

आयकर अपीलिय अधिकरण, पुणे न्यायपीठ “एक-सदस्य मामला” पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “SMC”, PUNE**

श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / **ITA No.325/PUN/2017**
निर्धारण वर्ष / **Assessment Year : 2009-10**

Sunil Kanhaiyalal Gidwani,
C.S. No.34, Laxmi Bunglow,
Revenue Colony,
South Shivaji Nagar,
Sangli-416416.

PAN : AFDPG9973Q

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Circle-1,
Sangli.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / **ITA No.327/PUN/2017**
निर्धारण वर्ष / **Assessment Year : 2009-10**

Sunil Kanhaiyalal Gidwani (HUF),
C.S. No.34, Laxmi Bunglow,
Revenue Colony,
South Shivaji Nagar,
Sangli-416416.

PAN : AAHHS9603Q

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Circle-1,
Sangli.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Sunil Ganoo
Revenue by : Shri S. P. Walimbe

सुनवाई की तारीख / Date of Hearing : 28.01.2020
घोषणा की तारीख / Date of Pronouncement : 07.02.2020

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are **two appeals** under consideration. Both the appeals are directed against the separate orders of the CIT(A)-1, Kolhapur dated

09.12.2016 and 30.11.2016 for the common assessment year 2009-10 respectively. Since the facts and issues are common in both the appeals, therefore, these were heard together and are being disposed of by this composite order.

ITA No.325/PUN/2017

2. We shall take up the appeal in ITA No.325/PUN/2017 for narrating the facts and adjudicating the issue.

3. Briefly stated that relevant facts include that the assessee is engaged in the business of trading activities and filed the return of income declaring total income of Rs.8,73,400/- in the individual capacity. At the end of the assessment u/s 143(3) r.w.s. 147 of the Act, the Assessing Officer made the additions u/s 68 of the Act. The CIT(A) confirmed the action of the Assessing Officer and dismissed the appeal of the assessee.

4. Aggrieved with the above decision of the CIT(A), the assessee is in appeal before the Tribunal with the following grounds :-

“1. Learned CIT (A) has erred in fact & in law in confirming reopening of the assessment u/s 147. Without any reason to believe about the escapement of income & reopening is done merely on suspicion & doubts & without any material or evidence of escapement. & Because it is already mentioned by A.O. in the reasons recorded by A.O. that assessee has not proved genuineness of the loan taken which clearly shows that assessment is made in prejudice manner & it was already fixed by A.O. to make addition u/s 68 irrespective of facts & evidences, which is highly illegal. & Because there was no occasion for appellant to prove the creditworthiness in A.Y. 2009-2010 which fact was known to A.O. & this is nothing but fishy & arbitrary reason of A.O. about the escapement merely based on whims & hence reassessment is bad in law & against the factual position also.

2. *Learned CIT (A) has erred in fact & in law in treating business income of the appellant of Rs 502804/- as income from undisclosed source without any evidence or proof.*

3. *Learned CIT (A) has erred in fact & in law in confirming addition u/s 68 on substantive basis in respect of loan given to Gajanan Sadashiv Koli of Rs 1165000/-. Irrespective of the fact that the provisions of section 68 are not at all applicable in the present case because this is a case of loan given not accepted. & Irrespective of the fact that the loan is given out of taxable income which is shown in the return & tax is also paid upon it & this fact is also accepted by A.O. & Irrespective of the fact that this will be double taxation. & Irrespective of the fact that there is no contrary material with A.O.*

4. *Learned A.O. has erred in fact & in law in confirming addition u/s 68 on substantive basis in respect of loan given to Jay Maharashtra Consumers Pvt. Ltd. of Rs 475000/-. Irrespective of the fact that the provisions of section 68 are not at all applicable in the present case because this is a case of loan given not accepted. &*

Irrespective of the fact that the loan is given out of taxable income which is shown in the return & tax is also paid upon it & this fact is also accepted by A.O. & Irrespective of the fact that this will be double taxation. & Irrespective of the fact that there is no contrary material with A.O.

5. *Learned CIT (A) has erred in fact & in law in confirming addition u/s 68 in respect of loan received from Sunil Gidwani (HUF) of Rs 955000/- Irrespective of the fact that Rs 955000/- are given out of soya trading income & all the necessary details / proofs of this income are given during the course of assessment proceedings of appellant & also in the case of Sunil Gidwani (HUF) & Irrespective of the fact that all this income is shown by Sunil Gidwani (HUF) in the return & tax is also paid upon it & this fact is also not disputed by A.O. & There is no contrary evidence or material with A.O.*

6. *Learned CIT (A) has erred in fact & in law in confirming addition u/s 68 in respect of loan received from Meghna Gidwani of Rs 60000/- Irrespective of the fact that Rs 60000/- are given out of disclosed & all the necessary details / proofs of this income are given during the course of assessment proceedings of appellant & also in the case of Meghna Gidwani. & Irrespective of the fact that all this income is shown by Meghna Gidwani in the return & tax is also paid by Meghna Gidwani & this fact is also not disputed by A.O. & There is no contrary evidence or material with A.O.*

7. *The appellant craves to leave, add / amend or alter any other grounds of appeal.”*

5. Before me, at the outset, referring to the ground no.1, which is legal in nature, ld. Counsel for the assessee brought our attention to the **“reasons recorded”** by the Assessing Officer and submitted that reasons recorded by the Assessing Officer before issuing of notice u/s 148 of the Act, are aimed at making verification to dig out the concealed income and

hence the reassessment proceedings are invalid. Further, ld. Counsel for the assessee submitted that an identical issue with identical “reasons” came before the Co-ordinate Bench of the Tribunal in **assessee’s own case** for the assessment years 2005-06 to 2007-08 vide ITA Nos.302 to 304/PUN/2019 order dated 01.11.2019. Eventually, the Tribunal decided the same in favour of the assessee on technical grounds. Further, ld. Counsel submitted that the contents of para 7 to 13 of the said order of the Tribunal (supra) are relevant in this regard.

6. After hearing both the parties and considering the said order of the Tribunal in assessee’s own case (supra), I find identical issue already adjudicated by the Tribunal and decided the same in favour of the assessee. Further, I find the contents of para 7 to 13 of the said order of the Tribunal (supra) are relevant and for the sake of completeness, the said para 7 to 13 are extracted hereunder :-

“7. I have heard the rival submissions and perused the material on record on the preliminary issue of re-opening the assessment. The Assessee in the present ground is challenging the validity of the reassessment proceedings u/s 147/148 of the Act. The law on re-opening of an assessment under the Act, is fairly settled. The Assessing Officer can re-open an assessment only in accordance with the express provisions provided in Section 147/148 of the Act. It is only on the Assessing Officer strictly satisfying the provisions of Section 147 of the Act that he acquires jurisdiction to re-open an assessment. Section 147 of the Act, clothes the Assessing Officer with jurisdiction to reopen an assessment on satisfaction of the following: (a) The Assessing Officer must have reason to believe that (b) Income chargeable to tax has escaped the assessment and (c) In cases where the assessment sought to be reopened is beyond the period of four years from the end of the relevant assessment year, then an additional condition is to be satisfied viz: there must be failure on the part of the Assessee to fully and truly disclose all material facts necessary for assessment. The requirement in the first proviso to Section 147 of there having to be a failure on the part of the Assessee "to disclose fully and truly all material facts" does not at all apply where the initial return has been processed under Section 143(1) of the Act.

8. In the present case it is required to be noted that by the impugned notice, the assessment for AY 2005-06 is sought to be reopened in exercise of power under

Section 147 of the I.T Act. The reasons recorded to reopen the assessment are as under :

“According to information gathered from informed sources, local enquiries and media reports, it has come to be known that Shri Karihaiyalal Gidwani, owns three flats, one in his name and two in the names of his two sons - Kailash and Amit in the Adarsha Housing Society. Again, one flat is learned to be booked in the name of Shri Gajanan S. Koli, where apparently it is believed that Shri Sunil K. Gidwani, son of Kanhiyalal Gidwani, has lent finance to purchase the same. All payments for the same were apparently made through Gidwani Family's various bank accounts in which apparently cash amounts were deposited and the same were transferred into the accounts of Gidwani's wife, son and daughter-in-law in HDFC Bank at Worli. Thereafter the said amounts were apparently transferred into the account of Ms. Jay Maharashtra CPL, HFDC Bank, Worli, in which Gidwani's sons are directors for making payments towards cost of the flats. On verification, it is seen that Shri Sunil Gidwani, the assessee, is assessed to income-tax and that he has advanced interest-free loans to the extent of Rs 51.3 lakhs to Shri Gajanan Koli for purchase of flat in Adarsha Coop. Housing Society, Mumbai, payments as under :-

S.No	Date	Amt (Rs.)
1	15.07.2004	50,000
2	15.09.2004	3,00,000
3	27.10.2005	9,75,000
4	06.07.2006	5,00,000
5	07.08.2007	5,00,000
6	25.10.2007	10,71,000
7	19.03.2008	5,70,000
8	12.02.2009	11,65,000
		51,31,000

The loan advanced to Shri Koli is interest-free loan and there are no business connection or relation between Shri Sunil Gidwani and Shri Gajanan Koli. No security of any kind against the loan from Shri Gajanan Koli is obtained.

In view of the above and on **verification of return of income filed for the assessment year 2005-06**, along with its enclosures, it is revealed that -

(i) During the year under consideration, the assessee has given **Rs.3,50,000/-** to Shri Gajanan S. Koli towards investment in Adarsha CHS, the **genuineness of the sources of this investment is not proved**. Therefore in view of the above, I have reasons to believe that the income chargeable to tax to the extent of Rs 350,000 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.”

Thus, as per the reasons noted hereinabove the reasons recorded by the AO is **on the basis of verification of the return of income filed by the Assessee**

alongwith with the enclosures. According to the AO it shows that assessee has given loan to Shri Gajanan Koli for investment in Adasrsh CHS, the genuineness of the source of investments is not proved and thus he has reason to believe that income chargeable to the extent of loan given has escaped assessment.

9. So far as the proposition of the Ld DR to the effect that when a return of income is processed u/s 143(1) of the Act, the Revenue has great latitude in reopening an assessment is concerned, I fully agree only to that extent with the aforesaid proposition but at the same time various high courts have held that, even in such cases, where return of income is processed u/s 143(1) of the Act, the reopening of an assessment can only be done if there is reason to believe that income chargeable to tax has escaped assessment. Here it would be relevant to refer to the observations of Hon'ble Delhi High Court in the case of CIT Vs. Orient Craft Ltd reported in [2013] 29 taxmann.com 392 (Delhi) wherein the Hon'ble High Court has observed that the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made u/s 143(3) of the Act and the other applicable where an intimation was earlier issued u/s 143(1) of the Act. It observed that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the re-opening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. It further observed that in doing so, it is further open to the assessee to challenge the reasons recorded u/s 148(2) of the Act on the ground that they do not meet the standards set in various judicial pronouncements.

10. I also find that various High Courts have held that for a mere verification of the claim, the power of reopening of assessment could not be exercised. The High Courts have also held that the AO under the guise of power to reopen an assessment cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment. Here the reference could be made to the decision of Hon'ble Gujarat High Court in the case of Inductotherm (India) P Ltd Vs. M Gopalan, DCIT reported in (2013) 356 ITR 481 (Guj) wherein it has been observed by Hon'ble High Court that for a mere verification of the claim, the power of reopening of assessment could not be exercised. It further observed that the Assessing Officer under the guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims, as if it were a scrutiny assessment.

11. When the facts of the present case is seen in the light of the decisions cited hereinabove, I am of the view that the reopening is sought by the AO **on the basis of the return of income filed by the assessee** and is **for the purpose of verification of the issue and is not based on any tangible material.**

12. I further find **that identical reasons were recorded by the AO for reopening the assessments in the case of Shri Kilash Kaniyalal Gidwani, Shri Sunil Kanhaiyalal Gidwani and Shri Sunil Kanhiyalal Gidwani.** When the reopening was challenged before the Co-ordinate Bench of the Tribunal, in their cases, the Tribunal vide order dated 11.09.2019 (ITA No769/PUN/2014) **held that the AO was not justified in taking recourse to the provisions of Sec. 147 of the Act and it struck down the initiation of assessment proceedings and the consequential assessment order passed u/s 147 of the Act.**

13. Considering the totality of the aforesaid facts, I am of the view that AO in the present case was not justified in taking recourse to the provisions of s. 147 of the Act and therefore the initiation of reassessment proceedings are not in accordance with law. I therefore set aside the initiation of reassessment proceedings and the

consequential assessment order. Thus, the grounds of the assessee in ITA No.302/PUN/2019 for A.Y. 2005-06 is allowed.”

7. After comparing the reasons recorded by the Assessing Officer for the year under consideration with that of the assessment years 2005-06 to 2007-08, I find the following are the relevant para from page 9 of the Paper Book and the same is extracted hereunder :-

“.....
(i) During the year under consideration, the assessee has given Rs.11,65,000/- to Shri Gajanan S. Koli towards investment in Adarsha CHS, **the genuineness of the sources of this investment is not proved.** Therefore, **in view of the above, I have reasons to believe** that the income chargeable to tax to the extent of Rs.11,65,000/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.”

8. From the above, it is seen that the Assessing Officer's observation about Rs.11,65,000/- is more or less similar to that of Rs.3.5 lakhs (supra) attempted to be taxed as concealed income for the assessment year 2005-06. On this concluded income and after examining the reasons, the Tribunal already quashed the reassessment proceedings as invalid. From the above extract, it is also evident that the Assessing Officer, based on mere suspicion regarding the genuineness of sources of investment, is of the opinion that the said amount has escaped to the assessment. There is no prima-facie reason for the Assessing Officer to come to that line of the reason to believe about the concealed income. In our opinion, it is a case of issuing notice u/s 147 of the Act for conducting roving enquiries and without having any tangible material that works as a "live wire".

9. Considering the above decision of the Tribunal (supra), I am of the view that the Assessing Officer was not justified in taking recourse to the provisions of section 147 of the Act and therefore, the initiation of reassessment proceedings are not in accordance with law. Therefore, following the rule of consistency, I set-aside the initiation of reassessment proceedings and the consequential assessment. Thus, the legal ground raised by the assessee by way of ground no.1 is allowed.

10. Considering the relief granted to the assessee on the legal issue, the adjudication of the other merits related grounds becomes academic exercise only. Thus, the other grounds raised by the assessee are dismissed as academic.

11. In the result, the appeal of the assessee in ITA No.325/PUN/2017 is partly allowed.

ITA No.327/PUN/2017

12. As stated earlier, the facts and issues in ITA No.325/PUN/2017 are identical to this appeal (ITA No.327/PUN/2017), therefore, our decision in ITA No.325/PUN/2017 shall apply *mutatis mutandis* to this appeal. Further, on perusal of the reasons as given at page 7 of the Paper Book, we find the following is the reasons for formation of reason to believe about the concealment of income :-

“.....

Therefore, verification of investment made by Gidwani family through various bank accounts reveals the need to unearth the undisclosed income.

Therefore in view of the above, I have reasons to believe that the income of the assessee Shri Sunil Gidwani (HUF) chargeable to tax for the A.Y. 2009-10 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.”

13. From the language used by the Assessing Officer, the above reasons itself shows that the Assessing Officer desires to conduct verification into the investment and leave alone the taxation of the concealed income. In our view, such verification of investment is linked to the suspicion and doubts. In this case, there is no ‘reason to believe’. It is settled legal proposition that the provisions of section 147 of the Act is not meant for conducting or verifying or roving enquiries as evident in the instant case. The “reasons recorded” in this case does not indicate the existence of any tangible material to the Assessing Officer that works as ‘live wire’. The provisions of section 147/148 of the Act cannot be invoked merely to conduct roving enquiries. Thus, the legal ground raised by the assessee is allowed.

14. Considering the relief granted to the assessee on the legal grounds, in our view, the adjudication of merits of addition becomes only an academic exercise. Accordingly, relevant grounds are dismissed.

15. In the result, the appeal of the assessee in ITA No.327/PUN/2017 is partly allowed.

16. Resultantly, both the appeals of the assessee are partly allowed.

Order pronounced on this 07th day of February, 2020.

Sd/-
(D. KARUNAKARA RAO)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे / Pune; दिनांक Dated : 07th February, 2020.
Sujeet

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Kolhapur;
4. The Pr. CIT-1, Kolhapur;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "एक-सदस्य मामला" / DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune