

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. 307/Asr/2016
Assessment Year: 2008-09

Asst. Commissioner of Income Tax, Circle-2, Amritsar vs. Khosla International,
Vill-Shahapur, G.T. Road, Batala
[PAN: AAEFK 5987E]
(Appellant) **(Respondent)**

Appellant by : Sh. Avish Mahajan (C.A.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 06.02.2019
Date of Pronouncement: 28.03.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue arising out of the Order by the Commissioner of Income Tax (Appeals)-1, Amritsar '(CIT(A))' for short) dated 29.02.2016, allowing the assessee's appeal contesting its' assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 30.03.2014 for Assessment Year (A.Y.) 2008-09.

2. The appeal challenges the impugned order on the twin aspects on which the ld. CIT(A) has quashed the assessment, i.e.,

(i) that the reopening is invalid as a notice u/s. 148(1), issued on 30.03.2013, is on the basis of a borrowed satisfaction;

(ii) that no notice u/s. 143(2) stands, in any case, issued.

The respective cases

3.1 The thrust of the Revenue's arguments advanced by the Id. Departmental Representative (DR), Sh. Charan Dass, during hearing, was that there is no discussion on some of the grounds on which the reopening of the assessment, framed in the first instance u/s. 143(3) (vide order dated 13.04.2009/copy on record), viz. disallowance u/s. 14A. In fact, even on other grounds – the reopening having been initiated on four different grounds, as, for example, under-valuation of stock of paddy; concealment of husk produced, there is no discussion in the assessment order, indicating overlooking of the relevant aspect/facts having a direct bearing on the assessee's income for the relevant year. The same would not preclude reassessment, which stands initiated within four years from the end of the relevant assessment year. That the relevant information was already on record, or could have been obtained at the time of the original assessment from an investigation of the material on record, or the facts disclosed thereby, or from an enquiry or search into facts or law, but was not in fact obtained, would not affect the jurisdiction of the Assessing Officer (AO) to reopen a concluded assessment. The law in the matter is well-settled, for which reference was made by him to *ALA Firm v. CIT* [1991] 189 ITR 285 (SC). That the attention of the AO was drawn toward the relevant material by the audit party, i.e., through the audit objection, would be of no moment, as explained in *CIT v. PVS Beedis Pvt. Ltd.* [1991] 237 ITR 13 (SC), being followed by the Tribunal, as in *Usha International v. Dy. CIT* (in ITA No. 1615/Del/2008, dated 09.03.2015/copy on record). Continuing further, the only thing relevant is that there is material on record which forms the basis of a reason to believe an escapement of income from assessment, i.e., there is relevant material on which a reasonable person could form the requisite belief. Falling in the realm of a subjective satisfaction of the assessing authority, the sufficiency of the reason/s could not be examined by the court, as held in *Asst. CIT v. Rajesh*

Jhaveri Stock Brokers Pvt. Ltd. [2007] 291 ITR 500 (SC) after a review of the judicial precedents. That the reasons can be on the basis of the same material, and it is not necessary that there should be new material, stands clarified in *Sewak Ram v. ITO* [2010] 236 CTR 462 (P&H); *Tilak Raj Bedi v. Jt. CIT* (in ITA No. 97 of 2009, dated 13/10/2009).

The second ground on which the Id. CIT(A) has annulled the assessment is the non-issue of the notice u/s. 143(2). The assessee, required to furnish a return of income within 30 days of the notice u/s. 148(1), did not do so. The communication to the AO vide letter dated 20.12.2013 for regarding the return filed on 30.09.2008 as in response to the notice u/s. 148(1), cannot be treated as a return in response to the notice u/s. 148(1). There was, accordingly, no occasion for the AO to issue notice u/s. 143(2). Reliance was placed on the *Tarsem Singla v. CIT* [2016] 385 ITR 138 (P&H), rendered upon considering the decision in *CIT (Asst.) v. Hotel Blue Moon* [2010] 321 ITR 362 (SC). Issue of notice u/s. 143(2) is even otherwise not mandatory for an assessment u/s. 147, as explained in *CIT v. Madhya Bharat Energy Corporation Ltd.* [2011] 337 ITR 389 (Del).

3.2 The Id. counsel for the assessee, Sh. Mahajan, would take us through the relevant part of the impugned order, submitting that in the facts of the instant case the AO had himself (vide letter dated 19.08.2011) written to the audit cell for dropping the audit objections, as there was, in his view, no valid ground for reopening. Earlier, even the Addl. CIT (vide letter dated 24.05.2011), required settlement of the audit objections. The assessee had found the same on an inspection of the assessment file on 11.12.2015, even as copies of these letters, i.e., dated 24.05.2011 and 19.08.2011, were denied to the assessee. Reliance in this regard was placed on the decision in *Larsen & Toubro Ltd. v. State of Jharkhand* (in CA No. 5390 of 2007 dated 21.03.2017/copy on record), wherein the issue of

notice u/s. 19 of the Bihar Finance Act, 1981 by the Assessing Officer at the instance of the audit party and not his personal satisfaction, was held as not permissible in law. At this stage, the Id. DR, who had earlier been required to call the assessment record, confirmed the existence of the letter dated 19.08.2011 by the AO to the audit cell for dropping the audit objections on record, which he was required to place on record, with a copy to the assessee. Be that as it may be, the Id. DR would further submit, the same represents the view of the then AO, and not that of the incumbent AO, i.e., who had issued the notice u/s. 148(1). The very fact that he had issued the said notice, after recording reasons, is proof enough of his satisfaction, so that it would not fall to be considered as a case of borrowed satisfaction. *Qua* the second plea, Sh. Mahajan would rely on the decision in *Meenakshi Aggarwal & Ors v. ITO* (in ITA Nos. 4171-4175/Del/2015, dated 16.10.2015/copy on record), wherein, with reference to the decision in *G.N. Mohan Raju v. ITO* (in ITA Nos. 242-243/Bang/2013, dated 10.10.2014), it stands explained that where the AO accepted the assessee's request for treating the return filed earlier as in response to the notice u/s. 148(1), as indicated by his framing the assessment u/s. 143(3), he is obliged to issue a notice u/s. 143(2), a failure on which would render the assessment as bad in law and without jurisdiction.

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

4.1 We shall take up the issue of borrowed satisfaction first. Without doubt, the satisfaction has to be of the AO, and not of any other, be it the audit party or a superior authority (to the AO) or any other. Further, again, it is the satisfaction of the incumbent AO, i.e., who records the reason/s to believe u/s. 148(2) and issues notice u/s. 148(1), and not of his predecessor or successor, that is relevant and material. Further still, whether in a given case there is borrowed satisfaction or not, is a question of fact. The highlighting of certain aspects or facts, which have a

direct nexus with or bearing on the income/income determination, by the audit party, exercising an administrative function, or in fact by the AO himself, which had escaped his attention (or that of the then assessing authority), or was overlooked in framing the assessment, would not bar reassessment as long as the condition/s precedent for the invocation of section 147 is satisfied, i.e., there is material/ information on record giving rise to a reason to believe escapement of income from assessment, which is specific, reliable and relevant to the formation of the belief. That the relevant facts could be found upon investigation of the material on record, or by being more diligent in the matter, would not impede reassessment. The law in the matter is well settled, as explained in several decisions by the Apex Court, viz. *PVS Beedis* (supra); *Phool Chand Bajrang Lal* [1993] 203 ITR 456 (SC); *ALA Firm* (supra); *Kalyanji Mavji & Co. v. CIT* [1976] 102 ITR 287 (SC), to cite some. Per contra, the material/information does not necessarily have to be from an external source, and could be from the material on record, as further clarified in the afore-cited cases, as indeed in *Sewak Ram* (supra); *Grover Nursing Home v. ITO* [2001] 248 ITR 493 (P&H); *Consolidated Photo and Finvest Ltd. v. Asst. CIT* [2006] 281 ITR 394 (Del).

In the present case, we have not been shown that the relevant aspect had been examined, taking a permissible view, i.e., with reference to the assessment order, to regard it as a case of review or change of opinion. Reference in this context may be made to *Ess Kay Engg. Co. Pvt. Ltd. v. Dy. CIT* [2001] 247 ITR 818 (SC) (approving that by the Hon'ble jurisdictional High Court reported at [1982] 137 ITR 446). In fact, even the same issue may be examined in a different context, validating the reassessment (*Venus Industrial Corporation v. Asst. CIT* [1999] 236 ITR 742 (P&H)). To say therefore that the present is a case of change of opinion or borrowed satisfaction in view of the audit objection having been raised would not be correct.

The import of the letter dated 19.08.2011 to the audit cell by the then AO, however, has to be considered. Vide the said letter (copy on record) addressed to the Dy. CIT (Audit), the Asst. CIT, Circle-II, Amritsar, gives a point-wise reply to each of the audit objections (raised vide audit memo dated 27.07.2010), stating as to why, in his opinion, reopening is not called for in this case. Subsequently, however, notice u/s. 148(1) was issued after recording reasons by the Dy. CIT, Circle-II, Amritsar, i.e., the AO at the relevant time. As afore-stated and, even as stated by the Id. DR, it is only the satisfaction of the incumbent AO that is relevant, i.e., the AO who records the reasons u/s. 148(2) and issues notice u/s. 148(1). In fact, the very fact of his recording reasons and issue of notice is proof enough of his satisfaction, besides being in conformity with the law. The view of the predecessor AO, which is clearly to the contrary, would not be of much consequence, i.e., legally. This is particularly so as the sufficiency of the reason/s (to believe escapement of income) is not in issue and cannot be examined. Being in the realm of a subjective satisfaction, it may be that one regards it as sufficient, while the other, not, and it is for this reason that the courts are not entitled to examine the sufficiency of the reason/s (viz. *Raymond Woollen Mills v. ITO* [1999] 236 ITR 34 (SC); *Phool Chand Bajrang Lal* (supra)). While there is no denying the propositions afore-stated, the fact of the matter is that the then AO, upon examining the audit objections, had issued a point-wise counter – which has been carefully perused, and stated reasons, supported by facts and law, as to why, in his view, the reopening was not called for in the facts and circumstances of the case. The audit objections, as is apparent, were, however, not dropped. There is nothing on record to show that the audit cell pointed to any factual inconsistency/s in the then AO's reply dated 19.08.2011. There is also no contention to this effect. As it appears, therefore, the matter kept lingering and, finally, the incumbent AO issued a notice on 30.03.2013, i.e., the fag end of the limitation period, recording the same

reason/s as stated in the audit memo dated 27.07.2010. That is, the audit cell prevailed and, again, as it appears, in view of a 'large' tax effect, calculated at Rs.51.11 lacs. Not one of the four grounds raised per the audit objections was dropped, or the reasons otherwise supplemented, meeting the various reasons stated by his predecessor for the reopening being not valid, to indicate a fresh application of mind by the incumbent AO. It is, thus, on facts, a clear case of borrowed satisfaction, invalidating the same, as explained in *Larsen and Toubro* (supra). Rather, as a perusal of the reply dated 19.08.2011 shows, the original assessment had been framed conscious of and having regard to the aspects brought forth by the audit party, taking a permissible view. It is, thus, also a case of change of opinion. The two infirmities are in fact inter-connected. The reopening of assessment is, in our view, thus, not valid in law, and the ensuing assessment, in consequence, without jurisdiction.

4.2 The second reason stated by the Id. CIT(A) for allowing the assessee's appeal is the non-issue of notice u/s. 143(2) of the Act; the assessment framed being u/s. 143(3) r/w s. 147. The Revenue contests this on the ground that no return was filed in response to the notice u/s. 148(1), so that there was, in law, no requirement to issue a notice u/s. 143(2). In this regard, in our view, the mere fact that the assessment order states the assessment as u/s. 143(3) would not, by itself, be conclusive of the matter. The issue, firstly, is whether there was, on facts and in law, a compliance of the notice u/s. 148(1) dated 30.3.2013 by filing a return in response thereto. In our considered view, clearly not. A return, to be regarded as valid in law, has to be under a particular provision of the Act. The procedural sections, as ss. 143(2), 148, etc. have concomitant time limitations, as otherwise the process of assessment would become open-ended and indefinite. It cannot be, and there is nothing in law to suggest, that the return in response to a notice u/s.

148(1) (or any other section for that matter) could be filed at any time, which could in that case be even on the last day by which the assessment is to, in law, be completed. There has been no compliance of the notice u/s. 148 dated 30/3/2013, and the Id. CIT(A) stating that there was a compliance of the said notice by the assessee vide its letter dated 20/12/2013, cannot be accepted. Where, then, one may ask, was the need for the AO to issue a notice u/s. 143(2), which is only in verification of a return, even as explained in *CIT v. Ram Narain Bansal* [2011] 202 Taxman 213 (P&H)? The jurisdiction to frame an assessment u/s. 147, which cannot be fettered by the condition of the assessee furnishing a return u/s. 148, gets assumed on issue of a valid notice u/s. 148(1). The assessment, initiated by the issue of notice u/s. 148(1), duly served, it may be appreciated, cannot be deferred, and has to be completed within a specified time period, which runs from the date of service of the said notice (s. 153(2)). The AO, accordingly, proceeded with the issue of notice u/s. 142(1), fixing the date of hearing for 09.9.2013. He could not possibly, it may be appreciated, given the constraints placed by law, keep awaiting a return, presuming that it would be filed one fine day! The said notice was responded to by the assessee, furnishing the relevant information (refer para 2 of the assessment order). The letter by the assessee, much later, and nearly 9 months after the section 148 notice, to the effect that the original return be regarded as in response to the notice u/s. 148, is of little consequence. The same cannot in law be regarded as a return furnished in response to the notice u/s. 148 dated 30/3/2013, duly served; there being no challenge to its' service; in fact, at any stage. Why, in a given case, the same may be furnished toward the end of the time limit for framing the assessment. There is no requirement in law to issue a fresh notice u/s. 148, or cause the service of that already issued again (refer: *ITO v. Lal Chand Aggarwal* [2012] 134 ITD 91 (Agra-TM)). In fact, the Hon'ble jurisdictional High Court in *VRA Cotton Mills (P.) Ltd. v. UOI* [2013] 359 ITR 495 (P&H), held that the

expression 'served' in *proviso* to sec. 143(2), to bring certainty to the proceedings and pre-empt attempts on the part of the assessee to evade receipt of notices u/s. 143(2), be construed as 'issued'.

The jurisdiction to frame an assessment u/s. 147 gets vested by the issue of notice u/s. 148 (*R.K. Upadhyaya v. Shanabhai P. Patel* [1987] 166 ITR 163 (SC)), and which therefore stands validly assumed in the instant case. There is in law no requirement to issue afresh a notice u/s. 148(1), with in fact the assessment proceedings having commenced thus, which are in fact being participated in by the assessee. The fresh notice u/s. 148, assuming the time there-for has not lapsed (at the relevant time) – which though had in the instant case, could in law only be upon the AO having a new cause of action against the assessee, after observing the procedure in its respect. Reference in this context be made to the decision in *Lal Chand Aggarwal* (supra). Any fresh notice u/s. 148 would not be valid, and the time limit for completing the assessment would be with reference to the date of service of the first validly issued notice. The assessment proceedings were accordingly proceeded with by the AO by issue of notice u/s. 142(1) after the expiry of the time limit for the furnishing the return in response to the notice u/s. 148(1) dated 30/3/2013. In fact, there is no mention of the letter dated 20.12.2013 in the assessment order, so that no cognizance thereof has apparently been taken by the AO. The original return is already on record, information per which, where so, could in any case be taken by the AO, i.e., irrespective and *de hors* the letter dated 20.12.2013. There was, under the circumstances, no need for issuing a notice u/s. 143(2), and neither would its' non-issue fail the assessment on that ground. The assessment though stated to be u/s. 143(3) r/w s. 147, is in effect and substance, in view of the non-compliance of notice u/s. 148(1), i.e., by filing a return as required thereby, is an assessment u/s. 144 r/w s. 147. The jurisdiction to reassess being assumed on the issue of a valid notice u/s. 148, the notice u/s. 143(2) does not, it

may be appreciated, assume the status of a jurisdictional notice. The failure to issue a notice u/s. 143(2) in such a case would not invalidate an assessment, as explained in *Madhya Bharat Energy Corporation Ltd.* (supra). This we also understand to be the ratio of the decision in *Ram Narain Bansal* (supra) and *Tarsem Singla* (supra), the latter rendered after a review of the judicial precedents, including *Madhya Bharat Energy Corporation Ltd.* (supra). A similar view had earlier been taken in *Areva T&D India Ltd. v. Asst. CIT* [2007] 294 ITR 233 (Mad). There is in our view no ambiguity in law; the words used in sec. 148(1), the scope of which is judicially well-settled, being 'so far as may be'. Even assuming one, the Apex Court in *L. Hazari Mal Kuthiala v. ITO* [1961] 41 ITR 12 (SC), a decision by its' larger bench, explained that the exercise of power would be referable to a jurisdiction which confers validity upon it and not a jurisdiction under which it will be nugatory. The decision in *Cabon India Ltd.* (supra) is not with reference to section 148 proceedings, or a case where the jurisdiction to assess has been already validly assumed. We have, in fact, found that there was no compliance of notice u/s. 148 by filing a return, as required by it, so that there was, on facts, no need in law to, in any case, issue a notice u/s. 143(2).

We are, accordingly, not in agreement with the assessee on the second issue, also pressed before us. The same, however, becomes academic in view of our finding of the impugned assessment being without jurisdiction.

4.3 We decide accordingly.

5. In the result, the Revenue's appeal is dismissed.

Order pronounced in the open court on March 28, 2019

Sd/-
(Sanjay Arora)
Accountant Member

Per: N.K.Choudhry

6. Perused the proposed order of Hon'ble A.M.
7. The Revenue Department has challenged the impugned order dated 29-02-2016 passed by the Ld. CIT(A)-1, Amritsar on following grounds:-

"(A) Whether on the facts and in the circumstances of the case & in law, Ld CIT(A) is justified in holding that the notice under section 148 of the Income Tax Act, 1961 was issued in this case merely on change of opinion on the basis of an audit objection, since the finding of Ld. CIT(A) is contrary to the observations of the Assessing Officer in para-7 of the reasons recorded for issue of notice under section 148 of the Income Tax Act, 1961.

(B) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the assessment framed by the Assessing Officer is not valid as no notice under section 143(2) of the Income Tax Act, 1961 was issued since the assessee failed to file any return in response to notice u/s 148 of the Income Tax Act, 1961 and, therefore, the assessing officer was right in not issuing notice u/s 143(2) of the Income Tax Act, 1961 during the course of assessment proceedings."

8. Hon'ble AM vide proposed order, dismissed the appeal of the Revenue Department while rejecting the Ground No. 1 of the Revenue Department, which relates to the initiation of reassessment proceedings u/s 147 on change of opinion, on the basis of an audit objection, by holding the re-opening as invalid and ensuing the assessment in consequence without jurisdiction.

9. Hon'ble AM however accepted the ground no. 'B' of Revenue Department, whereby the Revenue Department has raised the contention that the Ld. CIT(A) has erred in holding that the assessment framed by the Assessing Officer is not valid as no notice under section 143(2) of the Income Tax Act, 1961 was issued since the assessee failed to file any return in response to notice u/s 148 of the Income Tax Act, 1961 and, therefore,

the assessing officer was right in not issuing notice u/s 143(2) of the Income Tax Act, 1961 during the course of assessment proceedings.

10. Though I am in agreement with the decision on Ground no 'A' and ultimate result of the appeal, however not in concurrence with the conclusion/decision on ground No. 'B'. Because the Hon'ble A.M. quashed the assessment order itself therefore my non-concurrence on ground No. B does not impact the result of the appeal and consequently the appeal of the Revenue Department is liable to be dismissed.

11. In Result, the appeal of the Revenue Department stands dismissed.

Order pronounced in open Court on 28.03-2019

Sd/-

N.K. Choudhry

(Judicial Member)

ITAT, Amritsar Bench

Date: 28.03.2019

/GP/Sr Ps.

Copy of the order forwarded to:

- (1) The Appellant: Asst. Commissioner of Income Tax, Circle-2, Amritsar
- (2) The Respondent: Khosla International, Vill-Shahapur, G.T. Road, Batala
- (3) The CIT(Appeals)-1, Amritsar
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T.

True Copy

By Order