

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER

ITA No.6642/Del/2018
Assessment Year: 2009-10

Parvej,
C/o M/s Sanjeev Anand &
Associates,
77-Navyug Market,
Ghaziabad,
Uttar Pradesh.

Vs. ITO,
Ward-2(1),
Ghaziabad.

PAN: DKKPP4804A

(Appellant)

(Respondent)

Assessee by	:	Shri Somil Agarwal & Shri Deepesh Garg, Advocates
Revenue by	:	Shri Mithalesh Km. Pandey, Sr. DR
Date of Hearing	:	15.09.2022
Date of Pronouncement	:	19.10.2022

ORDER

This appeal filed by the assessee is directed against the order dated 31.07.2018 of the CIT(A), Ghaziabad, relating to Assessment Year 2009-10.

2. The grounds raised by the assessee read as under:-

“1. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned reassessment order u/s 148/144 and that too without assuming jurisdiction as per law and without complying with the mandatory conditions u/s 147 to 151 as envisaged under the Income Tax Act, 1961.

2. *That in any case and in any view of the matter, action of Ld. CIT (A) in confirming the action of Ld. AO in framing the impugned reassessment order u/s 148/144, is bad in law and against the facts and circumstances of the case.*

3. *That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the addition of Rs. 12,56,487/- allegedly on the ground that the land sold by the appellant was not the agricultural land and that too by recording incorrect facts and findings.*

4. *That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the addition of Rs. 12,56,487/- allegedly on the ground that the appellant is not entitled for exemption u/s 54B/54F of the Income Tax Act by recording incorrect facts and findings and without observing the principles of natural justice.*

5. *That in any case and in any view of the matter, action of Ld. CIT (A) in confirming the addition of Rs. 12,56,487/- allegedly on the ground that the land sold was not agricultural land and denial to allow exemption under section 54B and 54F is bad in law and against the facts and circumstances of the case.*

6. *That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.”*

3. The Id. Counsel of the assessee, drawing our attention to copy of the reasons recorded for reopening of assessment u/s 147 of the Act and issuing notice u/s 148 of the Act, dated 03.02.2016, placed at page 1 of the assessee's paper book, and copy of the assessment order dated 05.12.2016 passed u/s 148/144 of the Income-tax Act, 1961, submitted that the AO has initiated reassessment proceedings for AY 2009-10 on 03.02.2016, i.e., beyond the period of four years from the relevant assessment year. The Id. Counsel further submitted that prior to initiation of reassessment proceedings and issuing notice

u/s 148, the AO has not obtained mandatory approval from PCIT as per the requirement of section 151 of the Act and without issuing and serving notice u/s 148 of the Act. Therefore, the impugned notice u/s 148, reassessment proceedings and consequent reassessment order dated 05.12.2016 may kindly be quashed. The Id. Counsel also placed reliance on various judgements including the judgement of the jurisdictional High Court of Allahabad in the case of *Mahesh Kumar Gupta vs. CIT (2014), 363 ITR 300 (All)* and submitted that the proviso to section 151 of the Act supports the view that after the expiry of four years from the end of relevant assessment year, no notice u/s 148 of the Act shall be issued unless the Chief Commissioner or Commissioner is satisfied on the reasons recorded by the AO that it is a fit case for issuance of such notice. He further submitted that in the reasons, the AO states that notice u/s 148 of the Act may be issued, but, as per the assessment order the notice u/s 148 dated 14.03.2016 was returned by the Postal Department with the remark, 'incomplete address' and, thereafter, the AO did not bother to gather complete and proper address of the assessee and to issue notice at such address and to serve the same on the assessee as per the requirement of law. The Id. Counsel further placing reliance on the order of the ITAT Amritsar Bench dated 11.05.2016 in the case of *Shri Amrik Singh vs. ITO, in ITA No.630/Asr/2015* submitted that the condition that some proceeding must be pending is no longer applicable after 01.07.1995, but, under the provisions of section 133(6) of the Act, the prescribed authority have the power to call for any information for the purpose of enquiry under the

Act even in cases where there is no proceeding pending and the Income-tax Authority below the rank of Director or Commissioner can exercise the said power in respect of an inquiry only with the prior approval of the Director or the Commissioner. The Id. Counsel submitted that there is no iota of fact emerging from the assessment order that the AO has obtained any approval before issuing letter dated 30.10.2015/notice to the assessee as per the mandate of section 133(6) of the Act. He further submitted that before issuing notice u/s 148, it is mandatory for the AO to obtain approval from competent authority u/s 151 of the Act, but, this compliance has also not been made by the AO in the present case. The Id. Counsel also drew our attention to second proviso to section 133(6) as amended by Finance (No.2) Act, 1998 w.e.f. 01.10.1998 to submit that the powers provided under the said provision cannot be exercised by any income-tax Authority below the rank of Director or Commissioner without prior approval of Director or as the case may be, the Commissioner. Therefore, the impugned notice u/s 148 of the Act, reassessment proceedings and the consequent reassessment order dated 05.12.2016 may kindly be quashed being bad in law.

4. Replying to the above, the Id. Sr. DR vehemently supported the initiation of reassessment proceedings and the action of the AO in issuing notice u/s 148 of the Act and submitted that from the assessment order, it is clear that the AO issued notice to the assessee u/s 148 and, thereafter, several notices were also issued to the assessee, but, there was no compliance, therefore, the AO was

compelled to pass reassessment order u/s 148/144 of the Act. The ld. DR further submitted that prior to issuing notice u/s 148 of the Act, the AO also issued verification letter dated 30.10.2015 to the assessee to verify the transaction of sale of immovable property during AY 2008-09, but, there was no compliance by the assessee. Therefore, he had reason to believe that the capital gain on the sale consideration, chargeable to tax, has escaped assessment within the meaning of section 147 of the Act.

5. Placing rejoinder to the above, the ld. Counsel submitted that the AO was very well entitled to issue notice u/s 133(6) of the Act even in a case when no proceedings are pending, but, as per second proviso to section 133(6) w.e.f. 01.10.1998, such powers cannot be exercised by the ITO without prior approval of the Director or the Commissioner. The ld. Counsel also submitted that from the reasons recorded as well as from the impugned reassessment order, it is amply clear that the notice u/s 148 of the Act has been issued to the assessee to incomplete address which was returned unserved by the Postal authorities and, thereafter, the AO did not bother to gather the complete address or made any endeavour to issue another notice and serve it. The ld. Counsel also pointed out that from the assessment order it is also very clear that in the present case, the reassessment proceedings have been initiated after the expiry of four years, but, as per the requirement of proviso to section 151(c) of the Act, the AO has not obtained any approval of the competent authority before issuing notice u/s 148 of

the Act and omission to comply with mandatory provisions of the Act vitiates the reassessment proceedings and consequent reassessment order.

6. On careful consideration of the above rival submissions, first of all, I find it necessary to reproduce the reasons recorded by the AO for initiation of reassessment proceedings which read as follows:-

*“Parvez Ali S/o Sh. Mohd Kalwa,
Village Dasna,
Ghaziabad.
AY 2009-10.*

11. Reasons for the belief that income has escaped assessment.

On the basis of AIR information, verification letter 30.10.2015 was issued to the assessee to verify the sale of immovable property during F.Year 2008-09 relevant to A. Year 2009-10 for Rs.68,72,000/-. No compliance of verification letter was made by the assessee till date. The assessee has not filed return of income for the A. Year 2009-10 showing any income from Capital Gains. Hence, I have reason to believe that capital gain on sale consideration of Rs.68,72,000/- chargeable to tax has escaped assessment within the meaning of section 147 of the IT Act, 1961 for the A.Y. 2009-10. Therefore, notice u/s 148 may be issued.

*Sd/-
Income-tax Officer,
Ward-2(1), Ghaziabad.*

Date: 03.02.2016”

7. From the above, it is clearly discernible that the AO proceeded on the basis of AIR information and issued a verification letter dated 30.10.2015 to the assessee to verify the sale of immovable property during F.Y. 2008-09 relevant to A.Y. 2009-10. Thereafter, the AO noted that no compliance of verification letter was made by the assessee till the date of recording the reasons, i.e., 03.02.2016.

After mentioning that the assessee has not filed return of income for AY 2009-10 showing income from capital gains, he stated that has reason to believe that the capital gain on sale consideration chargeable to tax has escaped assessment within the meaning of section 147 of the Act and, therefore, notice u/s 148 may be issued.

8. Further, from the reassessment order dated 05.12.2016, I clearly note that in the first para, the AO noted that as per AIR information, the assessee had sold immovable property and there was no compliance of verification letter, therefore, proceedings u/s 148 were initiated and notices were issued. The table below the said para clearly shows that notice u/s 148 was issued on 14.03.2016 which was returned by the Postal Department with the remark: 'incomplete address.' Thereafter, the AO had not issued any other notice u/s 148 of the Act and there is no endeavour by the AO to obtain the complete and proper address of the assessee to comply with the mandatory provisions of the Act. Thereafter, in the second part of para 1, the AO noted the non-compliance of the assessee and proceeded to complete the assessment *ex parte* u/s 144 of the Act on the basis of the information available on the record. But, there is no mention regarding obtaining of mandatory approval u/s 151 of the Act from the competent authority in the assessment order.

9. From the first appellate order, I also note that the assessee, in ground No.1 raised in Form No.35 alleged that the impugned assessment order has been

framed without assuming valid jurisdiction as per law and without complying with the mandatory conditions u/s 147-151 of the Act. From the relevant operative part of para 8.1 I further note that the Id.CIT(A) mentioned that the brother of the appellant attended the proceedings on 21.11.2016 and made submissions and as per the AO's report, appellant's brother attended the proceedings on 06.10.2016 and copies of notices were provided to him. But, neither in the assessment order nor in the first appellate order, there is no whisper of any approval u/s 151 of the Act. It is also relevant and pertinent to mention that during the first appellate proceedings, the AO submitted a remand report dated 29.05.2018 wherein the AO stated that the notices issued to the assessee u/ss 148 and 142(1) of the Act were returned by the Postal Department with the remark: 'incomplete address.' He further stated that on 06.10.2016, the brother of the assessee Shri Javed Ali, who attended was provided the copy of notice issued from the Office of the ITO, but, there is no mention regarding obtaining of approval u/s 151 of the Act from the competent authority.

10. On above submissions, I may point out that by way of Finance Act, 2021, w.e.f. 01.04.2021, section 151 of the Act has been amended. I am dealing with the case of AY 2009-10 for which pre-amended provisions of section 151 applies. As per sub-section (1) of section 151, no notice shall be issued u/s 148 by an AO, after expiry of a period of four years from the end of relevant assessment year unless Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied on the reasons recorded by

the AO that it is a fit case for issue of such notice. In the present case, this mandatory compliance has not been made by the AO and on being asked by the Bench, the ld. Sr. DR also could not show us that the AO has complied with the requirement of sub-section (1) of section 151 prior to issuing notice u/s 148 of the Act. Therefore, on this count, the legal contention of the ld. Counsel of the assessee is found to be sustainable and I allow the legal contention of the assessee regarding non-compliance of sub-section (1) of section 151 of the Act.

11. Regarding the legal contention of the assessee that the notice u/s 148 has not been properly issued and served on the assessee is concerned, I am in agreement with the contention of the ld. AR that under the scheme of the Act, clear distinction has been made out between 'issue of notice' and 'service of notice.' Section 149 of the Act prescribing the period of limitation categorically lays down that no notice u/s 148 of the Act shall be issued after prescribed limitation has elapsed and the mandate of section 148(1) of the Act is that reassessment shall not be made until there has been service of notice. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the ITO to proceed to reassess and pass reassessment order as the notice having been issued within the period of limitation and, then, the ITO could proceed to complete the reassessment. In the present case, the AO intended to initiate reassessment proceedings for AY 2009-10 on 03.02.2016 by recording reasons (supra), i.e., after the expiry of a period of four years from the end of the relevant assessment year and issued notice u/s 148 of the Act on 14.03.2016 after the

expiry of four years, but, not more than six years from the end of the relevant assessment year although that was returned back with the remark of the Postal Department: 'incomplete address.' This is in compliance with the requirement of section 149 of the Act. Regarding compliance of section 148 of the Act, I am of the view that since the AO provided copy of the notice u/s 148 of the Act and other notices to the brother of the assessee on 06.10.2016, the same is sufficient to comply with the requirement of section 148 of the Act regarding service of notice before framing reassessment order. My conclusion also gets strong support from the judgement of the Hon'ble Supreme Court in the case of *R.K. Upadhyaya vs. Shanabhai P. Patel (1987) 166 ITR 163 (SC)*. Therefore, this legal ground of the assessee fails.

12. Since, in the earlier part of this order, I have concluded that the AO has not obtained mandatory approval under sub-section (1) of section 151 of the Act before issuing notice u/s 148 of the Act from the competent authority, therefore, this omission vitiates the reassessment proceedings, notice u/s 148 of the Act and consequent reassessment order dated 05.12.2016 being bad in law and without assuming valid jurisdiction by the AO as per the mandate of section 151 of the Act. Therefore, on this count, legal ground of the assessee is allowed and reassessment proceedings, notice u/s 148 of the Act and consequent impugned assessment order dated 05.12.2016 are quashed. Since I have allowed relief to the assessee by allowing legal ground and have quashed the impugned

reassessment order, therefore, grounds of the assessee on merits are not being adjudicated upon.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 19.10.2022.

Sd/-

(C.M. GARG)
JUDICIAL MEMBER

Dated: 19th October, 2022.

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi