

आयकरअपीलीयअधिकरण,इंदौरन्यायपीठ,इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS.SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.212/Ind/2022
Assessment Year: 2009-10

Shri Amit Agrawal Indore	बनम/ Vs.	ITO, Ward-1(3) Indore
(Appellant / Assessee)		(Respondent / Revenue)
PAN: ABRPA 2105 L		
Assessee by	Shri S. N. Agrawal, & Pankaj Mogra, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	09.02.2023	
Date of Pronouncement	27.02.2023	

आदेश/O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 20.07.2022 passed by learned Commissioner of Income-Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [**“Ld. CIT(A)”**], which in turn arises out of assessment-order dated 28.12.2016 passed by learned ITO, 1(3), Indore [**“Ld. AO”**] u/s 147 read with section 143(3) of Income-tax Act, 1961 [**“the Act”**] for Assessment-Year [**“AY”**] 2009-10, the assessee has filed this appeal on following grounds:

“1. That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in holding the re-opening of the case of the appellant under section 147 of the Income- tax Act, 1961 as valid without properly appreciating the facts of the case and submissions made before him even when the case of the appellant was reopened in absence of any tangible material and live link

of concealment of income and merely on the basis of borrowed opinion without independent application of mind.

2. That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in maintaining the protective addition of Rs. 5,00,000/- as made by the Ld Assessing Officer to the total income of the appellant under section 68 of the Income-tax Act, 1961 on account of alleged investment in Plot No. 5A as made by the appellant without properly appreciating facts of the case.”

2. Heard the learned Representatives of both sides at length and case-records perused.

3. Briefly stated the facts are such that the Ld. AO received an information from ITO-2(4), Indore vide letter dated 03.02.2016 to the effect that a cash payment of Rs. 5,00,000/- was made by assessee to M/s. PatrakarSahakariGruhNirmanSansthan, Indore [**“the Society”**] during the previous year 2008-09 relevant to AY 2009-10 under consideration. Acting thereon, the Ld. AO confronted the assessee vide letter dated 03.03.2016, in response to which the assessee categorically denied to have made any such payment to the aforesaid society. Further, the assessee also submitted vide letter dated 16.03.2016 (Refer Para No. 4 of the assessment-order) that the agreement for purchase of Plot No. 5A, in respect of which the cash-payment of Rs. 5,00,000/- was alleged to have been made by assessee to the society, was a forged document and not signed by assessee. However, the Ld. AO was not convinced and proceeded to re-openassessment by issuing notice dated 22.03.2016 u/s 148 of the Act. Finally, the Ld. AO made an addition of Rs.5,00,000/- in the hands of assessee on protective basis by observing and holding thus in Para No. 8 and 9 of assessment-order:

“8. During the assessment proceedings in the case of the Patrakar Sahakari Grah Nirman Sansthan Maryadit (PAN:AADP0706G) for AY 2008-09 addition was made of Rs. 40,89,000/- under provisions of section 68 holding that the credits shown as payment by the society not substantiated by suitable evidence. In the credits which have not been treated as genuine, there are entries appearing relating to assessee Shri Shailendra Agrawal, Rs.25,00,000/- and Shri Amit Agrawal, Rs.5,00,000/-. It was claimed that

these transactions were conducted in cash and cash was received by the Society from Shri Shri Shailendra Agrawal and Shri Amit Agrawal. However, the said contention of the society was not accepted in their assessment and the amount as claimed to be received from the assessee was added to the income of the society u/s 68 of the Income Tax Act 1961 on substantive basis.

*9. As per the evidence on record, produced by Patrakar Sahakari Grah Nirman Sansthan Maryadit an amount of Rs. 5,00,000/- is claimed to have been received by the Society from Shri Amit Agrawal. During the proceedings in this case the assessee has claimed that no amount whatsoever was paid by him to the Society against the Plot No 5A as claimed by the society, but Shri Deepak Mishra, Manager of the Society in his statement claimed that the amount was received by the society from the assessee. The appeal of the Society against the order dated 28.02.2014 is pending before the Ld CIT[A]. **Hence, the said amount of Rs 5,00,000/ is added to the income of the assessee on protective basis.** Penalty under section 271(1)(c) is initiated for furnishing inaccurate particulars of income.”*

[Emphasis supplied]

4. Aggrieved by the action of Ld. AO, the assessee went in first appeal to Ld. CIT(A) but however did not get any relief. Now the assessee has come in this appeal before us assailing the order of first appellate authority.

5. Drawing our attention to above-cited Para No. 8 and 9 of assessment-order, the Ld. AR demonstrated that the revenue-authorities had made an addition of Rs. 5,00,000/- in the hands of Society u/s 68 on substantive basis and thereafter made the same addition of Rs.5,00,000/- in the hands of assessee on protective basis. He further submitted that this exercise has been done by Ld. AO in a re-assessment framed u/s 147 of the Act upon the assessee. He further submitted that it is judicially well-settled that the proceeding of section 147 cannot be invoked for the purpose of making protective addition and, therefore, the entire assessment made by Ld. AO is

illegal and vitiated. To support this proposition, Ld. AR relied upon following decisions:

Hon'ble ITAT, Bangalore in DCIT Vs. Bullion Investment & Financial Services (P) Ltd. (2010) 123 ITD 568 (Bangalore):

"2.5 We have heard both the parties. The fact of undisclosed investment in the share capital of the assessee- company was found during the course of search and material was collected during the course of search that such investment belonged to Shri G.P. Goyal If such income was to be assessed in the hands of a person other than Shri GP Goyal, then revenue should have taken recourse under section 158BD. If the revenue was not sure as on which hands the assessment is to be made, then the revenue could have initiated proceedings against both the assessees. In the instant case, assessment in the case of Shri G.P. Goyal was completed on 31-7-1997. Notice under section 148 had been issued to the assessee-company on 27-7-1998. Once the revenue had taken its stand that such investment in the share capital belong to Shri G.P. Goyal and the assessment order was passed, then it cannot be said that the Assessing Officer was having reason to believe that income has escaped in the hands of the assessee-company. Reassessment cannot be made on mere suspicion. The Assessing Officer has to form a belief that income has escaped assessment in the hands of the assessee. Once it has been held that such investment belonged to Shri G.P. Goyal, then there was no further material to come to the conclusion that such escaped income belonged to the assessee.

2.6 The Apex Court in the case of Lalji Haridas v. ITO19611 43 ITR 387 observed at page 392 as under:

"In case where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie, it appears that the income may have been received either by 'A' or 'B' or by both together. It would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both the assessee.

But, in the instant case, the revenue held that such undisclosed income belonged to Shri GP. Goyal and assessment was made in the hands of Shri G.P. Goyal on substantive basis. The case of the assessee-company was not reopened during the pendency of proceedings in the case of Shri Goyal. Had the revenue made protective assessment in the case of Shri G.P. Goyal, then it could have taken action against the assessee-company. Thus the basic requirement for reopening the assessment is that the Assessing Officer should have reason to believe

that income has escaped assessment, is not satisfied in this case. Hence, we are satisfied that the learned CIT(A) was justified in holding that assessment cannot be reopened for making protective addition”

Hon'ble ITAT Lucknow Bench "B" in the case of Smt. Shobha Prajapati Vs. ITO-II, Faizabad [ITA No. 294 to 296/LUC/2010]:

“16. In the present case also assessment has been made in the hands of the husband of the assessee on substantive basis and protective assessment was made in the hands of the assessee. Therefore assessment u/s. 147/143/3) of the Act deserves to be cancelled.”

Hon'ble Mumbai High Court in the case of DHFL Venture Capital Fund Vs. ITO, (2013) 34 Taxmann.com 300:

“18. A protective assessment as the learned author indicates (Vol. 1 page 272) is regarded as being protective because it is an which is made ex abundant contela where the department has a "doubt as to the person who is or will be deemed to be in receipt of the income" A departmental practice, which has gained judicial recognition, has emerged where it appears to the Assessing Officer that income has been received during the relevant Assessment Year, but where it is not clear or unambiguous as to who has received the income. Such a protective assessment is carried out in order to ensure that income may not escape taxation altogether particularly in cases where the Revenue has to be protected against the bar of limitation. But equally while a protective assessment is permissible a protective recovery is not allowed. However, such an exercise which is permissible in the case of a regular assessment must necessarily yield to the discipline of the statute where recourse is sought to be taken to the provisions of Section 148. Protective assessments have emerged as a matter of departmental practice which has found judicial recognition. Any practice has to necessarily yield to the rigour of a statutory provision. Hence, when recourse is sought to be taken to the provisions of Section 148, there has necessarily to be the fulfillment of the jurisdictional requirement that the Assessing Officer must have reason to believe that income has escaped assessment. To accept the contention of the Revenue in the present case would be to allow a reopening of an assessment under Section 148 on the ground that the Assessing Officer is of the opinion that a contingency may arise in future resulting an escapement of income. That would, in our view, be wholly impermissible and would amount to a rewriting of the statutory provision. Moreover, the reliance which is sought to be placed on the provisions of Explanation 2(a) to Section 147 is misconceived. Explanation 2 provides a deeming definition of cases where income chargeable to tax has escaped

assessment and clause (a) includes a case where no return of income has been furnished by the assessee although his income or the income of any other person in respect of which he is assessable exceeds the maximum amount which is not chargeable to tax. As the reasons which have been disclosed to the assessee would indicate, this is not a case where an assessee has not filed a return of income simplicitor. The whole basis of the reopening is on the hypothesis that if the provisions of Sections 61 to 63 are attracted as has been claimed by the assessee, and the income of Rs 32.83 Crores which has been claimed by the assessee to be exempt is treated as exempt, in that event an alternate for taxing the income in the hands of the AOP of the contributories is sought to be set up. For the reasons already indicated, the entire exercise is only contingent on a future event and a consequence that may enure upon the decision of the Tribunal, that again if the Tribunal were to hold against the Revenue. A reopening of an assessment under Section 148 cannot be justified on such a basis. There has to be a reason to believe that income has escaped assessment. 'Has escaped assessment indicates an event which has taken place. Tax legislation cannot be rewritten by the Revenue or the Court by substituting the words 'may escape assessment in future Writing legislation is a constitutional function entrusted to the legislature.'

6. Placing a strong reliance on these judicial precedents, Ld. AR strongly argued that the present re-assessmentu/s 147 made by Ld. AO to make a protective addition is not sustainable and hence the same deserves to be quashed.

7. Per contra, the Ld. DR though supported the orders of lower authorities yet could not contradict these pleadings of Ld. AR either on facts or law.

8. We have considered rival submission of both sides, perused the case record and also the aforesaid decisions cited before us. After a careful consideration, we find that in the present case the addition has been made on protective basis by invoking section 147 of the Act which is not a valid action as per aforesaid decisions. Therefore, we do not find any reason of not accepting the submissions of Ld. AR. Further, the Ld. DR is not able to show any objection against the pleadings made by Ld. AR. We are, therefore, inclined to accept that the re-assessment framed by revenue authoritiesu/s

147 in the present case is not valid and the same is unsustainable. We order accordingly.

9. Other pleadings made by both sides on the merits of addition are rendered infructuous since we have already declared the assessment as invalid.

10. Resultantly, this appeal of assessee is allowed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 27/02/2023.

Order pronounced in the open court on/...../2023.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/Dated : 27.03. 2023

Patel/Sr. PS

*Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File*

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench,Indore*

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the approved draft is placed before other Member	
5.	Date on which the fair order is placed before the Dictating Member for pronouncement	
6.	Date on which the file goes to the Bench Clerk	
7.	Date on which the file goes to the Head Clerk	
8.	Date on which the file goes to the Assistant Registrar for signature on the order	
9.	Date of dispatch of the Order	