

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C+SMC": NEW DELHI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
SHRI K.N.CHARY, JUDICIAL MEMBER

ITA No. 563/Del/2019  
(Assessment Year: 2010-11)

Ashwani Atrish, Ch. No. 206-207, Ansal Satyam, RDC, Rajnagar, Ghaziabad PAN: AEOPA9658J	Vs.	ITO, Ward-1(1), Ghaziabad
(Appellant)		(Respondent)

Assessee by :	Shri Akhilesh Kumar, Adv
Revenue by:	Ms. Ekta Vishnoi, Sr. DR
Date of Hearing	15/10/2019
Date of pronouncement	13/01/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id CIT(A), Ghaziabad dated 31.10.2018 for the Assessment Year 2010-11.
2. The assessee has raised the following grounds of appeal:-
  - “1. That order of lower authority is bad in law and is against the facts and circumstances of the case and hence is unsustainable.
  2. That Id. CIT(A) grossly erred in sustaining validity of notice u/s 148 against the provision of law read with the decision of binding authorities.
  3. That Id. CIT(A) further erred in not appreciating the fact that notice u/s 148 is beyond jurisdiction, being issued without any application of mind/satisfaction of Id. AO/approving authority sheerly to conduct roving enquiries when no addition is made by AO on the basis of reasons recorded.
  4. That, without prejudice to above and only as alterative on merits, Id. CIT(A) erred in sustaining addition of Rs. 11,78,304/- u/s 2(22)(e), on a business transaction by wrongly branding same as loan, beside even computation of disallowance is also wrong.”
3. Brief facts of the case shows that assessee is an individual and based on permanent account number AIR information for purchase of property of ₹ 40 lakhs in assessment year 2010 – 11 was received from director of income tax. To examine the source of investment , letter of verification was

sent on 9/1/2017 which was not replied by assessee, AO further noted that assessee did not file income tax return for that year on verification of AST data and therefore notice under section 148 of the income tax act was issued after taking prior approval of the principal Commissioner of income tax on 29/3/2017. In response to that notice assessee filed its return of income on 29/11/2017 declaring a net income of ₹ 147890/-. Further notice under section 143 (2) of the act was issued on 29/11/2017.

4. The learned assessing officer noted that assessee and his wife have purchased the property for ₹ 40 Lakhs and incurred expenses of registration of ₹ 270,000. Assessee was asked to explain the source of investment made for acquisition of the above property. Assessee explained that it has obtained an interest free loan of ₹ 40 lakhs from one company and the payment was directly made by that company to the seller of the property. The learned assessing officer on further examination found that the assessee and his wife are director of that company and their shareholding in that particular company is 50% each. He also noted that company had reserve and surplus of Rs. 1178304/- as on 31/3/2010 and ₹ 8 60376 as on 31/3/2009. Consequently the AO issued notice under section 2 (22) (e) of the act that why ₹ 20 Lakhs should not be taken as a deemed dividend income in the hands of the assessee. The assessee explained that Company is operating the business of event management personally and gave a contract for providing the services of the event expenses to the assessee, who was a director of the company. Assessee supplied the services related to event management services to the company and company has paid the amount towards the services to other person on behalf of the assessee and therefore the above sum is not a deemed dividend but is on account of business transaction. It was further stated that above sum cannot be treated as a loan or advance. The learned assessing officer asked further details to the company and asked to produce the books of accounts for verification. The lender company submitted a detailed reply on 27/12/2017. The AO rejected the explanation of that company because of the reason that AO asked that company to submit the details of sundry debtors which was not so furnished by that company. Even when the summons were issued under section 131 of the act to the director of that

company know books of accounts of bills and vouchers et cetera were produced for the verification as well as the account of the assessee and his wife along with the copies of the bills raised by the assessee. Therefore, learned assessing officer reached at the conclusion that the detailed submitted by the lender company is just to avoid the taxation of deemed dividend income against the interest free loans and advances taken by the assessee from that company. He further held that fabricated fund flow statement is furnished. He further noted that on examination of ITD database, it was found that assessee has filed his return of income on 14/2/2010 declaring that salary income of ₹ 380,000 received from the above company who have deducted the tax at source. Therefore, assessee did not have any other source of income except the salary income and no business activity was carried out by the assessee during the year under consideration. Therefore, he rejected the contention of assessee that assessee has carried out any business during the year under consideration of event management and the payment has been received from the company against the sale and services is merely a concocted story and afterthought just to avoid the deemed dividend income in the hands of the assessee. Therefore, he made an addition of Rs, 1178304/- in the hands of the assessee as deemed dividend. He further found that assessee has filed his return of income showing that salary income of ₹ 3 80000 therefore to the net returned income as per ITR of ₹ 1 47490/-. He further made an addition of ₹ 3 80000/-. Accordingly the total income of the assessee was determined at ₹ 1 705794/- and passed an order under section 143 (3) of the income tax act on 27/12/2017.

5. Assessee being aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A challenging reopening of the assessment as well as on the merits. The learned CIT – A dismissed the appeal of the assessee on both the grounds. Therefore, assessee is in appeal before us.
6. The learned authorised representative submitted a paper book and relied upon the copy of the written submission filed before us which was placed before the learned CIT – A. He referred to the order sheet obtained by the assessee, which is placed at page number 13 to 17 of the paper book. He

further referred to approval obtained under section 151 of the income tax act on this issue wherein the principal Commissioner of income tax has mentioned that he is satisfied that this is a fit case for issue of notice under section 148 of the income tax act. He also referred to the purchase deed of the property as well as the annual accounts of the company from whom loan were received. Therefore it is submitted that the reasons recorded for reopening are with respect to examination of source of investment in property, no addition is been made on that count but the addition has been made on altogether different issue of deemed dividend. He therefore submitted that when on the original issue the addition has not been made, the addition cannot be made on other issues in reopened assessment proceedings. On the merits of the case he submitted that this is a business transaction and therefore it is neither a loan or advance received by the assessee from that company and therefore it cannot be taxed in the hands of the assessee as a deemed dividend.

7. The learned departmental representative eminently supported the order of the learned lower authorities
8. We have carefully considered the rival contention and perused the orders of the lower authorities. As per the reasons recorded for reopening of the assessment which is placed at page number 20 of the paper book reads as under:-

“ In this case permanent account number information has been received that the assessee has purchased immovable property of ₹ 40 Lakhs during financial year 2009 – 10 relevant assessment year 2010 – 11. To verify the transaction, very letters were issued to the assessee to furnish particulars of income tax assessment, filing of ITR for assessment year 2010 – 11 et cetera. And to explain as to how the said transaction has been disclosed/shown by the assessee in ITR. However, reply to the said letter had not been furnished and the assessee has failed to furnish any plausible explanation of the said transaction. Ongoing through the AST database, it has been observed that the assessee has not filed return of income for assessment year 2010 – 11. Since the assessee has not complied with the query

letter and ITR of the assessee for assessment year 2010 – 11 has not been filed, the high-value AIR transaction entered into by the assessee in financial year 2009 – 10 remained unexplained. As such, the source of amount invested in purchase of immovable property remained unexplained.

Therefore on the basis of credible information in my possession, I have reason to believe that on account of failure of assessee to disclose is correct and true income, the income chargeable to tax for the assessment year 2010 – 11 has escaped assessment within the meaning of section 147 of the income tax 1961.”

9. Therefore, admittedly, the case of the assessee was reopened for taxing the source of investment of purchase of property by the assessee. However, on perusal of the assessment order it is found that there is no such addition made in the hands of the assessee on that account. Thus, it is apparent that the reason for which the case of the assessee was reopened is not at all used for adjusting the income of the assessee. On reading of the provisions of section 147 and explanation 3 to that section, it is mandatory that for the purpose of assessment or reassessment, the assessing officer may assess reassess the income in respect of any issue, which has escaped the assessment and also , such issue comes to his notice subsequently in the course of the assessment proceedings, notwithstanding that the reasons for such issue has not been included in the reasons recorded under section 148 of the income tax act. Therefore it is apparent that if for the reasons the case of the assessee is reopened does not result into any addition on that account, the AO cannot make any addition on any other issue in reopened the assessment proceedings. This issue is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in [2011] 331 ITR 236 (Bom)COMMISSIONER OF INCOME-TAX v.JET AIRWAYS (I.) LTD. Where in it has been held that explanation 3 to section 147 of the Income-tax Act, 1961, was inserted by the Finance (No. 2) Act of 2009, with effect from April 1, 1989. The effect of the Explanation is that even though the notice that has been issued under section 148 containing the reasons for reopening the assessment does not contain a reference to a particular

issue with reference to which income has escaped assessment, the Assessing Officer may assess or reassess the income in respect of any issue which has escaped assessment, when such issue comes to his notice subsequently in the course of the proceedings. Parliament having used the words “assess or reassess such income and also any other income chargeable to tax which has escaped assessment”, the words “and also” cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word “or”. The Legislature did not rest content by merely using the word “and”. The words “and” as well as “also” have been used together and in conjunction. Evidently, what Parliament intends by use of the words “and also” is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess : (i) such income ; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147 . 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 accepts 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 notice under section 148 would be necessary in the event of challenge by the assessee. The effect of section 147 as it now stands after the amendment of 2009 can therefore, be summarised as follows : (i) the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year ; (ii) upon the formation of that belief and before he proceeds to make an assessment,

reassessment or recomputation, the Assessing Officer has to serve on the assessee a notice under sub-section (1) of section 148 ; (iii) the Assessing Officer may assess or reassess such income, which he has reason to believe, has escaped assessment 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 the section ; and (iv) though the notice under section 148(2) does not include a particular issue with respect to which income has escaped assessment, he may none the less, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. Therefore, as no addition has been made on the reasons for which the assessment of the assessee is reopened, the order of assessment made by the learned assessing officer cannot be sustained. In view of this we allow ground number 1-3 of the appeal of the assessee.

10. As we have already allowed ground number 1-3 on the issue of reopening the ground number 4 which is on the merits of the issue is not adjudicated.
11. Accordingly, appeal of the assessee is allowed.

Order pronounced in the open court on 13/01/2020.

-Sd/-  
(K.N.CHARY)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 13/01/2020  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi