

**IN THE INCOME TAX APPELLATE TRIBUNAL, JABALPUR BENCH,
JABALPUR (SMC)**

(through Video Conferencing)

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER

ITA No.40/JAB/2020
Assessment Year: 2013-14

Income Tax Officer, Ward -1, Rewa	vs.	Narayan Mishra, Rewa, Jabalpur (M.P.) [PAN: ADVPM 3285H]
(Appellant)		(Respondent)

Appellant by	Sh. S.K. Halder, Sr. DR
Respondent by	Sh. Abhijeet Shrivastava, Adv.
Date of hearing	30/08/2021
Date of pronouncement	31/08/2021

ORDER

Per Sanjay Arora, AM

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-1, Jabalpur ('CIT(A)' for short) dated 11/9/2020, partly allowing the Assessee's appeal contesting his assessment under section 147 read with sec.144 of the Income Tax Act, 1961 ('the Act' hereinafter) for the Assessment Year 2013-14 vide order dated 13/11/2019.

2. At the outset, confirmation was sought by the Bench from Sh. Srivastava, the Id. Counsel for the assessee, as to if the assessee had filed any Appeal or Cross Objection in respect of the impugned order, to which he replied in the negative, further clarifying that the same is being contested on merits, i.e., *qua* each of the Grounds of Appeal assumed by the Revenue, which are as under:

- (i) Whether on the facts and in the circumstances of the case, the Id. CIT(A) was justified in deleting the addition of Rs.16,69,585/- on account of unexplained investment.
- (ii) The appeal is being filed against falls under exceptional clause of para 10(c) of the Boards' Instruction No. 3/2018 dated to 11/07/2018.

3. It was, to begin with, observed that the appeal stands preferred by the Revenue in view of the exception vide para 10(c) of the Board Instruction No. 03/2018, dated 11/7/2018, issued u/s. 268A of the Act, which forms part of its latest Instruction, i.e., 17/2019, dated 08/8/2019. Sec. 268A mandates for an appellate authority to, while hearing appeals by the Revenue before it, have regard to the monetary limits fixed by the Board per its' instructions, orders or directions to the Income-tax Authorities, issued from time to time for the purpose of regulating the filing of appeals & references by the Revenue, and which, as per the latest Instruction dated 08/8/2019 is at Rs. 50 lacs for the appeals before the Appellate Tribunal, while the tax-effect of the instant appeal is admittedly below the said limit. Exceptions to the same, so that appeals could be validly filed even where they entail a tax-effect below the said limit/s, are listed at paras 10 & 11 to the Instruction dated 11/7/2018. Para 10 (c) reads as under:

'10. Adverse judgments relating to the following issues should be **contested on merits** notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:

- (a), or
- (b), or
- (c) Where the Revenue Audit objection in the case has been accepted by the Department, or'

Clearly, therefore, the audit objection by the Revenue Audit Party has to be accepted by the Revenue for its' appeal to fall within the ambit of the exception stated at para 10(c) and, accordingly, be admissible. Toward this, Sh. Srivastava would draw my attention to the Audit Objection dated 12/4/2016 (APB pgs. 10-

12), beneath which itself the Assessing Officer (AO), i.e., ITO, Ward 1, Rewa, has, vide his response thereto dated 13/4/2016, stated that the audit objection is not acceptable as the assessee had explained the investment under reference, i.e., for Rs. 16.69 lacs, for which explanation was sought from him, and addition *qua* which is the subject matter of the instant appeal. He has, in fact, he would further submit, also stated it to be a case of change of opinion. The audit objection, he concluded, has not been accepted by the AO for the Revenue to invoke the exception u/c. 10(c) supra.

The Revenue's case in this regard is that the very fact that notice u/s. 148 stands issued by the AO, which is only after recording reasons u/s. 148(2) and obtaining sanction from the Commissioner u/s. 151, implies that the Revenue had accepted the audit objection by the Revenue Audit Party (RAP). Its' appeal is thus admissible under exception 10(c) supra.

4. I have heard the parties, and perused the material on record insofar as is relevant for the Revenue's Gd. # 2.

The audit objection has been gone through. There is no reference therein to any material not already before the AO while framing the original assessment u/s. 143(3) on 10/3/2016 without making the impugned addition for Rs. 16.69 lacs. True, there is no discussion in respect of the said investment, or even a reference to the letter dated 22/2/2016 to the assessee during the course of the original assessment proceedings seeking explanation in respect of the said investment, in the assessment order dated 10/3/2016, which is brought forth for the first time only in the audit objection dated 12/4/2016. That, however, cannot by itself be read as an omission by the AO to consider the assessee's reply to the said letter, also referred to in the audit objection, the onus to show which (i.e., the said omission), would, again, be on the Revenue. The AO's comments to the

audit objection, rather, clarify that to be not the case and put pays any claim that the Revenue may make in the matter.

It could be argued, as indeed it was before me, that the very fact of the Revenue having issued notice u/s. 148 on 29/3/2019 is by itself a proof of it having accepted the audit objection and, thus, falling within the exception u/c. 10(c). The argument, impressive at first blush, is, however, facile and, in any case, not borne out by the record. The AO is categorical in his comments dated 13/4/2016 to the audit objection, making it abundantly clear that the same is unwarranted inasmuch as the assessee had explained the investment under reference, and would, in any case, be a change of opinion. The subsequent issue of the notice u/s. 148 in March, 2019, is, therefore, and, on the contrary, *a non-acceptance of the AO's non-acceptance of the audit objection by the RAP*, which clearly has prevailed in the matter leading to the issue of notice u/s. 148(1) after three years of the raising of the audit objection. The law confers plenary powers to the AO in the matter of assessment, which he exercised while framing the original assessment in March, 2016. Further, it is only on a reason to believe escapement from assessment of any income chargeable to tax that he assumes jurisdiction u/s. 147 to make an assessment bringing to tax such income/s. There is no reference to any subsequent facts, i.e., subsequent to assessment of March, 2016, or information coming to the possession of the AO, even if available on record though discovered later, i.e., after 10/3/2016, giving rise to the reason to believe escapement aforesaid, and which is a condition precedent for the issue of notice u/s. 148 and assumption of jurisdiction u/s. 147. The reasons recorded u/s. 148(2) refer to the AO's letter dated 22/2/2016 and the assessee's reply thereto, both events occurring prior to 10/3/2016, i.e., during the course of the original assessment proceedings. Further, the AO's comments to the audit objection make it amply clear that the assessee's reply to his letter dated 22/2/2016 was accepted by the AO. The Revenue has not shown

the said acceptance to be infirm, much less perverse, even as the course available in the former case would be a revision u/s. 263. It is also not the Revenue's case that the AO's opinion accepting the assessee's reply was perverse, i.e., a view no person properly instructed on facts and in law could take, as where the said reply is irrelevant or does not meet the letter dated 22/2/2016 by the AO. I am conscious, while so discussing, that there is no challenge to the notice u/s. 148(1) by the assessee, which aspect, i.e., the validity of the reasons recorded u/s. 148(2) or of the assumption of jurisdiction u/s. 147, must, therefore, be regarded as having attained finality. The present discussion only seeks to emphasize the non-sustainability of the argument advanced by the Id. Sr. DR inasmuch as there has been, both factually or legally, no omission to consider the assessee's explanation *qua* the impugned investment during the original assessment proceedings, nor the AO's view in accepting the said explanation perverse, in which either case the AO's objection to the audit objection would be rendered invalid in law. And the Revenues' subsequent action in issuing notice u/s. 148 interpreted, even as argued by the Id. Sr. DR, as an acceptance by the Revenue of the revenue audit objection. Needless to add, the Revenue has not shown me any counter by the RAP to the AO's comments dated 13/4/2016, meeting his objection, so as to exhibit thereby that the audit objection would survive the AO's comments, i.e., obtain despite the same, which (comments) would thus stand rendered inconsequential. Even as, as would be apparent, the matter is principally factual, the view taken in this case is supported by the decision by the Apex Court in *Larsen & Toubro Ltd. vs. State of Jharkhand* (in C.A. No.5390 of 2007, dated 21/03/2017).

The Revenue's appeal is thus not saved, as contended, by the exception listed under para 10(c) of the Board Instruction u/s. 119 r/w s. 268A dated 11/7/2018.

5. The Revenue's appeal is, accordingly, not maintainable u/s. 268A(1) of the Act. I decide accordingly.

6. In the result, the Revenue's appeal is dismissed.

Order pronounced in the Open Court on August 31, 2021

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 31/08/2021

Copy of the Order forwarded to:

1. The Appellant: Income Tax Officer, Ward- 1, Rewa -486001
2. The Respondent: Shri Narayan Mishra, 9/461, Nirala Nagar, Rewa - 486001
3. The Pr. CIT-1, Jabalpur
4. The CIT(A)-1, Jabalpur
5. The Sr. DR, ITAT, Jabalpur
6. Guard File

// True Copy //