IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 153/Asr/2014
Assessment Year: 2007-08

Nice Telecom, Cinema Road, Mansa, District Mansa [PAN: AAFFN 6574K]	vs.	Income Tax Officer, Ward 1(4), Mansa
(Appellant)		**(Respondent)**

Appellant by : Sh. I. S. Khurana (C.A.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 21.01.2019
Date of Pronouncement: 07.02.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals), Bathinda '(CIT(A)' for short) dated 04.12.2013, dismissing the assessee's appeal contesting its' assessment under section 144 read with section 147 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 11.12.2012 for Assessment Year (AY) 2007-08.

2. It may be relevant to recount the facts of the case in brief. The assessee-firm, a franchisee dealer for Tata Tele-Services Ltd. (TTSL) ('Principal') for sale of telephony services (mobile connections), including installation and repair of telephonic devices (hand sets), was assessed under the Act for the relevant year u/s. 143(3) on 08.12.2009 by making an addition of Rs.80,000/- to the returned income of Rs.27,020/-. The assessment was subsequently reopened by issue of notice u/s.

148(1) on 04.11.2011. The reasons recorded u/s. 148(2) for the purpose of issue of notice u/s. 148(1), stated two reasons to believe escapement of income chargeable to tax, as under: (PB pg. 9)

(a) The assessee had claimed deduction on account of expenditure on 'mobile repairs' and on 'recovery account' at Rs.1,58,675 and Rs.1,96,636/- respectively. The repair expenses incurred during the warranty period is to be borne by TTSL (Principal). Recovery account signifies recovery, and hence, is income;

(b) The capital account of Smt. Shallu Singla, partner, forming part of the final accounts, enclosed along with the return of income, reflected a credit balance (as on 31.03.2007) of Rs.7,39,841/-, while the balance-sheet as on that date shows her capital at Rs.6,64,841/-. The said difference (Rs.75,000/-), accordingly, would need to be added as the assessee's income.

Assessment was framed *ex parte* as the several notices u/s. 142(1), issued from time to time, remain uncomplied with, by disallowing the expenditure stated at (a) above and treating the difference at (b) above as unexplained, i.e., at Rs.5,37,331/-. In appeal, the assessee challenged the said assessment, both on legal grounds as well as on the merits of the adjustments made. Not finding favour with the ld. CIT(A), it, aggrieved, is in second appeal before us.

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

We shall consider the assessee's legal plea/s first as, where accepted, it may not be necessary for us to travel to the merits of the quantum adjustments effected in assessment. The first argument is of the reopening being a 'change of opinion' in-as-much as the original assessment u/s. 143(3) had been concluded after considering the assessee's claim *qua* expenses, including the two expenses referred to in the reasons recorded. There is no fresh material, not considered earlier, for the Assessing Officer (AO) to revise his opinion and form a view that the said expenses were required to be disallowed *in toto* or, at least to higher extent than

already disallowed. The relevant discussion is at para 3 of the section 143(3) order dated 08.12.2009, and reads as under (PB pgs. 8):

'3. The assessee firm derives income from commission on sales of connection, bill deliveries and purchase and sale of mobiles and accessories. The assessee has shown gross profit of Rs.19,04,393 whereas the net profit is Rs.27020 only, which is very low. The assessee has debited expenses in the profit and loss account in respect of mobile repair at Rs.1,58,675, recovery account Rs. 1,96,636, salary paid Rs. 9,66,000, which are on the very much higher side. After discussion with the assessee and his counsel, an addition of Rs.80,000 is made to the returned income for which the assessee agreed subject to no penalty action u/s. 271(1)(c) to cover up any leakage possible.

Income is computed as under:-	
Income declared by the assessee	Rs. 27020/-
Addition as discussed in para-3	Rs. 80000/-
Total income	Rs.107020/-'

There is no reference to the material considered; the defects observed in the assessee's claims, etc. in the relevant discussion in the order. The same does not reveal the basis of the adjudication, which is clearly *ad hoc* in nature. The same, in our view, cannot survive judicial scrutiny. As it appears, the AO referred to the impugned expenses as among the various expenses claimed, mentioning some of them which he considered to be on a higher side, without of course stating the basis of the said consideration or of any examination preceding it, which seemingly is influenced by his observation of the absorption of almost the entire disclosed gross profit of Rs.19.04 lacs, i.e., to the extent of Rs. 18.77 lacs (or 98.6%), by expenditure. His entire focus, as it appears, was to therefore arrive at a reasonable income, which he considered, after discussion with the assessee (and its' counsel), at Rs.1.0+ lac, citing 'possible leakage of revenue' as the reason to justify the addition. In the absence of any defect in the assesse's claim/s, the said reason, we may add, has no basis in law. A change of opinion presupposes formation of an opinion upon due application of mind *qua* the relevant aspect/s, while in the instant case we find the AO's action in making the assessment as guided solely by the

consideration of bringing, what he considers reasonable, sum to tax as income. Could it, for example, be said of the extent to which any of the expenses claimed by the assessee for the year, including the three expenses specifically mentioned by him in the assessment order, are actually disallowed, which (disallowance), in fact, has to be specific. This gets further supported by the fact that no set off *qua* the addition made (Rs.80,000/-) in assessment is allowed per the impugned reassessment, whereat the entire expenditure claimed under the heads 'mobile repair' and 'recovery' has been disallowed. We are, therefore, unable to accept the assessee's plea of the reasons recorded as amounting to a change of opinion, without in any manner suggesting that, where so, it would not, even under the amended law, bar reassessment. Reference in this context may be made to the decision in *A.L.A. Firm v. CIT* [1976] 102 ITR 622 (Mad.).

4. At the same time, however, in our view, the AO's action is not sustainable in law. Action u/s. 147 is no doubt permissible on the basis of 'reason/s' to believe being derived from the same material which was the subject matter of the assessment proceedings, as clarified in *Consolidated Photo and Finvest Ltd. v. Asst. CIT* [2006] 281 ITR 394 (Del.), and more recently by the Hon'ble jurisdictional High Court in *Sewak Ram v. ITO* [2010] 47 DTR 361 (P&H) (copy on record), relied upon by the ld. DR, Sh. Charan Dass, during hearing. So, however, the same must be a reason/s to believe escapement of income, having a live, rational, and direct nexus with the information or the material on record. The proposition is too well settled to require elaboration, and toward which we may though cite some decisions, as *S. Narayanappa & Ors. v. CIT* [1967] 63 ITR 219 (SC); *Sheo Nath Singh v. AA CIT* [1971] 82 ITR 147 (SC); and *ITO v. Lakhmani Mewal Dass* [1976] 103 ITR 437 (SC). In the instant case, we find the same as completely missing. There is, to begin with, no reference to the same in the reasons

recorded (PB pg. 9). On what basis, then, does the AO state of the repair expenditure incurred during the warranty period as being liable to be reimbursed to the assessee-agent and, thus, escapement of income to that extent? Again, even if the said non-reference is not regarded as conclusive in-as-much as it could be that, in spite of such material on record, the AO, though noticing it, did not consider it necessary to highlight the same in the reasons recorded, there is inexplicably no reference thereto even in the impugned assessment. The ld. DR was, accordingly, at loss to, upon being enquired by the Bench, show the said basis. On the contrary, as pointed out by the ld. counsel for the assessee, Sh. Khurana, there is no reference to the warranty period in the channel partner agreement (PB pgs. 13-39 of Additional Evidences (AE)). *Is, then, the AO acting on presumption, as Sh. Khurana would contend*? Similarly, *qua* recovery account, all that the reason recorded states is that recovery is income, without in any manner showing of any recovery having been made or indicated so in the material noticed subsequent to assessment, either in the reasons recorded or even in the ensuing assessment. How, then, could the AO have a reason to believe escapement of income *qua* recovery? As explained by Sh. Khurana with reference to the franchise agreement, the recovery of customer bills is the obligation of the franchisee-agent, and any non-recovery (or shortfall therein) is liable to be adjusted from his commission. The amount debited to the recovery account, claimed as expenditure, represents this recoupment by the Principal, also referring to its' account in the books of TTSL (PB pgs. 1-12 of AE). Where, in the absence of any recovery made by the assessee being shown, i.e., out of that adjusted in its' account, would there be any under-reporting of any income on that account? The reasons recorded are, clearly, presumptuous.

The third reason recorded is of a difference in the credit balance in the partner's capital account and that per the balance-sheet, both as at the year-end

(31.03.2007). In this regard too, we find merit in the argument advanced by Sh. Khurana. The balance-sheet, which represents part of the final accounts of the assessee, reflects a lower credit balance than per the partners' account statement accompanying it. How does the same lead to an inference of any income, he would posit? We agree. The reason for the difference though is not, as contended before us, a typographical error. The said difference is stated to be on account of the same difference in the cash introduced by the said partner on 28.03.2007, toward which though cash book has not been produced – in fact, at any stage. A typographical error in recording the cash introduced, it may be appreciated, would not result in a like difference in the account balance, as indeed obtains. Continuing further, the reason for the difference (in the account balance) could be among several. The balance cash (Rs. 75,000), for instance, could be on account of any other person/s, wrongly recorded in the account of the partner, since corrected; the concerned partner may have received back cash from the firm by 31.03.2007, entry in respect of which though remained to be posted in the partner's account as enclosed along with the balance-sheet; and so on. Though this is a matter of detail, a subject matter of the ensuing assessment, how does a lower credit balance in capital account, one wonders, result in an inference of the firm's income escaping assessment?

Non-application of mind on the part of the Assessing Officer, manifest in the original assessment order, attends the reasons recorded u/s. 148(2) as well. The reassessment accordingly fails for want of any reason to believe escapement of the stated incomes from assessment.

5. The third legal aspect on which the assessee challenges the assessment is non-service of notice u/s. 148(1). The ld. CIT(A) was not impressed as the said notice had not come back unserved from the postal authorities. The assessee's case is that the rebuttal presumption in law, i.e., of there being a proper service in due

course, is applicable only where the notice is sent by registered post along with acknowledgement due (RPAD), even as held by the tribunal in *Avneesh Kumar Singh v. ITO* [2010] 126 ITD 1 (Agra) (TM) (copy on record at pgs. 16-31 of the case law compilation). True, the statutory presumption u/s. 27 of the General Clauses Act, 1897 would apply only where the service has been made through registered post. The impugned order is silent on this aspect. No presumption of it being sent either per registered post or otherwise could be drawn. The same would necessitate reference to the record. Why, we wonder, the assessee did not inspect the assessment record to find if the notice, not received back, was sent, as is usually the case, per registered post, or not and, thus, meet the said statutory presumption in law. Again, we observe the assessee's address, i.e., Cinema Road, Mansa, as stated in the assessment order, remains the same throughout, finding mention in Form 35; the appellate order; Form 36, as well as the communications by the assessee to the tribunal. That, therefore, no notice during the assessment proceedings – which would only at the address on the Revenue's record, has been received by the assessee, is strange. The issue of service of notice u/s. 148(1), a question of fact, is therefore indeterminate. We do not, however, think that any useful purpose would be served by calling for the record to determine the said issue. The reason is two-fold. We have already held the reopening and the consequent reassessment as bad in law. Two, the jurisdiction to reassess u/s. 147 is assumed upon issue of notice u/s. 148(1) consequent to the recording of reasons u/s. 148(2), and not its' service (*R.K. Upadhyaya v. Shanabhai B. Patel* [1987] 166 ITR 163 (SC), also see section 149). Further, the time limitation for reassessment is u/s. 153(2) with reference to the date of service of the notice u/s. 148(1). Assuming therefore its' non-service, there still time for completion of assessment, i.e., after causing service thereof. This would again stand to be tested on the anvil of prejudice, if any, caused or, if that caused, i.e., on account of non service,

obtains as yet, for the said course to be adopted. No purpose stands to be attained from ascertaining if there has been a proper service in law of the notice u/s. 148(1) in the instant case.

6. The appeal was also argued on the merits of the adjustments made in assessment. It would be futile to dwell on the same. Both, the copy of the franchise agreement as well as the copy of the assessee's account in the books of the principal have been made part of a separate paper-book, i.e., of Additional Evidences (AE) (PB of AE), submitted along with a prayer for their admission. Sh. Khurana would toward this take us through the said agreement to show that the repairs as well as the collection of bills is the obligation of the assessee-agent, and in case of default, recoverable from it (assessee), whose account was shown to us as debited by the principal for these expenses. Admittedly, the documents are essential for deciding the merits, so that the same would merit being admitted. In fact, in-as-much there was reference thereto by the ld. counsel while showing the reasons recorded to be contrary to the actual state of affairs, there is a tacit admission of these evidences, which we make explicit We may though clarify that the reasons recorded fail not on account of the said admission, but the failure of the Revenue to show any material leading to or justifying the reasons recorded, and for which we have also referred to the impugned assessment. There is no question of a restoring the matter back to the file of the AO for considering the said material in view of our decision of the reopening being bad in law.

7. We decide accordingly.

8. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on February 07, 2019

Sd/-
(Sanjay Arora)
Accountant Member

Per: N K Choudhry, Judicial Member

9. I have perused the proposed order passed by Hon'ble A.M., whereby he has allowed the appeal of the assessee and quashed the reopening and assessment u/s 147 of the Act by holding as bad in law, however in para no. 5 made certain observations while concluding that **the issue of service of notice u/s 148, a question of fact is therefore indeterminate. "No purpose stands to be attained from ascertaining, if there has been a proper service in law of the Notice u/s 148(1) in the instant case".** Though I am in agreement with the result of the appeal, however not in concurrence with the observations made by Hon'ble A.M. in para no. 5 of the proposed order. As the Hon'ble A.M. quashed the assessment order itself therefore my non-concurrence does not impact the result of the appeal under consideration, hence the appeal of the assessee stand allowed.

Order announced in open Court on 7th day of February, 2019.

Sd/-
(N. K. Choudhry)
Judicial Member

Date: 07.02.2019
/GP/Sr Ps.
Copy of the order forwarded to:

(1) The Appellant: Nice Telecom, Cinema Road, Mansa, District Mansa
(2) The Respondent: Income Tax Officer, Ward 1(4), Mansa
(3) The CIT(Appeals), Bathinda
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

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By Order