

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No.3502/AHD/2014 (AY 2007-08)

(Hearing in Virtual Court)

Ashutosh Chandrakant Patel, “Ashutosh” Near Power House, Zanda Chowk, Silvassa, U.T. of D. & N.H, PAN : AGMPP 3734 C	Vs	The Assistant Commissioner of Income Tax, Vapi Circle, Vapi.
Assessee / appellant		Revenue / respondent

Assessee by	Shri A.Gopalakrishnan - CA
Revenue by	Mrs. Anupama Singla – Sr.DR
Date of hearing	14/03/2022
Date of pronouncement	06/06/2022

Order under section 254(1) of Income Tax Act

Per Dr. Arjun Lal Saini-AM:

This appeal by assessee is directed against the order of ld.Commissioner of Income Tax(Appeals)-Valsad, dated 10.11.2014 for Assessment Year (AY) 2007-08. The assessee raised the following grounds of appeal:

“01. On appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in holding that the appellant is not eligible for deduction U/s.80IB of the Income Tax Act 1961 on the ground that the return of income has not been filed as per provisions of section 80AC of the Act. The action of the Commissioner of Income Tax (Appeals) is contrary to the facts and circumstances of the case and law and deserves to be deleted.

02The appellant craves to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings.

03The appellant humbly prays that the appeal be allowed in toto”

2.The assessee vide letter dated 18.09.2012 raised the additional grounds of appeal as follows:

- “1. *On appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the learned assessing officer in re-opening the assessment by issuing notice under section 148 of the Act without recording any justifiable reason to believe that income has escaped assessment.*
2. *Alternatively and without prejudice to the above, on appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the addition by way of disallowance of deduction U/s.80IB made by the learned assessing officer in the assessment order framed U/s.143(3) r.w.s 147 of the Act on the basis of some other grounds, which does not form part of the reasons recorded for re-opening the assessment.”*

3.At the outset, Learned Counsel submits that assessee has raised additional grounds of appeal challenging the validity of reassessment under section 147 of the Act. These additional grounds are on legal issue, which goes to the root of the matter, and facts are already on records, therefore Learned Counsel prays the Bench that these additional grounds of appeal may be admitted. On the other hand, Learned DR for the Revenue has opposed the additional grounds raised by the assessee and stated that assessee did not challenge the validity of reopening of assessment during the appellate proceedings, therefore, at this stage the assessee cannot raise the additional ground.

4.We have heard both the parties on this preliminary issue. We note that assessee did not raise objections against the reasons recorded u/s 147 of the Act in the course

of assessment proceedings. Further, the ground regarding the validity of assessment was not raised before Ld CIT(A), on the contrary same is raised before the Tribunal by way of additional grounds. Learned Counsel submits before us that additional grounds of appeal may be admitted as it is being purely a legal issue and all facts are already on record. On the other hand, Learned DR for the Revenue pleaded that assessee did not raise this issue during the appellate proceedings, before the Ld CIT(A), therefore, at this stage the assessee can not raise additional ground on legal issue.

5. We note that Assessing Officer has recorded the reasons for re-opening of assessment under section 147 of the Act in assessee's case as on 01.03.2011 and notice u/s 148 of the Act was issued to the assessee on 04.03.2011 (vide assessment order para no.1). In response to notice u/s 148 of the Act, the assessee filed his return of income (vide assessment order para no.1). The assessee participated in reassessment proceedings and filed the relevant documents and details, on merits of the case, before the assessing officer. Thereafter, the Assessing Officer framed the assessment u/s 143 r.w.s 147 of the Act, dated 16.11.2011. Therefore, we note that the facts are already on assessment record, and this is a legal issue which goes to the root of the matter.

6. As we have already noted that it is purely a legal issue and all facts are already on record which goes to the root of the matter and no further inquiry is required for deciding the same as all facts are already on record. Therefore, in the light of ratio laid down by the Hon'ble Supreme Court in the case of National Thermal Power

Company Ltd., vs. CIT (1998) 229 ITR 382 (SC), we admit the additional grounds raised by the assessee.

7. Now, first we shall adjudicate the additional grounds raised by the assessee. As we have noted in earlier para that assessee has challenged the validity of re-opening of assessment u/s 147 of the Act, therefore, first of all, we should examine the reasons recorded by the assessing officer to know whether these reasons are recorded as per the scheme of the provisions of section 147 of the Act? The reasons of reopening of assessment as recorded by Assessing Officer are reproduced below:

"Name: Shri Ashutosh Chandrakant Patel

PAN:AGMPP3734C

Assessment Year: 2007-08

During the course of assessment proceedings in A.Y 2005-06 and A.Y. 2006-07, it was observed that the assessee is not fulfilling the basic conditions for claiming the deduction u/s 80IB. therefore, the claim of deduction u/s 80IB was disallowed. In the year under consideration assessee has also claimed the deduction u/s 80IB. This is a recurring issue and not entitle for claiming the deduction u/s 80IB. Therefore, I am satisfied and have reason to believe that the income chargeable to tax more than Rs.1 lacs has escaped assessment, for reopening within the meaning of Section 147 of the Act.

Therefore, notice u/s 148 of the I.T. Act is issue.

Place :Vapi

Date: 01/03/2011

Sd/- B.M. Meena

(B.M.Meena)

Income-tax Officer

Vapi Ward-1, Vapi.

8. We have gone through the above reasons recorded by the Assessing Officer, wherein we find that Assessing Officer has re-opened the re-assessment proceedings solely on the reason that during the previous assessments, that is, assessment years 2005-06 and assessment year 2006-07, assessee had not fulfilled the basic condition

for claiming deduction u/s 80IB of the Act. According to us, there are four major defects in the reasons recorded by the assessing officer, which are explained below:

(i) Possibility and Guess work: The above reasons were recorded based on possibility and guess work. The assessing officer does not have perfect information in his possession for assessment year 2007-08 (under consideration). The assessing officer has just made his estimation and applied his probability theory that there may be possibility that income for assessment year 2007-08 may be escaped from assessment, since the assessee had not fulfilled the basic condition for claiming deduction u/s 80IB of the Act for previous assessments, that is, assessment year 2005-06 and assessment year 2006-07. Therefore, assessing officer has failed to point out those basic conditions, which were not fulfilled by assessee, for claiming deduction u/s 80IB of the Act for assessment year 2007-08. Therefore, reasons are bad in law.

(ii) The reasons should be recorded on standalone basis: As per Income Tax Act, 1961, the right income should be taxed in the right assessment year. In the reasons recorded, the assessing officer took the assistance of assessment year 2005-06 and assessment year 2006-07, to assessee the income of the assessee for assessment year 2007-08, which is not permitted under the Act. Therefore, these reasons recorded by the assessing officer is not on standalone basis, for assessment year 2007-08.

(iii).Non-application of mind by assessing officer: The assessing officer has mentioned in the reasons recorded (only relevant portion of reasons recorded is reproduced) that:

“In the year under consideration assessee has also claimed the deduction u/s 80IB. This is a recurring issue and not entitle for claiming the deduction u/s 80IB.”

From the above it is clear that assessing officer did not mention in his reasons recorded that how and why the assessee is not entitled to claim deduction under section 80IB of the Act for assessment year 2007-08, this shows clear non-application of mind by the assessing officer.

(iv). The assessing officer did not highlight any tangible material to reopen the assessment for assessment year 2007-08 and reasons were recorded based on suspect.

9.From the above analysis of the reasons recorded by the assessing officer, it is abundantly clear that reasons recorded by the assessing officer are bad in law and not as per the provisions of section 147 of the Act. The reasons recorded by the Assessing Officer are not standalone basis, these reasons were recorded by using probability/guess work, there is complete non-application of mind by assessing

officer and moreover, the assessing officer has failed to point out tangible material for assessment year 2007-08.

10.As we have noted above that reasons were recorded by the assessing officer based on “**suspect**”. Since assessee has not fulfilled the conditions for assessment year 2005-06 and for assessment year 2006-07, therefore assessing officer suspects that assessee would not fulfil the conditions for claiming deduction under section 80IB for assessment year 2007-08 also. Reasons must have a live link with the formation of the belief. This is supported by Circular No.549 dated 31.10.1989 which clarified that the words “reason to believe” did not mean a change of opinion. The Hon’ble Supreme Court in ITO vs Lakhmani Mewal Das [1976]103 ITR 437 has lucidly explained the power of assessing officer to bring to tax income escaping assessment u/s.147 of the Act. The Hon’ble Court first held that the section provides that there must exist “reasons to believe“ and not “reasons to suspect”. The following were the relevant observations:

“The fact that the words "definite information" which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence. The powers of the Income-tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse

of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed.”

11. The purpose behind the relevant provisions imposing condition precedent for initiating reassessment proceedings is to ensure finality of proceedings. The Act also provides that such reason must be recorded in writing before issue of notice of reassessment so as to judge the existence of such belief before initiating reassessment proceedings by issue of notice u/s.148 of the Act. The above requirements are meant to ensure that powers to initiate reassessment proceedings are not exercised in an arbitrary manner. The Courts have analysed and explained in several cases as to what could be the valid reason to believe escapement of income, which would enable the Assessing Officer to successfully reopen the assessment. **It has been held that the words ‘reason to believe’ are stronger than the words ‘reason to suspect’ or ‘reason to doubt’.** It requires more than merely ‘satisfaction’ of the Assessing Officer. The belief entertained by the Assessing Officer must not be arbitrary or irrational. The expression ‘reason to believe’ does not mean purely subjective satisfaction of the Assessing Officer. The belief must be held in good faith. It cannot be merely pretence. Again, the belief must be of an honest and reasonable person

based upon reasonable grounds. The Assessing Officer may act upon direct or circumstantial evidence, but his belief must not be based on mere suspicion, gossip or rumours. The Assessing Officer would be acting without jurisdiction, if the reasons for his belief are not material or relevant. There should be nexus between the information coming into possession of the assessing officer and his belief on the basis of such information that income of the Assessee chargeable to tax has escaped assessment.

12. Thus, we note that reasons recorded by assessing officer does not stand the test as laid by judicial precedent as discussed above, which is necessary to assume jurisdiction u/s 147 of the Act, therefore, in the light of the aforesaid facts and circumstances of the case as discussed above , we find that the reasons recorded by the assessing officer to justify reopening the assessment u/s 147 fails and, therefore, the very assumption of jurisdiction to reassess the assessee fails. Since the assessing officer 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 and therefore, we quash the reopening and consequent reassessment order framed by him.

13. As the reassessment itself is quashed, all other issues on merits of the additions, in the impugned assessment proceedings, are rendered academic and infructuous therefore, we do not adjudicate them.

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

Order announced on 06 June, 2022 at the time of hearing in physical court of hearing.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER
Surat, Dated: 06/06/2022 /

Sd/-
(Dr ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Dkp Outsourcing P.S*

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

// True Copy //

Sr.Pvt. Secretary, ITAT, Surat