

आयकर अपीलिय अधीकरण, न्यायपीठ – “ए” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “VIRTUAL COURT A” KOLKATA*

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

**ITA No.2396/Kol/2019 &
C.O.No.48/Kol/2019**
(a/o ITA No.2396/Kol/2019)
Assessment Year: 2012-13

Dy. Commissioner of Income Tax, Circle-6(1), Aayakar Bhawan, 6 th Floor, P-7, Chowringhee Square, Kolkata-700 069 M/s Gaurav Rose Real Estate Pvt. Ltd., C/o G K Steels, Sagar Estates, 2, N.C. Diutta Sarani, 4 th Floor, Unit-3, Dalhousie, Kolkata-700 001 [PAN No.AABCG 0729 J]	<u>बनाम</u> / V/s.	M/s Gaurav Rose Real Estate Pvt. Ltd., C/o G K Steels, Sagar Estates, 2, N.C. Diutta Sarani, 4 th Floor, Unit-3, Dalhousie, Kolkata-700 001 Dy. Commissioner of Income Tax, Circle-6(1), Aayakar Bhawan, 6 th Floor, P-7, Chowringhee Square, Kolkata-700 069
अपीलार्थी /Appellant/ प्रतयाक्षेपक / co-objector	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri S.M. Surana, Advocate
राजस्व की ओर से/By Respondent	Shri Dhrubajyoti Ray, JCIT, DR
सुनवाई की तारीख/Date of Hearing	28-09-2020
घोषणा की तारीख/Date of Pronouncement	21-10-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue's appeal and assessee cross objection for assessment year 2012-13 arise against the Commissioner of Income Tax (Appeals)-2 Kolkata's order dated

30.08.2019 passed in case No.10471/CIT(A)-2/18-19 involving proceedings u/s 147 r.w.s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. For the reasons stated in the Revenue's condonation petition and on account of assessee's no objection, we condone one day's delay in filing of the Revenue's appeal **ITA No.2396/Kol/2019**. The case is now taken up for adjudication on merits.

3. The Revenue's twin substantive grounds raised in respect to the instant appeal *inter alia* plead that the CIT(A) has erred in law and on facts in quashing the Assessing Officer's action initiating sec. 148 r.w.s. 147 proceedings as merely based on conjecture and surmises thereby deleting the sec. 68 addition of unexplained cash credits to the tune of ₹3,10,00,000/- and commission thereupon of ₹3,10,000/- @ 1% of the former 69C of the Act; respectively. The CIT(A)'s detailed discussion to this effect reads as under:-

"I have further gone through the reasons as recorded by the AO and the same does not reveals that it has been mentioned or held by the AO that there is failure to disclose fully and truly all material facts on the part of the appellant. The relevant portion of the reasons as recorded by the AO are as under:-

*It is pertinent to mention here that ill this case the assessee has filed return of income for the year under consideration but no assessment as stipulated u/s. 2(40) of the Act was made and **the return of Income was only processed u/s 143(1) of the Act.** In view of the above provisions of clause (b) of explanation 2 to section 147 are applicable to facts of this case the assessment year under consideration is deemed to be a case where income chargeable tax has escaped assessment.*

In this case more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice V/s, 148 has been obtained separately from Pr. CIT as per the provisions of sect. 15 of the I. T. Act.

The AO has further mentioned that assessment in this case, was completed u/s 143 (1) and not scrutiny assessment was completed in the appellate case prior to issue of notice u/s 148. The facts are different as the assessee filed its return on 03.10.2012 disclosing an income of Rs.58,94,600/-. The said return taken up for assessment by issue of notice u/s 143(2) and after making the required enquiries the assessment was completed u/s. 143(3) on 25.03.2015 on total income of Rs. 1,20,82,850/- by making several additions. However, the said

additions were deleted by the Ld. CIT(A)-7 vide order dated 25.01.2018, copy of which are placed in the paper book Subsequently, the assessment was reopened u/s 147 by issue of notice u/s. 148 which was served on 27.03.2018. In response to the same the assessee filed return on 24.04.2018 and assessment was again completed u/s 147/143(3) dated 30.12.2018, the appeal against said order is under consideration.

*The AO passed the re-assessment order when the original assessment was made u/s. 143(3) **and the reopening beyond 4 years from the end of the assessment year.** There being no whisper in the reasons recorded that **income has escaped assessment for failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment** and as such the action u/s 147 was not in accordance with law. The case the proceedings u/s.147 were not in accordance with law and accordingly the assessment is void-ab-initio and is illegal to be declared as null and void. The assessment has been reopened u/s 147 after expiry of 4 years. The earlier assessments were completed u/s 143(3). However, it appears from the assessment order now passed that nowhere in the reasons recorded the AO was satisfied that that income has escaped assessment for failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. I find that, it is evident from the reasons recorded that there is no whisper-that-the income has escaped assessment for failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. When there is no case that there was failure on the part of the assessee to disclose all material facts necessary for assessment which is not whispered in the reasons recorded and for arguments sake even in the reassessment order the proceedings initiated u/s 147 is bad in law in view of various decisions cited as under:-*

The Allahabad High Court in the case of Pradeshiya Industrial & Investment Corpn. of U.P. Ltd reported **332 ITR 0324** has held that.-

Reassessment-Full and true disclosure-Notice after expiry of four years-Where there was full and true disclosure of all material facts during the original assessment and in the return filed by assessee and all the basis of those facts and application of mind by the AO, deduction under section 36(1)(viii) was allowed, notice for reopening issued after four years questioning the deduction as wrongly allowed, on the same facts was not valid as complete facts were already submitted. There was no failure of the assessee to disclose full and true facts for allowabilty of deduction under section 36(1)(viii).

Admittedly, notice under section 148 was issued after the expiry of four years. The notice under the proviso of section 147 can be issued after the expiry of four years only in, case where income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

From the perusal of the reason recorded it is apparent that no case has been made out that the assessee had failed to disclose fully and truly all material facts necessary for his assessment and no observation has been made in this regard.

The Madras High Court in the case of Fenner (India) Ltd reported **241 ITR 0672** has held that:-

Where assessment was reopened under section 147, after expiry of four years from the end of relevant assessment year, **assessing officer must prove that assessee has not disclosed full material facts in relation to escaped income so as to give legality to the notice issued under section 148. The duty of an assessee is limited to fully and truly disclose all the material facts. If the details placed by the assessee before the assessing officer was in conformity with the requirements of all applicable laws and known accounting principles and materials details had been exhibited before the assessing officer, it is for the assessing officer to reach such conclusions as he considered was warranted from such data and any failure all his part to do so cannot be regarded as assessee's failure to furnish the material facts truly and fully. Any lack of comprehension on the part of the assessing officer in understanding the details** placed before him cannot confer a justification for reopening the assessment, long after the period of four years had expired. On the facts of this case, it is clear that the escapement of income if any on this account is not on account of any failure on the assessee's part to disclose the material facts fully and truly. The notice issued by the assessing officer in exercise of his power under section 147, therefore, cannot be sustained.

The Gujarat High Court in the case of Garden Silk Mills Ltd reported **222 ITR 0027** has held that.-

the notice was issued after four years when there was no failure on the part of the assessee to disclose material facts necessary for assessment. The notice of reassessment was not valid and was liable to be quashed. Where an assessment under sub-section (3) of section 143 has been made for the relevant assessment year, notice under section 148 issued after expiry of four years from the end of the relevant assessment year quashed-because there was no material on record that Income chargeable to tax escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

The Delhi High Court in the case of Global Signal Cables (India) (P) Ltd reported 368 ITR 0609 has held that:--

Reassessment - Full and true disclosure
Absence of new material on information-AO reopened assessment under section 148 on the ground that

assessee had granted interest free loan, therefore, proportionate disallowance on account of interest and financial charges out of total interest and financial charges debited in Profit and Loss Account should have been made resulting in under assessment of income. Assessee challenged reopening of assessment on the ground that reopening was initiated on the basis of review or re-appreciation of the same material and no fresh material of any sort had come in the possession of the department as also **there had been no failure on the part of the assessee in disclosing fully and truly all material facts.**

Held: The facts of the present case were squarely covered by the decision in Swarovski India Pvt Ltd. v. Dy. CIT W.P.(C) 1909/2013 decided on 8-8-2014, wherein the notice under section 148 was quashed for being issued after the expiry of 4 years from the relevant assessment year wherein **there was no specific mention of which material facts were not disclosed by the assessee in the course of its original assessment proceedings under section 143(3).** In the present case also, there exist no grounds for reopening the assessment after the expiry' of 4 years from the relevant assessment years as the notice was based on re-appreciation of the same material on record. Revenue had not specifically indicated as to which material facts were not disclosed by the assessee in the course of the assessment proceedings under the said Act.

The Bombay High Court in the case of Grindwell Norton Ltd reported **267 ITR 0673** has held that:-

Nowhere in the reasons recorded by the assessing officer. it is stated that there is a failure on the part of the assessee to disclose material facts in the return filed by the assessee. It is not in dispute that in the present case, reopening of the assessment is beyond the period of four years from the end of the relevant assessment year. **In the absence of any failure on the part at the assessee to disclose fully and truly all material facts. the reopening of the assessment beyond the period of four years cannot be sustained.**

The .Bombay High Court in the case of Hindustan Lever Ltd.- reported 268 ITR 0332 has held that:- .

The reasons recorded by the assessing officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of relevant assessment year, therefore, notice issued under section 148 beyond four years relevant assessment Year was barred by limitation. In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was 31-03-1997 and from that date of four years are counted, the period of four years expired on 01-03-2001. The notice issued on dated 05-11-2002 and received by the assessee on 07-11-2002. Under these circumstances, the notice is clearly beyond the period of four years. **The reasons recorded by the assessing officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded are required to be read as they were recorded by the assessing officer.**

No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the assessing officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the assessing officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the assessing officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the assessing officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness, The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the assessing officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The assessing officer, in the event of challenge to the reasons, must be able to justify the same based all material available on record. He must disclose all the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded, assessment. The reasons recorded by the assessing officer cannot be supplemented by filing affidavit or making oral submission, .otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced. Having recorded finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147, the assessing officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3). On this short count alone the impugned notice is liable to be quashed and set aside.

The Calcutta High Court in the case of Jay Shree Tea & Industries Ltd reported 245 ITR 0567 has held that:-

After completion of the assessment, the assessing officer had issued notice under section 148 read with section 147, to the petitioner, asking the petitioner that its income had escaped as deduction under section 32AB(S) allowed more than the amount permissible under section 32AB of the Act The petitioner has challenged this notice on the ground that the notice has been issued after four years from the end of the relevant assessment year. Therefore, before the issue of notice, the income Tax Officer should satisfy whether any income has escaped and that the assessee has failed to disclose fully and truly all material facts necessary for the assessment.

Sustainable – In circumstances of case, there is hardly any case of escapement of income and **Secondly, department has failed to prove that assessee has failed to disclose fully and truly all material facts required for assessment**

of its income therefore, notice issued after 4 years from completion of assessment is quashed.

Before issue of notice under section 148, if he wants to issue notice after 4 years from the assessment years, the Income Tax Officer has to satisfy himself that there was an escapement of income to tax in the assessment order and secondly, that the assessee has failed to disclose fully and truly all material facts for assessment of his income. Admittedly, the notice under section 148 has been issued after the expiry of 4 years from the end of the relevant assessment years. If one looks into the assessment order as well as the chart produced by both the counsels, there is hardly any case of escapement of income. Secondly, the department has failed to prove that the assessee has failed to disclose fully and truly all material facts required for assessment of its income. Assuming but not accepting that there is some mistake in calculation either on the part of the assessee or on the part of the Income Tax Officer, that does not mean that the assessee has not disclosed fully and truly the material facts regarding his income. If some calculation mistake has been committed for the purpose of deduction under a particular section, that can be rectified, under section 154 of the Act, but on that ground no notice under section 148 can be issued. When the notice itself is bad in law, there is no reason to carry on with the futile exercise of completion of reassessment proceedings. Therefore, on both the counts there is no case or justification to issue the notice under section 148, particularly when the Income Tax Officer cannot assume jurisdiction to Issue notice under section 148 as per the provisions of the Act and the facts of this case.

While the proceedings under section 143(2) had culminated into an order under section 143(3), the issuance of the notice under section 148 after a period of four years requires that there ought to be a failure to disclose fully and truly all material facts. This is the settled principle as held in Oracle India (supra), BDR Builders & Developers (P) Ltd. v. DCIT (2017) **SCC Online Delhi 9408** which are all recent judgments of this Court.

In view of above, the reasons recorded by AO does not stand the test as laid by plethora of judicial precedence as discussed above which is necessary to assume jurisdiction u/s 147 of the Act. Therefore, I find that the reasons recorded by the AO to justify reopening the assessment u/s. 147 fails and, therefore, the very assumption of jurisdiction to reassess the assessee fails. Since the AO failed to do so as discussed, the assumption of jurisdiction by him to reopen itself is *corum non judice* and, therefore, all subsequent action is null in the eyes of law. In view of above, I quash the reopening and consequence reassessment order framed by him. I view of above, **these legal grounds of appeal are allowed.**”

4. We have given our thoughtful consideration to rival pleadings. Learned departmental representative is fair enough in not disputing the clinching fact that the Assessing Officer's re-opening reasons recorded in the present case forming part of CIT(A)'s above extracted discussion has treated the assessment in issue to be sec.

143(3) processing whereas the fact remains that it was an instance of regular assessment u/s 143(3) of the Act having been framed on 25.03.2015. We make it clear that we are dealing with assessment year 2012-13 and the Assessing Officer had initiated u/s 148 proceedings vide his corresponding notice served on the assessee on 27.03.2018. We observe in this factual backdrop that once it was a regular assessment and the Assessing Officer had nowhere recorded the assessee's failure in having disclosed fully and truly, all the relevant particulars, sec. 147 first proviso restricting the exercise of the re-opening jurisdiction without satisfying the corresponding embargo, renders the same as not sustainable in the eyes of law. We quote hon'ble apex court's celebrated decision in *Commissioner of Income Tax, Bangalore vs. K.Y. Pillah And Sons* (1967) 63 ITR 411 (SC) to affirm the CIT(A)'s action quashing the impugned re-opening in entirety as their lordships made it clear long back that such a course of actors may not involve independent examination of the relevant facts at the tribunal's behest. The Revenue fails in its sole substantive grievance as well as in the main appeal **ITA No.2396/Kol/2019**.

5. Learned authorized representative invited our attention to the assessee's cross objection **CO No.48/Kol/2019** supportive of the CIT(A)'s action thereby pleading *inter alia* that the same was not sustainable in law due to lack of his failure in having recorded the exact amount of taxable in and escaping assessment. We observe that once we have uphold the CIT(A)'s action, the assessee's instant cross objection is rendered infructuous. Ordered accordingly.

6. This Revenue's appeal **ITA No.2396/Kol/2019** is dismissed and assessee's cross objection **CO No.48/Kol/2019** is dismissed as rendered infructuous.

Order pronounced in open court on 21/10/2020

Sd/-
(लेखा सदस्य)
(J.Sudhakar Reddy)
Accountant Member
*Dkp-Sr.PS

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

दिनांक:- 21/10/2020

कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक /Assessee-M/s Gaurav Rose Real Estate Pvt. Ltd., C/o G K Steels, Sagar Estates, 2, N.C.Dutta, Sarani, 4th Floor, Unit-3, Dalhousie, Kol
2. राजस्व /Revenue-DCIT, Circle-6(1), Aayakar Bhawan,6th Floor, P-7, Chowringhee Square, Kolkata-700 069
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।