have therefore reason to believe that the above amount of Rs. 59,99,647/- has escaped assessment Issue notice u/s 148. to reassess the income escaping assessment (sd/- Arup Biswas)"

It is undoubtedly clear from the reasons recorded for reopening of assessment is that Rs. 59,99,647/ - as disclosed by the assessee during survey is to be taxed in section 68 to 69D of the Act and the same cannot be set off with other heads /other income."

5.1. A perusal of these reasons recorded by the ld. Assessing Officer for reopening the assessment demonstrate that no new tangible material has come into possession of the Assessing Officer. The survey in question u/s 133A of the Act, was much before the filing of the return of income. The reasons recorded are based on the information contained in the return of income. It is well settled that for exercising the power of reopening, the Assessing Officer should have new tangible material which has come into

his possession after processing the return of income and the material should have a live nexus with the reasons recorded. In this case there is no new material. The Id. CIT(A), has, in our view, rightly relied on the decision of the Kolkata 'B' Bench of the Tribunal in the case of *Meheria Reid & Co. vs. Income Tax Officer being ITA Nos. 53 & 54/Kol/2010*, wherein it has been held as follows:-

"9. We have taken due note of the fact that the original assessment proceedings were completed under section 143(1) of the Act and that the reassessment proceedings are initiated within four years but that does not, as is the settled legal position, does not imply, as has been indirectly suggested by the learned Departmental Representative, that assessment proceedings can be revisited even in the absence of legally sustainable reasons for formation of prima facie belief that income has escaped assessment. In other words, irrespective of whether or not the original assessment has been completed under scrutiny assessment or summary assessment, it is necessary that conditions precedent for invoking section 147 have to be satisfied. Hon'ble Bombay High Court, in the case of Prashant S Joshi v. ITO [2010] 324 ITR 154/189 Taxman 1 had an occasion to deal with this question and also consider the scope of Hon'ble Supreme Court's judgment in the case of Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500/161 Taxman 316 in this regard. After elaborately considering Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokes (P.) Ltd. (supra), Their Lordships of Hon'ble Bombay High Court have observed that "Hon'ble Supreme Court held that so long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceedings under section 147, and that the failure to take steps under section 143(3) will not render him powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued". "In other words", according to Hon'ble Bombay High Court, "when an intimation has been issued under section 143(1), the Assessing Officer is competent to initiate reassessment proceedings provided that the requirements of section 147 are fulfilled". It is thus concluded that "In such a case [i.e. when the reopening is within four years and the income tax return is processed under section 143(1)] as well, the touchstone to be applied is as to whether there was reason to believe that income had escaped assessment". It is thus clear that even when the original assessment is under section 143(1) and even when reassessment proceedings are initiated within a period of four years, it is still necessary that there should be reasons to believe that income had escaped assessment and such reasons are subject to judicial scrutiny. No doubt that at the stage of initiating reassessment proceedings, it is not necessary to establish that there has been an escapement of income, but essentially there have to be valid reasons to believe that income has escaped assessment and these reasons, on stand-alone basis, must be considered appropriate for arriving at the conclusion arrived at by the Officer recording the reasons. The mere fact that the assessment has been completed under section 143(1) per se cannot be a good ground to reopen the assessment, without satisfying the conditions precedent for invoking section 147 i.e. reasons for forming opinion that income has escaped the assessment. Elaborating upon this aspect of the matter, Hon'ble Shri R V Easwar, the then Senior Vice-President of this Tribunal, has, in the Third Member decision in the case of Telco Dadajee Shackjee Ltd. v. Dy. CIT [IT Appeal No. 4613/Mum/2005, dated 12-5-2010] in his inimitable words, observed as follows:

".....it needs to be remembered that section 147 applies both to section 143(1) as well as section 143(3), and, therefore, except to the extent that the reassessment notice under section 143(1) cannot be challenged on the ground of a mere change of opinion, still it is open to the assessee to challenge the notice on the ground that there is no reason to believe that income chargeable to tax has escaped assessment. The reason to believe must have a live link to formation of belief that income chargeable to tax had escaped assessment when the return was processed and accepted under section 143(1). To hold that in every case where a return was processed and accepted under section 143(1), the Assessing Officer will be free to reopen the same under section 148 even in the absence of a live link between the

reasons recorded and the formation of belief, would be to make the conditions of section 147 and 148 otiose as regards notices of reopening issued in the cases where the return was originally processed under section 143(1)....."

10. The true test for validity of reassessment proceedings, even in the cases in which original assessment has been completed under section 143(1), must, therefore, lie in whether or not the reasons recorded for reopening the assessment can be held to be sustainable in law.

11. It is also well settled in law, as has been held by Hon'ble Bombay High Court in the case of *Hindustan Lever Ltd. v. R B Wadkar* [\[2004\] 268 ITR 332/137 Taxman 479](#) as well, that ".....It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the AO to disclose and open his mind through the reasons recorded by him. He has to speak through the reasons." Their Lordships added that "The reasons recorded should be self explanatory and should not keep the assessee guessing for reasons. Reasons provide link between conclusion and the evidence....". When we examine the facts of this case in the light of the above legal position that there is nothing in the reasons to indicate that there is an escapement of income, but, at the most, need to verify that the reasons of discrepancy between income from profession as per return of income vis-à-vis as per the certificates of tax deduction at source. A variation in these two figures does not necessarily lead to escapement of income, because, for example, when income is booked on mercantile basis, the aggregate of such amounts, on which taxes have been deducted at source during the relevant previous year, will not necessarily tally with the income figure. There is thus no cause and effect relationship between the aggregate of payments, in respect of which taxes have been deducted at source, being more than relevant income having been booked in the profit loss account, and the income escaping assessment. In other words, just because the aggregate of such payments is more than income booked in the profit and loss account, as is the situation in the case before us, there is no valid reason to indicate that income has escaped assessment. All that the Assessing Officer records is the fact that these two figures are different, but then this fact does not necessarily lead to the inference that the income has escaped assessment, and, therefore, the Assessing Officer himself refers to the need to verify the matter by observing that "the discrepancy may be verified". So far so good, but then the fallacy creeps in when the Assessing Officer concludes that, for the said reason, "this is a fit case for reopening the assessment". As Hon'ble Bombay High Court has observed, in the case of *Hindustan Lever Ltd. (supra)*, the reasons should provide link between evidence and the conclusion. The evidence is that the figures of professional receipts as per TDS certificates and as shown in the profit and loss account vary, but then this does not lead to the conclusion that the income has escaped assessment. As a matter of fact, as we will see in paragraph 15 of this order a little later, on the same date and vide identical reasons recorded, the Assessing Officer has also reopened the assessment for subsequent assessment year as well, in which professional income as per profit and loss account was far more than the aggregate of figure of payments as per tax deduction at source certificates. It is thus the difference per se and not the professional income as per profit and loss account being less than the figure as per tax deduction at source certificates which is proximate cause of reopening the assessment. In any event, the difference between receipt and income is too significant to be ignored. There may be need to verify but that mere need to verify does not bring the matter within the scope of cases in which reassessment proceedings can be validly initiated. What is needed, to successfully invoke the reassessment proceedings, is the reasons to believe that income has escaped assessment. No doubt, even a prima facie reason for believing that income has escaped assessment is sufficient to invoke the reassessment proceedings, but there is a subtle, though significant, distinction between reasons to believe and reasons 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 enough to verify and examine the matter further. The mere fact that matter needs to be verified and deserves to be examined further can, in our humble understanding, never be a reason good enough to believe, even if it is a good reason to suspect so, that income has escaped assessment, and therefore, a reason good enough to invoke the reassessment

proceedings. An Assessing Officer may have a hunch that here is a case in which some income may have escaped assessment but that hunch or suspicion, howsoever legitimate, cannot be a reason to "believe" that income has escaped assessment. The condition precedent for invoking section 147 is, thus, far from satisfied. In this view of the matter, in our considered view, the very initiation of reassessment proceedings on the facts of this case was devoid of legally sustainable merits. We, therefore, quash the reassessment proceedings. As the reassessment proceeding itself is quashed, we see no need to deal with the matter on merits and dismiss the related grievances, raised by the assessee on merits of the case, as infructuous."

The Hon'ble Supreme Court in the case of *Income Tax Officer v. V. Lakhmani Mewal Das* reported 103 ITR 437 (SC), held as follows:-

As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

The Hon'ble Supreme Court in the case of *Ganga Saran & Sons vs. ITO* 130 ITR 1 (SC), held as follows:-

"6. It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the ITO can assume jurisdiction to issue notice under section 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the ITO would be without jurisdiction. The important words under section 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the ITO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the ITO in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the ITO could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by

reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid."

6. Applying the propositions laid down in these case-law to the facts of this case, we uphold the findings of the Id. CIT(A), from para 4.2. to para 4.4 at pages 8 to 13 of his order.

7. Though the assessee had relied on certain case-law and made submissions on the merits of the case, we do not adjudicate the issue as the Id. CIT(A) has not considered the merits of the case.

7. In the result, appeal of the revenue is dismissed.

Kolkata, the 13th day of July, 2018.

Sd/-
[S.S. Viswanethra Ravi]
 Judicial Member

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Dated : 13.07.2018
 {SC SPS}

Copy of the order forwarded to:

1. Swapan Kumar Mondal
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Station Road
Chinsurah R.S.
Dist. Hooghly
PIN - 712 102

2. Assistant Commissioner of Income Tax, Circle-2, Hooghly

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
 By order

Senior Private Secretary
 Head of Office/ D.D.O. ITAT, Kolkata Benches

