

**IN THE INCOME TAX APPELLATE TRIBUNAL  
CIRCUIT BENCH, VARANASI**

**BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER  
AND  
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

**ITA No.34/Alld/2018  
Assessment Year: 2007-08**

Varanasi Development Authority, Pannalal Park, Raja Udai Pratap Marg, Katchary, Varanasi PAN-AAATV6811A	vs.	Commissioner of Income Tax (Exemption), Lucknow
(Appellant)		(Respondent)

Appellant by:	Sh. Ashish Bansal, Advocate
Respondent by:	Sh. Amalendu Nath Mishra, CIT DR
Date of hearing:	12.01.2023
Date of pronouncement:	17.01.2023

**ORDER**

**PER VIJAY PAL RAO, J.M.**

This appeal by the assessee is directed against the order dated 28<sup>th</sup> February, 2017 of CIT(E) passed under section 263 of the Income Tax Act for the assessment year 2007-08.

2. The assessee development authority filed its return of income on 31<sup>st</sup> October, 2007 declaring nil income after claiming exemption under section 11 of the Income Tax Act. Initially, the scrutiny assessment under section 143(3) was completed on 20.11.2009 at Nil income. Thereafter, the assessment was reopened by issuing notice under section 148 of the Act dated 07.02.2014 to assess the income which has not been applied by the assessee for charitable purpose as well as the income from stamp fee which was considered as accrued but not taken the entire as source of receipt. The re-assessment was completed

under section 143(3) / 147 on 30<sup>th</sup> March, 2015. Thereafter, the CIT(E) on perusal of the assessment record noticed that the assessee has taken loan from Government of Uttar Pradesh and Work Bank. The balances of the same have been shown at Rs. 23,12,21,756/- as on 01<sup>st</sup> April, 2006. The assessee claimed accrued interest of Rs. 2,91,78,400/- as expenditure as per the income and expenditure account. The CIT(E) observed that since the interest was only accrued but not paid till filing of the ITR, it was not to be allowed as expenditure in view of the provisions of section 43B of the Income Tax Act. It was further noticed by the CIT(E) that the assessee has shown current liabilities under different heads:-

- i. Malva fee
- ii. Water tax
- iii. Sewer tax
- iv. Legal fee
- v. Registration money payable

But the assessee has not actually paid these taxes / fees and therefore, the same are not allowable expenditure as per the provisions of section 43B of the Income Tax Act. Consequently, the CIT(E) was of the view that the AO has overlooked these facts and the assessment order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Accordingly, the CIT(E) issued show cause notice dated 08.02.2017 under section 263 of the Income Tax Act and passed the impugned order whereby the assessment order dated 30<sup>th</sup> March, 2015 was held to be erroneous and prejudicial to the interest of the Revenue for want of necessary enquiries conducted by the AO and the same was accordingly, set aside. The CIT(E) directed the AO to make fresh assessment after making enquiries in respect of the loan taken by the assessee as well as the various fees and taxes which were not paid by the assessee. Aggrieved by the revision order, the assessee has filed the present appeal.

3. At the time of hearing, the learned counsel for the assessee has submitted that the assessment order passed by the AO under section 147/143(3) dated 30.03.2015 has been quashed by the CIT(A), vide order dated 01.04.2022. He has filed a copy of the order passed by the CIT(A). Thus, the learned AR has submitted that once the assessment order itself is quashed by the CIT(A), then the order passed by the CIT(E) under section 263 becomes infructuous and liable to be quashed. On the other hand, the learned DR has submitted that though the department has not filed the appeal against the order of the CIT(A) however, the department may file the appeal in due course. He has relied upon the impugned order of the CIT(E) passed under section 263 of the Income Tax Act.

4. We have considered the rival submissions as well as relevant material on record. There is no dispute that the CIT(A), vide order dated 01.04.2022 has quashed the assessment order dated 30.03.2015 passed under section 147 r.w.s. 143(3) of the Income Tax Act by holding that the reopening of the assessment is illegal and bad in law and liable to be quashed. The relevant finding of the CIT(A) in para 8.5 and 10.3 are as under:-

*"8.5. The contentions of the appellant have been carefully examined. The facts of the case clearly demonstrate that the A.O. did not have any "tangible material" on- the basis of which the reassessment proceedings u/s 147 were Initiated. It is trite law that such "tangible material" should have come into the possession of the A.O. subsequent to the passing of the original assessment order dated 20.11.2009. If the reassessment proceedings are initiated on the basis of the very same material which was available at the time of the original assessment proceedings, then, it would amount to a mere "change of opinion not "reason to believe" as has been extensively discussed in the Full Bench decision of the Delhi High Court In CIT Vs. Usha International (ITA No.2026 of 2010 In the present case there is no such material which came into the possession of the after the original assessment proceedings were concluded on the Bake of which the reassessment proceedings were initiated. The AO has passed the reassessment order on the same set of documents/reasons /facts which were also the basis of reassessment assessment proceedings in PORAX to him at the time of first proceedings was only a change of opinion" which is*

*not permissible in view of the above mentioned Supreme Court / High Court's decision. Therefore the appellant succeeds on this issue and the reassessment proceedings u/s 147 are liable to be quashed on this issue alone on the ground that they are illegal and bad in law.*

*ISSUE NO.2: No failure on part of appellant to disclose fully and truly all material facts.*

*9.1 In the Second Set of grounds, the appellant has contended that since it had disclosed fully and truly all material facts during the First assessment proceedings in 2009, therefore, in view of the proviso to Section 147, its case could not be legally reopened u/s 147. In this case, the original assessment order u/s 143(3) was passed on 20.11.2009 accepting the appellant's returned Income at Rs. Nil. The notice u/s 148 was issued on 21.02.2014 after a period of 4 years had lapsed from the end of the relevant assessment year.*

*9.2 The provision to Sec. 147 is reproduced hereunder.*

*"Provided that where an assessment under sub-section [3] of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section [1] of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."*

*9.3 Nowhere in the reassessment order passed u/s 147/143(3), the AO has demonstrated that there was failure one part of the appellant to disclose fully and truly all material facts necessary for assessment. Therefore the appellant's contentions on this issue are accepted and new of the Proviso to Section 147, the reassessment proceedings 147 are liable to be quashed on this Issue alone on the ground that they are illegal and bad in law.*

*ISSUE NO.3*

*10.1 Thirdly, apart from above, the appellant has also raised the ground of appeal that the AO was duty bound to pass a speaking order accepting or rejecting the objections raised by the appellant and he should have given at least 4 weeks' time before the completion of the reassessment proceedings.*

10.2 During the appellate proceedings, the appellant has raised the additional of appeal on this issue which is as under:

"1. The Additional Ground Numbers 1 of the Additional Grounds of Appeal reads as under-

"BECAUSE the Assessing Officer has further erred and acted illegally in passing the Assessment Order without providing four weeks' time to the Appellant after disposing off the objection raised by the assessee against reassessment proceedings on 26/03/2015 which is also against the settled Principles of Law & Principles of Natural Justice."

In support of Additional Ground Number 1, the Appellant begs to submit as under-

i. Without Prejudice to the submissions made herein above, the Appellant begs to submit that the order of rejection dated 26/03/2015 to the objections raised by the Appellant was communicated to the Appellant alongwith Assessment Order dated 30/03/2015 u/s 147/14313) of the Income Tax Act, 1961 on 04/04/2015 which further substantiate the fact that the Appellant was not given sufficient time (at least 4 weeks' time) to submit its cross objections/further submissions on the order of rejection as above before completion the reassessment proceedings as above.

i. The Appellant raised objections to the reasons recorded and requested to drop the proceedings initiate u/s 147/148 of the Income Tax Act, 1961 on 03/09/2014 itself which was kept itself pending/not disposed by the Assessing Office till 26/03/2015 i.e. only few days before the assessment was getting time barred. In the meantime the Assessing Officer continued to send notices u/s 142(1) of the Income Tax Act, 1961 calling for various details and documents without disposing off the objections raised by the Appellant which is against the settled Principles of Law as the law mandates that the objection, if any, has to be disposed off first by the Assessing Officer before further proceeding in the matter. Moreover, the Assessing Officer has to pass a speaking order accepting or rejecting the objections raised by the Assessee with a copy duly served to the assessee well in advance (at least 4 weeks before the completion of reassessment proceedings). We are supported by following judicial pronouncements to substantiate submissions:-

1. The judgement in the High Court of Judicature at Bombay in the case of "Bharat Jayantilal Patel Bharat Jayantilal Patel Vs. Union of India & Ora reported in WRIT PETITION (L) NO. 1044 OF 2015 dated 5TH MAY, 2015 The relevant extract of the said judgment is reproduced as under

*".....15. Thus, the grievance raised is that the assessing officer did not wait for the requisite period to expire and namely, four weeks from the date of communication of the order rejecting the objections....."*

*".....The petitioner specifically invited the attention of the assessing officer to the directions in the case of Asian Paints (supra) and to the effect that if the assessing officer does not accept the objections to the reopening of the assessment or the reasons recorded, he shall not proceed further in the matter within a period of four weeks from the date of receipt service's said offer on the assesses. Since the order dated the March 2016 is led to be rejecting the objections, then, the assessee prayed that a period of four weeks from that order, no steps shop at taken....."*

*".....There as well the assessing price without waiting for the period of four weeks had chosen to pass an assessment order. That assessment order was therefore, completely ignored by the Division Bench and it proceeded to test the validity and legality of the notice....."*

*".....28. We do not, therefore, find that the reasons which have been recorded for reopening the assessment meet and satisfy the statutory preconditions. Those having not being satisfied, there is no alternative but to quash and set aside the impugned notice and the assessment order following the same.*

*29. As a result of the above discussion, the writ petition succeeds, Rule is made absolute in terms of prayer clause (a). There will not be order as to Costs."*

*1. The judicial pronouncement given by Hon'ble Income Tax Appellate Tribunal, Pune in the case of "Nirmala V. Sanklecha, Nashik v. Income- tax Officer" reported in Cross Objection No. 35/Pun/2016 dated 23-02- 2018. The relevant extract of the said judgement is reproduced as under:-*

*.....7. Controverting the submissions made by DR, the Id. AR submitted that a perusal of order sheet entry reproduced in the statement of facts clearly show that the objections raised by the assessee were not disposed of by passing a speaking order. Not admitting but assuming, even if it is considered to be a valid order for disposing of objections, sufficient opportunity was not afforded to assessee by Assessing Officer for challenging such order as has been enunciated by the Hon'ble Bombay High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax reported as 296 ITR 90. The Hon'ble High Court has held that the Assessing Officer shall not proceed further in the matter within a period of four weeks from the date of service of order on objections, if they are rejected by Assessing Officer. In the present case, the non-speaking rejection order has been passed on 24-02- 2014 and immediately on the next day*

*i.e 25-02-2014 assessment order has been passed. Therefore, the alleged order disposing of the objections the case of Smt. mala Vijay Sanklecha cannot be considered as a valid order The Assessing Officer violated the principle of natural justice and the law laid down by Hon'ble Apex Court and Hon'ble jurisdictional, High Court. ITA Nos. 1937 & 1938 and CO Nos. 35 & 36/PUN/2016 Nirmala V Sanklecha, Nashik vs. Income Tax Officer....."*

*17. To sum up, the appeals by the Department and the cross objections filed by the assessee are dismissed. Order pronounced on Friday, the 23rd day of February, 2018,"*

*ii. Your goodself will appreciate that the rejection order dated 26/03/2015 against the objections raised by the Appellant dated 03/09/2014 was passed by the Assessing Officer just 4 days before the completion of reassessment proceedings on 30/03/2015 but the copy of the same was not served to the Appellant till completion of reassessment proceedings, thus barring the Appellant from exercising its legal rights to file cross objections/ submissions challenging the rejection order by the Assessing Officer which is the main subject matter of the appeal under reference. In fact, the rejection order dated 26/03/2015 against the objections raised by the Appellant dated 03/09/2014 was served to the Appellant simultaneously alongwith the Assessment Order u/s 147/148 of the Income Tax Act, 1961 on 04/04/2015. Thus based on the judicial pronouncements mentioned hereinabove, the reassessment proceedings are void ab-initio on this score.*

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*The ruling in the case of IL & FS Investment Managers Ltd. v. ITO- In the case of IL&FS Investment Managers Ltd. v. ITO [2008] 298 ITR 32 the Bombay High Court also quashed the notice under section 148, as it was found that the Id had disagreed with audit objection and still reopening was sought to be done as a result of change of his previous opinion.*

.....

.....

*That as already stated in Ground No.2, most of the cases cited by the Assessing Officers in his / her rejection order to the objections raised by the Appellant against re-assessment proceedings u/s 147/148 of the Income Tax Act 1961 are not relevant in the Appellant's case since the Assessing Officer already accepted the Appellant's reply to the queries raised u/s 154 of the Income Tax Act, 1961 and corresponded with the Audit team through written correspondence with a request to drop the audit para which substantiates the fact that the same issue on which the Assessing Officer*

*was satisfied at one stage, cannot subsequently be treated as fresh REASONS TO BELIEVE that the income of the Appellant has escaped assessment on the same issue on which he / she was satisfied with the Appellant's submissions. This further substantiates the fact the same was merely a "Change of Opinion" by the Assessing Officer which must not be treated as "REASON TO BELIEVE". Thus, the entire assessment proceedings are also void ab-initio on this issue.*

.....

.....

*The judgment so delivered by the Hon'ble Jurisdictional High Court, after interpretation of the objects of the regulatory statute and applicability of the same in the case of Authority constituted under UPUDA, has not been challenged by the revenue before the Hon'ble Supreme Court and thus the said view as expressed by the Hon'ble High Court on the issue of applicability of amended provisions of section 2(15) of the Act has attained finality, in favour of the appellant. Therefore, Hon'ble ITAT Lucknow "A" Bench, Lucknow, vide its Judgement dated 29.7.2015 (referred to herein supra) has given due cognizance to the above judgement of Jurisdictional High Court while setting aside assessee's case to your goodself for reconsideration on factual basis after comparing the activities of Lucknow Development Authority vis-a-vis Varanasi Development Authority."*

*10.3 The appellant's contentions have been carefully examined. The Supreme Court in the case of GKN Driveshafts (India) Ltd. (259 ITR 19) has laid down the law in this regard holding that the AO was duty bound to pass a speaking order disposing of the objections raised by the appellant against reopening. The Bombay High Court in the case of Asian Paints Ltd 4296 ITR 90) has also held that it is mandatory for Me A. O to dispose of the appellant objection by a speaking order and that he should not proceed with the assessment proceedings for 4 weeks thereafter. It is a fact that the objections raised by the appellant vide his letter dated 03.09.2014 were rejected by the AO vide order dated 26.03.2015 and immediately just 4 days thereafter, the reassessment proceedings were completed u/s 147 vide order dated 30.03.2015. Copy of the rejection order dated 26.03.2015 was not served on the appellant till the completion of the reassessment proceedings, thus, preventing the appellant from exercising his legal rights to challenge the rejection order. In view of the above discussions, appellant's contentions are upheld and the Reassessment Proceedings u/s. 147 are liable to be quashed on this issue alone on the ground that they are illegal and bad in law."*

5. Since, the re-assessment order itself has been quashed by the CIT(A) and the same is no more in existence in view of the order passed by the CIT(A) therefore, the revision order passed by the CIT(E) would not survive and liable to be quashed. We order accordingly. In case the Revenue succeed in the appeal, if any filed against the order of the CIT(A), the Revenue may seek to revive the present appeal to be decided on merits.

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

Order pronounced on 17.01.2023 at Allahabad, U.P. in accordance with Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-  
**[RAMIT KOCHAR]**  
**ACCOUNTANT MEMBER**

DATED: 17/01/2023  
Varanasi/Allahabad

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Copy forwarded to:

1. Appellant-Varanasi Development Authority
2. Respondent-CIT(E), Lucknow
3. CIT(A), Varanasi
4. CIT
5. DR

Sd/-  
**[VIJAY PAL RAO]**  
**JUDICIAL MEMBER**

By order  
Sr. P.S.