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

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.1688/Del/2019
[Assessment Year : 2013-14]

Hetram Bokan, 226, 2nd Floor, JMD Megapolis, Sohna Road, Sector-48, Gurgaon, Haryana-122001. ***PAN-AMKPB3430B***	vs	ITO, Ward-2(1), Gurgaon.
APPELLANT		**RESPONDENT**
Appellant by	None	
Respondent by	Shri Ramdhan Meena, Sr.DR	
Date of Hearing	12.01.2023	
Date of Pronouncement	12.01.2023	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2013-14 is directed against the order of Ld. CIT(A)-1, Gurgaon dated 07.12.2018. The assessee has raised following grounds of appeal:-

1. *"That the reasons recorded u/s 147 of the I.T. Act,1961 by the Ld. A.O. were merely based on the suspicion and without any tangible material so as to suggest any escapement of income. Hence the reassessment proceedings are liable to be quashed.*
2. *That the assessment order is void and invalid in law as there could be no reason of escapement of income merely on basis of cash deposits as held by Bir Bahadur Singh Sijwali v. ITO, (ITAT- Delhi) ITA NO. 3814 (DELHI) OF 2011.*
3. *That the CIT(A) erred in concluding that the assessee wasn't having cash in hand on the cash deposits dates in spite of furnishing the cash flow statement and its original source merely on surmises and conjectures and thereby confirming the addition of Rs 28,00,000/- on account of cash deposits.*

4. *That the order of the assessment having addition of Rs. 41,50,000/- to the income of the assessee, is invalid and illegal as the Ld. A.O. has failed to mention any charge under the Income Tax Act,1961.*

5. *Without prejudice to the above grounds, the Ld CIT (A) has failed to appreciate that interest u/s 234A can be charged up to the due date prescribed u/s 139(4) as it was impossible on the part of the assessee to file return after the due date prescribed u/s 139(4) due to lack of machinery provisions.*

6. *That the appellant reserves the right to amend, delete, add, substitute, modify or alter any one or more of the grounds of appeal at the time of hearing."*

2. At the time of hearing, no one attended the proceedings on behalf of the assessee. It is seen from the records that no one has been attending the proceedings on behalf of the assessee since 07.10.2019. The notices sent through speed post were returned back unserved by the Postal Authority. The assessee has not provided any new address to the Registry. Therefore, the appeal is taken up for hearing in the absence of the assessee and is decided on the basis of the material placed on record.

3. Facts giving rise to the present appeal are that the case of the assessee was re-opened for assessment u/s 147 of the Income Tax Act, 1961 ("the Act") on the ground that the assessee had not filed its income tax return and deposited cash amounting to Rs.41,50,000/- in his bank account maintained with Union Bank of India, Gurgaon. In response to the statutory notice, the assessee attended the proceedings and in respect of the cash deposited, it was stated that wife of the assessee had sold land for the consideration of Rs.1,17,17,000/- and this amount was transferred to his Union Bank account on 04.02.2011. The cash was deposited in his bank Account amounting to

Rs.7,50,000/- on 21.04.2012 and Rs.34,00,000/- on 23.11.2012. The assessee was asked to file cash flow statement however, the assessee could not do so. Therefore, the Assessing Officer ("AO") made addition of Rs.42,11,981/- including interest of Rs.62,981/- earned in this regard and assessed the income of the assessee at Rs.42,12,981/-.

4. Aggrieved by the action of Assessing Authority, the assessee carried the matter before Ld.CIT(A), who after considering the submissions, restricted the addition to the extent of Rs.28,00,000/-. Thereby, he granted relief in part however, sustained the balance addition on the ground that the withdrawal was made a long ago, time gap does not justify the claim of the assessee.

5. Aggrieved against the order of Ld.CIT(A), the assessee preferred appeal before this Tribunal.

6. **Ground Nos. 1 & 2** raised by the assessee are against the validity of re-opening of the assessment.

7. Ld. Sr. DR submitted that the assessee has not file its return of income and there was a deposit in his bank account. He further relied upon the orders of the authorities below. He submitted that Ld.CIT(A) has elaborately discussed the ground related to validity of assessment and following the judgements of the Hon'ble Punjab & Haryana High Court in the cases of *Grover Nursing Home 248 ITR 493 P&H; Gurera Gas Cylinders Pvt. Ltd. vs CIT 258 ITR 170 P & H; Jawand Sons Vs. CIT 326 ITR 39 P&H; Sewak Ram Vs ITO 236 CTR 462 (P&H); and Arun Kuamr Goyal v CIT (2013) 81 DTR 123 (P&H)* wherein Court rejected the plea of the assessee on the basis that assessment was not validly re-opened.

8. I have heard Ld. Sr. DR and perused the material available on record. I find that Ld.CIT(A) has decided the issue by observing as under:-

> 3.3. *"I have carefully considered the submissions of the appellant. I have also perused the facts recorded in the assessment order. It is evident from the facts on record that the appellant had deposited cash amounting to Rs. 41,50,000/- in his bank account. It is also evident from the facts on record that the appellant had not filed his ITR for the year under consideration. In these circumstances, the sources of cash deposits in the bank account of the appellant remain unexplained. There was no evidence on record to explain the possible sources of cash deposits of huge amount of Rs. 41,50,000/- in the bank account by the appellant. There was therefore a prima-facie reason to believe that the appellant had income which had escaped assessment. It is a settled law now that at the time of issue of notice u/s 148 only on prime-facie reason to believe that the income had escaped assessment is required. At the stage of issue of notice, the only question is whether there was belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction. The Hon'ble Supreme Court in the case of ITO v. Selected Dalurband Coal Co. (P.) Ltd., [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC) has held by that if the Assessing Officer, for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment, so long as the conditions of section 147 are fulfilled, the Assessing Officer is free to initiate proceedings under section 147. It is observed that the Assessing Officer had the reason to believe that income chargeable to tax had escaped assessment and it had a rational nexus with the material before him. He had reason to believe that income chargeable to tax has escaped assessment and*

duly recorded the reasons for the same. In this case there is no change in opinion of the Assessing Officer as the matter was never investigated or adjudicated or information on the issue was called or examined by the Assessing officer. The assessment in this case has been reopened within a period of four years. The Assessing Officer was therefore fully justified in issuing notice u/s 148. Reference in this regard may be made to the following case laws:-

1. ***ACTT Vs Rajesh Jhaveri Stock Brokers P. Limited.291 ITR 500 SC***

At the time of initiation of re-assessment proceedings only reason to believe that income chargeable to tax has escaped assessment is sufficient to invoke jurisdiction of AO to initiate re-assessment proceedings.

Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only

question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. P. Ltd. [1996] 217 ITR 597 (SC) ; Raymond Woollen Mills Ltd. v. ITO [1999J 236 ITR 34 (SC).

The scope and effect of section 147 as substituted with effect from April I, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be Satisfied: firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either emission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to

take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued."

II. Grover Nursing Home 248 ITR 493 P&H

An analysis of the aforementioned decisions of the Supreme Court makes it clear that the court can invalidate a notice issued under section 148 of the Act only if it is satisfied that no material was available before the Income-tax Officer on the basis- of which he could form a belief that the income chargeable to tax had escaped assessment or that the said belief was not at all bona fide or was based on vague, arbitrary and nonspecific information. However, the court cannot go into the sufficiency of the reasons for forming the belief and sit in appeal over the opinion formed by the competent authority.

III. Gurera Gas Cylinders Pvt. Ltd. vs CIT 258 ITR 170 P & H

A perusal of the reasons recorded by respondent No.2 shows that he had applied his mind to the relevant material and formed a belief that the petitioner had not disclosed complete facts which could enable it to claim deduction under section 80-I and, therefore, its income had not been properly assessed. At this stage, the court can 'neither go into the sufficiency or adequacy of the reasons recorded by respondent No.2 nor can it interfere with the notice simply because on an overall reappraisal of material, a different opinion may be formed.

IV. Raymond Wollen Mills Limited. Vs ITO 236 ITR 34 SC

In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot

strike down tile reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed.

V. Jawand Sons Vs. CIT 326 ITR 39 P&H

Under section 147 of the Act, after its amendment with effect from April 1, 1989, wide power has been given to the Assessing Officer even to cover cases where the assessee had fully disclosed the material facts. The only condition for action is that the Assessing Officer should have reason to believe that income chargeable to tax had escaped assessment. Such belief can be reached in any manner, and is not qualified by a pre-condition of full and true disclosure of material facts by the assessee as contemplated in the pre-amended section 14 7(a) of the Act. In the instant case, as far as the merits of the case is concerned, with regard to the permissible deduction under section 80-IB of the Act, it is clear position that the assessee was not entitled to claim deduction on account of duty drawback and DEPB incentives, as these incentive profits do not fall within expression "profits derived from industrial undertaking" in section 80-IB of the Act. Therefore, duty drawback and DEPB do not form part of net profits of the industrial undertaking [or the purposes of section 80- IB of the Act.

VI. Sewak Ram Vs ITO 236 CTR 462 (P&H)

After amendment of s. 147 w.e.f. 1st April, 1989, reassessment can be initiated even if there is disclosure in the return if without considering the particulars of the return, processing is done under s.

143(1) or assessment is made under s. 143(3). No doubt, mere change of opinion by itself is not a ground for reassessment as held in the judgments relied upon on behalf of the assessee but if there are reasons to believe that tax has escaped, reassessment is permissible. Reasons can be even on the basis of particulars of the return without any new material. Even if proceedings under s. 143(2) are not taken, reassessment proceedings can be taken.

VII. Arun Kuamr Goyal v CIT (2013) 81 DTR 123 (P&H) (HC)

Once there are reasons for the assessing officer to believe, whether such reasons originate out of the record already scrutinized or otherwise, he shall be within his competence to initiate the re-assessment proceedings. The formation of belief by the assessing officer must always be tentative and not a firm or final conclusion as the latter will negate the very object of giving an opportunity of hearing to the assessee. Reassessment based on agreement to sale which was signed by both parties is held to be valid. (A.Y. 2001 - 02).

3.4. Keeping in view the aforesaid factual and legal position, the Assessing Officer was fully justified in issuing notice u/s 148. The grounds of appeal are accordingly dismissed."

9. The above finding of Ld.CIT(A) is not controverted by the assessee by placing any binding precedents before me. Therefore, I donot see any reason to disturb the finding of Ld.CIT(A), the same is hereby affirmed. Thus, Ground Nos. 1 & 2 raised by the assessee are dismissed.

10. **Ground Nos. 3 & 4** raised by the assessee are against the sustaining of addition of Rs.28,00,000/-.

11. Ld. Sr. DR submitted that Ld.CIT(A) has given substantial relief to the assessee after considering the material on record.

12. I have heard Ld. Sr. DR and perused the material available on record. I find that Ld.CIT(A) has decided the issue by observing as under:-

> *4.7. "I have carefully considered the submissions of the appellant, the report of the Assessing Officer and the facts recorded in the assessment order. The only issue to be considered here is the sources of cash deposits amounting to Rs.41,50,000/- made by the appellant in his bank account during the year under consideration. The appellant has contended that this cash deposits was made out of cash withdrawals made from the same bank account in the previous year and also in the year under consideration. Perusal of the cash now statement filed by the appellant reveal that the major amount of cash withdrawals forming the part of the opening cash in hand of Rs.1,01,90,000/- as on 01/0412012 was made in the month of April, 2011. There is a time gap of almost 19 months' between these withdrawals and the date of deposits of Rs. 34 lakhs on 23/11/2012. It is further seen from the cash flow statement that the appellant had withdrawn Rs. 5 lakhs and Rs. 1 lakh on 09/05/2012 and 07/09/2012 prior to the cash deposits of Rs. 34 lakhs on 23/11/2012. In these facts and circumstances of the case, the contention of the appellant that he had cash available with him from the withdrawals made in April, 20 II to deposit the same in the bank account on 23/11/2012 is not justified.*
>
> *4.8 From the facts on record, it is evident that the two deposits during the year under consideration were made by the appellant as under:-*
>
> *i. 21/04/2012 - Rs.7,50,000/-*
>
> *ii. 23/11/2012 - Rs.34 lakhs.*

13. From the above finding of Ld.CIT(A), it is clear that although Ld.CIT(A) has accepted the opening cash in hand however, did not give set off of cash withdrawn of the assessee on the basis that there was time gap of 19 months between the withdrawals and the date of deposits. However, there is no

material on record placed before me by the lower authorities that this withdrawal was utilized for any other purpose. Therefore, it cannot be presumed that the assessee was not having cash available with him for deposit. I therefore, considering the fact that the assessee had demonstrated that he had withdrawn cash and the deposits in the bank account was out of the sale consideration of the land which wife of the assessee had sold. Under these undisputed facts, the finding of Ld.CIT(A) for sustaining the addition of Rs.28,00,000/-, cannot be affirmed. I therefore, direct the AO to delete the addition of Rs.28,00,000/-. Thus, Ground Nos. 3 & 4 raised by the assessee are allowed.

14. **Ground No.5** raised by the assessee is related to charging of interest. Since this ground is consequential in nature, I hold accordingly.

15. **Ground No.6** raised by the assessee is general in nature, needs no adjudication.

16. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 12th January, 2023.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

** Amit Kumar **

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI