

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA. No. 683/JP/2019
निर्धारण वर्ष / Assessment Years : 2009-10

Smt. Sushila Chachan 45-A, Cosmo Colony, Amrapali Circle, Vaishali Nagar, Jaipur-302021.	बनाम Vs.	The ITO, Ward-4(2), Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: ABLPC2084J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Shrawan Kumar Gupta (C.A.)
राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (ACIT)

सुनवाई की तारीख / Date of Hearing : 18/01/2021
उदघोषणा की तारीख / Date of Pronouncement : 30/03/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of the Id. CIT(A)-II, Jaipur dated 22.03.2019 relevant to assessment year 2009-10 wherein the assessee has taken the following grounds of appeal:-

"1. The impugned order u/s 143(3) rws 147 dated 18.11.2016 as well as the action taken u/s 147 by the Id. AO are bad in law, invalid, illegal and on facts of the case, for want of jurisdiction, barred by limitation and various other reasons and hence the same may kindly be quashed.

2. The Id. CIT(A) has grossly erred in law as well as on the facts of the case in confirming the trading addition of Rs. 53,645/- by estimating the business income of Rs. 73,915/- as against 20,270/- declared by the assessee and the Id. AO also erred in making the trading addition without invoking the provisions of Sec. 145(3) of the IT Act. Hence the addition so made by the Id. AO and confirmed by the Id. CIT(A) being contrary to the provisions of law, hence the same may kindly be deleted in full.

3. Rs. 2,27,540/-: The Id. CIT(A) has grossly erred in law as well as on the facts of the case in confirming the addition of Rs. 2,76,540/- on account of long term capital gain by not allowing the cost of construction and transfer expenses. Hence the addition so made by the AO and confirmed by the Id. CIT(A) is being totally contrary to the provisions of law and facts on the record and hence the same may kindly be deleted in full.

4. The AO has grossly erred in law as well as on the facts of the case in charging interest u/s 234A, B,C and the appellant totally denies in liability of charging of any such interest. The interest, so charges, being contrary to the provisions of law and facts, may kindly be deleted in full.

2. Briefly the facts of the case are that the assessee has filed her original return of income on 31.03.2010 declaring total income of Rs. 12,13,040/-. Subsequently notice U/s 148 of the IT Act was issued on 22.03.2016 and in response, the assessee filed her return of income on 25.07.2016 disclosing the income of Rs. 12,13,040/- as originally declared. Subsequently, the assessment was completed U/s 147 r.w.s.

143(3) of the Act wherein the Assessing Officer assessed the long term capital gain on sale of industrial plot at Rs. 14,78,929/- as against Rs. 12,07,389/- declared by the assessee. Further, trading addition of Rs. 53,645/- was also made by estimating the net profit @ 8% on the total declared sales/turnover of Rs. 9,23,932/- thereby assessing business income of Rs. 73,915/- as against Rs. 20,270/- declared by the assessing. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has since confirmed the additions and against the said findings, the assessee is in appeal before us.

3. During the course of hearing, the Id. AR taken us through the reasons recorded by the Assessing Officer before issuance of notice U/s 148 of the Act and the same reads as under:-

"On the basis of information available for the year under consideration, the assessee has sold an immovable property of Rs. 2475000. Information was called for from the assessee u/s 133(6) of the Income Tax Act, 1961. Assessee has not furnished any reply/supporting evidence in response to notice u/s 133(6). Therefore, the assessee failed to disclose truly and fully all material facts required for her/his assessment.

Looking to the facts mentioned above, I have the reasons to believe that the income to the extent of Rs 2475000/- has escaped assessment within the meaning of section 147 of the IT Act, 1961. Therefore, it is a fit case to issue notice u/s 148 of the I.T. Act, 1961"

4. It was submitted by the Id. AR that on perusal of the reasons, it may be noted that the Assessing Officer has stated that the assessee has sold an immovable property during the previous relevant to the impugned assessment year and which has not been disclosed by her. It was submitted that the reasons so recorded are factually incorrect without considering the material available on record in terms of original return of income filed by the assessee on 31.03.2010 wherein she has clearly disclosed capital gain on sale of the immovable property which is the subject matter of reasons so recorded by the Assessing Officer. It was accordingly submitted that the Assessing Officer has not considered the material available on record and applied his mind before recording the reasons that the income has escaped assessment, therefore, the notice so issued on the presumption and assumption and due to non-application of mind cannot be sustained in the eye of law. It was further submitted that once the assessee has declared the capital gains truly and fully in her return of income originally filed, that there cannot be any escapement of income as so alleged in the noticed issued U/s 148 of the Act.

5. It was further submitted that on perusal of the assessment order, it may be noted that the Assessing Officer has accepted the income so declared by the assessee whereas the whole of the sale consideration of Rs. 24,75,000/- has been truly disclosed and the Assessing Officer has not made any addition on the said issue, therefore, where there is no addition in respect of the matter in respect of which the reasons have recorded, the Assessing Officer is precluded from making any other addition in terms of disallowance of construction expenses as well as

transfer expenses and trading addition so made by him. In support, the reliance was placed on the following decisions:-

1. CIT vs. Shri Ram Singh 306 ITR 343 (Raj. HC)
2. CIT vs. Jet Airways (I) Ltd. 331 ITR 236 (Bom. HC)
3. Ranbaxy Laboratories Ltd. vs. CIT 336 ITR 136 (Del. HC)

6. It was accordingly submitted that there is no justifiable basis for acquiring jurisdiction by the Assessing Officer by invoking the provisions of Section 148 of the Act and therefore, notice so issued and consequent proceedings u/s 147 may be directed to be deleted.

7. Per contra, the Id. DR relied on the finding of the lower authorities and our reference was drawn to the findings of the Id. CIT(A) which are contained at para 2.3 of his order which reads as under:-

"2.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. The plea taken by the AR of the assessee is regarding validity of the assessment proceedings. The AO reopened the assessee proceedings after recording the due reasons and due satisfaction after following the due process. The case of the assessee was reopened in the light of information/documents to the extent which were available with the AO. The material before the Assessing Officer was relevant and affords a live link or nexus to the formation of the prima facie belief that income chargeable to tax has escaped assessment in the hands of the assessee. The sufficiency and correctness of material need not be looked at the initial stage at the time of reopening of the case. While considering whether commencement of reassessment proceedings was valid, the court has only to see whether there

was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not anything to be considered at that stage.

The "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, he can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion and what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief.

In view of above finding I do not find any legal infirmity on the plea, hence the reopening is invalid is not acceptable and hence dismissed.

8. We have considered the rival submissions and perused the material available on record. In this case, the assessee had originally filed her return of income on 31.03.2010 with ITO Ward 4(2), Jaipur declaring total income of Rs 12,13,040/-. The fact that return of income has been originally filed on 31.03.2010 is not in dispute and has infact been acknowledged by the AO in the assessment order. In the return of income so filed, the assessee has disclosed capital gains of Rs 12,07,389 on sale of an immoveable property declaring sale consideration of Rs 24,75,000/- and has claimed indexed cost of acquisition/improvement and transfer expenses. Thereafter, notice u/s 148 was issued on 22.03.2016 by the same Assessing officer, i.e, ITO Ward 4(2) after recording reasons wherein it has been stated that "On

the basis of information available for the year under consideration, the assessee has sold an immovable property of Rs. 2475000. Information was called for from the assessee u/s 133(6) of the Income Tax Act, 1961. Assessee has not furnished any reply/supporting evidence in response to notice u/s 133(6). Therefore, the assessee failed to disclose truly and fully all material facts required for her/his assessment.” We find that the very basis of reopening is that the assessee has sold an immovable property, she has failed to respond to notice u/s 133(6) and thus, the assessee has failed to disclose the said transaction and which has thus been made the basis for reopening the assessment proceedings. The fact that there is a return of income already filed by the assessee wherein she has disclosed the said transaction has thus not been considered by the AO while recording the reasons. The assessee may not have responded to notice u/s 133(6), however, where she has already filed her return of income and wherein the said transaction has been duly disclosed, there cannot be any failure on part of the assessee to disclose truly and fully such transaction. Thus, the very basis for reopening the assessment is basis incomplete facts available on record where such transaction has been duly disclosed and offered to tax which shows non-application of mind by the AO while recording the reasons and it cannot be held that there is a nexus between the material available on record and formation of belief that the income has escaped assessment. Similar view has been taken by the Coordinate Bench in case of **Shri Narain Dutt Sharma vs ITO** (ITA No.203/JP/2017 dated 07.02.2018) wherein it was held as under:

"13. We have heard the rival contentions and perused the material available on record. Firstly, it is noted that in the instant case, the notice under section 148 in exercise of powers under section 147 has been issued on 23.03.2014 after the expiry of period of four years from the end of the impugned assessment year i.e, AY 2007-08. In terms of proviso to section 147 of the Act, an action under the said provisions can be taken by reason of failure on the part of the assessee to file his return of income or to disclose fully and truly all necessary facts necessary for his assessment for the subject assessment year. The contention of the Revenue at the time of recording the reasons was that the assessee had failed to file his return of income for the impugned assessment year and the same was not reflected in the IT system. Per contra, the Id AR has submitted that return of income for the AY 2007-08 was filed by the assessee manually with ITO- Ward 6(1) Jaipur vide acknowledgment no. 2611000925 on 21.05.2008. It is relevant to note that the return of income so filed manually is with ITO Ward 6(1) who is the same officer who has subsequently issued the notice u/s 148 of the Act and therefore, Revenue cannot take the plea that return was filed wrongly by the assessee with another officer not having jurisdiction over the assessee. The related contention of the Revenue that the return so filed manually not uploaded in the IT system therefore cannot be accepted more so in the context of reassessment proceedings and where there is fault on the part of the assessee in filing his return of income.

14. Interestingly, during the course of reassessment proceedings, the ITO in his reassessment order stated clearly in Para 5 that "in the return of income filed under the head Business, you have declared income of Rs 175,510 on gross receipts of Rs 21,93,870 u/s 44AD." It is relevant to note the said return of income was not filed in pursuance to issuance of notice u/s 148 but the same was the return of income which was originally filed by the assessee u/s 139 of the Act. It is therefore clear that the whole foundation of the Revenue's reasoning is contradictory and self-defeating where at the time of issuance of notice u/s 148, it says that the assessee has failed to file his return of income and subsequently, during the proceedings u/s 147, it admits that the assessee has filed his return of income originally under section 139. On this ground itself, the assumption of jurisdiction u/s 147 cannot be sustained and the subject proceedings are liable to be quashed."

9. In light of aforesaid discussion and following the decision referred supra, where the very foundation for reopening the case is vitiated given that the assessee has filed her return of income disclosing the transaction of sale of immovable property for the specified consideration and offering the same to tax, there cannot be any reasons to believe that income has escaped assessment for the very same transaction the assumption of jurisdiction u/s 147 cannot be sustained and the subsequent proceedings are hereby directed to be set-aside.

10. In light of the aforesaid discussions, other contentions advanced by the Id AR including that on merits of the additions have become academic and thus not adjudicated upon.

In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 30/03/2021.

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)

(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 30/03/2021.

***Santosh**

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Smt. Sushila Chachan, Jaipur.
2. प्रत्यर्थी / The Respondent- ITO, Ward-4(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 683/JP/2019 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar