

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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 1037/JP/2018
निर्धारण वर्ष/Assessment Years : 2010-11

Shri Sumer Singh Chandel, 222, Near School, Roopangarh, Kishangarh-305801.	बनाम Vs.	The ITO, Ward-2 Kishangarh.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEXPC 6338 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से/ Assessee by : Shri O.P. Batheja (ITP)
राजस्व की ओर से/ Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख/ Date of Hearing : 29/10/2018
उदघोषणा की तारीख/Date of Pronouncement : 23/01/2019

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Ajmer dated 26.07.2018 for the Assessment Year 2010-11 wherein the assessee has taken the following ground of appeal:-

"The Id. CIT(A), Ajmer has grossly erred on facts and in law in confirming the addition of Rs. 7,49,856/- made u/s 69 of the Act, 1961."

2. Further, in Form No. 36, the assessee has also taken the following additional grounds of appeal as under:-

"1. The Id. AO has grossly erred in law in initiating the proceedings u/s 147/148 on his fallacious assumptions, without any application of mind and without fulfilling the requirements of law. Therefore, the notice issue by him u/s 147/148 is bad in law and void ab initio and deserves to be quashed.

2. The Id. Pr. CIT, Ajmer has accorded approval to issue notice u/s 148. Without any application of mind and thus did not fulfill the mandate of provision of sec. 151. Therefore, the notice issued u/s 148 on the basis of such approval deserved to be quashed.

3. The reasons recorded by the AO for initiating proceedings u/s 147/148 are totally different than the addition made by the AO and therefore, the reopening itself is null and void."

3. The Id. AR has submitted that the additional grounds are purely a legal grounds and it goes to the root of the matter, the same should be admitted in the interest of justice. In support, reliance was placed on the decision of Hon'ble Supreme Court in case of National Thermal Power Corporation Ltd. Vs. CIT 229 ITR 383. After hearing both the parties, the additional ground being a purely legal ground, the same is being admitted for adjudication.

4. Firstly, we take up one of the additional grounds taken by the assessee wherein he has challenged the order passed by the Assessing officer U/s 147 of the Act holding that the reasons recorded by the AO for initiating the proceedings U/s 147 of the Act are totally different

than the addition made by the AO and therefore, the reopening itself is null and void and liable to be quashed.

5. Briefly the facts of the case are that the notice U/s 148 of the Act was issued to the assessee on 29.03.2017 after recording the reasons and seeking the necessary permission of the competent authority and thereafter the assessee filed his return of income on 18.12.2017 declaring total income of Rs. 1,42,108/- and the assessment was thereafter completed U/s 147 r.w.s. 144 of the Act wherein an amount of Rs. 7,49,856/- was brought to tax as unexplained investment U/s 69 of the Act.

6. The reasons recorded by the AO before issuance of notice u/s 148 which reads as under:-

"On perusal of the material available on record, it reveals that the assessee has made transactions as per NMS Cycle-1 more than Rs. 10. lacs i.e. Rs. 13,43,18,580/- in the future & option (F&O) and delivery basis during the period of 01/04/2009 to 31/03/2010. The assessee was provided with an opportunity to explain the transactions. However, the assessee has failed to submit any explanation in this regard. In absence of return of income for AY 2010-11 as well as the explanation of the assessee, the above transactions is not open for verification. I have, therefore, reasons to believe that on account of non-availability of adequate details on the record, income chargeable to tax has escaped assessment.

Further, it is pertinent to mention here that as per the provisions of clause (a) of Explanation 2 of section 147 of the Income-tax Act, 1961, where no return of income has been furnished by the assessee although his total income or the total income of any person in respect of which he is assessable under this Act during the previous year exceeds the maximum amount which is not chargeable to income tax, shall also be deemed to be income chargeable to tax which has escaped assessment.

In view of above facts and circumstances I have sufficient reasons to believe that the assessee has not shown profit on the said transactions in respect of which his assessable under the Income-tax Act during the previous year relevant to the assessment year under consideration. As such the income to the tune of Rs. 13,43,18,580/- has escaped assessment as the assessee has not filed return of income for the AY 2010-11. Thus, it is a fit case to issue a notice under section 148 of the I. T. Act, 1961 for initiating the assessment proceedings under section 147 of the Income-tax Act, 1961. Therefore, approval of Worthy Pr. CIT is requested to initiate proceedings u/s 147 in the instant case."

7. On perusal of the reasons so recorded by the Assessing Officer, it is noted that the Assessing Officer observed that the assessee has made transactions amounting to Rs. 13,43,18,580/- in the future & option and delivery basis, however, no return of income has been filed and the assessee has not shown profit on the said transaction and therefore, the income to the tune of Rs. 13,43,18,580/- has escaped

assessment. Therefore, the very basis for assumption of jurisdiction U/s 147 of the Act relates to profit arising out of the transactions in the future and option during the previous year relevant the impugned assessment year. From the perusal of the assessment order, we find that the Assessing Officer has taken note of the fact that the assessee has not declared any profit/ loss from share and derivative trading and from the details of commodity trading furnished by the assessee, the assessee has incurred huge losses in commodity trading. Thereafter, the Assessing Officer has looked at the commodity trading account of the assessee in the books of M/s Tradeswift Derivative Private Limited and M/s Tradeswift Commodities Private Limited and noted that the assessee has made total payment of Rs. 7,69,856/- to the broker against the loss incurred by the assessee in commodity trading, however, only an amount of Rs. 20,000/- was paid from the assessee's bank account and remaining payment of Rs. 7,49,856/- was not reflected in the assessee bank account. Therefore, the said amount of Rs. 7,49,856/- was brought to tax as unexplained investment U/s 69 of the Act.

8. We, therefore, find that the reasons for assumption of jurisdiction relates u/s 147 relates to transactions in the future and option amounting to Rs. 13,43,18,580/- and in respect of which the assessee has not disclosed the profit in his return of income. During the assessment proceedings u/s 147, the Assessing Officer has taken note of the fact that the assessee has incurred huge loss in commodity trading and therefore, nothing has been brought to tax. Firstly, it is not very clear whether the transaction in the future and option and the

transaction examined by the Assessing Officer relating to commodity trading are similar transactions or not. Secondly, the reasons recorded talks about the fact that such income to the tune of Rs. 13,43,18,580/- has escaped assessment, however, nothing to that effect has been brought to tax in the hands of the assessee while completing the assessment proceedings u/s 147 of the Act. Even where the transaction in the future and option and the transaction examined by the Assessing Officer relating to commodity trading are assumed to be similar transactions, the fact that the assessee has incurred a loss, the AO has not determined the loss so incurred by the assessee. Therefore, where the basis of assumption of jurisdiction U/s 147 of the Act in terms of transactions in the future and options has not been brought to tax while completing the assessment proceedings, bringing to tax any other income by invoking the deeming provisions of Section 69 of the Act is beyond the jurisdiction of the Assessing Officer u/s 147 of the Act. It is a settled legal proposition that only where the transaction which is subject matter of assuming the jurisdiction U/s 147 of the Act survive during the course of examination and finally brought to tax while completing the assessment proceeding u/s 147, the AO may also bring to tax any other income found during the examination which has escaped assessment and which comes to his notice in the course of proceedings U/s 147 of the Act. However, where the transaction which is the basis for assuming of jurisdiction U/s 147 does not survive and is not brought to tax finally in the hands of the Assessing Officer, then in such a situation even where any other income chargeable to tax which has escaped assessment and which comes to his notice in the course of proceedings U/s 147 of the Act, the same cannot be brought to tax in

the hands of the assessee. In the result, in the present case, the addition towards unexplained investment by invoking deeming provisions U/s 69 of the Act cannot be sustained for the reasons that the transactions relating to future and option which was the subject matter of assumption of jurisdiction U/s 147 of the Act does not survive.

9. In this regard, useful reference can be drawn to the decision of Hon'ble Bombay High Court in case of CIT v. Jet Airways (I) Ltd.[2011] 331 ITR 236, while examining Explanation 3 to Section 147 of the Act, the Hon'ble High Court has held that the Assessing Officer has to necessarily assess/re-assess the income which escaped assessment on the basis of the formation of the reasonable belief for opening the assessment. It is only on assessing/reassessing such income which has escaped assessment in the reasons recorded, would it be open to the Assessing Officer to assess/reassess any other income, which came to his notice during the reassessment proceedings. However, in the absence of reassessing the income which escaped assessment and which was the basis for formation of belief in issuing the notice, the order passed on reassessment is bad in law.

10. In light of above discussions and in the entirety of facts and circumstances of the case, the assessment order passed u/s 147 cannot be sustained and the addition so made by the Assessing Officer deserved to be set aside.

11. In the view of the above, the other grounds so raised by the assessee becomes infructuous and have not been adjudicated upon.

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

Order pronounced in the open Court on 23/01/2019.

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 23/01/2019.

***Santosh**

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

1. अपीलार्थी / The Appellant- Shri Sumer Singh Chandel, Kishangarh.
2. प्रत्यर्थी / The Respondent- ITO, Ward-2 Kishangarh.
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. 1037/JP/2018 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar