

आयकर अपीलीय अधिकरण, 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.399/Ind/2022
Assessment Year: 2013-14

Shri Shantilal Yadav Gram Nagziri, Tehsil Gogawa, Khargone (Appellant / Assessee)	<u>बनम/</u> Vs.	ITO, Khargone (Respondent / Revenue)
PAN: AIWPY 0915 C		
Assessee by	Shri S. N. Agrawal, & Pankaj Mogra, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	27.03.2023	
Date of Pronouncement	31.03.2023	

आदेश/O R D E R

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

Feeling aggrieved by appeal-order dated 27.09.2022 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 29.12.2019 passed by learned ITO, Khargone [**“Ld. AO”**] u/s 147 read with section 143(3) of Income-tax Act, 1961 [**“the Act”**] for Assessment-Year [**“AY”**] 2013-14, 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 deciding the appeal ex-parte without giving proper opportunity of being heard to the appellant.

2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the validity of reassessment proceedings initiated

under section 147 of the Income Tax Act, 1961 even when reopening was done in absence of any tangible material and live link of concealment of income and merely for verification of source of cash deposits in the bank account.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 65,19,500/- made by the Assessing Officer on protective basis on account of on-money received in cash against sale of agricultural land by invoking the provisions of section 69A of the Income-Tax Act, 1961 and consequential charging of tax at the rates prescribed under section 115BBE of the Income Tax Act, 1961 without properly appreciating the facts of the case and submissions made before him/her.

4. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs.65,19,500/- made by the Assessing Officer on protective basis on account on-money received in cash against sale of agricultural more so when agricultural land sold by the appellant was not a capital asset and henceforth, capital gain arising on sale of such land was not chargeable to tax under the Income Tax Act, 1961.

5. The appellant reserves the right to add, alter and modify the grounds of appeal as taken by him.”

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 to the effect that a cash deposit of Rs. 46,15,000/- was made by assessee in his bank account with Bank of India, Nagziri Branch during the financial year 2012-13 relevant to AY 2013-14 under consideration. Acting thereupon, Ld. AO asked the assessee to explain the source of cash-deposit but finding no response from assessee, Ld. AO took action u/s 147 through notice dated 20.02.2019 issued u/s 148. During the course of assessment-proceeding, when the Ld. AO confronted the assessee about source of cash deposit in bank, the assessee made following submission which is culled out from para No. 5(a)/(b) of assessment-order:

“(a) In reply, it is submitted by assessee that the assessee had sold an agricultural land of 8.402 hectare at Village-Rupkheda, Khargone to three persons during the period under consideration. Sources of cash deposited in his above bank account has been explained by the assessee as out of on-money received in cash against sale of above agriculture land.

(b) *The assessee further submitted that he had sold a joint agriculture land of 8.402 hectare, Patwari Halka No. 38, Khasra No. 2 at Village: Rupkheda, Khargone to the family members of Shri Ramesh Chandra S/o Shri Premji Karani, 1/21, Verma Nagar, Laxmi State Co-operative Housing Society, Old Nagardasa Road, Andheri East, Mumbai during the year under consideration. The assessee further submitted that he had entered a sale agreement of above land with Shri Ramesh Chandra S/o Shri Premji Karani on 18/02/2012 for total sale consideration of Rs. 1,11,81,500/- @ Rs. 5,35,000/- per acre. The assessee submitted that he had received an amount of Rs. 5,11,000/- as advanced on the date of sale agreement on 18-02-2012 against the above transaction. The assessee further submitted that balance amount of Rs. 1,06,71,500/- was received by him during F.Y. 2011-12 through the mode of RTGS of Rs. 41,52,000/- as per registered sale-deed and in cash of Rs. 65,19,500/- as on-money from the purchaser of land.”*

Thereafter, Ld. AO also examined the copies of registered sale-deeds and sale-agreement executed by assessee in relation to sale of lands and ascertained the quantum of on-money receipts at Rs. 65,19,500/- having been received during the financial-year under consideration, which is not in dispute. Ultimately, Ld. AO made an addition of Rs. 65,19,500/- in the hands of assessee on protective basis and in the hands of purchasers of land on substantive basis.

4. Being aggrieved, assessee filed first-appeal to Ld. CIT(A) but did not succeed. Now, the assessee has come in this appeal before us.

5. Assailing the order of lower authorities, Ld. AR made several contentions; we would like to discuss the relevant and effective contentions as under:

(i) That the Ld. AO has framed assessment u/s 147 wherein the impugned addition of Rs. 65,19,500/- has been made on protective basis. Ld. AR referred to the recent decision of **ITAT, Indore in Shri Amit Agarwal Vs. ITO, Ward-1(3), Indore ITA No. 212/Ind/2022 order dated 27.02.2023** where the protective addition made in the proceeding of section 147 has been held to be invalid. The relevant paragraphs of the decision are re-produced below:

“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. ITO* 19611 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-assessment u/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 authorities u/s 147 in the present case is not valid and the same is unsustainable. We order accordingly."*

(ii) That the impugned on-money for which the addition has been made is actually a part of the sale-consideration of the agricultural land sold by assessee and in no way different than the consideration declared in the registered sale-deed. According to Ld. AR, since the agricultural land was not a "capital asset" and the resultant capital gain earned by assessee arising from sale-consideration was not taxable under the provisions of Income-tax Act, 1961; the impugned "on-money" is also a part of the same consideration/capital gain earned by assessee which is non-taxable. Ld. AR gainfully relied upon the decision of **ITAT, Cochin in ITO Vs. Abraham Varghese Charuvil, 186 TTJ 528** to support this proposition.

6. Per contra, Ld. DR placed a heavy reliance upon the orders of lower authorities and argued that the fact of on-money receipt is based on the

sale-agreement submitted by assessee as well as clear acceptance given by assessee himself during assessment-proceeding, therefore the addition has been rightly made by Ld. AO, which must be upheld.

7. We have considered rival submissions of both sides and perused the case-records in the light of applicable provisions of law and the decided judicial rulings cited above. We find *firstly* 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 the decision of Indore Bench of ITAT in **Amit Agarwal (supra)**. *Secondly*, we note that the impugned on-money received by assessee is undisputably part of the sale-consideration/capital gain relatable to agricultural land which was non-taxable under the provisions of act; therefore the “on-money” would also partake the character of not-taxable income itself as held by Cochin Bench of ITAT in **Abraham Varghese Charuvil (supra)**. Thus, without delving further, we only suffice to conclude that both of the legal contentions raised by Ld. AR are meritorious. Ld. DR is not able to rebut these pleadings made by Ld. AR. Being so, we are of the considered view that the addition made/confirmed by Ld. AO/CIT(A) in present case is not sustainable. Accordingly, we delete the addition. The assessee succeeds in this appeal.

8. Resultantly, this appeal of assessee is allowed.

<i>Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 31/03/2023.</i>

<i>Order pronounced in the open court on/...../2023.</i>
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Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/Dated : 31.03.2023
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	