IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH '(A)', KOLKATA
[BEFORE SHRI P.M. JAGTAP, HON'BLE VICE PRESIDENT (KZ) &

SHRI S. S. GODARA, HON'BLE JUDICIAL MEMBER]

[Through Virtual Court]

I.T.A. No. 2143/Kol/2019
Assessment Year : 2006-07

ACIT, Central Circle – 4(2), Kolkata.....Appellant
Room No. 506, 5th Floor,
Aayakar Bhawan Poorva,
110, Shanti Pally,
Kolkata – 700 107.

Vs

Shri Harsh Vardhan Neotia.....Respondent
7/2, Queens Park,
Kolkata – 700 019.
[PAN: ABKPN 2311 A

&

I.T.A. No. 2144/Kol/2019
Assessment Year: 2006-07

ACIT, Central Circle – 4(2), Kolkata.....Appellant
Room No. 506, 5th Floor,
Aayakar Bhawan Poorva,
110, Shanti Pally,
Kolkata – 700 107.

Vs

Smt. Madhu Neotia.....Respondent
7/2, Queens Park,
Kolkata – 700 019.

Appearances by:
Shri Ram Bilash Meena, CIT, DR appearing on behalf of the Revenue.
Nilima Joshi, FCA appearing on behalf of the Assessee

Date of concluding the hearing : August 04, 2020
Date of pronouncing the order : August 14, 2020

ORDER

PER P.M. JAGTAP, VICE-PRESIDENT (KZ)

These two appeals are preferred by the Revenue against a common order dated 24.07.2019 passed by the Ld. CIT(A) – 21, Kolkata in the case of Shri Harsh Vardhan Neotia and Smt. Madhu

Neotia and the same have been heard together and are being disposed of by a single consolidated order.

2. Both the assessees in the present case are individuals who filed their returns of income for the year under consideration originally on 30.07.2006 declaring total income of Rs. 18,98,22,722/- and Rs. 19,58,46,609/- in the case of Shri Harsh Vardhan Neotia and Smt. Madhu Neotia respectively. In the assessments originally completed u/s 147/143(3) of the Act vide orders dated 30.12.2008, the total income as declared by the assessee was accepted by the Assessing Officer. Thereafter, information was received by the AO showing that the assessees had operated bank accounts in Switzerland with HSBC Bank which were not disclosed in their regular books of account or the returns of income. He, therefore, again reopened the assessments and issued notices u/s 148 to both the assessees after recording the reasons. In reply, letters dated 18.03.2013 were filed by both the assessees in the office of the Assessing Officer requesting that returns originally filed by them on 30th July, 2006 may be treated as the returns filed in response to the notices issued u/s 148. During the course of assessment proceedings, both the assesees did not sign the 'Consent Waiver Forms' to facilitate the process of procuring the full details of transactions made through HSBC Bank Jeneva, Switzerland by the AO. They also failed to furnish the copies of their bank statements as required by the AO and finally denied of having maintained any bank accounts with HSBC, Switzerland. On the basis of whatever information received by him, the AO found that it was difficult to arrived at any concrete conclusion, as regards the deposits

and transactions made by the assessee through their HSBC accounts maintained in Switzerland. He, therefore, did not make any addition to the total income of both the assessees on this issue in the assessments completed u/s 147/143(3) vide orders dated 10.02.2015, but made a certain other additions on account of Long Term Capital Gain, Short Term Capital Gain, disallowance u/s 14A etc. and determined the total income of the assessees at Rs. 27,52,32,413/- and Rs. 28,52,11,197/- in the case of Shri Harsh Vardhan Neotia and Smt. Madhu Neotia respectively.

3. Against the orders passed by the AO u/s 147/143(3) of the Act, both the assessees preferred their appeals before the Ld. CIT(A). During the course of appellate proceedings before the Ld. CIT(A), it was contended on behalf of the assessees inter alia that the assessments were reopened by the AO on the basis of information received by him regarding the bank accounts allegedly maintained by both the assessees with HSBC Bank, Switzerland, but finally no addition was made by him to the total income of the assessees on the said issue in the assessments completed u/s 147/143(3) of the Act wherein additions were made on altogether different issues such as capital gain etc. which did not form the basis of reopening of assessments. It was contended that since no addition was made by the AO to the total income of the assessees on the issue which had formed the basis of reopening, it was not permissible for him to make additions on other issues which were not the basis of the reopening of assessments. Reliance in support of this contention was placed on behalf of the assessees on the decision of Hon'ble Rajasthan High

Court in the case of Shri Ram Singh 306 ITR 346 and the decision of Hon'ble Punjab & Haryana High Court in the case of Atlas Cycle Industries 180 ITR 319. The assessee also relied on the decision of Kolkata Bench of ITAT in the case of Dipti Mehta vs ITO (ITA No. 2032/Kol/2018 dated 01.03.2019) to contend that this legal position propounded in the various judicial pronouncements was further strengthened by insertion of Explanation 3 to section 147 by the Finance No. 2 Act 2009 with retrospective effect from 01.04.1989. The Ld. CIT(A) find merit in this contention raised on behalf of the assessee as the same was duly supported by judicial pronouncements cited on behalf of the assessee and deleted the additions made by the AO to the total income both the assessees in the assessments completed u/s 147/143(3) of the Act vide orders dated 10.02.2015 holding that if the assessments were reopened on certain issue, but no additions was made on that issue, then it was not permissible to make additions on other issues unless those other issues were connected to the issue on the basis of which the assessments were reopened.

4. Aggrieved by the order of the Ld. CIT(A), the Revenue has preferred these appeals before the Tribunal on the following identical grounds:

> *"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that in the proceeding u/s 148, no addition can be made on the other issues unless those other issues are connected to the issue on which reopening has been done.*
> *2. That the Ld. CIT(A) has erred by not considering the decision of the Hon'ble Delhi High Court in the case of Jakhotia Plastics (P) Ltd. reported in 94 taxmann.com 96 (SC)."*

5. We have heard the arguments of both the sides and also perused the relevant material available on record. The Ld. CIT, DR has not raised any material contention to challenge the relief allowed by the Ld. CIT(A) vide his impugned common order to both the assessees by relying on the various judicial pronouncements and has simply relied on the orders of the Assessing Officer in support of the Revenue's case. The learned counsel for the assessee, on the other hand, has strongly supported the impugned order of the Ld. CIT(A) giving relief to both the assessees on the issue under consideration and submitted that the decision rendered by the Ld. CIT(A) is duly supported by various judicial pronouncements discussed and relied upon by him in the impugned order including the decision of Coordinate Bench of this Tribunal. He has further relied on another decision of the Coordinate Bench of this Tribunal rendered in the case of DCIT vs M/s. Aryan Mining & Trading Corporation Ltd. vide order dated 22.05.2019 passed in ITA No. 122 & 123/Kol/2017 wherein a similar issue was involved and the same was decided by the Tribunal in favour of the assessee after taking into consideration various judicial pronouncements including the decision of Hon'ble Calcutta High Court in the case of M/s. Infinity Infotech Parks Ltd. vide paragraph No. 9 to 11 of its order which read as under:

> *"9. It should be kept in mind that the concept of assessment is governed by the time barring rule and the assessee acquires a right as to the finality of proceedings. Queitus of the completed assessment is the Fundamental Rule and exception to this rule is Re-opening of assessment by AO under section 147 or exercise of Revisional jurisdiction by CIT under section 263 of the Act. Therefore, the Parliament in its wisdom has provided safeguards for exercise of the reopening of assessment jurisdiction to AO; and revisional jurisdiction of CIT by providing condition precedent which is sine qua non for assumption/usurpation of jurisdiction. In the case of*

reopening of assessment, the reason to believe escapement of income is the jurisdictional fact and law (mixed question of fact and law) and for revisional jurisdiction the order of the AO should be erroneous as well as prejudicial to the revenue. Unless the condition precedent is not satisfied, the AO or the CIT can exercise their reopening jurisdiction or revisional jurisdiction respectively. The legislative history in respect to the reopening u/s. 147 of the Act, is that the Parliament by Direct Tax Laws (Amendment) Act 1987 w.e.f. 01.04.1989 had substituted "for reason to believe escapement of income" to 'for reasons to be recorded by him in writing, is of the opinion'' which gave unbridled subjective satisfaction to the AO was later substituted back to 'reason to believe escapement of income'', by the Direct Tax Laws (Amendment) Act, 1989. The Hon'ble Apex Court as well as the Hon'ble High Courts have already held in plethora of cases the test of a prudent person instructed in law in understanding jurisdictional fact and law (mixed question of fact and law) the reason to believe escapement of income (supra). For reopening the assessment by the AO the condition precedent of reason to believe escapement of income is sine qua non. It must be kept in mind that reasons to believe postulates foundation based on information and belief based on reason. Even if there is foundation based on information, still there must be some reason warrant holding the belief that income chargeable to tax has escaped assessment. It has to be kept in mind that the Hon'ble Supreme Court in Ganga Saran & Sons P. Ltd. Vs. ITO (1981) 130 ITR 1 (SC) held that the expression "reason to believe" occurring in sec. 147 "is stronger" than the expression "if satisfied" and such requirement has to be met by the AO in the reasons recorded before usurping the jurisdiction u/s. 147 of the Act. We note that before the AO assumes jurisdiction to re-open it is necessary that the conditions laid down in the said section 147 has to be satisfied viz., AO should record "reason to believe" that the income chargeable to tax for that assessment year has escaped assessment. If this condition is not satisfied at the first place, then it cannot be said the AO has validly assumed jurisdiction u/s. 147 of the Act. Therefore, the question for consideration is whether on the basis of the reasons recorded by the AO, he could have validly usurped the jurisdiction to reopen and reassess the assessee on a different issue which has not found place in the reason recorded, when the fact is that the precise basis (issue) recorded in reasons to believe escapement of income has disappeared or dropped. For that it has to be seen as to whether the AO on the basis of whatever material before him, [which he had indicated in his "reasons recorded"] the AO had reasons warrant holding a belief that income chargeable to tax has escaped assessment. It is important to

remember that the reasons recorded by AO to reopen has to be evaluated on a stand-alone basis and no addition/extrapolation can be made or assumed, while adjudicating the legal issue of AO's usurpation of jurisdiction u/s. 147 of the Act. Moreover, the Parliament has given power to AO to reopen the assessment, if the condition precedent as discussed above is satisfied, and not otherwise. It has to be kept in mind that the jurisdictional fact and law is the 'income' which according to AO, escaped assessment, which he has to spell out while recording reasons for reopening u/s. 147 of the Act. This "income" which has escaped assessment and which according to him, constituted the basis/foundation for reopening is precisely the jurisdictional fact and law which empowered him to usurp the jurisdiction to reopen and reassess the escaped income as contemplated u/s. 147 of the Act. We note that in the present case in hand notice u/s. 148 for reopening was issued on 17.02.2015 and the reasons recorded for reopening the assessment was that the assessee has suppressed the actual production of iron ore to the tune of 8,78,079 MT valued at Rs.1,79,41,61,259/- thereby escapement of income happened and for which precise reason recorded AO invoked the reopening jurisdiction after the assessment was framed u/s. 153A/143(3) of the Act on 28.04.2014 (supra). However, we note that at page 3 of the reassessment order the AO has accepted the contention of the assessee after going through the Form HI filed before DG, Mines and has recorded that he is not drawing any adverse inference so far as production of iron ore by the assessee and did not make any addition/disallowance on this issue for which purpose only he invoked his reopening jurisdiction u/s. 147 of the Act. So, we note that here is a case wherein the AO invoked the reopening jurisdiction for a specific purpose which issue was dropped, then according to assessee and rightly so, the condition precedent for assuming jurisdiction has disappeared/absent, then the AO lacks jurisdiction to proceed further to reassess any other income which he has not taken note in the reasons recorded to reopen. Therefore, the AO ought not to have proceeded to reassess the assessee on a new issue of artificial loss created by misusing the client's code modification. And, therefore, the jurisdictional fact which is sine qua non to assume jurisdiction is found to be lacking/absent and, therefore, the very invocation of jurisdiction to reopen itself is not existing and, therefore, when the foundation on which reopening was initiated is non-existing then the AO's assumption of jurisdiction is without jurisdiction and so all subsequent action is a nullity in the eyes of law. At the cost of repetition we say that AO without satisfying the condition precedent as stipulated under section 147 of the Act cannot have successfully usurped the reopening jurisdiction, so as

discussed above the precise fact for which the AO re-opened in this case disappeared after AO dropped the same, thereafter ideally the AO should have dropped the reassessment proceedings and ought not to have proceeded to reassess the assessee on an issue which he did not refer at all in the reasons recorded to justify re-opening. The Explanation (3) to Sec. 147 of the Act, will come to the aid of the AO/department only when the AO has successfully usurped/assumed the reopening jurisdiction on the strength of the reasons recorded by him to re-open the assessment. So without successfully satisfying the condition precedent to reopen i.e. reason to believe escapement of income, which can be discerned from reading of the reasons recorded by the AO that too on a stand alone basis, the AO cannot proceed to make any other additions without making any additions on the facts specifically stated in the reasons recorded for which he decided to reopen. We would like to make it clear that in this case when the AO realized that the reason for re-opening i.e, suppression of iron ore production is non-existing, then the AO should have first dropped this reassessment; and thereafter ought to have recorded reasons indicating escapement of income on account of misuse of client code modification and issued fresh notice u/s 148 of the Act and initiated reassessment for the same. We note that the Hon'ble Bombay High Court in Jet Airways (I) Ltd. (supra) have discussed all the case laws on the issue and considered various Hon'ble High courts decisions. However, we note that the Hon'ble Punjab & Haryana High court in Majinder Singh Kang (supra) has not delved into the ratio decidendi laid by the Hon'ble Bombay High Court decision in Jet Airways (I) ltd. (supra). The Hon'ble Punjab &Haryana High court in the case of CIT Vs. Mehak Finvest (P) Ltd. (supra) has followed the Division bench order in Majinder Sing Kang (supra) since it was binding on the same High Court and taking into consideration that the SLP against the Majinder Singh Kang has been dismissed.

10. However, we note that the Hon'ble Bombay High Court in the case of Jet Airways (supra) has considered at length the effect of the insertion of Explanation (3) to sec. 147 of the Act by the Finance No. 2 Act, 2009 retrospectively w.e.f. April 1, 1989 and has laid down the ratio decidendi of the issue before us. We note that the jurisdictional High Court i.e. Hon'ble Calcutta High Court in ITAT No. 60 of 2014 in GA No. 1736 of 2014 CIT Vs. M/s. Infinity Infotech Parks Ltd. has concurred with the view taken by the Hon'ble Delhi High Court judgment in Ranbaxy Laboratories Vs. CIT 336 ITR 136 (Del.) and Hon'ble Bombay High Court in CIT Vs. Jet Airways India Ltd. 331 ITR 236 (Bom.) approved the Tribunal's view on the same which is reproduced as under:

"We further find that similar view was taken by the Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways India Ltd. (supra) and the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories India Ltd. (supra). The ratio laid down in these decisions is that reassessment must be in the first place, be in respect of income escaped assessment for which the reasons were recorded and only thereafter in respect of some other items of escaped income. If, however, the income, escapement of which was the foundation for recording of reasons to believe, is not assessed or reassessed in the order under section 147, then it is not mere open to the AO to independently assess any other income, which comes to his notice subsequently." (Emphasis given by us)

11. Since we have taken note that there is no whisper about the escapement of income i.e. loss created by misusing client's code modification has been mentioned in the reasons for reopening conveyed to the assessee vide letter dated 19.03.2015 no addition in respect of this can be made without making any addition in respect to the item shown to have been escaped assessment in the reasons recorded by ibid letter dated 19.03.2015. During reassessment when the AO finds that the item on the basis of which he reopened does not survive, then the reasons recorded to reopen loses its significance and the fall out is that the AO's jurisdiction to reassess is without jurisdiction and therefore is illegal and fragile in the eyes of law; and thereafter he should have dropped the reassessment proceeding there only as discussed supra. Therefore, after having no jurisdiction to reassess his further action of a new fact finding in the absence of any item specified in the reasons recorded which is the foundation on which he reopens when no longer subsists, the AO's action is hit being 'Quarum non-judice' and, therefore, the impugned addition is non-est in the eyes of law and so it has to necessarily go. Therefore, the appeal of the Revenue is devoid of any merits and, we find that the legal issue has been rightly decided in favour of the assessee and the action of the Ld. CIT(A) is upheld. Since we have decided the legal issue, the merits of the case have become academic in nature and needs no adjudication.

6. It is thus clear that the solitary common issue involved in these appeals of the Revenue is squarely covered in favour of the assessee by the various judicial pronouncements including the decision of Hon'ble Calcutta High Court in the case of M/s. Infinity Infotech Parks

Ltd. (supra) and respectfully following the same, we uphold the impugned order of the Ld. CIT(A) giving relief to both the assessees on the said issue.

7. In the result, both the appeals of the Revenue are dismissed.

Order Pronounced in the Open Court on 14th August, 2020.

Sd/-	Sd/-
(S.S. Godara)	(P.M. JAGTAP)
JUDICIAL MEMBER	VICE PRESIDENT

Dated: 14/08/2020
Biswajit, Sr. PS

Copy of order forwarded to:

1. ACIT, Central Circle – 4(2), Kolkata.
2. Shri Harsh Vardhan Neotia & Smt. Madhu Neotia, 7/2, Queens Park, Kolkata – 700 019.
3. The CIT(A)
4. The CIT
5. DR

True Copy, By order,

Assistant Registrar / H.O.O.
ITAT, Kolkata