

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री भागचन्द, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 336/JP/2018  
निर्धारण वर्ष/Assessment Year : 2009-10.

Shri Ajay Wahi, Dr. Wahi's Diagnostic Clinic, A-5, Chandpole, Jhotwara Road, Jaipur.	बनाम Vs.	The ACIT, Circle-1, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AABPW 0826 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Dilip Shivpuri (Advocate)  
राजस्व की ओर से / Revenue by : Smt. Seema Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 18.04.2018.  
घोषणा की तारीख / Date of Pronouncement : 09/07/2018.

आदेश / ORDER

PER VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 19.01.2018 of Id. CIT (A) for the assessment year 2009-10. The assessee has raised the following grounds of appeal :-

- " 1.(a) In the facts and circumstances of the case and in law, the Id. CIT (A) has erred in confirming the action of the Id. AO in reopening the assessment u/s 147 of Income Tax Act, 1961. The action of the Id. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without any basis.

- (b) In the facts and circumstances of the case and in law, the Id. CIT (A) has erred in confirming the action of the Id. AO in issuing notice u/s 148 of Income Tax Act, 1961, without obtaining proper sanction u/s 151 of the Income Tax Act, 1961. The action of the Id. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without jurisdiction.
2. In the facts and circumstances of the case and in law, the Id. CIT (A) has erred in sustaining the additions made by the Id. AO, by treating Rs. 60,00,000/-, received by the assessee, for the purposes of calculating Long Term Capital Gains, inspite of the fact that the assessee was not the owner of the land and was merely a holder of Power of Attorney. The action of Id. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire additions sustained by the Id. CIT (A).
3. The assessee craves his rights to add, amend or alter any of the grounds on or before the hearing.

**Ground No. 1 is regarding validity of reopening of the assessment.**

2. The assessee is an Individual and a Doctor by profession. The assessee filed his return of income declaring income of Rs. 3,33,530/- on 30.07.2009. The assessment was completed under section 143(3) on 20.12.2011. Thereafter the AO issued notice under section 148 on 29<sup>th</sup> March, 2016 to assess the income on account of sale of two properties by the assessee at Rs. 60,00,000/- each. The assessee raised objections against the notice issued under section 148 by the AO which were disposed off by the AO vide separate order dated 30<sup>th</sup> November, 2016. The assessment was completed under section 143(3) read with section 147 of the IT Act on 29.12.2016 whereby the AO made an addition of Rs. 1,01,79,171/- as Long Term Capital Gain arising from sale of plots of land. The assessee challenged the

action of the AO before the Id. CIT (A) and also raised a ground against the validity of reopening. However, the Id. CIT (A) has upheld the validity of reopening of the assessment.

3. Before us, the Id. A/R of the assessee has submitted that the reasons recorded by the AO does not mention the date on which the information came into the possession of the department. The original assessment was completed under section 143(3) on 20<sup>th</sup> December, 2011 whereas the AO has mentioned in the reasons recorded that the return of income was processed under section 143(1). Therefore, the AO has not applied his mind by reopening the assessment and also it is based on the change of opinion when the original assessment was completed under section 143(3). He has referred to the decision of Hon'ble Supreme Court as well as Hon'ble Delhi High Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC) and 123 Taxman 433 (Delhi) respectively and submitted that it is settled law that reasons as recorded cannot be improved upon subsequently. Hence in case the information was available to the AO at the time of framing the original assessment under section 143(3) then the reopening is based on change of opinion and consequently it is bad in the eyes of law. The Id. A/R has also raised objections against the approval granted by the JCIT and submitted that the JCIT has not applied his mind while granting the approval of reopening as it is written "Yes". Therefore, the Id. A/R has submitted that in view of the decision of the Hon'ble Madhya Pradesh High Court in case of CIT vs. S. Goyanka Lime & Chemicals Ltd., 231 Taxman 73 (MP), it cannot be said that the sanctioning authority has applied his mind to the order of sanction and assumption of jurisdiction was invalid. The Id. A/R

has pointed out that the said decision of Hon'ble Madhya Pradesh High Court has been upheld by the Hon'ble Supreme Court reported in 237 Taxman 378 (SC). The Id. A/R has also placed reliance on the decision of Hon'ble Supreme Court in the case of Chuggamal Rajpal vs. S.P. Chaliha, 79 ITR 603 (SC) and submitted that the Apex Court has held that if the sanctioning authority has read the report carefully, he would have never come to the conclusion on the material before him that this is a fit case to issue notice under section 148. Therefore, merely writing 'Yes' and affixing his signature on the approval application/form does not show that the sanctioning authority has applied his mind. The Id. A/R has further contended that the reopening cannot be resorted to for verification of facts as the AO has given the reason while disposing off the objections raised against the notice under section 148 that the reopening was necessary to verify the facts of the case as power of attorney could have been used to evade tax. Therefore, reopening of assessment can be done only if there is a reason to believe that the income chargeable to tax has escaped assessment. The belief should be that of a honest and reasonable person based on reasonable ground and after proper appreciation of facts emerging out of the material on record. The reasons given by the AO while disposing off the objections clearly show that at the time of reopening of the assessment, the AO was not sure of the fact and whether the power of attorney was genuine or not. Therefore, it is not a case of reason to believe that income chargeable to tax has escaped assessment. In support of his contention, he has relied upon the decision of Hon'ble Supreme Court in the case of Indian Oil Corporation vs. ITO, 159 ITR 956 (SC). The Id. A/R has submitted that when there was no tangible material to come

to the conclusion that there is an escapement of income, the reopening of assessment is not valid and liable to be quashed.

3.1. The next contention of the Id. A/R is that the reopening of the assessment is after expiry of 4 (four) years from the end of the assessment year and the original assessment was completed under section 143(3), therefore, in the absence of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment the reopening is not valid as per proviso to section 147 of the Act. He has relied upon the decision of Hon'ble Madras High Court in the case of CIT vs. Arvind Remedies Ltd., 378 ITR 547 (Mad.) as well as the decision of Hon'ble Bombay High Court in case of Sitara Diamonds Pvt. Ltd. vs. DCIT , 345 ITR 91 (Bom.). The Id. A/R has pointed out that it was clear to the AO that assessee was only a power of attorney holder and he was not the owner of the plots of land, therefore, there could not be any escapement of income in his hands. Hence the assessee could not be said to have failed to disclose fully and truly all relevant material necessary for assessment. He has referred to the decision of Hon'ble Supreme Court in case of Suraj Lamp & Industries Pvt. Ltd., 340 ITR 1 (SC) and submitted that the Hon'ble Court has held that power of attorney holders are not the owners of the land.

3.2. On the other hand, the Id. D/R has submitted that it is a clear case of non disclosure of the transaction of sale of two properties by the assessee in the return of income, therefore, undisputedly the assessee has failed to disclose fully and truly all relevant material facts necessary for assessment. The information received by the AO regarding the sale of two plots of land by the assessee is a tangible material sufficient to form the belief that income assessable to tax has escaped assessment.

Thus the Id. D/R has submitted that even if the original assessment was completed under section 143(3) when assessee has failed to disclose the transaction of sale of two plots then it is a fit case for reopening of the assessment. As regards the sanction granted by the JCIT, the Id. D/R has submitted that it is not a case of simple approval by writing 'Yes' but the JCIT has applied his mind and specifically given the reasons that it is a fit case for issuing notice under section 148. The said noting is in the hand of JCIT and after considering the relevant record as well as the reasons recorded by the AO. Therefore, when the JCIT granting approval has gone through the material on record as well as the reasons recorded by the AO, then the decision taken for approving the issuance of notice under section 148 is after due application of mind. She has relied upon the orders of the authorities below.

4. We have considered the rival submissions as well as the relevant material on record. The assessee filed his return of income on 30.07.2009 which was subjected to scrutiny assessment under section 143(3) vide order dated 20<sup>th</sup> December, 2011 as stated by the Id. A/R of the assessee. This fact has not been disputed by the Id. D/R. The AO subsequently reopened the assessment by issuing notice under section 148 on 22<sup>nd</sup> March, 2016 and recording the reasons as under :-

" The assessee had filed its return of income for A.Y. 2009-10 on 30/07/2009 declaring total income of Rs. 3,33,530/- which stands processed u/s 143(1) on 04/01.2011.

As per information available with this office, it was noticed that the assessee has sold two properties on 24./03/2009, the face value of both properties were Rs. 60,00,000/- each. As per the State Government Stamp Duty Authority, the final face value of the properties were Rs. 95,87,550/- and Rs. 83,37,000/-.

On verification of the facts from the return of income of the assessee, it has been found that the assessee has neither shown these transactions nor shown any Capital Gain in his return of income.

On the basis of the information available on record, I have reasons to believe that income of Rs. 1,79,24,550/- chargeable to tax has escaped assessment as per clause (b) of explanation 2 of section 147 of the IT Act, 1961. Therefore, it is a fit case to issue notice u/s 148 of the I.T. Act, 1961."

It is clear from the reasons recorded by the AO that the AO examined the assessment record and noted that the assessee has not declared the transaction of sale of two properties or the capital gain arising from those transactions in the return of income. The transactions of sale of properties in question undisputedly resulting in the income assessable to tax as these two properties are not falling in the exclusion clause of the capital asset as per section 2(14) of the IT Act. The assessee has not disputed the facts recorded in the reasons by the AO but the only objection raised by the assessee is that the assessee has sold these properties as power of attorney holder and not as owner of these lands. However, we find that the sale consideration was received by the assessee in his own name and was deposited in the bank account of the assessee though subsequently the assessee has transferred part of the sale consideration in the name of other persons. Thus this fact of sale of lands by the assessee and receiving the sale consideration in his own name constitute tangible material to form the belief that the income assessable to tax has escaped assessment particularly when the assessee has neither disclosed these transactions nor offered any capital gain in the return of income. As regards the objection of change of opinion, we note that the AO has not carried out any

investigation or examination on any issue and has passed the order dated 20<sup>th</sup> December, 2011 summarily as under :-

“ The assessee filed returns of income for A.Y. 2009-10, vide receipt no. 79529530300709 dated 30-07-2009. The assessee had income from running of diagnostic centre, consultancy & interest from Bank FDRs. The case was selected for scrutiny under the CASS.

The notice u/s 142(1) and 143(2) of the Income Tax Act, 1961 were issued to the assessee and Sh. Rakesh Kedia, C.A. and the counsel for the assessee attended the proceedings from time to time. After discussion the returned income of the assessee is accepted.”

Therefore, when the assessee has not declared any income from the transaction of sale of these two plots of land as well as the transaction itself and further when the AO has not carried out any further examination on any of the issues including the deposits made in the bank account of the assessee regarding the sale consideration, then the reopening based on the information received by the AO regarding the fact of sale of these plots by the assessee cannot be faulted with on the ground of change of opinion. The decisions relied upon by the Id. A/R of the assessee on these points cannot be applied to the facts of the case when it is not a case of mere possibility of income based on the information received by the AO but the information pertains to the transaction resulting definite income chargeable to tax. In the absence of the transactions as well as the income arising from the transaction of sale of these lands disclosed in the return of income, the assessee cannot take a plea that the reopening is based on change of opinion.

5. The next objection raised by the Id. A/R of the assessee is regarding the approval granted by the JCIT without application of mind. We note that the JCIT has granted the approval after considering the form for recording the reasons for initiating the proceedings under section 148 which contains all the details as well as the reasons recorded by the AO and after considering the reasons recorded by the AO, the JCIT has granted the approval as under :-

*" 12. Comments of the Joint CIT on the reason recorded by the AO. : Yes it is a fit case for issue of notice u/s 148."*

Thus considering the facts and circumstances of the case, when the approval was granted based on the reasons recorded by the AO which is part of the proforma as well as the information regarding the transaction of sale of plots of land, it cannot be inferred that the said approval is without application of mind. The decisions relied on by the Id. A/R of the assessee are based on the peculiar facts when the approval was granted on the proforma and by writing only "yes" on the dotted line even without having reasons recorded by the AO. The lead decision on this point is of Hon'ble Supreme Court in the case of Chhugamal Rajpal vs. S.P. Chaliha, 79 ITR 603 (SC) wherein on the question of according the permission by the Commissioner on the reports submitted by the AO under section 151 (2), the Hon'ble Supreme Court has observed and held as under :-

“ Further, the report submitted by him under section 151(2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice under section 148. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under section 148.”

We further note that the Hon'ble Supreme Court has reproduced the report of the AO seeking permission/approval of the Commissioner for issuing notice under section 148 which does not contain the reasons recorded by the AO for coming to the conclusion that it is a fit case to issue notice under section 148. Thus based on these peculiar facts of that case, the Hon'ble Supreme Court has specifically pointed out that the report submitted by the AO under section 151(2) does not mention any reason for coming to the conclusion that it is a fit case for issue of notice under section 148 and consequently the Commissioner mechanically accorded permission. Whereas in the case in hand, the report submitted by the AO duly set out the reasons for coming to the conclusion that the income assessable to tax has escaped assessment and this is a fit case to issue notice under section 148. Hence we do not find any substance or merit in the objection raised by the Id. A/R of the assessee against the approval granted by the JCIT. The other decisions relied upon by the Id. A/R of the assessee are on the similar lines as that of the decision of Hon'ble Supreme Court in the case of Chhugamal Rajpal vs. S.P. Chaliha (supra).

5.1. The Id. A/R has also raised the objection that the reopening is after 4 (four) years from the end of the assessment year under consideration and, therefore, in the absence of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, the AO has no jurisdiction to reopen the

assessment. We find that though the original assessment was completed under section 143(3) and, therefore, the reopening after 4 years from the end of the assessment year can be made only when there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The AO has specifically recorded in the reasons that on verification of facts from the return of income of the assessee, it has been found that the assessee has neither shown these transactions nor shown any capital gain in his return of income and this fact recorded by the AO in the reasons has not been disputed by the assessee. Though the assessee has taken a stand that these lands in question do not belong to the assessee and, therefore, the income from transfer of these lands are not assessable in the hands of the assessee however, once the assessee has sold these properties and received the consideration and the transactions are not recorded either in the books of accounts or disclosed in the return of income, then the condition of not disclosing fully and truly all material facts necessary for assessment is satisfied. Hence, in view of the above facts and circumstances of the case as well as the discussions, we do not find any error or illegality in the orders of the authorities below qua this issue.

**Ground No. 2 is regarding the addition made by the AO on account of capital gain which was sustained by the Id. CIT (A).**

6. We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. During the year under consideration the assessee sold two plots of land for a consideration of Rs. 60,00,000/- each total amounting to Rs. 1,20,00,000/- vide Sale Deed dated 24<sup>th</sup> March, 2009. The assessee had executed the Sale Deeds in the capacity of Power of Attorney holder on behalf of the other persons who are stated to be the owners of these lands. We further note that assessee received the entire consideration and after retaining an amount of Rs. 20,00,000/-, transferred the balance amount in the names of various persons who were stated to be the owners of the land in question. The assessee produced the affidavit in support of the claim that the owners of the land are the other persons and assessee has acted only as Power of Attorney holder. We find that one of the owners of the land is wife of the assessee and there is a vexed history of the land changing the hands from one person to other person including the donation was made to the society/trust and again it was returned to the donor. Accordingly, all these facts which are pointed out by the assessee in the affidavits filed of alleged owners of the lands require to be verified to ascertain the real nature of transaction on the part of the assessee, though to the extent of Rs. 20,00,000/- which is retained by the assessee, the same would be, in any case, assessed to tax in the hands of the assessee as income if the assessee is not found to be the owner of these lands. Accordingly, we set aside this issue of assessment of capital gain to the record of the AO for carrying out a proper verification and examination of the relevant facts and then to ascertain the actual beneficiaries of the transaction of sale of these properties apart from Rs. 20,00,000/- which was retained by the assessee

and then decide the issue as per law. Needless to say, the assessee be given proper opportunity of hearing.

7. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 09/07/2018.

Sd/-

( भागचन्द )  
(BHAGCHAND)

लेखा सदस्य / Accountant Member  
जयपुर / Jaipur

दिनांक / Dated:- 09/07/2018.

das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant-Shri Ajay Wahi, Jaipur.
2. प्रत्यर्थी / The Respondent-The ACIT, Circle-1, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 336/JP/2018}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar