आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 17/JPR/2022
निर्धारण वर्ष/Assessment Years : 2008-09

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| Shri Dinesh Agarwal<br>A-32, Nulite Colony Tonk Road,<br>Jaipur. | बनाम<br>Vs. | DCIT,<br>Circle-6,<br>Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAVPA 5325 K | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/ Assessee by : Shri Shrawan Kumar Gupta (C.A.)
राजस्व की ओर से/ Revenue by : Mrs Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing 12/04/2023
उदघोषणा की तारीख/Date of Pronouncement : 30/06/2023

आदेश/ ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal is filed by the assessee against the order of the ld. CIT(A) National Faceless Appeal centre, Delhi [hereinafter referred as "NFAC"] dated 23-11-2021 for the assessment year 2008-09 wherein the assessee has raised the following grounds of appeal.

*" 1. INITIATION UNDER SECTION 147 OF THE ACT IS BAD IN LAW;*

*(i) Invocation is illegal in view of Proviso to section 147;*

*The learned CIT(A) has grossly erred in law & facts in confirming the order of Ld. AO in invocation of section 147 and assessing the income in view of Proviso to Section 147, without having jurisdiction henceforth may kindly be*

*declared the complete proceedings as null and void ab initio as There was nothing on record to suggest that there was any failure on part of assessee to disclose truly and fully all material facts necessary for assessment"*

*Joint Commissioner of Income-tax (OSD) v. Devendrasinh Chhatrasinh Vaghela (2019) 109 Taxmann.com 51 (SC)*

*(ii) Invocation of Section 147 solely on the basis of valuation of property under section 50C of the Act.*

*Under the facts and circumstances of the case, the proceeding initiated U/s 148 of the Income Tax Act, 1961 is void ab-initio deserves to be quashed because the action has been taken on the basis of the provisions of Section 50C of the IT Act*

*(1) ITO Vs. Shiv Shakti Build home (p) Ltd ITA 157/JD/2009*

*(2) Arun Kumar Choudhary ITA No 268/JP/2015*

*(3) Jagdish Chandra Boriwal ITA No. 216/Jodh/2017*

*(4) CIT Vs. K K Enterprises 178 txmann 187 (Rajasthan)*

*(i)) Change of Opinion;*

*Under the facts and circumstances of the case the proceedings initiated U/s 148 of the act, is void ab initio deserves to be quashed because questioned transaction has already been adjudicated during the course of original regular assessment proceedings therefore 147/148 proceedings are merely change of opinion without having any tangible material.*

*(1) M.J. Pharmaceuticals Ltd."v. Deputy Commissioner of Income-tax, Central Circle 32, Mumbai (2008) 167 Txmann 136 (Mumbai)*
*(2)CIT v. Kelvinator of India Ltd. [2010] 187 Taxman 312 (SC) (3) Saurabh Natvarlal Soparkar v. Assistant Commissioner of Income-tax, Circle 4(2) (2021) 131 taxmann.com 63 (Gujrat)*
*(4) Rajena Agro Products (P.) Ltd. v. Assistant Commissioner of Income Tax (2021) 127 Taxmann.com186 (Gujrat)*

*(ii) Borrowed Satisfaction without applying the mind, Under the law & facts of the case the Ld. AO has grossly erred in reopen the case on the basis of AIR information and without verifying the correctness of the information and therefore re-assessment proceeding is absolutely bad in law and without jurisdiction and further AO not recorded his satisfaction re-assessment is based on borrowed satisfaction which was not sufficient to confer power on the AO to initiate re-assessment proceedings against the assessee.*

*CIT Vs. Shree Rajasthan Syntex Ltd.(2009) 313 ITR 231 (Raj.)SLP dismissed: (2009) 313 ITR (St.) 27 (SC)*

*Sun Pharmaceutical Industries Lt. Vs. Dy. CIT (2016) 287 CTR (Del.) 621*

*(iii) Initiation is in very hyper mechanical manner,*

*Under the facts and circumstances of the case the Ld. AO has grossly erred in initiating the section 147 as the initiation is based on the borrowed satisfaction therefore being a hyper mechanical proceeding without application of mind of Ld. AO, it should be quashed.*

*(iv) Without providing opportunity of cross examination; The Ld. AO has grossly erred in initiating the proceedings under section 147 of the on the basis of third party statement recorded behind assessee's back and further not contra vended to him. Denial of opportunity to the assessee to cross examine the witnesses whose statements were made the sole basis of the impugned order is a serious flaw rendering the order a nullity in as much as it amounted to violation of principles of natural justice. (Andman timber industries V/s Commissioner of Central Excise (SC) 281 CTR (2015)241)*

*2. WITHOUT PROVIDING OPPORTUNITY OF BEING HEARD "NO SHOW CAUSE NOTICE NO ADDITION":*

*Under the facts and circumstances of the case the Ld. AO was not justified in making the addition without providing sufficient opportunity of being heard as specific show Cause notice have not been issued by the then. Therefore fundamental right of the assesse has been encroached.*

*3. ADDITION FOR Rs. 2,35,806/- TREATED AS LONG TERM CAPITAL GAIN IS UNJUSTIFIED;*

*The learned CIT (A) has grossly erred in law & facts in the circumstances of the case in confirming the addition of Rs. 2,35,806/- as made by Ld. AO on the basis of merely assumption/presumption, perverse findings and vague in the air without having any cogent material on record as well as tangible material which can prove that such excess amount of Rs. 2,35,806/- have been received by the assesse appellant therefore complete addition liable to be deleted, Income-tax Officer v. Zain Constructions (2020) 113 Taxmann.com513 (SC)*

*4. UP TO 110% EXCESSIVE VALUATION IS PERMITTED; The Ld. CIT(A) has grossly erred in law and facts in the circumstances of the case in confirming the Ld. AO in making addition for Rs. 2,35,806/- in view of excessive valuation as made by Stamp Valuation Authority from Rs. 38,82000/- to Rs. 41,17,806/- while according to third proviso of Section 50C as inserted w.e.f. 01.04.2021 (as clarificatory nature), up to 10% excess valuation as made by Stamp Valuation Authority is permitted under the eyes of exchequer, therefore complete additions should be deleted.*

*5. Under the facts & Circumstances the learned AO was not justified in charging interest u/s 234A & 234B*

2.1 Apropos Ground of appeal No. 1 to 4 of the assessee, the facts as emerges from the order of the ld. CIT(A) are as under:-

> ‘’5. Appellate Findings: The facts of the case, assessment order and submission of the appellant has been considered carefully. All grounds of appeal are against the action of the AO u/s 148 of the I.T. Act. The ground saying that the reasons for reopening the case are not provided by the AO is not explained well. The AO has clearly mentioned in the order para 2 of the order that reasons were well duly provided to the assessee. Hence, dismissed.

5.1 The other plea taken by the appellant is that the reassessment made u/s 147 is nothing but change of opinion since during the assessment all these facts were before the AO and no new facts are emerging. The contention of the appellant is not acceptable as the information received from the Sub-Registrar is received subsequently and was not available before the AO during the original assessment proceedings. As the Stamp Valuation Authority has valued the property at Rs.41,17,806/-. The difference of Rs.2,35,806/- remained from being taxed u/s 50C. The AO has rightly reopened the case u/s 147 and the order is confirmed. Accordingly, the appeal is dismissed.

6. In the result, the appeal is dismissed.''

2.2 During the course of hearing, the ld. AR of the assessee prayed that the ld. CIT(A) has erred in confirming the action of the AO for which the ld. AR of the assessee filed the detailed written submission countering the findings of the ld. CIT(A)

"GOA 1-2 Invalid action and u/s 148 and invalid assessment :

FACTS: 1. The facts of the case are that the Assesse is a regular Income Tax assessee for past several years. During the year i.e A.Y. 2008-09he had Income from business and profession, Capital Gain viz. Short Term Capital Gain and Long Term Capital Gain along with other source income. The Assesse filed his return of income on 29/09/2008 declaring Total income at Rs. 35,07,160/-. Copy of the of return alongwith Computation of Income and Financial Statements are Annexed as PB 1-12.

2. That during the year under consideration the petitioner was indulged in the activities of Government Works Contract under his Proprietor Ship firm M/s Neelkanth Enterprises, Trading of Shares and F&O and Trading of Real Estate under his Personal Name viz. DINESH AGARWAL apart of it he involved in Real Estate Transaction as Selling of Capital Assets also.

3. That the Income Tax Return for the AY 2008-09 as filed on dated 29/09/2008 was called for regular Scrutiny through issuing Notice U/s 143(2) of the act, on dated 28/08/2009 and asked queries, which were replied in sufficiency, thereafter assessment order was passed U/s 143(3) of the Act, dated 22/11/2010 by accepting Return Income vide Assessment Order dated 22/11/2010, Annexed as PB-61.

4. That after it the l. AO has issued a Notice U/s 148 on dated 27/03/2015, Annexed as PB-16. In Compliance to Notice U/s 148, assessee submitted ITR and asked to the ld. AO for Reasons, which have been duly received, Annexed at PB - 21.

5. That in pursuant to Notice U/s 148 and compliance made by the Appellant, the Ld. AO issued Notice U/s 143(2) and Query Letter U/s 142(1) of the act, Annexed at PB-26 & 27.

6. That the assessee has filed Objection in response of Notice U/s 148 and Reasons recorded as supplied by the then, vide Objection letters dated 16/06/2015, 31/07/2015 and 11/08/2015 on various grounds, Annexed at PB-28-35.

7. That the Ld. AO disposed of Objections vide their order dated 26/08/2015 through non-speaking order, Annexed at PB-36-37.

8. That the issue as considered by the Ld.AO through Reasons recorded for escapement of Income is based on information received from I& CI, Jaipur regarding excess valuation done by Stamp Valuation department compared to Face Value as declared by the Appellant and accepted by the Registering Authority the then, during the course of selling of Immovable Property and getting registered Sale Deed before Registration Authority. In factum Appellant sold out an immovable Property for Rs. 38,82,000/- on dated 19/02/2008 which was revalued by Stamp Valuation Department on the basis of departmental audit at Rs. 41,17,806/- therefore Ld. AO alleged the difference of Rs. 2,35,806/- to be escapement of Income and re-opened the Assessment by issuing Notice U/s 148 of the Act.

9. That the Re-assessment proceedings u/s 148/147 have been completed by making addition at Rs. 2,35,806/- in Total Income of the Assessee Appellant as declared and accepted by the Ld. AO the then in original Assessment dated 22/11/2010.

10. In first appeal we have filed detailed WS and legal position. However the ld. CIT(A) has not considered the same in their true perspective and sense and summarily rejected the plea of the assesse and confirmed the order of the action of the ld. AO.

Hence this appeal before your honor

SUBMISSIONS:

1. Notice is barred by the limitation and invalid:

1.1 Firstly it is submitted that the Action taken by the AO u/s 147/148 is barred by the limitation. Because as in this case the assessment was completed u/s 143(3) on 22.11.2010. And as per S. 147 the notice u/s 148 shall not be issued after the expiry of four year from the relevant assessment year in the case where the assessment was completed U/s 143(3) or 148. And in this case 4 years has been ended or expired on 31.03.2013, when the notice has been issued on 27.03.2015. Thus the notice issued u/s 148 is illegal and invalid due to barred by the limitation, for this reason the assessment may kindly be quashed.

1.2 Because in this case the assessee had already filed all the details of during the course of original assessment proceedings on the issue query as under 148 has been furnished vide letter to AO. As clear by perusal of Assessment record it has observed that petitioner had already been assessed during the course of Regular Scrutiny Assessment Proceeding under section 143(3) through assessment order passed on dated 22/11/2010 and issue in respect of re-opening of Assessment has already been discussed and considered by the then AO and no addition were made on this particular issue, and four years have already been elapsed from the end of Assessment Year as on 31/03/2013, and Notice for re-assessment U/s 148 issued on 27/03/2015, therefore First Proviso to section 147 of the act, has triggered which put a statutory obligation upon Assessing Officer to prove first 'any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year',

1.3 That by perusal of letter dated 26/08/2015 through which objection disposed of by the Ld. AO it is ample cleared that Ld. AO ignored the statutory liability as casted upon him through statute whereas in instant case he had to bring such

instances where any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. But in instant case the Ld. AO taking a different interpretation of the statute trying to justify his arbitrary act, which led to complete proceedings void abinitio, as re-opening was without jurisdiction.

1.4 We relied upon following land mark decisions of Jurisdictional HC as well others;

1.4.1 In the case of National Dairy Development Board vs. DCIT 353 ITR 538(Guj.) held that Reassessment—Full and true disclosure—Notice after expiry of four years—AO has reopened the assessment on two grounds—First ground is that while computing the taxable income the petitioner has excluded "provision written back" which is income escaping assessment in the year under consideration—Aforesaid ground is based upon verification of the return of the petitioner i.e., material disclosed by the petitioner itself—Second ground relating to the claim of depreciation is based on the reasoning that the claim is to be curtailed in view of subsequent insertion of Expln. 6(b) to s. 43(1) with retrospective effect from 1st April, 2003—However, in either case, there is nothing whatsoever in the reasons recorded to indicate that there is any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year—Therefore, the condition precedent for invoking the proviso to s. 147 is clearly not satisfied and assumption of jurisdiction under s. 147 is not valid—Moreover, by virtue of second proviso to s. 147, the income which is subject-matter of any appeal, reference or revision has been expressly kept out of the purview of the said section—Since the income which is stated to have escaped assessment in the second ground was subject-matter of appeal, it would not fall within the ambit of s. 147 and thus, the AO lacked jurisdiction to reopen the assessment on that ground—Hence, impugned notice under s. 148 is quashed and set aside.

1.4. 2 In the case of Winsome Textiles Industries Ltd. vs. UOI & ORS. 278 ITR 470(P&H) held that Reassessment—Full and true disclosure—Notice after expiry of four years—Notice under s. 148 on the ground that assessee failed to submit P&L accounts of one of its units for earlier years—Not justified—There is no provision of law which requires furnishing of P&L a/c of earlier years—Assessee cannot be charged with failure to disclose fully and truly material facts necessary for assessment—Assessment had been completed under s. 143(3) and AO could have required the assessee to produce necessary statements at that time—Failure

of AO could not be treated at par with failure of assessee—Proceedings under s. 147 after expiry of four years were wholly without jurisdiction

1.4.3 In the case of Pr. CIT v/s Samcor Glasses Ltd. & M/s Samtel Colour Ltd. in Appeal No. 768 &769/2015 dt. 12.10.2015 the Honble Del. High Court held that " it is settled position of law that the reopening of assessment beyond four years is not sustainable unless there was a failure by the assessee to disclose any material particulars on the basis of which there were reasons to believe that the income has been escaped assessment.
970&993/Jp/2016 dt. 16.03.2017

1.4.5 In the case of Banswara Syntax Ltd. Vs. ACIT 138 Taxmann 275 (Rajasthan) (16/03/2004), where in the facts are being similar to the present case, the Honorable Jurisdictional High Court held;

"10. In the present case, the petitioner is not challenging the sufficiency or adequacy of material, on the basis of which, belief has been found but his case is on the basis of reasons recorded by the Assessing Officer himself. He had no jurisdiction to initiate proceedings on the date on which he issued notices which were clearly beyond four years from the end of relevant assessment year, which, in the present case, comes to end on 31st March, 2001. It is apparent from the reasons that Assessing Officer did not hold any belief that escapement of income chargeable to tax from the assessee was on account of any failure on part of the assessee to disclose truly and fully all material facts necessary for his assessment for assessment year 1996-97. Thus, it was clearly a case falling within the ambit of proviso to section 147 and notices issued after 31st Jan., 2001, were clearly barred by time. Thus, Assessing Officer had no jurisdiction to issue the notices.

11. Learned counsel for the respondent sought to contend that since this objection could be taken before the Assessing Officer and can be disposed of by him, this Court ought not to interfere in the case. However, he is unable to point out that this case is not governed by proviso to section 147 nor he contends that if the case is governed by proviso to section 147, the notices issued on 28th March, 2001, will be clearly barred by time. Since a case of patent lack of jurisdiction is made out on the basis of Assessing Officer's own recorded reasons, we are not persuaded to relegate the petitioner to alternative remedy.

Accordingly, the writ petition is allowed and impugned notices are quashed. No costs."

Similarly in the case of First Source Solutions Ltd. vs. ACIT 12(2)(1) Mumbai, 438 ITR 139 (Mumbai), 31/08/2021 wherein the facts, being similar to the present case, the Hon'ble High Court observed;

"11. Therefore, when the assessment is sought to be reopened after the expiry of period of four years from the end of the relevant year, the proviso to section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. This stipulation does not govern a notice for reopening within a period of four years. In the case at hand, as noted earlier, there is not even a whisper about what fact was not disclosed. In our view, therefore, the notice to reopen under section 148 of the said Act itself was issued without jurisdiction. Consequently, the order passed also cannot be sustained.

12. Therefore, the impugned notice dated 29th March 2019 as well as the order dated 16th September 2019 are hereby set aside."

2. Invocation of Section 147 solely on the basis of valuation of property under section 50C of the Act:

*Further it is submitted that the notice u/s 148 can be issued only when there is any escape of income because S. 147 provides that If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, here the assessee has not escaped any income he has disclosed all the income in the return of income, the AO has reopened the case on the basis of value adopted by the Sub Registrar for the purpose of stamp duty. In which the value was adopted at Rs. 41,17,806/- on their own purpose as against actual sale consideration at Rs.38,82,000/-. And for invoking the deeming provision of S. 50C the AO issued the notice u/s 147/148 and in this provision no escapement of income is involved and also no income has been accrued or arose. Hence if there is no escarpment then the notice issued u/s 148 is invalid.*

Under the facts and circumstances of the case, the proceeding initiated U/s 148 of the Income Tax Act, 1961 is void ab-initio deserves to be quashed because the action has been taken on the basis of the provisions of Section 50C of the IT Act.

Instant case was re-opened only on the basis of Information as received from I&CI department (Income Tax Department) whereas Stamp Valuation Report speak up about Excessive difference in Valuation as done by Stamp Valuation Department and Valuation as presented by the Assesse Appellant of Sale

Transaction of an Immovable Property as under Questioned. Here it is to be noted that the sale transaction of Rs. 38,82,000/- of Questioned property has been alleged by the Ld. AO to be at Rs. 41,17,806/-, besides it he did not hold any incriminating material in support of his allegation while other side the Assesse Appellant has already submitted each and every documents which he possessed and such documents have been adjudicated by the Ld. AO the then during the course of original Assessment as done U/s 143(3) of the Act. Here it is also notable that by showing/declaring the sale consideration of the Immovable Property suo motu at Rs. 38,82,000/- he declared Long Term Capital Gain at Rs. 30,53,976/- and paid the Tax on it.

Here it is also notable that the allegation of excessive valuation at Rs. 41,17,806/- could not have been proved after assessment because assesse appellant did not receive any of excessive amount of sale consideration as claimed by the Ld AO the then.

Therefore re-opening on the basis of merely on presumption is not valid and this observation has been holding by various land mark Judgment also as pronounced by this Jurisdictional ITAT as well as HC as follows;

In the case of ITO Vs. Shiv Shakti Build home (p) Ltd ITA 157/JD/2009 it has been held that *The Inspector has only stated that though the assessee purchased the property @ Rs. 250 per sq. ft. in that area, the rate was from Rs. 500 to 600 per sq. ft. No details or any instances have been given in the said report. In any case this report could not be the basis for information of belief of the AO regarding escapement of income. There has to be nexus between formation of belief and escapement of income. In the present case, only valuation done by the stamp valuation authority and the Inspector's report have been taken as basis for formation of belief. There has to be reason for formation of belief and the reason should be such, from which prima facie it could be inferred that there is escapement of income. Every reason, if remotely connected with the issue, cannot be said to be a sufficient reason for formation of belief regarding escapement of income. There has to be live nexus between the reason and formation of belief regarding escapement of income. Merely because the stamp valuation authority has adopted certain valuation for payment of stamp duty, the same cannot be a basis to conclude regarding escapement of income in the hands of purchase, particularly when no tangible material has been brought on record to suggest the escapement of income except the Inspector's report which cannot be relied upon.—CIT vs. D.N. Pachori (2010) 189 Taxman 420 (MP) relied on.*

In the case of Arun Kumar Choudhary ITA No 268/JP/2015 wherein in para 9 page 8 onward it has been held that *"9. Evidently, the provision of Se. 50C are deeming provisions enacted specifically for the purpose of Sec. 48 of the Act. Sec. 50C(1) specifically provides that where the consideration received qua transfer of the land is less than the value adopted by the Stamp Valuation Authority, the value so adopted shall, for the purpose of Se. 48 be deemed to be the full value of consideration received as a result of transfer. Sec. 48 provides the mode of computation of capital gain. A conjoint reading of Sec. 50C and 48 of the Act Shows that the deeming provisons of Sec. 50C are only for such computation. That being, so as rightly contended, the valuation adopted by the Stamp Valuation Authority cannot by itself, be made the basis for reopening the concluded assessment.*

*10. thus, a mere adoption of higher value of the property by the Stamp Valuation Authority cannot lead to a formation of belief of escapement of income, particularly when the value so adopted is adopted for the stamp duty purpose only.*

*11. Moreover, it is nowhere the case of the department that the Assessing officer had brought on record any tangible material whatsoever to suggest escapement of income, which could have, beside the Inspectors report, led to the formation of belief of escapement of income. It is trite, as also considered in the case of ITO v/s Shiv Shakti Build Home (P) Ltd (Supra), that there has to be a nexus between the formation of belief and the alleged escapement of income. In the absence of any positive material brought on record by the Assessing Officer to suggest escapement of income. , no such nexus exist herein. Therefore respectfully following the decision in the case of ITO v/s Shiv Shakti Build Home (P) Ltd (Supra), the grievance of the assessee by way of the modified additional ground taken is accepted and the initiation of the assessment proceedings is quashed."*

Jagdish Chandra Boriwal ITA No. 216/Jodh/2017

CIT Vs. K K Enterprises 178 taxmann 187 (Rajasthan)

3. Change of Opinion;

Under the facts and circumstances of the case the proceedings initiated U/s 148 of the act, is void ab initio deserves to be quashed because questioned transaction has already been adjudicated during the course of original regular assessment proceedings therefore 147/148 proceedings are merely change of opinion without having any tangible material.

By perusal of Reasons recorded before initiating re-assessment proceedings vide para 11 it has observed that the re-assessment was initiated on the basis of Information received from I & CI regarding Stamp Valuation of Sale deed of an Immovable Property at Rs. 41,17,806/- which was originally registered at Rs. 38,82,000/- (which is also face value of the Transaction)and this Transaction pertains to Plot No. 414, Scheme No.10 Surya Nagar, GopalPuraByepass, Jaipur (Rajasthan) " (Registered Sale Deed is available at PB 38-49) which had already been adjudicated during the course of original Assessment proceedings as evidenced through Note Sheet of such assessment proceedings at PB-14-15 and reply submitted in response of desire of Ld. AO the then at PB-120-122.

Therefore it is notable that the issue already adjudicated by the Ld. AO the then and applied his mind and examination again by same office bearer comes under preview of Change of Opinion which is not permitted under statute and precedence's are established through many land mark judgments which are being referred here below.

M.J. Pharmaceuticals Ltd.*v. Deputy Commissioner of Income-tax, Central Circle 32, Mumbai (2008) 167 Txmann 136 (Mumbai)

CIT v. Kelvinator of India Ltd. [2010] 187 Taxman 312 (SC)

SaurabhNatvarlalSoparkar v. Assistant Commissioner of Income-tax, Circle 4(2) (2021) 131 taxmann.com 63 (Gujrat)

Rajena Agro Products (P.) Ltd. v. Assistant Commissioner of Income Tax (2021) 127 Taxmann.com186 (Gujrat)

4. Borrowed Satisfaction without applying the mind,

Under the law & facts of the case the Ld. AO has grossly erred in reopen the case on the basis of AIR information and without verifying the correctness of the information and therefore re-assessment proceeding is absolutely bad in law and without jurisdiction and further AO not recorded his satisfaction re-assessment is based on borrowed satisfaction which was not sufficient to confer power on the AO to initiate re-assessment proceedings against the assessee.

Sun Pharmaceutical Industries Lt. Vs. Dy. CIT (2016) 287 CTR (Del.) 621

5. Initiation is in very hyper mechanical manner,

Under the facts and circumstances of the case the Ld. AO has grossly erred in initiating the section 147 as the initiation is based on the borrowed satisfaction therefore being a hyper mechanical proceeding without application of mind of Ld. AO, it should be quashed.

6. Without providing opportunity of cross examination;

The Ld. AO has grossly erred in initiating the proceedings under section 147 of the on the basis of third party statement recorded behind assessee`s back and further not contra vended to him. Denial of opportunity to the assessee to cross examine the witnesses whose statements were made the sole basis of the impugned order is a serious flaw rendering the order a nullity in as much as it amounted to violation of principles of natural justice. (Andman timber industries V/s Commissioner of Central Excise (SC) 281 CTR (2015)241)

7. WITHOUT PROVIDING OPPORTUNITY OF BEING HEARD "NO SHOW CAUSE NOTICE NO ADDITION";

Under the facts and circumstances of the case the Ld. AO was not justified in making the addition without providing sufficient opportunity of being heard as specific show Cause notice have not been issued by the then. Therefore fundamental right of the assesse has been encroached.

8. In view of the above facts, circumstances and legal position of law the assessment may kindly be quashed.

GOA 3 AND 4 : ADDITION FOR Rs. 2,35,806/- TREATED AS LONG TERM CAPITAL GAIN IS UNJUSTIFIED AND UP TO 110% EXCESSIVE VALUATION IS PERMITTED:

FACTS: Vide the facts of GOA1-2

Further in first appeal we have filed detailed WS and legal position. However the ld. CIT(A) has not considered the same in their true perspective and sense and rejected the plea of the assesse in very summarily manner and confirmed the order of the action of the ld. AO.

SUBMISSIONS:

1. The learned CIT (A) has grossly erred in law & facts in the circumstances of the case in confirming the addition of Rs. 2,35,806/- as made by Ld. AO on the basis of merely assumption/presumption, perverse findings and vague in the air

without having any cogent material on record as well as tangible material which can prove that such excess amount of Rs. 2,35,806/- have been received by the assesse appellant therefore complete addition liable to be deleted,

Income-tax Officer *v.* Zain Constructions (2020) 113 Taxmann.com513 (SC)

2. The Ld. CIT(A) has grossly erred in law and facts in the circumstances of the case in confirming the Ld. AO in making addition for Rs. 2,35,806/- in view of excessive valuation as made by Stamp Valuation Authority from Rs. 38,82000/- to Rs. 41,17,806/- while according to third proviso of Section 50C as inserted w.e.f. 01.04.2021 (as clarificatory nature), up to 10% excess valuation as made by Stamp Valuation Authority is permitted under the eyes of exchequer, therefore complete additions should be deleted.

3. No evidence of receiving Excess sale consideration: Further the ld. AO has not brought on record that the assessee has received more or excess consideration or own money than to actual sale consideration. On this preposition kindly refer following decision of the Honble Supreme Court and High Courts

3.1 In the case of CIT vs. Khandelwal Shringi & Co.: (2017) 398 ITR 0420 (Raj) it has been held that *Income from undisclosed sources—Unexplained investments—Purchase of agricultural land—Deletion of addition—Tribunal deleted addition made by AO on account of unexplained investment in purchase of agricultural land on basis of sale agreement and other documents found and impounded during course of survey u/s 133 in which sale consideration was specified amount—Held, while computing undisclosed income, rates of property fixed by Stamp Valuation Authority for purposes of registration of sale deeds, could not be taken to be price for which property was purchased—In absence of evidence on record, higher price for sale of land could not be presumed from consideration shown in registered sale deeds and rates of property fixed by Stamp Valuation Authority for registration purposes could not be taken to be price for which property might had been sold—There was no justification for AO to estimate selling price of land at Rs. 40 per sq.ft. instead of Rs. 20 per sq.ft. and for CIT(A) to presume selling price at 22 per sq.ft—Tribunal committed no error in allowing appeal of assessee—Revenue's appeal dismissed.*

3.2 The Honble Supreme Court in the case of CIT vs. Shivakami co. (P) Ltd. 159 ITR 0071(SC) held that *Capital gains—Applicability of first proviso to s. 12B of 1922 Act—Proviso to s. 12B not attracted unless there is evidence that more consideration than what was stated in the document of transfer was received—*

*Onus in this regard is on Revenue—Emphasis in those provisions is on consideration declared or disclosed by the assessee as distinguished from the consideration actually received by the assessee—Capital gains is intended to tax the gains of the assessee and not what the assessee might have gained—Shares sold by the assessee to related parties at lower value allegedly for safeguarding the shares from being taken over by Government in settlement of tax dues—No evidence that consideration actually received was more than what was disclosed or declared by the assessee—There was thus no understatement of full value of consideration—No capital gains under the first proviso to s. 12B was, therefore, leviable*

3.3. In this connection we also relying on the decision of Honble Rajasthan High Court in CIT v/s K.K. Enterprises 178 Taxman 187(Raj.)/13 DTR 289 wherein it has been held that *" AO determined the sale price of the plots by adopting the rate of Rs. 40 per sq.ft. on the basis of rate taken by sub registrar and made addition to assessee's income not justified. Apparently, there was no reliable material on record before the assessing authority to assume sale of plots at Rs. 40 per sq. ft.. In the absence of any evidence on record, it cannot be presumed hat land has been sold by the assessee at a higher price than the consideration shown in the registered sale deeds- Rates of property fixed by the Stamp valuation Authority for registration purpose cannot be applied to arrive at the price for which the property might have been sold*".

The ratio of above judgments is also followed by the jurisdictional ITAT Jodhpur Bench, Jodhpur recently in the case of Sh. Hussain Ali Bohara ITA No. 564&578/Jodh/2010 dt. 19.01.2012

3.4 In case of CIT v/s Supriya Enterprises 232 ITR 887(Ker). It has been held that The registered documents reflect the price of the land is a piece of evidence which cannot be discarded. The ordinary rule is that apparent state of affairs is real unless contrary is proved and the burden of proving the contrary lies on the person who assessed/alleged it Kindly refer Daulat Ram Rawat Mull 87 ITR 349 (SC)..

ACIT v/s Excellent Land Developers (P) Ltd. 1 ITR (Trib.) 563

3.5 In the case of Inderlok Hotels (P) Ltd v/s ITO 122 TTJ 145(Mum). Here also the position is very same because here assessee purchases a land and after conversion and developing in to plotting the same have been sold after making some profit. The lower authority nowhere alleged that the assets were sold in loss

and he neither made any inquiry nor brought any evidence on record that the land sold on higher price than shown in sale deed. If he was having any doubt about the sale price of lands he could have made independent inquiry. The assessee has discharged onus lie upon him by producing the copies of sale deed. Now the onus was lies upon the revenue to disprove the same.

3.6 In CIT V/S Chandni Bhuchar 34 DTR 137(P&H)- It has been held that valuation done by the any State Agency for The purpose of the stamp duty would not ipso fact substitute the actual sale consideration as being passed on the seller by the purchaser in the absence of any admissible evidence value taken by the stamp duty authority could not be taken as actual sale consideration and value shown in the sale deed had to be accepted. Also refer CIT v/s Smt. Raj Kumari Vimla Devi (2005) 279 ITR 360(All). CIT v/s Shweta Buchar 192 Taxman 67(P&H) Also refer Hussain Ali Bohara in ITA No. 564 & 578/JDH/2011 dt.

3.7 In CIT v/s Dolphin Builders (P) Ltd 90 DTR 75(MP)-Understatement of sale consideration of flates- When there was no evidence that the excess amount, if any was collected by G- Builders or even if it was collected then it was passed on the assessee. No addition could be made in the hands of the assessee.

*Recently followed by the Honble ITAT in the case of Sh. Jagdish Chandra Boriwal in ITA No. 216/JD/2017 dt. 01.08.2017.*

Under the facts & Circumstances the learned AO was not justified in charging interest u/s 234A & 234B.

The ld. AR of the assessee conclusively submitted that the addition of Rs.2,35,806/- should be deleted in view of the aforementioned grounds of appeal.

2.3 On the other hand, the ld. DR supported the order of the ld. CIT(A).

2.4 We have heard both the parties and perused the materials available on record and also the case laws cited by the respective parties. It is not imperative to repeat the facts of the case but the main thrust of the assessee is relating to addition of Rs.2,35,806/- made by the AO by observing as under:-

''4. I have gone through the reply and carefully considered it, however, on the basis of material facts available on records it is not found tenable. The provisions of Section 50C are crystal clear and mandatory by nature which would not be defeated on the ground mere surmises or descriptions of circumstances which have no relevancy and justification for suppressing sale consideration and in consequences reduce tax liability of the assessee.

On the basis of material facts available and in the circumstances of the case, the difference of Rs.2,35,806/- i.e.in between face value and stamp value, is required to be added back to the total income of the assessee as long as term capital gains.''

Thus, the AO made disallowance of Rs.2,35,806/- in the hands of the assessee which in first appeal has been confirmed by the ld. CIT(A). The relevant extract of ld. CIT(A)'s findings are as under:-

''5.1……T*he contention of the appellant is not acceptable as the information received from Sub-Registrar is received subsequently and was not available before the AO during original assessment proceedings. As the State Stamp Valuation authority has valued the property at Rs.41,17,806/-. The difference of Rs.2,35,806/- remained from being taxed u/s 50C. The AO has rightly reopened the case u/s 147 and the order is confirmed. Accordingly, the appeal is dismissed.''*

We find that it is an admitted fact that the assessee has sold the property for the sale consideration at Rs.38,82,000/- (PB Page 43 & 44) and Stamp Valuation Authority has adopted the value at Rs. 41,17,806/- (PB page 24) for the purpose of stamp duty. Thus there was difference of Rs. 2,35,806/-, which comes to 6.07%. It may be noted that this case is covered by the decision of ITAT, Coordinate Bench of Jaipur in the case of Sita Bai Khetan v/s Income Tax Officer Ward 6(3) Jaipur (in ITA No. 826/JP/ 2013 dated 27-07-2016) and ITAT Jaipur Bench has followed the order of the ITAT Coordinate Bench, Pune ( ITA No. 1543/PN/2007) in the case of *Rahul Construction* vs DCIT and placed the operative para No. 4.2 in its order as under with a view to adjudicating upon the ground of the assessee

> *"4.2…….In the instant case, the difference between the valuation adopted by the Stamp Valuation Authority and declared by the assessee is less than 10%. Therefore, respectfully following the decision of the Hon'ble Coordinate Bench, we hereby direct the AO to adopt the value as declared by the assessee. This ground of the assessee is allowed."*

It is also noteworthy to mention that ITAT, Mumbai Bench ''I' on the similar issue in the case of Maria Fernandes Cheryl *Vs* Income Tax Officer In ITA No. 4850/Mum/2019 for the assessment year 2011-12 vide order dated 15-01-2021 held as under:-

" 9. We have noted that as against the stated consideration of Rs 75,00,000, the stamp duty valuation of the property is Rs 79,91,500. The

> difference is just Rs 4,91,500, which is about 6.55% of the stated sale consideration. As the difference between the stated consideration vis-à-vis the stamp duty valuation is admittedly less than 10% of the stated consideration in this case, and in the light of the above discussions, we are of the considered view that Section 50C will have no application in the matter. The enhancement in capital gain computation, as made by the Assessing Officer, thus stands disapproved. The assessee gets the relief accordingly."

Therefore in view of the above deliberations and also aforesaid orders of co-ordinate Benches( supra), we find that the difference between the valuation adopted by the Stamp Valuation Authority at Rs. 41,17,806/- and declared by the Assesse at Rs. 38,82,000/- comes to Rs. 2,35,806/- i.e. 6.07% which is less than 10% as recognized by the Legislature by inserting an amendment w.e.f. 01/04/2021. Hence, we set aside the order of the ld. CIT(A) and direct the AO to take the sale consideration of the property at Rs. 38,82,000/- only and addition made by the AO is directed to be deleted. The grounds raised by the assesse are accordingly allowed.

3.1 The Ground No. 5 of the assessee is relating to charging of interest u/s 234A & 234B of the Income Tax Act, 1961 which is mandatory and consequential in nature.

4.0 In the result, the appeal of the assessee is allowed

Order pronounced in the open Court on 30 /06/2023.

Sd/- Sd/-

( राठोड कमलेश जयन्तभाई ) ( डॉ.एस.सीतालक्ष्मी)
(RATHOD KAMLESH JAYANTBHAI) (Dr. S. Seethalakshmi)
लेखा सदस्य / Accountant Member न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 30/06/2023.
*Mishra
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Dinesh Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-6, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 17/JPR/2022}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar