

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.4840/Del/2016
Assessment Year: 2005-06

Sachin Jain,
S/o Shri Chaman Lal Jain,
Near Jain Mandir, Shanti Nagar,
Rishikesh.

Vs. ITO,
Ward-1(4)(2),
Rishikesh.

PAN: ADHPJ2085N

(Appellant)

(Respondent)

Assessee by	:	Shri Rohit Tiwari & Shri Shobhit Tiwari,, Advocates
Revenue by	:	Shri D.S. Rawat, Sr.DR
Date of Hearing	:	11.10.2018
Date of Pronouncement	:	20.11.2018

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 1st January, 2016 of the CIT(A), Dehradun, relating to Assessment Year 2005-06.

2. This is the second round of litigation before the Tribunal. This appeal was earlier dismissed by the Tribunal vide order dated 29th December, 2016 for non-prosecution. Subsequently, the Tribunal, vide order dated 9th March, 2018, recalled its earlier order. Hence, this is a recalled matter.

3. There is a delay of 152 days in filing of this appeal before the Tribunal by the assessee. The assessee has filed a condonation petition along with an affidavit explaining the reasons for delay in filing of the appeal. After considering the submissions made therein and on a perusal of the record, the delay in filing of the appeal is condoned and the appeal is admitted for adjudication.

4. The facts of the case, in brief, are that the assessee is an individual and derives income from retail trading of steel utensils and sundry gift items. He filed his return of income on 16th March, 2006 declaring total income of Rs.1,01,500/- which was processed u/s 153(1) of the IT Act on 21st March, 2006. Subsequently, the Assessing Officer reopened the assessment u/s 147 of the Act on the ground that the assessee has not shown any investment in construction of building. In response to the notice issued u/s 148 of the IT Act, the assessee submitted that the return already filed on 16th March, 2006 may be treated as return filed in response to notice u/s 148.

5. The Assessing Officer, during the course of assessment proceedings, observed that the assessee had made an investment of Rs.25,73,350/- in construction of building jointly with his brother Shri Sachin Jain at Vill. Falsua, P.O. Dandi, via Barkot, Ranipokhari, Teh – Rishikesh.. The total covered area of the building was 8301 sq. feet. The assessee filed details of unsecured loan taken from eight persons totaling to Rs.25,95,000/-. The assessee also submitted before the Assessing Officer that he has not kept books of account and has not maintained any bills and vouchers for purchase of building material for the construction work. Since the assessee could not produce

any copy of bank statement for the period of construction of the building and denied to have maintained any books of account or other documents regarding construction of building, the Assessing Officer rejected the value shown by the assessee towards construction of the building and referred the matter to the DVO, Meerut for determination of the value of construction. It is pertinent to mention that till the completion of the assessment, the valuation report was not received by the Assessing Officer. The Assessing Officer asked the assessee to produce Shri Chaman Lal Jain (father), Smt. Sudha Jain (mother) and Shri Nitin Jain (brother) from whom the assessee had taken loan of Rs.2,10,000/- each in cash. The assessee filed copy of return of income along with capital account of the above persons. The assessee also produced the above persons whose statements were recorded by the Assessing Officer.

5.1. However, the Assessing Officer was not satisfied with the source of the above persons on the ground that they were filing return of income declaring meager income and the money was paid in cash and, therefore, their capacity and genuineness of the transaction remained unproved. He, therefore, made addition of Rs.6,30,000/- on account of the above three loan creditors. Similarly, from the capital account of the assessee, the Assessing Officer noted that the assessee has shown to have invested Rs.4,25,000/-. He examined the copy of the returns filed by the assessee from assessment year 2001-02 to 2004-05 and observed that the assessee does not have enough means to invest such huge amount. Since the assessee was not maintaining any books of account/documents, nor produced any bank statement, the Assessing

Officer inferred that the assessee had made the investment out of his undisclosed income. He accordingly made addition of Rs.4,25,000/- on account of unexplained investment. Thus, the Assessing Officer made addition of Rs.10,55,000/- to the total income of the assessee.

6. Before the CIT(A), the assessee, apart from challenging the addition on merit, challenged the validity of the reopening of the assessment. It was submitted that the ITO issued notice u/s 148 dated 19th March, 2012 and the assessee, in response to the same had submitted that the original return filed may be treated as return in response to notice u/s 148. It was also submitted that the copy of record and documents and reasons for reopening of the case u/s 148 be supplied. However, the Assessing Officer never supplied the reasons for reopening of the assessment. Since the AO had not complied with the mandatory provisions of the Act, therefore, the assessment order passed u/s 147/143(3) dated 20th March, 2013 is *void ab initio*. For the above proposition, the following decisions were relied upon:-

- i) Commissioner of Income Tax Vs. Videsh Sanchar Nigam Ltd., High Court of Bombay (2012) 340 ITR 0066;
- ii) Nandlal Tejmal Kothari Vs. Inspecting Assistant Commissioner Of Income Tax & Ors. Supreme Court of India (1998) 147 CTR 0321 : (1998) 230 ITR 0943;
- iii) Suresh Chandra, Vs. Income-Tax Officer, ITAT (Delhi Bench "G" New Delhi) ITA No. 3061/DEL/2012
- iv) Dhakeswari Cotton Mills Vs. CIT (1954) 26 ITR 775. SC
- v) Tin Box Co. Vs. CIT (2001) 249 ITR 216 (SC)
- vi) Tata International Ltd. Vs. Dy. CIT ITA Nos. 3359 to 3361/M/2009, A.Ys. 2001-02 to 2002-03, Bench "E" dated 29/6/2012 .
- vii) Kuber Tobacco Products (P) Ltd. Vs. Deputy Commissioner Of Income Tax, ITAT, Delhi Special Bench (2009) 120 TTJ 0577 (SB) : (2009) 18 DTR 0001 : (2009) 117 ITD 0273

7. However, the Id.CIT(A) rejected the legal ground as well as the arguments challenging the addition on merit. So far as the legal issue is concerned, the Id.CIT(A) at para 16 of the order has observed as under:-

“16. I have duly considered the facts and circumstances of the case. The first issue that needs to be addressed is whether the assessment is legally valid. It is observed from the assessment order that the day after the receipt of the letter from the assessee, the Assessing Officer issued a notice under section 143(2) & 142(1) along with a questionnaire to the assessee and in response to this questionnaire and notice, the assessee filed the details of the investment made in the property, the sources of such investment and evidences in support of the sources of such investment. Thus, it would seem that the Assessing Officer did not supply the assessee with a copy of the reasons on that day. However, the assessee responded to the questionnaire and submitted the requisite details and supporting evidences to back up his claims about the sources of investment into the house property -in response to the notice u/s 142(1). This would actually bring his case within the ambit of section 292BB, for it must be assumed in accordance with the deeming fiction of that section that all that was required to be done, was done and that the assessee waived his right to object to the issue of notice under section 148 and willingly participated in the assessment proceedings. Thus, since he had no objection to the issue of notice under section 148 during the assessment proceedings, he is precluded from raising this issue in appeal (which he has as per the first ground) as per the provisions of section 292BB, and there is no infirmity in the proceeding on this account. The Assessee has submitted that section 292BB is not retrospective in application and has cited the judgment of Kuber Tobacco Products Pvt Ltd (supra) in this regard. Hence it cannot apply to the case. However that judgment did not consider the possibility of a proceeding of earlier year initiated after 1.04.2008 and therefore its finding that the provision could not be retrospective may not address a situation where the proceedings were initiated after 1.04.2008 as in this case. Hence it is held that the provisions of section 292BB will apply.”

8. So far as the addition on merit is concerned, the Id.CIT(A) sustained the addition of Rs.6,30,000/- on account of loan taken from the parents and brother of the assessee and the addition of Rs.4,25,000/- on account of unexplained investment.

9. Aggrieved with such order of the CIT(A), the assessee in appeal before the Tribunal by raising the following grounds:-

“1. That in facts and circumstance of the case, the Learned CIT has erred wrongly that the provisions of section 292BB is covered for the A.Y. 2005 - 06 wherein reasons of recording for reopening the assessment has not been furnished to the appellant even on written demand till the completion of the assessment is bad at law.

2. That in facts and circumstances of the case, CIT(A) has failed to appreciate that the provisions of section 292BB is not retrospective but applicable from A.Y. 2008 - 09 as per ITAT, Delhi Special Bench Judgment in the case of Kuber Tobacco Products.

3. That in facts and circumstances of the case, framing of the assessment by the ITO without furnishing the reasons for reopening the assessment is not sustainable in law when the appellant has duly asked to furnish the reasons, ignoring the same is arbitrary and illegal.

4. That in facts and circumstances of the case, the assessee receives the amounts from relatives and close friends after withdrawing from the personal Bank accounts then he invested in the construction of the building, adding back the same in the A.Y. 2005 - 06 is against the principal of accounting and law.

5. That in facts and circumstances of the case, the credit of the amount which has been spent during the A.Y. 2004 - 05 on the Building as admitted by AO in the assessment order may please be given and the addition to that extent may please be reduced.

6. That the addition to the returned income as sustained by the Id. CIT (A) may please be deleted.

7. That in fact and circumstance of the case, appellant be permitted to add or delete any grounds of appeal.”

10. The Id. counsel for the assessee, at the outset, filed a copy of the order of the Tribunal in the case of brother of the assessee Shri Amit Jain vide ITA No.6650/Del/2015, order dated 2nd September, 2016 and submitted that under identical facts and circumstances, the reopening of the assessment has been held as *void*. Therefore, this being a covered matter, the legal ground raised by the assessee has to

be accepted and the appeal of the assessee should be allowed. So far as the merit of the case is concerned, he submitted that the assessee has substantiated all the three ingredients of provisions of section 68, i.e., the identity and credit worthiness of the loan creditors and genuineness of the transactions. So far as the addition on account of unexplained investment amounting to Rs.4,25,000/- is concerned, the Id. counsel for the assessee reiterated the same submissions as made before the Assessing Officer and CIT(A).

11. The Id. DR, on the other hand, heavily relied on the order of the Assessing Officer and CIT(A).

12. I have considered the rival submissions made by both the sides and perused the material available on record. I find identical issue had come up before this Bench of the Tribunal in the case of brother of the assessee, Shri Amit Jain. I find the Tribunal in ITA No.6650/Del/2015, Order dated 2nd September, 2016, has discussed the issue relating to the validity of the reassessment proceedings in absence of non-supply of reasons for initiating the proceedings u/s 147/148 of the IT Act. The relevant observations of the Tribunal from para 8 onwards read as under:-

“8. I have heard both the parties and perused the relevant records available with us, especially the orders of the revenue authorities and the case law cited by the assessee’s counsel on the issue in dispute. In my view, it is very much necessary to reproduce the contents of the reply dated 27.8.2012 of the assessee in response to the notice issued u/s. 148 of the I.T. Act, 1961 dated 19.3.2012 submitted before the Assessing Officer.

8.1 In response to the notice dated 19.3.2012, assessee filed his reply dated 27.8.2012 in Hindi Language, the English version thereof is as under:-

*“Sewa Mai
The Income Tax Officer,
Ward-1,
Rishikesh.*

Subject: Letter Aayakar Adhikari/Ward 1/RSK/148/2012-13/14.08.2012

Dear Sir,

In reference to the letter regarding Income Tax return dated 16.03.2006 for the assessment year 2005-06 receipts no. 8337 Income Tax ward-1 Rishikesh was deposited and the xerox copy is enclosed herewith wherein Income of Rs. 1,34,120/- is declared the same may be treated in reply to notice u/s. 148.

It is also requested the assessment of the tax payer which has been opened, the copy of record & document be supplied and reason for open of the case u/ s 148. Please reply the same.

Sd/-

Amit Jain

PAN No. ADRPJ3989P”

8.2 For the sake of clarity, we are further reproducing the relevant portion of para 20 of the impugned order passed by the Ld. CIT(A) wherein the Ld. CIT(A) has categorically mentioned that the reasons recorded for reopening of the case were not supplied to the Assessee.

“.....Thus, it is quite clear that the Assessing Officer did not supply the assessee with the copy of the reasons on the basis of which the case was reopened. On the face of it, the case of the assessee would seem to be covered by the judgments cited by the counsel”

8.3 After carefully going through all the documents available with me, especially the reply to the notice u/s. 148 of the I.T. Act and the order of the Hon'ble Apex Court in the case of GNK Driveshafts (India) ltd. vs. ITO reported in 259 ITR 19 (SC) as cited by the Id. Counsel of the Assessee, I find that the Hon'ble Apex Court in the case of GKN Driveshafts (India) Ltd. vs. ITO 259 ITR 19 (2003) has held that *“it is clear*

that the completion of assessment/re-assessment without furnishing the reasons recorded by the AO for initiation of proceedings under section 147/148 of the Act is not sustainable in law as it is incumbent on the AO to supply them within reasonable time. I note that on the anvil of this judgment, on the request of the Assessee, the AO is bound to furnish the reasons recorded for initiation of proceedings under section 147 of the Act within a reasonable period of time so that the assessee could file its objections thereto and the AO was to dispose of the same by passing a speaking order thereon, which the AO has not done. I also note that even as per the rules of natural justice, the assessee is entitled to know the reasons on the basis of which the AO has formed an opinion that income assessable to tax has escaped assessment. The furnishing of reasons to the assessee is to enable/facilitate it to present its defence and objections to the initiation of proceedings under section 147/148 of the Act. Therefore, I am of the considered opinion that there was no justifiable reasons for the AO to deprive the assessee of the recorded reasons by him for initiating proceedings under section 147/148 of the Act. Therefore, in my considered opinion, the reopening in question is not sustainable in the eyes of law, hence, the same is quashed.

8.4 Even otherwise, I note that Ld. CIT(A) has erred in applying the provisions of 292BB in the instant A.Y. 2005-06, however, in view of the ITAT, Delhi Special Bench Judgment in the case of Kuber Tobacco Products (P) Ltd. reported in (2009) 120 TTJ 0577 (SB), the provisions of section 292BB is not retrospective and the same are applicable only from the A.Y. 2008-09.

8.5 In the background of the aforesaid discussions and the precedents relied upon, as aforesaid, I allow the assessee's appeal on legality aspect without proceeding to adjudicate on merits by quashing the orders of the authorities below.

9. In the result, Assessee's appeal is allowed."

13. Since the facts of the instant case are identical to the facts of the case decided by the Tribunal in the case of brother of the assessee, therefore, respectfully following the order of the Tribunal cited, supra and in absence of any contrary material brought to my notice, I hold that the reopening of the assessment in the instant case is void due to non-supply of the reasons recorded by the A.O. for reopening of the assessment. Since

the reopening has been held as *void*, therefore, the subsequent proceedings also become null and void. The grounds raised by the assessee are accordingly allowed.

14. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 20.11.2018.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 20th November, 2018

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Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi