

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 540/JP/2018
निर्धारण वर्ष / Assessment Year: 2009-10

Dinesh Kumar Agarwal HUF, D-53, Ganesh Park, Ambabari, Jaipur.	बनाम Vs.	I.T.O., Ward 4(4), Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAAHD 6437 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Rakesh Kumar Kabra (CA)
राजस्व की ओर से / Revenue by : Smt. Runi Pal (JCIT)

सुनवाई की तारीख / Date of Hearing : 19/09/2019
उदघोषणा की तारीख / Date of Pronouncement : 24/10/2019

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 16/02/2018 of Id. CIT(A)-2, Jaipur for the A.Y. 2009-10. The assessee has raised following grounds of appeal:

- "1. The very action taken u/s 147 r/w 148 is bad in law without jurisdiction and being void ab-initio, the same kindly be quashed.*
- 2. Rs. 1,00,122/- :- The Id. AO erred in law as well as on the facts of the case in making addition of Rs. 1,00,122/- on the allegation that the transaction with reference to ITS information was not disclosed and hence, was treated as unexplained investment made in mutual fund/shares u/s*

67 of the Act. The addition so made related to transaction which has not been undertaken by assessee and also not part of ITS information of assessee. Addition being contrary to the provisions of law and facts kindly be deleted in full.

3. *Rs. 99,778/- :- The Ld. AO erred in law as well as on the facts of the case in making addition of Rs. 99,778/- on account of the profit on the sale of the truck even though the same was not mentioned in the reasons recorded u/s 148(2) of the Act. The addition so made being beyond the scope of sec. 147 as also otherwise being totally contrary to the provisions of law and facts kindly be deleted in full.*
4. *The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."*

2. Ground No.1 of the appeal is regarding validity of reopening U/s 148 of the Income Tax Act, 1961 (in short, the Act).The assessee HUF filed its original return of income on 02/03/2010 declaring total income of Rs. 4,64,000/-. Subsequently, as per AIT information, the A.O. noted that the assessee has invested Rs. 6,50,000/- in the mutual funds and the said transaction has not been declared in the return of income. Accordingly, the A.O. reopened the assessment by issuing a notice U/s 148 of the Act on 22/03/2016. The A.O. completed the reassessment vide order dated 26/7/2016 at a total income of Rs. 9,41,470/-. The assessee challenged the action of the A.O. before the Id. CIT(A) but could not succeed.

3. Before the Tribunal, the Id AR of the assessee has submitted that the A.O. has reopened the assessment to assess the income on account of investment made in mutual funds of Rs. 6.50 lacs whereas no such transaction was found to be carried out by the assessee during the year under consideration. Further the A.O. in the reassessment order has not made any addition on account of alleged transaction of the mutual funds but some other additions are made in the reassessment order. Therefore, reopening in bad in law as it is based on the incorrect facts and the alleged transaction does not belong to the assessee. He has also relied upon the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd. 331 ITR 236 (Bom) and submitted that when the A.O. has not made any addition in respect of income for which he has initiated the proceedings U/s 147/148 of the Act then in absence of any escapement of income, the A.O. cannot make addition independently of some other income.

4. On the other hand, the Id DR has relied upon the orders of the authorities below and submitted that the assessment was reopened by the A.O. on the basis of information, therefore, the A.O. was having material to form a belief that the income assessable to tax has escaped assessment.

5. I have considered the rival submissions as well as the relevant material on record. There is no dispute that the assessee has filed its return of income U/s 139 of the Act and declared income of Rs. 4,64,000/-. Subsequently, the A.O. reopened the assessment by recording the reasons as under:

नि.व. 2009-10 में AIR के तहत इस कार्यालय में अपलब्ध सूचना के अनुसार करदाता द्वारा Mutual Fund में रुपये 6,50,000/- का निवेश किया है करदाता ने नि. वर्ष 2009-10 की आयकर विवरणी रुपये 4,64,000/- की आय दर्शाते हुए दिनांक 02.03.2010 को कार्यालय में प्रस्तुत की है। आयकर विवरणी का अवलोकन करने पर पाया गया कि करदाता द्वारा Schdule AIR में Transaction amount नहीं दर्शाया है अतः करदाता द्वारा अपनी आयकर विवरणी में पूर्ण तथा सही तथ्य प्रस्तुत नहीं किये हैं।

अतः उक्त तथ्यों को ध्यान में रखते हुए मेरे पास विश्वास करने का यह कारण है कि करदाता के मामले में Mutual Fund में रुपये 6,50,000/- के निवेश की राशि का निर्धारण वर्ष 2009-10 में निर्धारण से वंचित रह गई है, अतः निर्धारण के लिए आयकर अधिनियम 1961 की धारा 147 के तहत धारा 148 का नोटिस जारी करने के लिए योग्य है।

Thus, the A.O. has reopened the assessment by forming a belief that the income in respect of the investment made by the assessee of Rs. 6.50 lacs in mutual funds has escaped assessment. It is pertinent to note that the investment made in the mutual funds in itself is not in the character of income, though, the source of the said investment if not explained by the assessee can be assessed to tax U/s 69 of the Act. Further, in the reassessment proceedings, the A.O. accepted the fact that the alleged transaction of investment in mutual funds at Rs. 6.50

lacs were not found to be belonging to the assessee as there was no such investment made by the assessee during the year under consideration. Therefore, once the A.O. in the reassessment proceedings, holds that the income for which he has initiated the proceedings U/s 147/148 of the Act had not escaped assessment then the A.O. has no jurisdiction in the reassessment proceedings to assess any other income. The Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd. (supra) while considering the identical issue has held in para 13 to 17 as under:

13. The effect of the amended provisions came to be considered in two distinct lines of precedent on the subject. The first line of authority, to which a reference has already been made earlier, adopted the principle that where the Assessing Officer has formed a reason to believe that income has escaped assessment and has issued a notice under section 148 on certain specific issues, it was not open to him during the course of the proceedings for assessment or reassessment to assess or reassess any other income, which may have escaped assessment but which did not form the subject-matter of the notice under section 148. This view was adopted in the Judgment of the Punjab and Haryana High Court in *Vipan Khanna's case (supra)* and in the judgment of the Kerala High Court in *Travancore Cements Ltd.'s case (supra)*. This line of authority, would now cease to reflect the correct position in law, by virtue of the amendment which has been brought in by the insertion of *Explanation 3* to section 147 by Finance (No. 2) Act of 2009. The effect of the *Explanation* is that once an Assessing Officer has formed a reason to believe that income chargeable to tax has escaped assessment and has proceeded to issue a notice under section 148, it is open to him to assess or reassess income in respect of any other issue though the reasons for such issue had not been included in the reasons recorded under section 148(2).

14. The second line of precedent is reflected in a judgment of the Rajasthan High Court in *CIT v. Shri Ram Singh* [2008] 306 ITR 343. The Rajasthan High Court construed the words used by Parliament in section 147 particularly the words that the Assessing Officer 'may assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes

to his notice subsequently in the course of the proceedings' under section 147. The Rajasthan High Court held as follows :

". . . if is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax, which has escaped assessment for any assessment year, with respect to which he had "reason to believe" to be so, then, only in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under section 147.

To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his "reason to believe", had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

15. Parliament, when it enacted the *Explanation (3)* to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in *Explanation 3* to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of *Explanation 3* consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in *Travancore Cements Ltd.'s case (supra)* and of the Punjab & Haryana High Court in *Vipan Khanna's case (supra)* would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in *Shri Ram Singh's case (supra)*, *Explanation 3* as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in *CIT v. Atlas Cycle Industries [1989] 180 ITR 319¹*. The decision in *Atlas Cycle Industries' case (supra)* held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in *Atlas Cycle Industries' case (supra)* and of the Rajasthan High Court in *Shri Ram Singh's case (supra)* would not be affected by the amendment brought in by the insertion of *Explanation 3* to section 147.-

16. *Explanation 3* lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of *Explanation 3* by the Finance Act (No. 2) of 2009. However, *Explanation 3* does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An *Explanation* to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

17. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147(1) and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of *Explanation 3* to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in *Shri Ram Singh's case (supra)*. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147(1) as they stood after the amendment of 1-4-1989 continue to hold the field.

Accordingly, the assessment was reopened based on the incorrect facts and nonexisting facts then the same is not sustainable in law. Further

even after reopening of the assessment when the income which was viewed as escaped assessment was not actually found to be escaped then no further addition can be made by the A.O. in the reassessment proceedings. Hence, the impugned reassessment order dated 26/07/2016 is not sustainable in law and the same is quashed.

6. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 24th October, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 24th October, 2019

*Ranjan

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

1. अपीलार्थी / The Appellant- Shri Dinesh Kumar Agarwal HUF, Jaipur.
2. प्रत्यर्थी / The Respondent- The I.T.O., Ward 4(4), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 540/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar