IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member)

ITA No. 2246 & 2247/Kol/2019
Assessment Years: 2011-12 & 2012-13

Subodh Chandra Das……Appellant
C/o S.N. Ghosh & Associates, Advocates
"Seben Brothers' Lodge"
P.O. Buroshibtala
P.S. Chinsurah
Dist. Hooghly
West Bengal - 712 105
[PAN : AVNPD 7603 E]

Vs.

Income Tax Officer, Wd-23(3), Hooghly……Respondent

Appearances by:
Shri Somnath Ghosh, Advocate, appeared on behalf of the assessee.
Shri Jayanta Khanra, JCIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : February 25th, 2020
Date of pronouncing the order : March 4th, 2020

ORDER

Per J. Sudhakar Reddy, AM :-

Both these appeals filed by the assessee are directed against separate but identical orders of the Learned Commissioner of Income Tax (Appeals) – 6, Kolkata, (hereinafter the "ld.CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 16/08/2019 for the Assessment Year 2011-12 & dt. 21/08/2019 for the Assessment Year 2012-13

2. As the issues arising in both these appeals are identical, they are heard together and disposed off by way of this common order.

3. The assessee, Shri Subhodh Ch. Das, is an individual carrying on the business of purchase and sale of raw jute, edible oils, seasonal fruits etc. He filed his return of income on 07/03/2012 for the Assessment Year 2011-12 and on 19/09/2012 for the Assessment Year 2012-13. The Assessing Officer received information from DDIT (Inv.), Unit-1, Kolkata [DDIT], and based on this information he recorded reasons for reopening the assessments and thereafter reopened the assessment for both the assessment years u/s 147 of the Act, by issuing notice u/s 148 of the Act. Thereafter, he completed the assessment for the assessment year 2011-12 on 13/12/2018

determining the gross total income at Rs.11,20,501/- interalia making addition of Rs.7,24,475/-, as undisclosed profit and for the assessment year 2012-13, determined the total income at Rs.49,64,207/- *interalia* making addition u/s 68 of the Act and disallowing claim of expenditure. Aggrieved assessee carried the matter in appeal.

3.1. For the assessment year 2011-12, the ld. CIT(A) dismissed the case as withdrawn. For the assessment year 2012-13, the ld. CIT(A) granted part relief.

4. Aggrieved with both the orders, the assessee is in appeal before us.

5. The ld. Counsel for the assessee, submitted that the ld. CIT(A) was wrong in recording that the assessee has chosen to withdraw the appeal. He submitted that payment of disputed demand does not take away the right of the assessee to pursue an appeal and alleged acquiescence by the authorised representative of the appellant if any to withdraw the appeal is wrong and unauthorized and hence not accepted by the assessee. Hence he submitted that the assessee has filed these appeals.

5.1. The ld. Counsel for the assessee, challenged the reopening of assessment for both the assessment years. He submitted that the reasons recorded for both the assessment years are identical and the figures mentioned in the reasons for reopening for both the Assessment Years is the same and a copy has been placed at page 55 of the paper book. He took this bench through the reasons and submitted that there is total non-application of mind by the Assessing Officer to the information received from the DDIT (Inv.) and that this is evidenced by the fact that the assessing officer has recorded in the reasons that the assessee is engaged in "Tyre Business" and whereas as per the facts recorded by the Assessing Officer himself, in the assessment order, states that the assessee was not engaged in tyre business but that he was engaged in trading in raw jute, pulses, fruits, taking mango gardens on lease etc. He further pointed out that in the reasons itself, it is recorded that the assessing officer has formed his belief on "suspicion". He argued that the reasons recorded should be a trigger for coming to a conclusion that income subject to tax has escaped assessment and that the bank account in question is a disclosed bank account and cash deposits and withdrawals therefrom are official transactions recorded in the cash books and ledgers which were audited and report filed along with the return of income, such official record of transaction cannot

lead to a conclusion that they are unaccounted transactions which resulted in income escaping assessment. That the books were impounded by the DDIT (Inv.) and that all the cash transactions were explained before the DDIT and that after such explanation of all the cash deposits, and as all these transactions are part of the accounts based on which return of incomes were filed by the assessee there is no trigger for forming a reasonable belief that cash transactions recorded in the official books and official bank account are unexplained cash transactions not disclosed to the Department. He further submitted that the assessing officer has simply recorded reasons of reopening based on borrowed satisfaction of the DDIT and that he is not come to a conclusion by himself by conducting a *prima* facie verification of the information to come to a conclusion that there is a escapement of income subject to tax by conducting a *prima facie* enquiry.

He further submitted that the ld. Pr. CIT has not recorded proper satisfaction while granting approval u/s 151 of the Act and that he has simply recorded "fit case", and that this does not satisfy the requirements of law and hence the re-opening is bad in law.

5.2. For all the above propositions, the ld. Counsel for the assessee relied on a number of case law, which I would be considering as and when necessary.

5.3. He submitted that the reasons recorded are the same for both the assessment years and even the figures of cash deposits recorded are the same for both the years which shows no-application of mind to the information received by the Assessing Officer and that it is recorded that cash deposits are between Rs.3.69 Lakhs to Rs.37 Lakhs and that cash withdrawals range from Rs.12 Lakhs to Rs.35 Lakhs, which is a huge range, which also shows lack of application of mind to the information received.

5.4. On merits, for the assessment year 2011-12, he submitted that the books of account were impounded by the DDIT. The DDIT vide letter dt. 31/05/2018, forwarded the cash book, ledger and other books of accounts to the assessing officer and without considering the same, the assessing officer made a best judgement assessment u/s 144 of the Act, on the ground that the assessee has not produced books of accounts. He submitted that this is travesty of justice and hence bad in law.

5.5. For the assessment year 2012-13, on merits, he submitted that the assessee had taken two dilapidated properties on lease from the landlords and as a tenant and used the same for business and had incurred expenditure of Rs.7,89,910/- for making these dilapidated structures useful for his business. He submits that the expenditure has been wrongly disallowed despite the fact that the assessee has filed ample evidence in the form of agreement with the tenant etc. He argued that this expenditure is in the revenue field and has to be allowed as it has not been doubted by the revenue.

On the addition made of cash credits u/s 68 of the Act, he submitted that these were advances received from various customers and the assessee has substantiated the same with evidences and hence the addition in question is bad in law. He took this Bench through each of these evidences filed before me in the form of a paper book. In support of each of these arguments, he cited certain case law, which I would be considering as and when required.

6. The ld. D/R, submitted that the assessee should have objected before the assessing officer that he is not carrying on tyre business and not doing so at the first available opportunity results in the assessee losing its rights to object to the reopening. He submitted that, at the stage of recording of reasons, the assessing officer need not prove with evidence the escapement of income and reasonable belief of escapement of income suffices. He further submitted that DDIT (Inv.) has given a detailed report and based on this information, the assessing officer reopened the assessment after recording proper reasons and hence the reopening is valid in law. On the recording the approval u/s 151 of the Act, he submitted that the ld. Pr. CIT's remark "fit case" for reopening is a sufficient recording of satisfaction. He submitted that the issue may be restored to the file of the ld. CIT(A) on merits, for the reason that the ld. CIT(A) had dismissed the appeal for the assessment year 2011-12 as withdrawn and as the assessee disputes this conclusion of the ld. CIT(A). He submitted that the ld. CIT(A) may be directed to dispose off the appeal on merits.

He further pointed out that the issues may be sent back to the file of the lower authorities for fresh adjudication for the reason that the books of accounts were

available with the Department for the Assessment Year 2011-12 and hence passing an order u/s 144 of the Act may not be proper.

6.1. For the assessment year 2012-13, he submitted that the issue may be set aside to the ld. CIT(A) on merits for verification of the evidences filed by the assessee as it appears that factual conclusions have to be drawn.

7. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

8. We first take up the challenge to the reopening of assessment for both the assessment years, made by the assessee. The reasons recorded are expected for ready reference:-

> *"Information was received from the DDIT(INV),Unit-1(l), Kolkata vide letter No. DDIT(Inv)/Unit-1(1)/Subodh/2017-18/8155 dt. 06.03.2018, that during the financial year 2010-11 relevant to the Assessment Year 2011-12, the assessee, Shri Subodh Chandra Das, PAN: AVNPD7603E made cash deposits and withdrawals amounting to Rs. 1.17 Crore and Rs. 1.06 Crore respectively in his bank account. Cash deposits range are from 3.69 lakhs to Rs. 37.00 lakh and cash withdrawals range are from Rs. 10.00 lakh to Rs. 35.00 lakh. From the information it is also evident that in para 17A of the Form 3CD, the Auditor himself accepted the fact that the assessee has made certain payments in cash by violation of section 40A(3) of the I.T. Act,1961. Being an individual engaged in tyre business such large cash deposits and cash withdrawal do not appear to be genuine business transaction. As such, such cash deposits amounting to Rs. 1.17 crores are suspicious and have not been truly disclosed before the Department and hence, the cash deposits were the undisclosed income of the assessee which was escaped assessment as per the provision of Sec.147.*
>
> *In view of the above, have reason to believe that there is an escapement of income by the assessee during the F.Y. 2010-11 relevant to the assessment year 2011-12. Notice u/s.148 of the Income Tax Act may be issued in this case for A.Y. 2011-12, if approved."*
> ***(Emphasis Supplied)***

8.1. The reasons recorded are identical for both the Assessment Years. Even the figures recorded are the same in the reasons recorded for both the Assessment Years.

9. A perusal of the reasons demonstrate that the Assessing Officer was of the belief that the assessee is engaged in "tyre business" and as such, large cash deposits and cash withdrawals do not appear to be genuine business transaction. This assumption of the Assessing Officer is factually incorrect. The Assessing Officer in the assessment order for

the Assessment Year 2011-12 dt. 13/12/2018 at page 5, records that, "the assessee was engaged in the business of raw jute, seeds etc. in remote areas." This proves that there was non-application of mind by the Assessing Officer while recording reasons for reopening. The basis on which the reopening is made is factually incorrect. When the assessee is not engaged in "tyre business" and when he is engaged in the business of raw jute, seeds, taking mango gardens on lease etc. that too in remote areas, cash transactions are inevitable. The Assessing Officer also records that the tax auditor has noted the fact of these cash transactions in his audit report in From No. 3CD. Hence he knew that these are not unrecorded transactions. Thus, the entire premise on which the reopening is made, is bad in law. This proves total non-application of mind by the Assessing Officer to the information that came into his possession prior to recording reasons that income escaped assessment. It proves that the Assessing Officer has come to believe that the income subject to tax has escaped assessment based on wrong facts and inferences. Such re-opening is bad in law.

10. The Hon'ble Supreme Court in the case of *Chhugamal Rajpal v. S.P. Chaliha* reported in *[1971] 79 ITR 603 (SC),* has held as follows:-

> *"When instant appeal came up for hearing on the last occasion, as the court found the affidavit filed by the ITO to be vague and indefinite, the court directed the counsel for the department to produce records of the ITO to show that the ITO had complied with the requirements of section 148 and section 151(2) of the Act. When the appeal was taken up for hearing on the 18-1-1971, only the report submitted by the ITO to the Commissioner and the order of the Commissioner was produced.*
>
> *In his report, the ITO did not set out any reason for coming to the conclusion that this was a fit case to issue notice under section 148. The material that he had before him for issuing notice under section 148 was not mentioned in the report. In his report he vaguely referred to certain communications received by him from the Commissioner Bihar and Orissa. He does not mention the facts contained in those communications. All that he said was that from those communications 'it appears that these persons (alleged creditors) were name-lenders and the transactions are bogus'. He had not even come to a prima facie conclusion that the transactions to which he referred were not genuine transactions. He appeared to have had only a vague feeling that they might be bogus transactions. Such a conclusion did not fulfil the requirements of section 151(2). What that provision requires is that he must give reasons for issuing a notice under section 148. In other words he must have some prima facie grounds before him for taking action under section 148. Further his report mentioned 'Hence proper investigation regarding these loans was necessary'. In other words his conclusion is that there is a case for investigating as to the truth of the alleged transactions. That was not the same thing as saying that there were reasons to issue notice under section 148. Before issuing a notice under section 148, the ITO must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under section 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of section 147 are satisfied, the ITO has no jurisdiction to issue a notice under section 148. From the report submitted by the ITO to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has*

escaped assessment for that year; nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax had escaped assessment for that year. The court was not satisfied that the ITO had any material before him which could satisfy the requirements of either clause (a) or clause (b) of section 147. Therefore, he could not have issued a notice under section 148. Further, the report submitted by him under section 151(2) did not mention any reason for coming to the conclusion that it was a fit case for the issue of a notice under section 148. The court was also of the opinion that the Commissioner had mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under section 148. To question No. 8 in the report which read 'whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148' he just noted the word 'Yes' and affixed his signature thereunder. The Court was of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this was a fit case to issue notice under section 148. The important safeguards provided in section 147 and 151 were highly treated by the ITO as well as by the Commissioner. Both of them appeared to have taken the duty imposed on them under these provisions as of little importance. They substituted the forum for the substance.

In the result this appeal was allowed, the order of the High Court was set aside and the impugned notice quashed.

11. The Hon'ble Supreme Court in the case of *Ganga Saran & Sons (P.) Ltd. v. Income-tax Officer* reported in *[1981] 130 ITR 1 (SC)* held as follows:-

"The amount of remuneration paid to D was not without consideration; in fact, it was paid for valuable services rendered by D in solely managing the business of the Delhi branch of the assessee. Hence, one could not reasonably come to the belief that the payment of remuneration made to him was sham and bogus. It is true that D was the brother-in-law of G, the managing director of the assessee, but this circumstance could not by any stretch of imagination lead to an inference that the payment of remuneration to D, who was solely managing and looking after the business of the Delhi branch of the assessee, was sham and bogus. Even a close relative, who is in management and in charge of a business on a full time, is entitled to be paid remuneration and, in fact, it would be wholly unreasonable to expect him to work free of charge.

The statements of account of D with the assessee for the relevant accounting year as also the previous years were with the 1T0 at the time of the original assessment and these statements of account clearly showed that out of the amount of remuneration credited to his account, he had made a gift of Rs. 12,550 to the sons of G on 31-7-1957 and given a loan of Rs. 2,25,000 to G on 25-8-1958 and the ITO was fully aware that G was the managing director of the assessee. It is possible that subsequent gifts made by D to G's wife and daughter-in-law were not disclosed to the ITO at the time of original assessment but the said gifts being subsequent to the relevant accounting year, the assessee was not bound to disclose the same. Moreover, it is difficult to appreciate how the assessee could be said to be under an obligation to disclose to the ITO in the course of its assessment as to how a director, who was in sole charge of the management of the business of the assessee and who was being paid remuneration for the services rendered by him to the assessee, had utilised the amount of remuneration received by him.

It is, thus, clear that in the instant case neither the ITO had reason to believe that income of the assessee had escaped assessment nor was he right in concluding that the assessee omitted or failed to disclose fully and truly any material facts relating to its assessment. Hence, section 147(a) *was not applicable and the impugned notice issued by the ITO under section 148 was without jurisdiction."*

11.1. Applying the propositions of law laid down in the above case law to the facts of the case on hand, we have to hold that the reopening is bad in law as the belief is based on wrong facts and inferences and against the facts on record.

12. Further the Assessing Officer, in the reasons recorded clearly states that the cash deposits amounting to Rs.1.17 Crores, are "suspicious". Suspicion cannot be basis of recording reasons that income subject to tax has escaped assessment, for the purpose of reopening of assessment. The reasons recorded contradict the information in Form 3CD, wherein he noticed that the tax auditor has audited these transactions and draw some conclusions and that these were examined by the Assessing Officer. When the entire transactions, bank accounts etc. are recorded in the books, the question of coming to a conclusion that the transactions are not truly disclosed, is a factual mistake. Moreover, it is clear that the entire reasons are recorded based on borrowed satisfaction from the office of the DDIT-Kolkata, rather than *prima facie* application of mind by the Assessing Officer to the information received. The books of accounts were impounded by the investigation wing. The books of accounts were audited and the copies of the annual accounts and audit report were on the file of the Assessing Officer. The Assessing Officer has not bothered to examine the information received with these documents. He recorded reasons that he has formed a belief that income subject to tax has escaped assessment based on surmises and conjectures arising out of wrong facts.

13. The Hon'ble Delhi High Court in the case of *Signature Hotels (P) Ltd. vs. ITO* reported in *[2011] 338 ITR 51 (Del.)* held as follows:-

> *" that the reason given by the assessee did not satisfy the requirements of section 147. The reasons and the information referred to were extremely scanty and vague. There was no reference to any document or statement except an annexure. The annexure could not be regarded as a material or evidence that prima facie showed or established nexus or link which disclosed escapement of income. The annexure was not a pointer and did not indicate escapement of income. Further, it was apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. Therefore, the proceedings under section 148 were to be quashed.*

14. The Hon'ble Delhi High Court in the case of *Pr. CIT vs. G & G Pharma India Ltd.* reported in *[2016] 384 ITR 147 (Del.)* held as follows:-

> *"that after setting out four entries, stated to have been received by the assessee on a single date, i.e., 10-2-2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the Assessing Officer stated that he had also perused various materials and report from Investigation Wing and on that basis it was evident that the assessee-company had introduced its own unaccounted money in its bank account by way of above accommodation entries. The*

above conclusion is unhelpful in understanding whether the Assessing Officer applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the Assessing Officer, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the assessee, which must have been tendered along with the return, which was processed under section 143(3).Without forming a prima facie opinion, on the basis of such material, it was not possible for the Assessing Officer to have simply concluded that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries. Thus, the reassessment order was not valid."

15. The Hon'ble Delhi High Court in the case of *Pr. CIT vs. Meenakshi Overseas (P) Ltd.* reported in *[2017] 395 ITR 677 (Delhi)*, held as follows:-

"Section 68, read with section 147, of the Income-tax Act, 1961 - Cash credit (Accommodation entries) - Assessment year 2004-05 - Information was received from Director (Investigation) that during year under consideration, assessee had received accommodation entries from a beneficiary - Notice under section 148 was issued and an assessment order was passed by Assessing Officer treating credit received as unexplained income under section 68 - Whether since there was no independent application of mind by Assessing Officer to tangible material and, conclusions of Assessing Officer were reproduction of conclusion in investigation report, reasons failed to demonstrate link between tangible material and formation of reason to believe that income had escaped assessment and, consequently, reassessment was unjustified - Held, yes

16. Applying the proposition of law to the facts of this case, we have to hold that the reopening for both the Assessment Years, is bad in law, as there is non application of mind to the information by the Assessing Officer, so as to come to a reasonable belief that income subject to tax has escaped assessment.

17. The Assessing Officer has recorded the same figures of cash deposits for both the Assessment Years, which also demonstrates non-application of mind. The turnover, cash deposits, cash withdrawn etc. varies from year to year. For all these reasons, by applying the propositions of law laid down by various courts, to case on hand, we quash the reopening of assessment as bad in law for both the Assessment Years.

18. As we have quashed the reopening of assessments as bad in law for both the Assessment Years, we do not adjudicate the appeals on merit as it would be an academic exercise.

19. In the result, both the appeals of the assessee are allowed.

Kolkata, the 4th day of March, 2020.

Sd/-
[**J. Sudhakar Reddy**]
Accountant Member

Dated : 04.03.2020
{SC SPS}

Copy of the order forwarded to:

1. ***Subodh Chandra Das***
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2. ***Income Tax Officer, Wd-23(3), Hooghly***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches