IN THE INCOME TAX APPELLATE TRIBUNAL "RANCHI" BENCH: RANCHI
VIRTUAL HEARING AT KOLKATA

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 64/Ran/2018
Assessment Year : 2010-11

ITO, Ward-3(4), Daltonganj	Vs.	Shri Rajesh Kr. Agarwal (PAN: AINPA 2619 Q)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing	14.07.2022
Date of Pronouncement	30.08.2022
For the Appellant	Shri R.R. Mittal, CA
For the Respondent	Shri Pranob Koley, Sr. D.R

ORDER / आदेश

Per Shri Rajesh Kumar, AM:

This is the appeal preferred by the revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-Ranchi [hereinafter referred to as 'Ld. CIT(A)'] dated 05.12.2017 for the assessment year 2010-11.

2. The ground raised by the revenue is under:

> *1. That on the facts and circumstances of the case, the Ld. CIT(A) has erred in quashing the reassessment order on the ground of invalid notice u/s 148 of the I.T. Act, 1961. The "change of opinion" as pointed out by the Ld. CIT(A) is unacceptable as the case was reopened u/s 148 of the Act not on the basis of mere change of opinion but on the basis of the escapement of huge amount of income by the assessee which was not taken into account by previous Assessing Officer.*

3. The revenue has challenged the order passed by the Ld. CIT(A) on the ground that the Ld. CIT(A) has wrongly held that the reopening to be bad in law as based upon mere change of opinion and thus wrongly quashed the re-opening of assessment which is in fact made on the basis of escapement of income.

4. Facts in brief are that the return of income was filed on 23.09.2009 declaring total income of Rs. 6,33,508/-. The case of the assessee was selected for scrutiny and assessment was framed u/s 143(3) of the Act vide order dated 30.12.2012 assessing total income at Rs. 6,34,360/-. The assessee is engaged in the business of trading of Kendu Leaves. The case of the assessee was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act dated 04.03.2015 which was served on the assessee on 11.03.2015. The said re-opening was done on the ground that income has escaped assessment because of three reasons namely, i) Non-deduction of TDS from transportation charges of Rs. paid by the assessee which were liable to be added back ii) the purchase of Rs. 94,63,847/- from undisclosed sources of income which is unexplained investment by the assessee and was liable to be added to the income of the assessee and iii) refund of VAT of Rs. 1,72,022/- and TCS of Rs. 4,09,770/- which were not reflected in the bank account of the assessee and thus recomputed the undisclosed income of the assessee which has escaped assessment and liable to be added in the total income. Finally the income was assessed at Rs. 1,64,68,619/- by adding all the three items as stated in the reasons recorded u/s 148(2) of the Act.

5. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) on legal issue as well as on merits. The Ld. CIT(A) allowed the appeal of the assessee on legal issue by questioning the reopening of assessment as bad in law by observing and holding as under:

> *"6.2. I have considered the submissions of the appellant and have perused the assessment order. I find that in this case Return of income for the AY 2010-11 was filed on 23.09.2009 declaring total income of Rs. 6,33,508/-. Order u/s 143(3) of the Act was passed on 30.12.2012 on a total income of Rs. 6,34,360/-. The Ld. Assessing Officer, it appears, while recording his 'reasons to believe' noted' all the facts which were already on record as would be evident from the following:*
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> > *"subsequently from assessment records, on perusal, of the Profit & Loss Account (contract work) it was observed" [para-2.1] "However, it was also seen that in the Column.27 of Audit Report (Form No.SCB'), Auditor had mentioned 'As informed to us no TDS liability on payment of freight because payment to individual truck payment is below Rs. 50,000/- during the year. "[[para-2.1] "Further, on perusal of the audit report it was also noticed that the appellant had been debited X1,06,03,297Z- in the Profit & Loss Account during the period" [para-2.2] "further, it was noticed that as per Audit Report produced by the appellant of the period 2009-*

10 the appellant had received back VAT & TCS amounting to Rs. 72,022/- & Rs. 4,09,770/-respectively" [para-2.3]."

6.3 It is quite evident that all the information on which the Ld. Assessing Officer relied upon were available on record and which were obtained at the time of the proceedings u/s.143(2)/142(1) leading to the passing of the order u/s.143(3) of the Act on 30.12.2012; These were verified and no adverse inference was drawn. This amounts to change of opinion'.

6.4 On the issue whether 'change of opinion' is allowed, useful reference can be made of the case of CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561(SC),wherein the Hon'ble Supreme Court held:

"However, one needs to give a schematic interpretation to the words 'reason to believe', failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which, cannot be per se reason to, reopen. One must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess, but the reassessment has to be based on fulfillment of certain preconditions and if the concept of change of opinion' is removed as contended on behalf of the department, then in the garb of reopening the assessment, review would take place. One must treat the concept of change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after 01.04.1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment. Under the Direct Tax Laws' (Amendment) Act,. 1987, the Parliament not only deleted the words 'reason to believe', the Parliament reintroduced the said expression and deleted, the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer, " (Emphasis Supplied)

6.5. The facts on record also show that all the necessary evidences were placed on record by the appellant during the course of the assessment proceedings which culminated in an order u/s. 143(3) of the Act dated 30.12.2012. In this regard the Hon Tie Bombay High Court in the case of Hindustan Lever Ltd. v. R.B. Wadkar, Asstt. CIT (No.2) [2004] 268 ITR 339 on the issue of "failure to disclose fully and truly all material facts relevant for assessment for the assessment year" has observed as under : -

"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 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 reach 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. The reasons are the manifestation of the mind of the Assessing Officer. The reasons

> *recorded should be self-explanatory and should not keep the, assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenged to the reasons, must be able to justify the same based, on material available on record. He must disclose in 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 the 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 an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced. "*

> *6.6. Therefore the power to reassess cannot be exercised on the basis of mere change of opinion i.e. if all facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the Assessing Officer notice under Section 147/148 of the Act is not permissible. The powers under Section-147/148 of the Act cannot be exercised to correct errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under Sections 147/148 of the Act only on satisfaction of the jurisdictional requirements. Further, the reasons for reopening an assessment has to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. In the present case, the notice was clearly issued based on the material which the Ld. Assessing Officer had sought and had been submitted by the appellant before the passing of the order u/s. 143(3) of the Act. They were part of the assessment record. The Ld. Assessing Officer was not justified in issuing notice u/s.148 of the Act on the same material which was clearly on account of 'change of opinion'. Ground of appeal is allowed."*

6. The Ld. D.R. vehemently submitted before us that the Ld. CIT(A) has grossly erred in quashing the reopening of assessment u/s 147 read with 148 of the Act by ignoring the facts of record that the AO has not examined all these three issues in the original assessment proceedings and therefore there is no question of change of opinion as has been held by the Ld. CIT(A). In defense of his arguments, the Ld. D.R relied on the couple of decisions namely Hon'ble Supreme Court of India in the case of *Indi-Aden Salt Mfg. & Trading Co. (P.) Ltd. vs. Commissioner of Income-tax reported in [1986] 159 ITR 624 (SC)* and the decision of Hon'ble High Court (Nagpur Bench) in the case of *Income-tax Appellate Tribunal vs. Bachraj Nathani reported in [1946] 14ITR191 (Nag.).* The Ld. D.R. submitted that in order to reopen the assessment, the AO is required to form a reasonable belief that income has escaped assessment since the AO had not examined these issues at all in the original assessment proceedings. The ld DR ,therefore, argued that the AO has sufficient

reasons that income has the escaped assessment and was rightly opened without there being any change of opinion. The ld DR thus prayed before the bench that the order of the ld CIT(A) may kindly be reversed.

7. The Ld. A.R on the other hand heavily relied on the order of Ld. CIT(A) by submitting that issue raised on the basis of audit report which was duly examined and was available before the AO in the original assessment proceedings and is part of assessment record. The Ld. A.R. submitted that the Ld. CIT(A) has correctly quashed the reopening of assessment on the ground of change of opinion as this record was already before the AO. The Ld. A.R. submitted that while reopening the assessment, the reasons recorded on the basis of same material and therefore there was no substantive new material before the AO and thus reasons were recorded on the basis of same material as available in the original assessment proceedings. The Ld. A.R. therefore prayed that the appeal of the revenue may kindly be dismissed by upholding the order of Ld. CIT(A).

8. After hearing the rival parties and perusing the material on record, we note that the assessment was framed in the case of assessee u/s 143(3) of the Act vide order dated 30.12.2012. We observe from the records and also rival arguments before us that the reasons recorded on the basis of audit report which was available before the AO at the time of original assessment proceedings which culminated in assessment order being framed u/s 143(3) of the Act dated 30.12.2012. Thus, this apparent from the above that there was no new substantive material before the AO at the time of recording of reasons. In our opinion, the assessment was reopened on the basis of same material which was available before the AO in the original assessment proceedings. Therefore we do not find any infirmity in the order of Ld. CIT(A) which has been passed after following the decisions of Hon'ble Apex Court in the case of *CIT Vs Kelvinator of India Ltd (2010) 320 ITR 561(SC)* and *Hindustan Lever Ltd Vs R.B. Wadkar , Asstt CIT (2004) 268 ITR 339*. Considering the facts and circumstances as

discussed above we are inclined to uphold the order of ld CIT(A) on the issue of re-opening. The appeal of the revenue is dismissed.

9. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court on 30th August, 2022

Sd/-	Sd/-
(Sonjoy Sarma/ संजय शर्मा)	(Rajesh Kumar/राजेश कुमार)
Judicial Member /न्यायिक सदस्य	Accountant Member /लेखा सदस्य

Dated: 30th August, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- ITO, Ward-3(4), Daltanganj
2. Respondent – Shri Rajesh Kr. Agarwal, Jail Hata, Daltanganj-822101
3. Pr. CIT- , Ranchi
4. DR, Ranchi Bench, Ranchi.

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata