

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2303/Kol/2013 Assessment Year :2006-07

Bera Cycle Stores C/o Shri Somnath Ghosh, Advocate Seven Brothers' Lodge, P.O. Buroshibtala, Chinsura, Dist. Hooghly, Pin-712 105 [PAN NoAADFB 1635 R]	V/s.	DCIT, Circle-2, Income Tax Office, Sahoo Bhawan, Khudiram Ngar, P.O. Midnapore, Dist. Paschim Midnapur, Pin-721 101
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Somnath Ghosh, Advocate
प्रत्यर्थी की ओर से/By Respondent	Md. Ghyasuddin, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	05-07-2016
घोषणा की तारीख/Date of Pronouncement	24-08-2016

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-XXXVI, Kolkata in appeal No.331/CIT(A)-XXXVI/Kol/Cir-2, Mid./2011-12 dated 31.07.2013. Assessment was framed by DCIT Circle-2, Midnapore u/s 147/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide her order dated 27.12.2011 for assessment year 2006-07.

Shri Somnath Ghosh, Ld. Authorized Representative appeared on behalf of assessee and Md. Ghyasuddin, Ld. Departmental Representative appeared on behalf of Revenue.

2. In this appeal various grounds have been raised by assessee as under:-
(All the grounds are independent and without prejudice to each other)

1. *FOR THAT the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata was remiss in failing to appreciate that none of the conditions precedent existed and/or have been complied with and/or fulfilled by the Ld. Deputy Commissioner of Income Tax, Circle 2, Midnapur for his assumption of jurisdiction u/s. 147 of the Income Tax Act, 1961 and the specious order passed u/s. 147/143(3) of the Act in pursuance to the impugned notice dated 12-05-2010 issued u/ s. 148 of the Act is therefore ab initio void, ultra vires and null in law.*

2. *FOR THAT on a true and proper interpretation of the scope and ambit of the provisions of s. 147 of the Income Tax Act, 1961, the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata was absolutely in error in upholding the action of the Ld. Deputy Commissioner of Income Tax, Circle 2, Midnapur of issuing notice u/s. 148 of the Income Tax Act, 1961 without adducing any "tangible material" on record in support of such futile exercise and the purported conclusion reached on that behalf is completely unfounded, unjustified and untenable in law.*

3. *FOR THAT the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata acted unlawfully in upholding the action of the Ld. Deputy Commissioner of Income Tax, Circle 2, Midnapur of issuing notice u/ s. 148 of the Income Tax Act, 1961 merely on change of opinion basing on the evidence already adduced on record in course of the original assessment proceedings and the specious action on that behalf is thoroughly arbitrary, unwarranted and perverse.*

4. *FOR THAT the specious action of the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata in upholding the disallowance of the expenses incurred on account of cost of carriage in the sum of Rs. 5,18,570/- in absence of any contract for carrying out any work in this respect by the Ld. Deputy Commissioner of Income Tax, Circle 2, Midnapur by invoking the provisions of s. 40(a)(ia) of the Income Tax Act, 1961 is wholly illegal, illegitimate and infirm in law.*

5. *FOR THAT the Ld. Commissioner of Income Tax (Appeals) XXXVI, Kolkata gravely erred in upholding the addition amounting to Rs. 5,18,570/- made and based on an illegal reference to the provisions of s. 40(a)(ia) of the Income Tax Act, 1961 misconceiving the payment incurred on account of cost of carriage by the Ld. Deputy Commissioner of Income Tax, Circle 2, Midnapur which had no connotation of falling foul of such enactment and the adverse*

finding reached extraneous considerations not germane to the issue is totally opposed to law.”

3. At the outset, Ld. AR of assessee has challenged the assessment proceedings u/s. 147 of the Act in its ground No. 1 to 3 on the ground that reasons to believe were not furnished to se before completion of assessment and no “*tangible material*” was found in issuing the notice u/s. 148 of the Act and it was issued only on mere change of opinion.

4. The fact in brief are that assessee in the present case is a partnership firm and engaged in wholesale trading in bicycles and its parts. The assessee for the year under consideration filed its return income on 31.10.2006 declaring business income of ₹7,80,409/-. Thereafter returned income of assessee was assessed u/s 143(3) of the Act for an amount of ₹10,38,360/- vide order dated 28.11.2008. Subsequently, AO issued notice u/s. 148 of the Act on 12.05.2010 on the ground that the transportation charges was incurred by assessee in contravention of the provision of Sec. 40(a)(ia) for an amount of ₹5,18,750/-. In compliance thereto assessee requested the AO to treat the original returned income as filed against the notice u/s. 148 of the Act. The assessee during the course of assessment submitted that provision of Sec. 40(a)(ia) of the Act was not applicable as the amount of such transportation charges were paid within the financial year and no outstanding amount was payable as on 31.03.2006. However, AO disregarded the claim of assessee and added a sum of ₹5,18,570/- to the total income of assessee.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A), whereas assessee submitted that on receipt of notice u/s 148 of the Act, a request was made before the AO to provide the certified copy of reasons recorded u/s. 148(2) of the Act but AO failed to do so. The assessment was completed u/s. 143(3) of the Act has been reopened without any fresh evidence being

brought on record except the audit objection raised by Revenue Audit Party. However, Ld. CIT(A) disregarded the claim of assessee by observing that as per order-sheet entry on 12.05.2010 the reasons recorded u/s. 148(2) of the Act was duly written and accordingly notice u/s. 148 of the Act was issued to assessee. It was further observed that the above stated order-sheet entry was duly signed by the authorized representative on 12.09.2011. Accordingly, Ld. CIT(A) presumed that the reasons recorded u/s. 148(2) of the Act has been duly communicated to assessee. It was also observed that assessee during the assessment proceedings u/s 147 of the Act has made the submission in response to queries raised during the assessment proceedings. It was also observe that there was a survey in M/s Calcutta Cycle Co. and family members of assessee were also the partners with M/s Calcutta Cycle Co. the reasons recorded for reopening of the case u/s 148(2) of the Act were supplied to Authorized Representative of M/s Calcutta Cycle Co. In view of above, Ld. CIT(A) held that assessee was well aware about the reasons recorded u/s 148(2) of the Act. It was also observed that present case is also covered under the provisions of Sec. 292BB of the Act. Regarding the assessee's objection for the reopening of assessment u/s. 147 of the Act on the ground that no new material was brought on record, it important to note that the aspect of transportation charges as per the provision of Sec. 194C of the Act was not at all examined by the AO. The AO has made no enquiry and there was no examination as well, so there is no question for changing the opinion. Accordingly, Ld. CIT(A) dismissed the plea of assessee challenging the assessment proceedings u/s. 147 of the Act.

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

6. Before us Ld. AR submitted Index of papers which is running pages from 1 to 181 and reiterated the submissions as stated before Authorities Below and asserted that the reasons recorded u/s. 148(2) of the Act was not

provided. Regarding the observation of the Id. CIT(A) for furnishing of reason recorded at the time of survey, it was submitted that survey was conducted at the business premises of assessee's sister concern on dated 03.03.2006 and in the instant case, order was completed u/s. 143(3) of the Act on 28.11.2008 and notice u/s. 148 of the Act was issued on 12.05.2010 therefore no reasons recorded u/s. 148 of the Act was supplied to assessee. The Id. AR also submitted that the Assessing Officer had himself enquired about the details of transportation by an entry in the order sheet on 11-09-2008. In reply the appellant on 17-10-2008 adduced on record the details of transportation expenses along with evidence to establish the propriety of the expenditure which was accepted by the Ld. Assessing Officer as admissible. In other words, the Ld. Assessing Officer had formed an opinion in respect of the admissibility of such expense incurred on "transportation charges" in the sum of Rs. 6,96,736/- which is inclusive of the impugned amount of Rs. 5,18,570/-. It is an accepted fact that the Assessing Officer in the instant case initiated the proceedings u/s 147 of the Income Tax Act 1961 basing his premise of escapement of income "On scrutiny of assessment records". In other words the Assessing Officer had formed his belief basing on the existing materials which were provided by the appellant in course of the original assessment proceedings. The Assessing Officer has simply attempted to re-examine the issue of admissibility of the expense under the head "**transportation charges**" which is impermissible in law. The Assessing Officer without any tangible material has assumed jurisdiction u/s. 147 of the Income Tax Act 1961 which amounted to "**change of opinion**" meaning thereby review of the same facts without any further reference to any new facts or law. This stance of the Assessing Officer is simply not in parity with law. The statutory requirement for issuing notice u/s 148 of the Act is that there must be tangible material which in the opinion of the Assessing Authority leads to the conclusion of escapement of income. In other words, the law perforce enjoined compliance with such material requirement for assumption of jurisdiction to initiate proceedings for re-assessment however the action

contemplated by the Assessing Officer in this respect amounted to review of the original decision which is *ultra vires* the scope and ambit of the provisions of Sec.147 of the Act. Admittedly no new facts or materials were brought on record to justify the assumption of jurisdiction for exercising the power conferred u/s. 147 of the Act. It is settled that the concept of "**change of opinion**" on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of s. 147 of the Act by the Direct Tax Laws (Amendment) Act, 1987 and 1989. After the amendment, the Assessing Officer has to have reasons to believe that income escaped assessment but this does not imply that the Assessing Officer can reopen an assessment on a mere change of opinion. The concept of change of opinion- must be treated as an in-built test to check abuse of power. Hence after 1st April 1989 the Assessing Officer has power to reopen an assessment provided there is "**tangible material**" to come to the conclusion that there was escapement of income from assessment. On the other hand the Id. DR drew our attention on the order sheet entry and submitted that the reasons for reopening the case were duly communicated. With regard to the allegation of change of opinion the Id. DR submitted that there was no specific query on the default of TDS during assessment proceedings. So where no query has been raised then the question of change of opinion does not arise. Just production of books of accounts does not mean fully disclosure of income. The Id. DR vehemently supported the order of the lower authorities.

7. We have heard rival contention as well as relevant material on record. We have also carefully perused the various decisions relied upon by the parties. Though the arguments from both sides were also addressed on the merits of the issue; however, at this stage, we confined ourselves to the issue of validity of reopened assessment. From the aforesaid discussion, we find that the Id. DR failed to bring anything contrary to the arguments with regard to the furnishing of reasons to believe. The original assessment records were available with the Id. DR at the time of hearing of the case. Several courts

have decided this issue in favour of assessee in the aforesaid facts & circumstances. In this connection, we rely in the judgment of Hon'ble High Court of Bombay in IT Appeal No. 4235 of 2010 case of where it was held as under:-

“2. The finding of fact recorded by the Income Tax Appellate Tribunal is that in the present case the reasons recorded for reopening of the assessment though repeatedly asked by the assessee were furnished only after completion of the assessment. The Tribunal following the judgment of this Court in the case of CIT V/s Formento Resorts 8& Hotels Limited, Income Tax Appeal No. 71 of 2006 decided on 27th November 2006 has held that though the reopening of the assessment is within three years from the end of relevant assessment year, since the reasons recorded for reopening of the assessment were not furnished to the assessee till the completion of assessment, the reassessment order cannot be upheld. Moreover, Special Leave petition filed by the Revenue against the decision of this Court in the case of Formento Resorts & Hotels Limited has been dismissed by the Apex Court vide order dated 16th July 2007.”

The Hon'ble Apex Court in the case of GNK Driveshafts (India) Ltd. Vs. ITO 259 ITR 19. The relevant extract of the order is reproduced below.

“We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under s. 148 of the IT Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years.”

As we find that in the instant case, the AO failed to provide the reasons to the assessee in spite of the fact the specific request was made to the lower authorities. Relying in the aforesaid judgment we reverse the order of the lower authorities. Hence this ground of the appeal is allowed in favour of assessee.

8. As we have allowed the appeal of the assessee in his favour on technical grounds, the remaining grounds of the assessee do not require any adjudication at this stage.

9. **In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 24/08/2016

Sd/-

(न्यायिक सदस्य)

(N.V.Vasudevan)

(Judicial Member)

Kolkata,

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

(Accountant Member)

*Dkp

दिनांक:- 24/08/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Bera Cycle Stores, C/o SriSomnathGhosh, Advocate, Seven Brothers' Lodge, P.O.Buroshibtala, Chinsurah, Dist. Hooghly-712105
2. प्रत्यर्थी/Respondent-DCIT, Circle-2, Income Tax Office, Shoo Bhawan, Khudiram Nagar, P.O.Midnapore, Dist. Paschim Midnapre Pin 721 101
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।