

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A No.3137/DEL/2018
Assessment Year 2009-10

Kunwar Ayub Ali, H. No. 301, D-86-89 Kaushambi, Ghaziabad.	v.	ITO, Ward-1(3), Ghaziabad.
TAN/PAN: AEIPK0492A		
(Appellant)		(Respondent)

Appellant by:	Shri Akhilesh Kumar, Adv.		
Respondent by:	Shri Anuj Garg, Sr.DR		
Date of hearing:	16	01	2023
Date of pronouncement:	17	04	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the Assessee against the order of the Commissioner of Income Tax (Appeals)-II, Noida ('CIT(A)' in short) dated 27.02.2018 arising from the assessment order dated 27.03.2015 passed by the Assessing Officer (AO) under Section 147/148 of the Income Tax Act, 1961 (the Act) concerning AY 2009-10.

2. As per the grounds of appeal, the assessee has challenged the order of Id. CIT(A) on twin grounds.

(i) Lack of jurisdiction under Section 147 of the Act

(ii) Legitimacy of addition /disallowance on merits.

3. Briefly stated, the assessee is a civil / criminal lawyer who filed the return of income for Assessment Year 2009-10 on 31.03.2009 declaring total income at Rs.2,39,651/- for which intimation was issued under Section 143(1) of the Act. During the year, the assessee sold agricultural land with constructed area for actual consideration of Rs.24,69,000/- which represents 1/4th of total consideration of Rs.98,76,000/- where 3/4th share belongs to one Shri Mashroof Ali. The Assessing Officer reopened the assessment by issuing notice under Section 148 of the Act dated 26.03.2014 alleging escapement of income with the allegation that the assessee sold residential/ agricultural land of Village Dasana for Rs.98,76,000/- as against the circle rate of Rs.1,56,99,500/-. It was alleged that capital gain was derived from the said transaction but ITR was not filed resulting in escapement. The income was assessed at Rs.72,11,880/- by an *ex-parte* order under Section 144 r.w. Section 147 of the Act.

4. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) however upheld the assumption of jurisdiction assumed under Section 147 but however granted partial relief on merits.

5. Further aggrieved, the assessee preferred appeal before the Tribunal.

6. We have carefully considered the rival submissions on

the point in issue and perused the assessment order as well as the first appellate order. We have also perused the material referred to and relied upon in the course of hearing as per Rule 18(6) of Income Tax (Appellate Tribunal) Rule, 1963.

7. As per the grounds of appeal, the assessee has questioned the validity of assumption of jurisdiction together with correctness of addition on merits. The issue of jurisdiction goes to the very root of the matter and thus assumes primacy for adjudication purposes. We shall thus delve the validity of assumption to begin with.

8. The reasons recorded under Section 148(2) which is the bedrock for assumption of jurisdiction under Section 147 is reproduced herein for ready reference:

Reasons for issue notice w/s 148 of the Income tax Act, 1961

Shri Kunwar Avvub Ali s/o Shri Masroof Ali, Vill. Masoori, Ghaziabad

PAN AEIPK 0492A Assessment year 2009-10

26.03.2014

As per AIR information the assessee has sold residential/agricultural land situated at Village Dana Distt. Ghaziabad as per details below:

1. Khata No. 218 Khasra No. 1607 and 1712 measuring about 5435 Sq. Meter total covered area 228.84 Sq. Meter for Rs. 98,76,000/- but the circle rate was Rs. 1,56,99,500/- on which stamp duty was paid.

The assessee has earned capital gain on the sale consideration of

residential /agricultural land but the assessee has not filed Return of Income for the assessment year 2009-10.

I have reasons to believe that the assessee has income from capital gain which is chargeable to tax for the assessment year 2009-10 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Issue notice us 148 of the I.T. Act, 1961.”

9. With reference to the reasons recorded as noted above, the ld. counsel for the assessee submits at the outset that the belief towards escapement has been entertained by the Assessing Officer on the basis that the assessee has not filed the return of income for Assessment Year 2009-10 which is grossly contrary to facts on record. The assessee had duly filed return of income on 31.03.2009 thereby the most basic reason itself is wholly incorrect and not existed and noticeably PAN of the assessee was duly mentioned in sale deed. Secondly, the sale consideration of Rs.98,76,000/- was giving rise to allegation of escapement towards the sale consideration for the purposes of escapement of capital gain whereas actual share of sale consideration relatable to the assessee stands at Rs.24,69,000/- only and therefore, the basic information is yet again wrong and mentioned in reasons without application of mind.

10. We find that the issue is squarely covered in favour of the assessee by the judgments rendered in the case of *Mumtaz Hazi Mohmad Menon (2018) 408 ITR 268 (Guj)*. As per the ratio of the judgment, the assumption of jurisdiction on the

basis of wholly incorrect facts cannot be conferred in law. In this case also, the reasons cited were that the assessee did not file return and the capital gain on sale consideration was not brought to tax which reasons were found to be factually incorrect. The assessee had return of income which was not noticed by the Assessing Officer. Consequently, the notice issued under Section 148 for reopening the assessment was quashed for assumption of jurisdiction on factually incorrect premise. In the similar fact situation, the Hon'ble Gujarat High Court also quashed the re-assessment proceedings in *Sagar Enterprises vs. ACIT, (2001) 257 ITR 335 (Guj.)* where reasons were recorded *dehors* the fact, i.e., return not filed when the return was actually filed. Similarly, Hon'ble Delhi High Court in *Dr. Ajit Gupta vs. ACIT, 383 ITR 361 (Del)* has observed that reason for reopening of assessment based on mistaken factual premise is unsustainable in law.

11. In the light of the aforesaid judgments declaring the position of law, we find merit in the plea of the assessee towards inherent lack of jurisdiction under Section 147 of the Act. In the instant case also, the assessee had filed return of income and declared the transaction arising on sale of property which fact was not taken cognizance by the Assessing Officer while reopening the assessment.

12. The reopening proceedings itself being not permissible on the basis of inherently wrong facts, we do not consider it necessary to delve the merits of the addition. We thus set

aside the action of the CIT(A) and quash the re-assessment proceedings giving rise to the present appeal.

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

Order pronounced in the open Court on 17/04/2023.

Sd/-

**[CHANDRA MOHAN GARG]
JUDICIAL MEMBER**

DATED: /04/2023

Prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**