

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 373/Asr/2009
Assessment Year: 2004-05

Bilal Ahmed Wani,
S/o Mohd. Yousuf Wani,
Srinagar
[PAN:]

(Appellant)

Vs. Income Tax Officer,
Ward 2, Srinagar

(Respondent)

Appellant by : Sh. Vinamar Gupta (C.A.)

Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 17.09.2018

Date of Pronouncement: 28.09.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the Order by the Commissioner of Income Tax (Appeals), Bathinda ('CIT(A)' for short) dated 22.06.2009, dismissing the assessee's appeal contesting its' assessment u/s. 143(3) r/w s. 147 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 29.12.2006 for the Assessment Year (AY) 2004-05.

2. This is the second round before the Tribunal. In the first round, the tribunal dismissed the assessee's appeal *qua* the addition of Rs.13 lacs made toward unexplained investment in land, purchased by the assessee during the relevant year for a sum of Rs.102 lacs, i.e., accepting the assessee's explanation *qua* the balance purchase cost (of the subject land) of Rs.89 lacs, vide order dated 11.02.2010 (copy

on record). The assessee had disputed the said assessment both on the legal aspects as well as on the merits of the said addition per several grounds before the tribunal, being Grounds 1 to 4, which stood considered and disposed vide its' said order (per paras 3 through 7). The assessee moved the tribunal u/s. 254(2), alleging that several aspects had not considered per the said order. The tribunal recalled its' said order for, in its' words, arguments on the written submissions by the Id. Departmental Representative (DR), vide para 4.1 of its order u/s. 254(2) dated 27.02.2013 (copy on record). The said written submissions, also reproduced at page 6 (para 5.2) of its' section 254(1) order, stand reproduced at para 4 of the tribunal's order u/s. 254(2), and read as under:

'It is submitted that the Hon'ble Bench had directed the undersigned to file written submissions with regard to the applicability of the judgments relied upon by Shri R.C. Khanna, CA, Counsel for the assessee, during the course of hearing of the aforementioned appeal.

It is submitted that though Shri Khanna had relied upon four judgments and he only had dwelt upon the applicability of the decision of the Hon'ble Delhi A Special Bench in the case of *Motorola Inc. vs. Deputy Commissioner of Income-tax* reported in 95 ITD 269. Therefore, I am giving my comments on the relevance of this decision alone. In this case, the AO had issued notice under section 148 but as the time for issuing of notice under section 142(1)(i) had not yet expired, *the Hon'ble Tribunal held that the AO could not issue/notice under section 148 until time for issuing of notice under section 142(1) (i) had (not) expired.* This is not relevant to the facts of the case in appeal as in this case the return under section 142(1) could be filed upto 31.10.2004 but since no return had been filed by the assessee upto this date, the AO had validly issued notice u/s 148 on 20.12.2005. Thus, this judgment is not applicable to the facts of the case and no cognizance of this judgment need be taken.'

(emphasis, supplied)

As it appears, the counsel for the assessee in the first round (Sh. R.C. Khanna, CA), had relied on certain decisions during hearing, on which the Bench required the Id. DR to respond, and which he did after the conclusion of the hearing per the said written submissions. It is on account of the consideration of the said written submissions, which may have caused prejudice to the assessee in-as-much as the same were submitted after the close of the hearing, i.e., without the assessee having

the benefit thereof and opportunity to respond thereto, that the tribunal recalled its' order. Further, as apparent, the only decision, reliance on which stands commented upon by the ld. DR per the said written submissions, is *Motorola Inc. v. Dy. CIT* [2005] 95 ITD 269 (Del) (SB). The same stands dealt with by the tribunal per para 5.2 of its section 254(1) order, reading as under:

'5.2. Similarly, we have gone through the decision of ITAT Delhi (Special Bench), in the case of *Motorola Inc. vs. Dy. CIT* [2005] 95 ITD 269 (Delhi)(SB) and found that the same is not applicable to the facts of the present case, as the notice in this case has been issued after expiry of 12 months. The Ld. 'DR' has specifically argued this point in the written submissions. It is pertinent to reproduce the written submission dated 28.01.2010, filed by the Ld. 'DR' on the issue:'

(this is followed by the written submissions by ld. DR, reproduced (supra))

The tribunal having recalled its' order for arguments on the written submissions by the ld. DR, the ld. counsel, Sh. Gupta was, during hearing, asked by the Bench to advert to the findings by the tribunal *qua* the said written submissions, as well as to show as to how the same were not sustainable, so as to influence, nay, alter the decision of the tribunal. He would respond by stating that per the said written submissions the ld. DR had made two incorrect statements, which had influenced the tribunal's mind. One, that the assessee had not filed any return of income, i.e., prior to the issue of notice u/s. 148. The assessee had in fact filed the return of income u/s. 139(1) on 29.10.2004, which was within time as a time period for furnishing the same, available up to 31.10.2004. A reference in this regard was made by him to pgs. 45-46 of the assessee's paper book (PB). This, he would continue, is an admitted fact; the assessee relying on the same return in compliance to the notice u/s. 148, as well as the AO confirming the same per his remand report dated 09.03.2009 (PB pgs.54-55). Two, that the notice u/s. 142(1), issued simultaneously with the notice u/s. 148 on 20.12.2005, could not be issued on that date. The Special Bench in *Motorola Inc.* (supra) has clarified that despite there

being no time limit specified for the issue of notice u/s. 142(1) (i.e., prior to the amendment to the Act by Finance Act, 2006, w.e.f. 01.04.2006, placing a time limit for the issue of notice u/s. 142(1) as the end of the relevant assessment year), the same could be issued within one year of the end of the relevant assessment year. Further, that the issue of notice u/s. 148, where the time for issue of notice u/s. 142(1) has not elapsed, is not valid. The notice u/s. 142(1)(i) could therefore in the present case be issued up to 31.03.2006. The issue of notice u/s. 148 on 20.12.2005 in the instant case, thus, is not valid. On being asked of the relevance of the issue of notice u/s. 142(1) and, consequentially, the issue of the validity of section 148 issued on 20.12.2005, given that the assessee had furnished the return on 29/10/2004, he could not furnish any satisfactory answer, merely stating that, as it appears, the AO was not aware of the filing of the return of income by the assessee on 29.10.2004, i.e., at the time of issue of notice u/s. 148.

3. I have heard the parties, and perused the material on record.

3.1 The assessee, as afore-noted, had challenged the impugned addition, both on the legal aspect/s as well as on the merits of the addition. The tribunal, relying principally on the decision in the case of *Asst. CIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* [2007] 291 ITR 500 (SC), further noting that the Apex Court had therein referred to judicial precedents in the matter, found the notice u/s. 148 as valid both with regard to the 'reason to believe' as well as the date of its' issue, concluding as under: (at para 5.7)

'Having regard to the above fact situation of the present case, we do not find any substance in the contention of the ld. counsel for the assessee and, hence, assumption of jurisdiction by the AO under section 147 r.w.s. 148 of the Act, after recording reasons, cannot be faulted as upheld by the ld. CIT(A). Further, the notice u/s. 148 of the Act was issued after expiry of one year from the date of filing the said return of income. Therefore, the action of the ld. CIT(A) is justified and these three grounds of appeal of the assessee are dismissed'.

On merits, after discussing the matter vide paras 6 through 6.2, it, relying on the decision in *CIT v. Mohankala P.* [2007] 291 ITR 278 (SC), held that the genuineness of the transaction could not be proved by the assessee, dismissing his fourth ground.

3.2 The relevant part of the recall order reads as under:

‘4.1 The Registry is directed to fix the main appeal in ITA No. 373(Asr)/2009 for 13.03.2013 for arguments on the written submissions filed by the Id. DR.’

The sole issue, given the mandate for recall by the tribunal per its order u/s. 254(2) dated 27.02.2013, since merged in its order u/s. 254(1) dated 11.02.2010, is the validity of the notice u/s. 148 dated 20.12.2005 in the facts and circumstances of the case and the law as explained, i.e., with reference to the submissions by the Id. DR, seeking to assail the assessee’s reliance on the decision in *Motorola Inc.* (supra).

It is apparent that the AO was not aware of the assessee having furnished his return of income u/s. 139 on 29.10.2004. This is as there was otherwise no need or occasion to issue a notice u/s. 142(1). This, in fact, is an undisputed fact, duly noted by the tribunal, whose order u/s. 254(1) contains reference thereto (viz. at para 3 of the said order). The issue of notice u/s. 142(1), or the question of the time period within which the same could be issued, is thus rendered inconsequential in view of the admitted fact of the assessee furnishing his return of income u/s. 139 on 29/10/2004, removing the basis for the issue of notice u/s. 142(1). The issue of notice u/s. 148(1) on 20.12.2005 would thus have to be considered independent and *de hors* the issue of notice u/s. 142(1), i.e., in the backdrop of a given, i.e., of the assessee having furnished his return u/s. 139 on 29.10.2004. The notice u/s. 142(1), issued on 20/12/2005, could even otherwise be, as explained in *Motorola Inc.* (supra), be issued only upto the end of the relevant assessment year, i.e.,

31/3/2005, in the present case. The validity of notice u/s. 148 cannot, therefore, be assailed as premature.

Further, the decision in *Motorola Inc.* (supra), reliance on which stands impugned by the Id. DR through his written submissions, on facts, assists the Revenue's case, rather than that of the assessee. Sh. Gupta would, upon this being observed by the Bench during hearing, submit that the assessed had, per his application u/s. 254(2), raised other issues as well before the tribunal, which though were not taken into account by it while recalling its' order u/s. 254(1). As afore-stated, this tribunal cannot breach the ambit of the recall or the terms thereof set out per the recall order. This is particularly so as, again, as afore-noted, the tribunal had answered all the Grounds, i.e., 1 to 4, raised by the assessee *qua* the said addition, per its' section 254(1) order. It may be, for the sake of clarity, also added that the tribunal has considered and met the assessee's reliance on the other decisions cited by his counsel while adjudicating the assessee's appeal per its' sec. 254(1) order.

3.3 Under the circumstances, and for the reasons afore-stated, I find no reason for interference with the tribunal finding the issue of notice u/s. 148 as valid (refer para 5.7 of its order). I decide accordingly, declining interference.

4. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on September 28, 2018

Sd/-
(Sanjay Arora)
Accountant Member

Date: 28.09.2018

/GP/Sr. Ps.

Copy of the order forwarded to:

(1) The Appellant: Bilal Ahmed Wani, s/o Mohd. Yousuf Wani, Srinagar

- (2) The Respondent: Income Tax Officer, Ward 2, Srinagar
- (3) The CIT(Appeals) Bathinda
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T

True Copy

By Order