

आयकर अपीलीय अधीकरण, न्यायपीठ –“C(SMC)” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C(SMC)” BENCH: KOLKATA
 [Before Hon’ble Shri A. T. Varkey, JM]

I.T.A. No. 1055/Kol/2019
Assessment Year: 2009-10

Tapan Chakraborty (PAN: AHZPC2170R)	Vs.	Income-tax Officer, Ward-1(2), Durgapur
Appellant		Respondent

Date of Hearing (Virtual)	01.07.2021
Date of Pronouncement	07.07.2021
For the Appellant	Shri Somnath Ghosh, Advocate
For the Respondent	Shri Jayanta Khanra, JCIT

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A), Durgapur dated 20.03.2019 for AY 2009-10.

2. At the outset, the Ld. AR of the assessee Shri Somnath Ghosh, Advocate brought to our notice that this is a case wherein the AO has exercised his jurisdiction to reopen the assessment u/s. 147 of the Income-tax Act, 1961 (*hereinafter referred to as the “Act”*) by issuing notice u/s. 148 of the Act based on certain AIR information. According to the Ld. AR, the condition precedent for invoking the jurisdiction u/s. 147 of the Act is that AO should have “reason to believe, escapement of income” of the assessee in the year under consideration. According to the Ld. AR, in this case this essential condition precedent is absent and, therefore, the AO did not had the requisite jurisdiction to reopen the assessment and, therefore, all consequential action taken by the AO are bad in law. For buttressing his arguments, the Ld. AR drew our attention to the reasons recorded by the AO to reopen the assessment which according to the Ld. AR does not reveal that the AO had formed the belief based on the information he received (AIR) that there was an escapement of income of the assessee in this assessment year. In order to examine this assertion of the Ld. AR, it would

be prudent to reproduce the reasons recorded by the AO to reopen the assessment u/s. 147 of the Act which is as under:

“REASON FOR REOPENING OF THE CASE: TAPAN CHAKRABORTY, PAN: AHZPC2170R, AY 2009-10

This office is in receipt of a letter dated 08.01.2016 from the O/o the Jt. CIT, Range-1, Durgapur, containing AIR related information for the A.Y. 2009-10. On perusal of the said information, an individual transaction statement (ITS relevant to the A.Y. 2009-10 in respect of Tapan Kumar Chakraborty PAN: AHZPC2170R has been generated in AST.

As per record the assessee has filed his return of income for the A.Y. 2009-10 on 30.03.2010 in ITR-4 declaring total income of Rs. 1,85,199/-.

Vide this office letter no. 970-971 dated 01.02.2016 approval to issue letter u/s. 133(6) has been sought from the ld. Pr. CIT, Durgapur, vide his letter no.5864 dt. 16.02.2016 Ld. Pr. CIT, has accorded his kind approval to issue letter u/s. 133(6).

After obtaining prior approval of Pr. CIT, Durgapur letter u/s. 133(6) has been issued to the assessee as well as Oriental Bank of Commerce, Andal Br. However, the AR of the assessee appeared and submitted a letter. The A/R said that the assessee has no current account and hence the assessee opened a savings a/c for operating his business transactions. In this context, the assessee's submission was not tenable and the source of cash deposit of the said A.Y. was not substantiate by the assessee. The AIR data shows that total cash deposit of Rs.10,64,200/- in a savings account. The assessee has shown Income from business of Rs.1,85,199/-. On perusal of bank statement it is seen that there is a cash deposit of Rs.10,64,200/- and total deposit of Rs. 16,11,720/-.

However, as per compliance furnished by the assessee against this office requisition u/s. 133(6), the source of deposits in the bank account could not be substantiated by the assessee with any supporting evidence. Therefore, it is concluded that the deposits in the said bank account is nothing but cash credit u/s. 68 of the I. T. Act, 1961.”

3. Drawing our attention to the reasons recorded, the Ld. AR submitted that the AO states that he was in receipt of a letter dated 08.01.2016 from the Office of the Joint Commissioner of Income-tax, Range-1, Durgapur wherein as per the AIR information for the AY 2009-10 in respect of the assessee who has declared total income of Rs.1,85,199/-. According to the information, the AO notes that the assessee had a savings bank account in Oriental Bank of Commerce, (Andal Branch) wherein total cash deposit of Rs.10,64,200/- was deposited. The AO, however, acknowledges in the reasons recorded that the assessee has shown income from business of Rs.1,85,199/- and a perusal of bank statement shows that cash deposit is to the tune of Rs.10,64,200/- out of the total deposit of Rs.16,11,720/-. That according to the AO, the assessee failed to substantiate the source of deposits in the bank account with any supporting evidence, therefore, he concluded that the deposit in the said bank account is nothing but cash credit u/s. 68 of the Act. Based on these reasons

recorded, the AO has reopened the assessment of the assessee for AY 2009-10 by issuing notice u/s. 148 of the Act. However, it is noted that the reasons recorded by the AO (supra) does not make any averment by the AO that the essential condition precedent for reopening the assessment i.e. “reasons to believe” of the AO (Formation of belief by AO) in respect of “escapement of Income” has not been anywhere stated by the AO without which he could not have validly assumed jurisdiction to reopen the assessment. It is elementary that all receipts are not income; and it is settled law that when a receipt of an assessee is sought to be taxed as income of the assessee, the initial burden to prove that it falls within the ken of the taxing provision is on the AO; and if the AO succeeds to bring the receipt in question in the teeth of the charging provision of the tax law, then the onus shifts on the assessee to demonstrate that the receipt is non-taxable being exempt. Be that as it may, in this case it has been brought to the notice of this Tribunal that the assessee had filed before the AO along with his regular return of income on 30.03.2010 (AY 2009-10) the P&L Account from which it is clear that the assessee has shown gross receipt from transport contract of Rs.16,11,720/- (page 26 of paper book) which includes the cash deposit made in the account of the assessee. According to Ld. A.R the assessee is a transport contractor who arranges truck in lieu of commission. Further the Ld. AR drew our attention to the bank statement placed at pages 18 to 20 of the paper book which reveals that cash deposit is followed by issue of cheque as payments (within one or two days) to different persons (lorry owners). This fact is revealed from few entries in the bank statement wherein on 15.04.2008 the assessee received Rs.22,000/- cash deposit (page 18 of PB) and the assessee had issued cheque to Shri Madan Roy on 17.04.2008 an amount of Rs.10,000/- and on 18.04.2008 to Shri Nema Dey of Rs.5,000/- totaling Rs.15,000/- was thus paid to the lorry owners/drivers within two days. The bank statement reveals total receipts of Rs. 16,11,720/- out of which cash deposits of Rs. 10,64,200/- which was followed with cheque issuance to various persons which fact shows that followed by regular deposits payments/withdrawals are also made by the assessee. The assessee’s contention is that he is a transport contractor which as a matter of fact has been accepted by the AO in the assessment order framed u/s. 147/143(3) of the Act. So, according to him, being a transporter his income could have been taxed by applying the provisions of section 44AE of the Act i.e. on presumptive basis @ 5% (AY 2009-10) of the total receipt, and by virtue of this provision he is not required to keep

any books of account (AY 2009-10) as was the law which stood in this relevant assessment year. Whereas the assessee had filed ROI on 30.03.2010 showing as his income of Rs. 1,85,200/- which is more than the presumptive tax and had filed the computation of income (page 25 of PB) wherein assessee has shown income from transporting business of Rs. 16,11,720/- and expenses (truck fare etc.) to the tune of Rs. 13,75,280/- and has shown net income of Rs. 2,36,440/- and after claiming deduction has returned an income of Rs. 1,85,199/- along with the P&L account wherein also the gross receipt is shown as Rs. 16,11,720/-. So when these documents are there with the department, when the AO is in receipt of any information (AIR) about such as assessee, then it was incumbent upon him to carry out preliminary enquiry and collect some material so as to form 'a belief' that assessee's income have escaped assessment.

4. It should be kept in mind that the concept of assessment is governed by the time barring rule and an assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence/material regarding undisclosed income or AO has information in his possession showing escapement of income. Here it is important to understand that information adverse may trigger "*reason to suspect*", then the AO to make reasonable enquiry and collect material which would make him believe that there is in fact an escapement of income. The statutory mandate/condition precedent for an AO to exercise his power to reopen an assessment is that he should record in his reasons recorded that he has formed the belief based on the reason upon the foundational facts revealed by the information which he (AO) received. It is settled that "*Reason to believe*" postulates a foundation based on information and a belief based on reason. After a foundation based on information, is made there still must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped income. In this context it must be remembered that Hon'ble Supreme Court in M/s Ganga Saran & sons (P) Ltd. vs. 130 ITR 1 (SC) has held that the expression "Reason to believe" occurring in section 147 of the Act is stronger than the expression "is satisfied" and such requirement has to be met by the AO before he usurp the jurisdiction to re-open an assessment. So in this case, from a perusal of the reasons recorded by the AO (supra), he has not even stated whether based on the information he got, the assessee's income has escaped

assessment. He simply stated the information he got and concluded that the cash deposits are cash credit u/s 68 of the Act. The AO's conclusion does not reveal any reasons. Reason is the link between the information and the conclusion, which is absent. The information of cash deposit is the only basis for the conclusion. Thus the reason to form the belief that income has escaped assessment is absent in this case and which is *sine qua non* to usurp the jurisdiction to re-open. The essential requirement of law to re-open an assessment is "Reason to believe" escapement of income, which requirement of law, the AO has not met in the reasons recorded in the instant case. Therefore, the assessee succeeds in the legal challenge raised by him. In the light of the aforesaid facts and discussion, I am inclined to hold that the assumption of jurisdiction by AO to reopen is invalid and consequently it is held that the reopening of the assessment is bad in law and, therefore, stands quashed.

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

Order is pronounced in the open court on 7th July, 2021.

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 7th July, 2021

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Tapan Chakraborty, C/o S. N. Ghosh & Associates, Advocates, 2, Garstin Place, 2nd floor, Suite No. 203, Off Hare Street, Kolkata-700 001..
2. Respondent – ITO, Ward-1(2), Durgapur.
3. CIT(A),Durgapur. (sent through e-mail)
4. CIT, Durgapur
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Senior Pvt. Secretary/DDO
