IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "SMC", LUCKNOW

BEFORE SHRI. A. D. JAIN, VICE PRESIDENT

ITA No.703/LKW/2017
Assessment Year: 2009-10

Smt. Nirmala Nigam 104/102, P. Road Kanpur	v.	Income Tax Officer 3(5) Kanpur
TAN/PAN:AFCPN4993C		
(Appellant)		(Respondent)

Appellant by:	Shri P. K. Kapoor, C.A.		
Respondent by:	Shri C. K. Singh, D.R.		
Date of hearing:	20	02	2019
Date of pronouncement:	22	02	2019

O R D E R

This is assessee's appeal for assessment year 2019-10 against the order of the ld. CIT(A)-I, Kanpur, dated 4/8/2017, taking the following grounds:-

1. BECAUSE the Income-tax Officer-3(3), Kanpur was not vested with the jurisdiction of assessing officer in the case of the "appellant", initiation of reassessment proceedings by the said Income-tax Authority is void ab initio and consequently, the entire re-assessment proceedings right from recording of reasons to the passing of re-assessment order got wholly vitiated with the result, the reassessment order deserves to be held as null and void.

2. BECAUSE the Income-tax Officer-3(5), Kanpur who was vested with the jurisdiction of Assessing Officer over the "appellant", neither recorded reasons for escapement of income nor did he issue notice under section 148 within the prescribed time limit, the entire re-assessment proceedings got vitiated rendering the re-assessment order as illegal, being time barred.

3. BECAUSE in any case, the notice under section 148 of the "Act" dated 31.03.2016 issued by the Income-tax Officer-3(3), Kanpur was not issued and served in accordance with provisions of law, the re-assessment proceedings in pursuance thereof got wholly vitiated and consequently re-assessment order dated 30.12.2016 is to be held as null and void.

4. BECAUSE requisite satisfaction for escapement of income amounting to Rs.1,00,000/- or more was not recorded as per provisions of section 149(1)(b) of the "Act", the reasons recorded became wholly deficient and invalid with the result the entire re-assessment proceedings held there-under became bad in law rendering the re-assessment order as null and void.

5. BECAUSE otherwise also there was no live link or nexus between the material/ information and the formation of belief for escapement of income and consequently the reassessment proceedings got vitiated with the consequence the reassessment order dated 30/12/2016 deserves to be held as null and void.

6. BECAUSE in any case, mandatory notice under section 143(2) of the "Act" not served upon the assessee, as required by law, the re-assessment order by the Income-tax Officer-3(5), Kanpur being without authority is to be held as illegal.

7. BECAUSE service of notice under section 143(2) dated 20.09.2016 upon Shri Nigam, Advocate is bad in law, as the said person was not authorized by the assessee to receive such notice and consequently, the re-assessment order got wholly vitiated with the result, the same deserves to be held as null and void.

8. BECAUSE even otherwise, notice under section 143(2) dated 20.09.2016 had been served upon Shri Rohit Nigam, Advocate on 20.09.2016, whereas the power of attorney in his favour was issued on 21.09.2016 and consequently service of notice upon Shri Rohit Nigam, Advocate is invalid.

WITHOUT PREJUDICE TO THE AFORESAID

9. BECAUSE THE "CIT(A)" has erred in law and on acts in confirming the disallowance of Rs.7,83,760/- out of cost of improvement of the house property transferred during the year on

the ground that bills relating to cost of construction were bogus, fudged and un-verifiable.

10. BECAUSE during the course of proceedings before the lower authorities, the "appellant" had furnished/produced the relevant bills in support of cost of improvement and the same being authentic and genuine, the authorities below were not correct in making/sustaining disallowance to the extent of Rs. 7,83,760/-.

11. BECAUSE the disallowance of Rs.7,83,760/- out of claimed cost of improvement has been made in a wholly arbitrary manner and purely on an adhoc basis, consequently the addition of Rs.7,83,760/- deserves to be deleted.

12. BECAUSE while sustaining the disallowance of Rs.7,83,760/-, the Id. "CIT(A)" has completely overlooked the written submission/material placed before him through the on-line/e-filing process and as such, the order passed by "CIT(A)" being contrary to the principles of natural justice, the addition of Rs.7,83,760/- on account of part disallowance out of improvement cost deserves to be deleted.

13. BECAUSE the observation of non compliance by the "CIT(A)" are not factually correct as in compliance to the requisitions issued by "CIT(A)", the "appellant" had submitted online response on or before the date fixed for the compliance.

14. BECAUSE various adverse observations by the "CIT(A)" are based on presumption, surmises and conjectures and the same are contrary to the facts available on record.

15. BECAUSE "CIT(A)" has overlooked to deal with and decide ground no. 2 raised before him challenging the disallowance of deduction of Rs. 1,00,000/-claimed under section 80C of the "Act" during the course of assessment proceedings, and such a claim being duly supported by documentary evidence, the same deserves to be allowed.

16. BECAUSE the order appealed against is contrary to the facts, law and principles of natural justice.

2. The following are the reasons recorded by the Assessing Officer to form belief of escapement of income:-

"The Department is in the possession of information to the effect that the assessee has got income from sale of house property during F.Y. 2008-09 relevant to A.Y. 2009-10 for a consideration of Rs.21,50,000/- which is duly reflected in her Balance Sheet filed by the assessee for the year under consideration. Further, the assessee has purchased an immovable property amounting to Rs.65,57,000/- which is duly reflected in the ITS query in AST during the year under consideration.

On perusal of ITR for A.Y. 2009-10, the assessee has not shown capital gain for sale of the said property and not shown any Exemption u/s 54 of the I.T. Act. I have reason to believe that assessee has willfully concealed the aforesaid transactions from the Income Tax Department and has escaped assessment within the meaning of provisions of section 147 of the Income Tax Act, 1961."

3. As per ground No.4, the reasons recorded do not contain the requisite satisfaction of the Assessing Officer, in accordance with the provisions of section 149(1)(b) of the Act, for escapement of income amounting to Rs.1 lakh or more and that so, these reasons and the entire reassessment proceedings are invalid. In this regard, the ld. A.R. of the assessee has placed reliance on the following decisions:-

(i) Mahesh Kumar Gupta vs. CIT and Another, 363 ITR 300 (Alld.).

(ii) Amar Nath Agarwal vs. CIT & Another, 371 ITR 183 (Alld.)

(iii) Smt. Ushal Agarwal vs. ITO, order (CLPB: 162-185) 19/6/2018, passed by the ITAT (SMC), Agra, in ITA No.167/Lko/2018, for assessment year 2007-08.

4. The ld. D.R., on the other hand, has contended that since this objection was not raised before the Assessing Officer by the assessee, she cannot do so now.

5. Heard. Apropos ld. D.R.'s objection that the objection by way of ground No.4 having not been raised by the assessee before the

Assessing Officer, the same cannot be raised at this stage, the matter stands squarely settled by the Hon'ble jurisdictional High Court in the case of 'Abdul Majid vs. CIT', 199 CTR (All.) 364, amongst other decisions, holding that an objection going to the root of the very jurisdiction, can be raised at any stage. Undisputedly, the objection regarding alleged discrepancy in the reasons recorded by the Assessing Officer to believe escapement of income, goes to the very root of the matter, i.e., jurisdiction of the Assessing Officer to reopen the completed assessment of the assessee. Therefore, the same can be raised for the first time before the Tribunal. Accordingly, this argument of the Department is rejected.

6. Coming to the merits of ground No.4, Section 149(1)(b) of the Act states that no notice u/s 148 shall be issued for the relevant assessment year, if four years, but not more than six years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to, or is likely to amount to, Rs.1 lakh, or more for that year. Thus, the requirement of section 149(1)(b) of the Act clearly is that notice u/s 148 of the Act can only be issued if the income escaping assessment amounts to, or is likely to amount to Rs.1 lac. In the reasons recorded, as a reading thereof would show, there is no mention that income amounting to Rs.1 lakh or more is believed to have escaped assessment. These reasons were, as noted in the assessment order, issued on 31/3/2016, i.e., after the lapse of four years, but before the lapse of six years, from the end of the relevant assessment year (A.Y. 2009-10).

7. As is well settled, the reasons recorded are to be considered ipso facto, as they are, without supplementing them, without bolstering them. 'CIT Vs. Samraj Krishan Chaudhary', 368 ITR 638 (All) handed

down by the Hon'ble Jurisdictional High Court, amongst a plethora or other decisions, is eloquent on the issue.

8. In this regard, 'Mahesh Kumar Gupta', 363 ITR 300 (All.), as relied on by the assessee, is directly on the issue. In this case, the Hon'ble Jurisdictional High Court has held as follows:

> "11. The reason assigned for reopening is that the petitioner after converting the leasehold land into freehold sold the property within three years after converting the land into freehold resulting into short term capital gain in view of the Karnataka High Court's decision referred to above. What income is said to have been escaped does not find mention therein. Even assuming for the sake of argument, the income was liable to be taxed as short term gain unless there is any material before the authority concerned that it exceeds the limit of Rs. 1 Lakh, extended period of limitation of six years will not be available to the department. The normal period of limitation is four years for giving the notice under section 148 and where the escaped income is likely to be amount to Rs.1 Lakh or more, the extended period of limitation of six years would be attracted. This objection of the petitioner has been rejected by the impugned order on the ground that since the permission has been granted by the Joint/Additional Commissioner, Income Tax, statutory requirement stands fulfilled vide para-3 of the order which is reproduced below:-
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> > "You have also objected that it is not mentioned in the reasons of taking action U/S 148 that the escaped income is more that 100000/-. In this connection this to inform that it is mentioned in notice U/S148 itself that the notice is being issued after proper sanction of Joint/Addl. Commissioner of Income Tax. This fulfills the requirement of law, you have provided the reasons of initiating action U/S148 not computation of income. The computation of income will be provided after proper hearing & giving proper opportunities to be heard."
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> 12. The stand of the department as is evident from the above quoted paragraph has no legs to stand. The Joint/Additional

Commissioner, Income Tax was not aware about the fact that the income chargeable to tax which has escaped the assessment is Rs.1 Lakh or more for the relevant Assessment Year. The proviso to section 151 (1) fortifies our view which says that after the expiry of four years from the end of the relevant Assessment Year no notice under section 148 shall be issued or unless the Chief Commissioner or Commissioner is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of such notice. On a true and proper construction of the proviso it is imperative that the Assessing Officer in his reason should state that the escaped income is likely to be Rs.1 Lakh or more so that the Chief Commissioner or the Commissioner may record his satisfaction. The sanctioning authority must be aware that it has exercised power of extended period of limitation under 149 (1) (b) of the Act. Exception has been carved out by clause (b) to section 149(1) in respect the income chargeable to tax which has escaped assessment, amounts to Rs.1 Lakh or more. To fall within exception clause the relevant facts should have been recorded by the Assessing Authority in its order while recording the reason so that a sanctioning authority may apply its mind to the proposition while granting the sanction.

13. The learned counsel for the department after close of the argument has filed the following judgements for consideration of this Court:-

1. GKN Driveshafts (India) Ltd. Vs. ITO [2002] 259 ITR 19/125 Taxman 963 (SC).
2. Dr. H.S. Bawa Vs. CIT, [2012] 25 Taxmann.com 15/210 Taxman 57 (P & H).
3. Vikram Kothari (HUF) Vs. State of U.P., [2011] Taxmann.com 280/200 Taxmann.com 152 (Alld).
4. Export Credit Guarantee Corporation of India Vs. Addl. CIT [2013] 30 Taxmann.com, 211 (Bom).
5. Asstt.CIT Vs. Rajesh Jhavri, [2007] 291 ITR 500/161 Taxman 316 (SC).

6. Chief Commissioner (Admn.) (U.P.) V. Kanhaiya Lal Kapoor, [2005] 147 Taxman, 12 (All).

7. Pooran Mal Vs. Director of Inspection, [1974) 93 ITR 505 (SC)

8. Deep Chand Daga Vs. ITO [1970] 77 ITR, 661 (MP) and,

9. Fisher Xomox Sanmar Ltd. V. Assistant CIT, [2007] 294 ITR 620 [2008] 168 Taxman 251 (Mad.)

14. None of the judgments referred to above have any connection to the point in issue even remotely. They relate either to the question of non-disclosure of income or failure on the part of the assessee to disclose the income fully or truly and what amounts to "reason to believe an information". None of these points were urged before us and we failed to understand the filing of the rulings by the counsel as referred to herein above.

15. The only point urged and pressed before us is whether in absence of anything in the reasons recorded to suggest that the income chargeable to tax which has escaped the assessment is Rs. one lakh or more having not been mentioned the reassessment notice given after four years of the close of the assessment order is valid or not.

16. For the reasons given above, we find sufficient force in the argument of the learned counsel for the petitioner that on the basis of the reasons recorded by the Assessing Officer, the initiation of the reassessment proceedings relevant to the Assessment Year 2000-2001 by means of the notice dated 23.3.2007 after more than four years is clearly barred by time."

9. Then, in 'Amar Nath Agarwal' 371 ITR 183 (All.), it has been held as follows:-

"16. From the aforesaid, it is clear that two distinct conditions must be satisfied before the Assessing Officer can assume jurisdiction to issue a notice under Section 148 of the Act, namely, that he must have reasons to believe that the income of the assessee had escaped assessment and, that he must have reasons to believe that such escapement Was by reasons 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 are not fulfilled, the notice issued by the Assessing Officer would be without jurisdiction.

17. Further, from a perusal of Section 149(l)(b) of the Act, it is imperative that the Assessing Officer, in his reasons, should also state that the escaped income is likely to be Rs.1 lakh or more, which is an essential ingredient for seeking the approval and satisfaction that is to be recorded by the Competent Authority under Section 151 of the Act.

18. Consequently, before taking any action, the Assessing Officer is required to substantiate his satisfaction in the reasons recorded by him. If the conditions mentioned are not satisfied, then the issuance of notice would be invalid.

19. The reasons recorded by the Assessing Officer is, that the assessee had sold the property within three years after converting lease hold land to free hold resulting into short term capital gains in view of the judgment in Dr. V. V. Mody (supra).

20. The aforesaid reasons, makes it clear that the assessee was required to pay short term capital gains tax instead of long term capital gains tax and, therefore, the Assessing Officer had reasons to believe that the income had escaped assessment. In the instant case, admittedly, the notice was issued after four years but before six years. In our opinion, the reasons so recorded by the Assessing Officer was not sufficient to initiate proceedings under Section 148 of the Act. We find from the reasons recorded by the Assessing Officer that no such reasons has been recorded to the effect that the escaped income in likely to be Rs.1 lakh or more except for the assessment year 2001-02.

21. In Mahesh Kumar Gupta v. CIT [2014] 363 ITR 300/[2013] 215 Taxman 114/33 taxmann.com 409 (All) a coordinate Bench of this Court held that it is imperative for the Assessing Officer to record in his that the escaped income is likely to be Rs.1 lakh or more so that the Chief Commissioner or Commissioner may record his satisfaction u/s 151 of the Act. The Court further held that if the said reason has not been recorded by the Assessing Officer,

> the initiation of the reassessment proceedings after more than four years would be clearly barred by time.
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> 22. A similar provision, namely, Section 34(1A)(ii) existed under the Income Tax Act, 1922. A full Bench of this Court in Jai Kishan Srivastava v. ITO [1960] 40 ITR 222 (All) held that non-recording of the reason by the Assessing Officer that the escaped income was likely to be Rs.1 lakh or more was fatal to the issuance of the notice for reassessment.
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> 23. In K.S. Rashid & Son v. ITO [1964] 52 ITR 355 (SC) a Constitutional Bench of the Supreme Court held:
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> "The second point which is very important is that in regard to the cases falling under section 34(1A), action can be taken only where the income which has escaped assessment is likely to amount to Rs.1 lakh or more. In other words, it is only in regard to cases where the escaped income is of a high magnitude that the restriction of the period of limitation has been removed."
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> 24. Since no reasons were recorded that the escaped income is likely to be Rs.1 lakh or more so that the Chief Commissioner or Commissioner may record his satisfaction under section 151, the initiation of reassessment proceedings after more than four years was clearly barred by time."

10. The ratio decidendi of both the decisions of the Hon'ble Jurisdictional High Court evidently is that in the absence of anything in the reasons recorded to suggest that the income chargeable to tax which has escaped assessment is one lakh rupees or more, the notice issued u/s 148 of the Act beyond four years, but before the lapse of six years from the end of the relevant assessment year, is invalid.

11. Both 'Mahesh Kumar Gupta', (supra) and 'Amar Nath Agarwal', (supra) have been followed by the Agra, ITAT (SMC) in 'Smt. Ushal Agarwal' (supra), while deciding this issue in favour of the assessee under similar facts and circumstances. No contrary decision has been cited before me.

12. In view of the above, the grievance of the assessee, raised by way of Ground No. 4 is justified and it is accepted as such. Respectfully following 'Mahesh Kumar Gupta', (supra) and 'Amar Nath Agarwal' (supra), the reasons (APB-29) recorded under section 147 of the I.T. Act and all proceedings pursuant thereto, culminating in the order under appeal are held to be null & void ab-initio.

13. As such, nothing further survives for adjudication, nor was anything else argued.

14. In the result, the appeal is allowed.

Order pronounced in the open Court on 22/02/2019.

Sd/-
[A. D. JAIN]
VICE PRESIDENT

DATED: 22nd February, 2019
JJ:2002

Copy forwarded to:

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

By order

Assistant Registrar