

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

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| ITA No. 1103/Bang/2022 |
| Assessment year : 2009-10 |

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| Sri Katari Ramaswamy Sudhir, 230, 6 th Cross, Talacavery Layout, Amruthahalli, Bangalore – 560 092. PAN : BBAPS 7430N | Vs. | The Income Tax Officer, Ward 6[3][2], Bangalore. |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri V. Srinivasan, Advocate & Ms. Sunaina Bhatia, CA |
| Respondent by | : | Shri Gudimella VP Pavan Kumar, Jt.CIT(DR)(ITAT), Bengaluru. |

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| Date of hearing | : | 07.02.2023 |
| Date of Pronouncement | : | 14.02.2023 |

ORDER

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the order of CIT(Appeals), National Faceless Appeal Centre, Delhi [NFAC], Delhi dated 28.11.2022 for the assessment year 2009-10.

2. The assessee raised the following effective grounds :-

“1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The order of re-assessment is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with, especially since the notice u/s. 148 of the Act, dated 15/03/2016 came to be served only in the month of July 2016, which is beyond the period of limitation for issue of notice and in the absence of any valid materials to show that the proceedings were initiated before the expiry of limitation, the impugned order of re-assessment requires to be cancelled.

2.1 Without prejudice to the above, the learned CIT[A] ought to have appreciated that the reopening of the assessment was only for verification of the sources for cash payment made, which is clear from the reasons recorded furnished by the learned A.O. and having regard to the reasons recorded as they are, there was no bonafide "reason to believe" that income had escaped assessment for the year under appeal and consequently, the reopening of the assessment was bad in law and thus, the impugned order of assessment founded on the invalid reopening of the assessment proceedings ought to have been cancelled.

3. Without prejudice to the above, the learned CIT[A] is not justified in upholding the addition of Rs. 1,40,00,000/- as unexplained credit u/s.68 of the Act, without appreciating that the appellant had explained the source of the cash payments made by him and had also led evidence in support of the source of the cash received under the facts and in the circumstances of the appellant's case.

3.1 The learned CIT[A] ought to have appreciated that the so-called inconsistency in the dates of repayments made by the appellant to Sri S.M. Dhareshwar subsequently in the year 2011 was not material in as much as there was no dispute that Sri S.M.Dhareshwar had confirmed having advanced a sum of Rs.

1,40,00,000/- to the appellant on 25/08/2008, which was used to make the advance to Smt. Vasundhara and thus, the source of the cash payments made by the appellant during the year stands explained.

3.2 The aforesaid addition is purely on suspicion and surmise, assumptions and presumption and therefore, the addition made deserves to be deleted under the facts and in the circumstances of the appellant's case.

4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to Interest u/s. 234-A and 234-B of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.”

3. The assessee is an individual deriving income from consultancy services. For the AY 2009-10, the assessee filed a return of income on 31.12.2010 reporting an income of Rs.1,82,650. An information was received from Dy. DIT, Investigation Unit 2(1), Bengaluru during the course of investigation in the case of Mrs. B.V. Vasundhara that the assessee had paid a sum of Rs.1,40,00,000 in cash on 25.8.2008 as advance for purchase of land situated at Venkata Reddy Layout, Ejjipura, Bengaluru. Accordingly, the AO issued a notice u/s. 148 reopening the assessment of the assessee u/s. 147.

4. The AO during the course of reassessment proceedings called on the assessee to furnish the source for cash paid to Mrs. Vasundhara. The assessee submitted before the AO that the assessee has received an advance from Shri S.M. Dhareshwar for procurement of property and the said amount is the source for payments made to Smt. B.V.

Vasundhara for purchase of property. The assessee also submitted that the transaction did not materialise and the assessee had received money back from Smt. B.V. Vasundhara and returned the same to Mr. S.M. Dhareshwar. The assessee also furnished copies of cash book, balance sheet, ledger extract of Mr. S.M. Dhareshwar as appearing in the books of the assessee and also the confirmation from Mr. Dhareshwar dated 21.11.2016. The AO had called for information from Mr. Dhareshwar u/s. 133(6) of the Act to furnish certain details pertaining to the impugned payment. Mr Dhareshwar had in reply furnished a confirmation addressed to the AO explaining the source from which he has made the impugned payment to the assessee. The AO after perusing the details furnished has held that –

“8. There is no written agreement / MOU between the assessee and Mr.S.M.Dhareshwar except confirmation of accounts from S.M.Dhareshwar furnished by the assessee. The entire transaction was in cash and there were no receipts for having received and paid the cash to support it. The assessee has also not furnished any receipt as evidence in support of cash received from Mr.S.M.Dhareshwar. In the absence of supporting evidence, loan of Rs.1,40,00,000/- from S.M. Dhareshwar shown in the balance sheet of the assessee is nothing but a fake loan brought back his own money to the books. The explanation offered by the assessee is also not satisfactory. Accordingly sum of Rs.1,40,00,000/- found credited in his books as loan from Mr. S.M.Dhareshwar is treated as unexplained credit u/s 68 of the Income Tax Act, 1961 and brought to tax. Assessee has concealed his income by introducing fake loan. Penalty proceedings u/s271(1)(c) of the I.T.Act, 1967 is initiated separately.”

5. Aggrieved by the order of the AO, the assessee preferred appeal before the CIT(A).

6. Before the CIT(A), the assessee contended the reopening on the ground that the notice u/s. 148 was time barred and also that the reasons recorded by the AO contains only that the source for cash payments need to be examined, but has not given any reason which would give rise to a belief that income has escaped assessment. The assessee also contended the issue on merits before the CIT(A) by stating that the source for a cash payment made by the assessee has been properly substantiated before the AO and accordingly the addition is to be deleted. The CIT(A) did not accept the legal contention of the assessee by stating that the assessee has not objected to the proceedings u/s. 148 before the AO and that the reasons for reopening the case were supplied to the assessee.

7. On merits, the CIT(A) held that the assessee had to prove the identity of the creditor, creditworthiness and the genuineness of the transaction which the assessee failed to discharge and therefore the CIT(A) upheld the addition made by the AO. Aggrieved, the assessee is in appeal before the Tribunal.

8. The Id AR submitted that the assessee called for the reasons recorded during the course of reassessment proceedings and from the perusal of the reasons recorded, it is noticed that the AO has stated that the source for cash payment needs to be examined. The relevant extract of the reasons recorded are as given below:-



Office of the Income Tax Officer, Ward-6(3)(2), Room No.412, 4th Floor, B.M.T.C Building, 80
Pet Road, 6th Block, Koramangala, Bengaluru – 560095.

F.No. 2/148/ITO-W-6 (3)(2)/2016-17

Dated: 09-11-2016.

PAN: BBAPS7430N

To,

Mr. K.R. Sudhir
No.230, 6th Cross, Talacauvery Layout, Amruthalli,
Bengaluru-560092.

Sir,

Sub: Reason for re-opening of scrutiny assessment in your case-AY 2009-10.

Ref: 1. Notice u/s148 of the Income Tax Act, 1961 dated 15-03-2016.

2. Your letter filed on 28.07.2016.

3. Notice u/s 143(2) dated 28.09.2016. . . .

Please refer to the above.

As requested by you I am furnishing herewith the reason for reopening your case for the
AY 2009-10 which is as under;

*Information was received from Dy. DIT(Invg), Unit-2(1), Bengaluru that during
the course of investigation in the case of Mrs. B.V. Vasundhara, the assessee Mr.K.R.Sudhir had
paid a sum of Rs.1.40 Crores in cash on 25.08.2008 to Mrs. B.V. Vasundhara as advance for sale
of land situated at Venkata Reddy Layout, Ejipura, Begur Hobli, Bengaluru. The source for cash
payment needs to be examined. In view of the above facts and circumstances there is an
escapement of income within the meaning and purview of section 147 of the I.T.Act, 1961.
Therefore, I have reasons to believe that the income chargeable to tax has escaped assessment
within the meaning of section 147 of the income Tax Act, 1961 for the A.Y. 2009-10.*



Yours faithfully,

M.L. Chandraprakash
(M.L. Chandraprakash)

Income Tax Officer, Ward-6(3)(2),
Bengaluru.

Sudhir-K.R.

9. The Id AR submitted that from the above it is clear that there is
no reason for escapement recorded and the reopening is for verification

of source of cash for the payment. Accordingly the Id AR submitted that the reopening is based on mere suspicion and therefore bad in law.

10. On merits, the Id AR submitted that the source for cash payment has been clearly explained before the lower authorities. The Id. AR submitted that the assessee explained before the AO that he has received an amount of Rs.1,40,00,000 from Shri Dhareshwar which was made over by the assessee to Smt. B.V. Vasundhara. The Id. AR also submitted that the assessee had furnished the ledger extract, day book, etc. to substantiate the source before the lower authorities. The Id. AR therefore argued that the source has been clearly explained and cannot be held as unexplained u/s. 68 of the Act.

11. The Id. DR submitted that one of the limb for making addition u/s. 68 is the genuineness of the transaction and that the assessee has failed to prove the genuineness which is evident from the finding of the CIT(A) as extracted below:-

“Finding

The AO has clearly stated that the details furnished have been verified. It is noticed from the ledger account of S.M. Dhareshwar for the period 01.04.2008 to 31.03.2015 appearing in the book of assessee. The assessee has paid Rs. 90,00,000/- on 28.08.2011 and Rs. 50,00,000/- on 29.04.2013. However as per the day book of S.M. Dhareshwar he had received Rs. 90,00,000/- on 01.08.2011 itself. Even the entry in confirmation of accounts from Mr. S.M. Dhareshwar furnished by the assessee show that Rs. 90,00,000/- was received by Mr. Dhareshwar on 01.08.2011. This shows that the assessee claim of source for advance paid is out of advance received from S.M. Dhareshwar is not a genuine transaction.”

12. Therefore it is submitted by the Id DR that the CIT(A) has rightly confirmed the addition made by the AO u/s.68.

13. We heard the rival submissions and perused the material on record. Before going into the merits of the case we will first consider the legal contentions raised by the assessee with regard to the reopening. In this regard we notice that the coordinate bench of the Tribunal in the case of *Smt. C.P. Prameelamma in ITA No.369/Bang/2014 dated 09.10.2015* on an identical issue held as under:-

07. We have perused the orders and heard the rival contentions. Before adjudicating the merits of the addition made by the AO, it is required to see whether the reopening was rightly resorted to in the circumstances of the case. There is no dispute that assessee was only an agriculturist and was having only agricultural income. There is also no dispute that assessee's husband had shown in his return of income, a sum of Rs.10.77 lakhs as loan received from the assessee. To a question whether assessee's husband had filed a confirmation from the assessee during the course of his assessment proceedings, Ld. AR submitted that it was furnished. This was not contradicted by the Ld. DR. In a case where confirmation of a creditor is filed by a party the AO is having ample powers to verify the correctness of the confirmation. In our opinion, the first course of action that should ordinarily be resorted to, is not issue of a notice u/s.148 of the Act to the concerned creditor. AO never issued summons u/s.131 of the Act to the concerned creditor and obtained a statement on oath. If from such statement he could gather sufficient material to come to a conclusion that there was escapement of income, or even in a case creditor failed to attend the summons, the AO could have resorted to a reopening. No doubt assessee here had not filed a return of income at all. Explanation 2 to Section 147 of the Act deals with a situation where there has been no return of income filed. Explanation 2 is reproduced hereunder :

Explanation — 2. For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:--

- (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;
- (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

It is clear from clause (a) of the above Explanation that there can be deemed or fictional presumption of income escaping tax in a case where no return of income was furnished, only if the total income of such party would have exceeded the maximum amount, not chargeable to tax. In other words where no return has been filed by an assessee and the AO wants to invoke jurisdiction vested upon him u/s.147 of the Act, the reasons mentioned by the AO for reopening should show a logical thought process which would show how he came to a conclusion that the total income of the such person exceeded the maximum amount which was not chargeable to tax. Now if we have a look at the reasons recorded by the AO in the case before us, what is mentioned is that he wanted to verify the source of income for the advance of Rs.10.77 lakhs given by the assessee to her husband. There is nothing here whatsoever mentioned regarding any lacunae in the confirmation filed by the assessee in the course of her husband's assessment proceedings or regarding any investigation done by the AO that could bring out something which would show an escapement of income. Argument of the Ld. DR is that in a case where assessee has not filed a return at all, the reasons that are to be given for reopening should not be seen with the same eyes as in the case of an assessee who had filed a return of income earlier. Even if we accept this contention, reasons given by the Ld. AO for issue of notice u/s.148 of the Act, does not give even a hint of any escapement of income or tax. As for the reliance placed by the CIT (A) on the Hon'ble Apex Court judgment in the case of GKN Driveshafts (supra), question there was whether reasons had to be

furnished to an assessee and his reply disposed off, before concluding the assessment. In our opinion this case will not support the case of the Revenue here. In the circumstances of the case we are convinced that reopening was resorted only on suspicions and the test of relevancy is not satisfied. Ex-consequenti we hold the reassessment invalid.”

14. In assessee's case in the reasons recorded which is reproduced in the earlier part of the order, the AO has stated that the reopening is done to verify the source of money advanced by the assessee to Smt. B.V. Vasundhara. Other than mentioning this, the AO has not recorded any adverse finding which has led to his belief that income has escaped assessment. As per explanation 2 to section 148, cases when return of income is filed the income chargeable to tax is said to have escaped assessment if it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return. The AO in the given case has not recorded noting any understatement of income or any excessive claim of loss or deduction/allowance. The AO has reopened the assessment to verify the source of the amount advanced and without any adverse finding has stated that the said amount has escaped assessment. This conclusion of the AO in our view is not tenable since it is based on mere suspicion not based on any concrete evidence. Therefore the ratio laid down in the above case by coordinate bench is applicable to the assessee's case and accordingly respectfully following the same we hold that the reopening of assessment is not valid and the re-assessment based on the same is thereby quashed.

15. We have allowed the legal contentions raised with regard to reopening in favour of the assessee and therefore the submissions made in this regard on merits have become academic not warranting any adjudication.

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

Pronounced in the open court on this 14th day of February, 2023.

Sd/-

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 14th February, 2023.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.