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

डा॰ एस. सीतालक्ष्मी,न्यायि कसदस्य एव ंश्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 82/JPR/2023
निर्धारण वर्ष/Assessment Years : 2010-11

Kailash Chand Yadav 100, Kalu Baba Ki Dhani, Sheoshinghpura, Akoda, Phulera, Jaipur-303338.	बनाम Vs.	Income Tax Officer, Ward-1(1), Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ACXPY 1162 C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby : Shri S.L. Poddar(Adv.)&
Shri J.P. Singh (Adv.)
राजस्व की ओरसे/Revenue by: Smt. Monisha Choudhary(Addl.CIT)

सुनवाई की तारीख/Date of Hearing :10/08/2023
उदघोषणा की तारीख/Date of Pronouncement: 11/09/2023

आदेश/ORDER

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

This appeal is filed by the assessee aggrieved from the order of the National faceless Appeal Centre, Delhi [herein after referred to as "NFAC/ld.CIT(A)"] dated 03.01.2023 for the assessment year 2010-11.

2. The assessee has raised the following grounds of appeal:-

"1. In the facts and circumstances of the case of the Learned CIT(A) has erred in not giving the benefit of peak credit or earlier cash withdrawal from the same bank.

2. In the facts and circumstances of the case of the Learned CIT(A) has erred in not considering the submission that the amount deposited in bank was on behalf of principal employer on account of recovery of debtors.

3. The assessee craves your indulgence to add amend or alter all or any grounds of appeal before or at the time of hearing.

4. In the facts and circumstances of the case of the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in passing the order u/s 148/144 of the Income Tax Act, 1961.

5. In the facts and circumstances of the case of the Learned CIT(A) has erred in confirming the addition of Rs. 25,85,740/- made by the Learned Assessing Officer u/s 69A of the Income Tax Act, 1961 on account of cash deposited in the bank account of the assessee."

3. Brief facts of the case are that the assesseeis an individual and working as sales manager with M/s Tadkeshwar. He was also authorized to collect money from debtors located out of the station. The employer has allowed the assessee to deposit cash in his bank branch nearby debtors to avoid risk of theft while traveling. The money deposited by the assessee (collected from the debtors of M/s Tadkeshwar) and subsequently made withdrawal from ATM. The said cash again given back to the employer and thereby the necessary entries were made in debtors account against their dues by his employer firm. The assessee received a sum of Rs. 1,00,000/- as salary from M/s Tadkeshwar. This was the income source of

income of the assessee. Hence, he was not liable for filing the income tax return. The case was selected for scrutiny as per ITS details the department had gathered that the assessee has deposited cash amounting to Rs. 25,85,740/- with State Bank of Bikaner and Jaipur during Financial Year 2009-10. The Learned Assessing Officer has issued notice u/s 148 on 24.03.2017 which was never served on the assessee. Subsequent notices u/s 142(1) have also not been received by the assessee. The learned Assessing Officer passed the order u/s 148/144 of the Income Tax Act, 1961 on 04.12.2017 determining total income at Rs. 25,85,740/- inter-alia making an addition of Rs. 22,65,837/- u/s 69A of Income Tax Act, 1961 by the cash deposited in bank as unexplained money.

4. Feeling dissatisfied from the finding of the ld.AO the assessee preferred the appeal before the ld. CIT(A). The relevant findings of the ld.CIT(A) is reproduced here in below:-

> "In the light of the above mentioned ratios when one examines the reasons behind the re-opening it emerges that the bank account of the assessee witnessed cash deposits to the tune of Rs. 25,85,740/- in the FY 2009-10 and that the assessee had not filed his return of income. The above clearly connotes sufficient grounds and material before the AO for initiating re-assessment proceedings and this in no way could be termed as 'non-tangible material' or based on rumours/gossip.
>
> Further reliance is placed on the following decisions to drive home the point that the re-assessment proceedings were initiated in a valid manner and based on sufficient material before the AO;

(i) Recourse is drawn in support of the AO's actions, from the decision of the Apex Court in the case of Raymond Woolen Mills Ltd vs. ITO & others [236 ITR 34] [SC] and Yuvraj vs UOI [315 ITR84][SC]where the Supreme Court held that

"That while determining whether commencement of reassessment proceedings was valid it was only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage."

(ii) The Supreme Court in case of Calcutta Discount case has held as under:

"The position therefore is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "underassessment" that would be sufficient to give jurisdiction to the ITO to issue the notice u/s 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation."

(iii) Supreme Court in case of ACIT vs. Rajesh Jhaweri Stock Brokers Pvt. Ltd [2007]161 Taxmann 316(SC) has held as follows:

"Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe will mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income has escaped assessment, it can be said to have reason to believe that an income has escaped assessment. The said expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an in-built idea of fairness to taxpayers. [Para 16]

The scope and effect of section 147, as substituted with effect from 14- 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly, the Assessing Officer must have reason to believe that income, profits or gains chargeable to income-tax had escaped assessment, and secondly, he must also have reason to believe that such escapement had occurred by reason

of either 6) omission or failure on the part of the assessee to file a return under section 139 for any assessment year with the Assessing Officer or fii) to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148, read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words, if the Assessing Officer, for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147."

(iv) Delhi High Court in its decision in case of Smt. Sonia Gandhi & Sh. Rahul Gandhi in Writ Petition no. 8482/2018 dt.10.09.2018 affirmed the department's view that:

a) Court cannot substitute its own reasons to believe in place of what has been recorded by the AO.

b) Recording of reasons by AO is necessarily tentative and prima facie not expected to be conclusive.

c) Court cannot go into either sufficiency of reasons or correctness of reasons and adequacy of reasons so long as there are reasons recorded based upon tangible material.

d) If court finds that a 2nd view is also possible, it would refrain from interfering at stage of issue of notice under section 147 merely because 2nd view is possible and then what has been recorded by the AO.

e) Supreme Court has already held in the case of Rajesh Jhaveri stockbrokers that reason to believe cannot mean AO has to finally ascertain the facts by legal evidences or conclusions.

5.1.2 In light of the discussion above it is held that the proceedings u/s 147/148 were initiated rightly and legally. GoAs no. 1 & 2 are, accordingly, dismissed.

5.2 Ground no. 3 of the appeal relates to the completion of assessment u/s 144 of the Act. During assessment proceedings, the AO had issued notices u/s 142(1) of the Act dated 11.09.2017 and 20.11.2017 but in response to these notices none attended nor any reply/written submission was made by the assessee. At that point, AO had no other option but to complete the assessment proceedings u/s 144 of the Act as per material available on record. Therefore, assessee's claim that AO had erred in completing the assessment proceedings u/s 144 is incorrect and dismissed. Ground no. 3 of the appeal is also dismissed.

5.3.1 Ground no. 4 of the appeal relates to the addition of Rs. 25,85,740/- u/s 69A of the Act. The assessee vide his submission dated 08.09.2022 had submitted that he was working in Shree Tadkeshwar Food Product as salesman. He claimed that he was authorized by firm to collect money from debtors situated out of town which he used to deposit in his bank account and returned the money to employer firm after returning to headquarter. The assessee was asked to furnish copies of his returns of income for previous and years subsequent to the year in contention. His general refrain was that his income being below taxable limit he was not liable to file return of income for any of the years. Additionally he claimed to be a mere collector of cash on behalf of his employer and apart from a certificate from his employer furnished ledger accounts of parties from whom cash was purportedly collected.

The said evidences don't prove to be conclusive in light of the following observations:

(i) Perusal of bank statement of the assessee reveals that the cash was deposited and withdrawn by ATM and that there was not even a single transaction that would have gone to prove that the amount had been returned to the assessee's purported employer. By merely saying that the money doesn't belongs to him doesn't prove that he was not responsible for the transaction happening in his account.

(ii) The so called employer's certificate about his status doesn't quantify the amount he collected in cash during the year on their behalf. Neither does it certify that he had been assigned the task of collecting money.

(iii) His plea that he deposited cash on behalf of his employer and returned it to the company on his return to headquarters doesn't get supported by the fact that practically every time the same amount was withdrawn from an ATM.

(iv) There could not be an alternative rationale that he withdrew from the ATM to pay it to the employer. He could have well made a lump sum transfer to his employer. It is clear that these amounts were never intended to be disclosed to taxes.

(v) The cash deposits (as seen from the narrations w.r.t. bank statement entries) were made in his account in different branches/locations of country (for e.g. (1) Vadakkenchery, Kerala, (2) Neem ka Thana, Rajasthan, (3) Bhopal, Madhya Pradesh, (4) Jhajjar, Haryana and many other branches) and ATM withdrawal were made mostly at Gundlupet (Bangalore). This fact also doesn't gell with the assessee's claim that he collects money from various debtors and deposits in his account and returned back to the employer. The question arises here is that if he went to such different locations of the country and deposited them at far flung locations what was the rationale for ATM withdrawals from an equally far flung location.

(vi) An alternative plea that was taken during the course of appellate proceedings that 'peak credit' should be arrived at points towards an indirect admission that it was his money.

(vii) The theory of peak credit also has to be rejected given that there is no evidence of the same money being deposited again. The cash, self- admittedly, flow from different transactions.

5.3.2 The matter gets further exacerbated by the fact that the assessee did not respond to notices sent during assessment. As per ITS details the assessee had deposited cash amounting to Rs. 25,85,740/- in his saving account with State Bank of Bikaner and Jaipur. During assessment proceedings assessee was asked by the AO regarding the source of the cash deposits but the assessee didn't respond to such notices leaving the AO with no option but to add the above mentioned cash in income of the assessee as undisclosed income u/s 69A of the Act. In the present case the assessee is dealing totally in cash and his attempts to shift ownership of the cash, to who he claims to be, his employer doesn't get verified owing to the reasons cited in the previous para. Addition made by the AO vide order u/s 144 r.w.s. 147 dated 04.12.2017 is held to be correct. Ground no. 4 of the appeal is dismissed.

5.4 Ground no. 5 of the appeal is consequential and requires no separate adjudication. Hence, ground no. 5 of the appeal is dismissed.

5.5 Ground no. 6 of the appeal is general in nature and requires no separate adjudication. Hence, ground no. 6 of the appeal is dismissed.

6. In light of all of the above facts, all grounds of appeals are disposed off and the appeal of the assessee is dismissed."

5. As the assessee did not receive any relief from the order of the ld. CIT(A), assessee preferred the present appeal. The ld. AR for the assessee has filed a detailed submissions in support of the grounds so raised and is reproduced hereinbelow:-

"BRIEF FACTS OF THE CASE: -

The assessee is an individual and working as sales manager with M/s Tadkeshwar. He was also authorized to collect money from debtors located out of station. The employer has allowed to the

assessee to deposit cash in his bank branch nearby debtors to avoid risk while traveling. The money deposited by the assessee (collected from the debtors of M/s Tadkeshwar) withdraw subsequently from ATM and given to the employer than necessary entries were made in debtors account against their dues. The assessee received a sum of Rs. 1,00,000/- as salary from M/s Tadkeshwar. This was the income source of income of the assessee. Hence, he was not liable for filing the income tax return. The case was selected for scrutiny as per ITS details the department had gathered that the assessee has deposited cash amounting to Rs. 25,85,740/- with State Bank of Bikaner and Jaipur during Financial Year 2009-10. The Learned Assessing Officer has issued notice u/s 148 on 24.03.2017 which was never served on the assessee. Copy of notice u/s 148 is available on **paper book page no. 177.** Subsequent notices u/s 142(1) have also not been received by the assessee. The learned Assessing Officer passed the order u/s 148/144 of the Income Tax Act, 1961 on 04.12.2017 determining total income at Rs. 25,85,740/- inter-alia making an addition of Rs. 22,65,837/- u/s 69A of Income Tax Act, 1961 by the cash deposited in bank as unexplained money.

Aggrieved with the order of the learned Assessing Officer the assessee preferred appeal before the Learned CIT(A) who has confirmed the addition without considering the submissions and evidences submitted before him.
Aggrieved with the order of the learned CIT(A) the assessee has preferred appeal before your honour. The individual grounds of appeal are as under–
Ground No. 1 –
In the facts and circumstances of the case of the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in passing the order u/s 148/144 of the Income Tax Act 1961.

1. No service of notice u/s 148 –

   The assessment order was passed u/s 148/144 of the Income Tax Act 1961 on 04.12.2017. In the assessment order the Learned Assessing Officer has mentioned on page 1 para 1 that notice u/s 148 was issued on 24.03.2017 but the Learned Assessing Officer is silent on the service of notice on the assessee as this notice was never served on the assessee. Copy of notice u/s 148 is available on **paper book page no. 177.** In page no. 1 para 3the Learned Assessing Officer further mentioned that the notice u/s 142(1) have also been issued to the assessee on 11.09.2017 was sent through speed post AD. But the Learned Assessing Officer is also silent about the service of this notice. He has further mentioned that a final show cause notice dated 20.11.2017 was sent to assessee through e-mail ID manoj17mkmc@gmail.com. From where the Learned Assessing Officer has got this ID is not known, as the assesssee was not filed any income tax return for the Assessment Year 2010-11. The e-mail ID manoj17mkmc@gmail.com is not pertaining to the assessee.

   But Learned Assessing Officer is silent in the entire assessment order about mode of service of notice u/s 148 by affixture or by another way. These notices including notices issued u/s 148 are not available on ITBA portal.

Therefore, the assessee has made a request to the Jurisdictional Assessing Officer vide application dated 13.03.2023 and 27.03.2023 to provide copy of all notices and evidencesregarding service of notice specially first notice issued u/s 148 of the Income Tax Act 1961. The Learned Assessing Officer has provided the copy information and notices which are placed on **paper book page no. 178 to 180** which includes copy of notice issued u/s 148 dated 24.03.2017 along with dispatched details and copy of order sheet and copy of proposal u/s 151 approved by PCIT, Jaipur-1. The learned AO has not provided the details and evidence regarding service of notice u/s 148. The Learned Assessing Officer has supplied the information required by the assessee on 20/04/2023 along with order sheet. The Learned Assessing Officer has supplied the copy of notice u/s 148 dated 24.03.2017 and he has also supplied a Postal Receipt. In the postal receipt the date of post of notice is clearly mentioned 28/03/2017**. But in the entire order sheet there is nowhere mentioned about service of notice u/s 148 or dispatch of notice.** Copy of order sheet is available on **paper book page no. 177.** It is also worthwhile to mentioned that the number on postal receipt i.e. ER385131722IN is also not traceable, so that it can be proved whether the notice was served or not to assessee or anyone else. Hence the notice u/s 148 remained unserved.

The case was reopened on the ground that assessee had deposited cash amounting to Rs.25,85,740/- in SBBJ and no return was filed hence learned ITO was under belief that income has escaped within the meaning of section 147 of the Income Tax Act 1961 amounting to Rs.25,85,740/-.In this connection we have to submit that assessee could not replied during assessment proceeding due to frequently out station during this period .None of the notice issued by learned assessing officer was received by the assessee.Affidavit in this regard is available on **Paper Book Page No. 38.**

In the assessment order the stipulations mentioned above are not discussed. In fact in the assessment order the Learned Assessing Officer has simply mentioned that notice u/s 148 was served. No date of service has been mentioned in the assessment order. Therefore, the first defect is that it is time-barred and issued after the expiry of limitation period and also it was never served on the assessee. In the circumstances it submitted that in the absence of valid service of notice u/s 148 the assessment so completed is ab-initio void. The following case laws are quoted in support: -

(i) **<u>Deep Chand Kothari Vs. CIT 171 ITR 381 (Raj. HC)</u>**

It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

(ii) **<u>West Bengal State Electricity Board vs. DCIT 198 CTR 122 (Kol)</u>**

In case an order is passed without jurisdiction, the same is a nullity. Jurisdiction can never be conferred by agreement or by default or acquiescence, as was held by the apex Court in National Thermal Power Co. Ltd. (supra). Therefore, a

question of law arising out of facts found by the authorities and which goes to the root of the jurisdiction can be raised for the first time before the learned Tribunal.

(iii) **Dwarka Constructions Pvt Ltd vs. Income Tax Officer (ITAT Jaipur) 43 Taxworld 98 ITA No. 1688/JP/2008 dated 25.02.2010**

Service of notice upon the assessee by affixture is not valid in law since the procedure laid down under order 5 rule 12 to 20 of CPC have not been follow. Assessing Officer has nowhere mentioned that despite best and reasonable efforts the notice could not be served in the ordinary course upon the assessee.

(iv) **COMMISSIONER OF INCOME TAX vs. NAVEEN CHANDER (HIGH COURT OF PUNJAB & HARYANA) (2010) 323 ITR 49**

Service by affixture without following procedure under Order V, r. 20, CPC—Invalid—No substantial question of law arises

(v) In the case of Gurana Vs. Kshese AIR 1944 p, 247, it was held that where there is no evidence to show that there was any enquiry as to whether there was any local agent or relative competent to accept the service, service by affixture cannot be accepted. In the case of Sambhu Nath Vs. Girish Chancha Mohapatra AIR 1985 Or; 215, it was observed that where the defendant denies the service of notice made through process server, onus of proof shifts to the plaintiff who should prove the essential ingredients of the Order 5 rule 17 by examining the process server. In the present case, though the assessee-company denied the service by way of affixation but the department has not rebutted this assertion by filing the affidavit of the concerned serving officer,

(vi) In the case of Yallawwa Vs, Shantavva, AIR 1997 SC 35, it has been observed that it must be kept in view that substituted service to be resorted as the last resort when a defendant cannot be served in ordinary way and the court is satisfied that there is reason to believe that the defendant is keeping out of way for the purpose of avoiding service or for any other reason, summons cannot be served in ordinary way,

(vii) In the case of CIT Vs, Ramendra Nath Ghosh (1971) 82 ITR 888 (SC), the Hon'ble Supreme Court has confirmed the order of High Court by holding that, on the facts that service of notices was not in accordance with law and, therefore, it could not be said that the assessee had been given a proper opportunity to put forward their case as required by section 33B of the Income-tax Act, The facts in this case were that the inspector of income-tax who had to serve notices under section 33B of the Income-tax Act, 1922, claimed to have served the notice by affixing them on the assessee's place of business but in his report did not mention the names and addresses of the persons who identified the place of business of the assessee, nor did he mention in his report or in the affidavit filed by him that he personally knew the place of business of the assessee, The assessee, however, claimed that they had closed their business long before the notice were issued, On writ petitions filed by the assessee, the High Court held that there was no proper service on the assessee and the orders of the CIT pursuant thereto could not be sustained,

(viii) Similar view was expressed in the case of Jagannath Prasad &Ors, Vs, CIT &Ors, (1977) 110 ITR 27 (All), In that case it was observed that according to section

282 of the Income-tax Act, a notice has to be served, either by post or as if it were a summons issued by a court under the CPC, The following observations were also made in that case:

"When service by affixture can be restored under Income-tax Act? According to section 282 of the Income-tax Act, a notice has to be served either by post or as it were a summons issued by the court under the CPC, If the notice is not sent by post, it can be served as provided by Order 5, rule 20 of the CPC, However in order to invoke this provision certain conditions must exist, i,e" the court should be satisfied that the defendant is avoiding the service of the notice, The fact that the process server could not find the assessee does not mean that the assessee was avoiding the service, Also the process server did not make more than one attempt to serve the notice, Therefore, it cannot be said that the conditions acquired for application of Order 5, rule 20 existed, The Income-tax Officer's order directing service by affixture was, therefore, invalid,"

In view of the above case laws the ratio of which is applicable to the facts of the case, the assessment requires to be quashed.

3. **Assessment is invalid if notice u/s 148 not served properly** –

It is submitted that since the delivery of the notice of reassessment could not be made to the asseessee, by virtue of the further proviso to sub-rule (2) of Rule 127, the communication had to be delivered at the address as available with the banking company however, no such steps were taken, therefore, service of notice was not complete and reopening of assessment was invalid.

It is consistent view of the Courts that not mere issuance of notice of reopening of assessment but its service on the assessee, that too, within the time frame envisaged under section 149 of the Act is necessary for a valid reopening of assessment. In case of **Y. Narayan Chetty &Anr. vs. Income Tax officer, Nellore &Ors** reported in **35 ITR 388**, the Supreme Court in the context of Income Tax Act, 1922 had observed as under:-

"5. The first point raised by Mr. Sastri is that the proceedings taken by respondent 1 under s.34 of the Act are invalid because the notice required to be issued under the said section has not been issued against the assessees contemplated therein. In the present case the Income Tax Officer has purported to act under s.34(1)(a) against the three firms. The said sub-section provides inter alia that "if the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax has been under assessed", he may, within the time prescribed, "serve on the assessee a notice containing all or any of the requirements which may be included in the notice under sub-section (2) of Section 22 and may proceed to reassess such income, profits or gains". The argument is that the service of the requisite notice on the assessee is a condition precedent to the validity of any reassessment made under Section 34; and if a valid notice is not issued as required, proceedings taken by the Income Tax Officer in

pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. In our opinion, this contention is well-founded. The notice prescribed by Section 34 cannot be regarded as a more procedural requirement; it is only if the said notice is served on the assessee as required that the lncome Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in the CIT v. Ramsukh Motilal and R.K. Das & Co. v. CIT and we think that that view is right."

Where no notice under section 148 is issued or if the notice so issued is shown to be invalid, or the service of notice so issued, is shown to be invalid, AO could not proceed with the subsequent proceedings for making assessment, reassessment or re-computation under section 147. Unless, the notice was served on the proper person in the manner prescribed under section 282, the service was insufficient and AO did not have jurisdiction to re-assess the escaped income.

In the case of **Charan Singh Vs ITO (ITAT Jaipur) - ITA No. 906/JP/2018 – order dated 22/01/2019** the Hon'ble Bench has held the following –

(i) Under Section 148 of the Act, the issue of notice to the Assessee and service of such notice upon the Assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements.

(ii) For the AO to exercise jurisdiction to reopen an assessment, notice under Section 148 (1) has to be mandatorily issued to the Assessee. Further the AO cannot complete the reassessment without service of the notice so issued upon the Assessee in accordance with Section 282 (1) of the Act read with Order V Rule 12 CPC and Order III Rule 6 CPC.

(iii) Although there is a change in the scheme of Sections 147, 148 and 149 of the Act from the corresponding Section 34 of the 1922 Act, the legal requirement of service of notice upon the Assessee in terms of Section 148 read with Section 282 (1) and Section 153 (2) of the Act is a jurisdictional pre-condition to finalizing the reassessment.

(iv) The onus is on the Revenue to show that proper service o f notice has been effected under Section 148 of the Act on the Assessee or an agent duly empowered by him to accept notices on his behalf. In the present case, the Revenue has failed to discharge that onus.

(v) The mere fact that an Assessee or some other person on his behalf not duly authorized participated in the reassessment proceedings after coming to know of it will not constitute a waiver o f the requirement of effecting proper service of notice on the Assessee under Section 148 of the Act.

(vi) Reassessment proceedings finalised by an AO without effecting proper service of notice on the Assessee under Section 148 (1) of the Act are invalid and liable to be quashed.

(vii) Section 292 BB is prospective. In any event the Assessee in the present case, having raised an objection regarding the failure by the Revenue to effect service of notice upon him, the main part of Section 292BB is not attracted.

4. **Reasons recorded are not correct** –

On requested by the assessee the Learned Assessing Officer has supplied the copy of reasons recorded. Copy of reasons recorded is available on **Paper Book Page No. 179 to 180.** The Learned Assessing Officer made the addition of Rs. 25,85,740/- on the basis of reasons recorded which are not correct, as the Learned Assessing Officer has made the addition of Rs. 25,85,740/- on the basis of cash deposited in the bank, however the cash withdrawals entries are also there. At least the benefit of cash withdrawal must have been given by the Learned Assessing Officer. The entire cash deposited in the bank account cannot be added as income of the assessee. In a recent judgement in case of **Narayana ShibaroorShibaraya Vs ITO** in ITA No. 684/Bang/2022 dated 23/11/2022 the Honourable ITAT Bangalore has held that "if deposit of money in bank a/c is preceded by withdrawal of money from the very same bank a/c then the source of funds is prima facie demonstrated or explained by Assessee. There is plethora of decisions are also available on the same issue. But the Learned Assessing Officer has not given the benefit of earlier cash withdrawal from the same bank and made addition of Rs. 22,65,837/- of the entire cash deposits. The Learned Assessing Officer therefore had no reason to believe that income escaped assessment. He has initiated proceedings simply on the basis information available in ITS. It is settled position of law that proceedings u/s 148 cannot be initiated on the basis of reason to doubt. Therefore, the assessment deserves to be quashed. The following case laws are quoted in support: -

(i) **GANGA SARAN & SONS (P) LTD. vs. INCOME TAX OFFICER & ORS. 130 ITR 1 (SC)**

Action u/s 148 is not warranted on mere suspicion or rumour.

(ii) **Phoolchand Bajrang Lal vs. CIT 203 ITR 456 (SC)**

It is opened to an assessee to establish that there in fact existed no belief of that the belief was not bonafide one or was based on vague irrelevant and not specific information.

(iii) **JOINT COMMISSIONER OF INCOME TAX & ORS. vs. GEORGE WILLIAMSON (ASSAM) LTD. 258 ITR 126 (Gau)**

Reassessment—Full and true disclosure—Reason to believe—For exercising powers under s. 147 the assessing authority must have reason to believe that any income

chargeable to tax has escaped assessment—Reason given by the assessing authority must have a rational connection or relevance for formation of that belief—Except for a letter written by a CIT to another CIT, the assessing authority had no other material before him for the belief that the alleged payments were in fact not made by the assessee-company and that the amounts paid through cheques were returned back in cash after routing it through four or five bank accounts—Thus, assessing authority could not reach a conclusion simply on the basis of the statement of BS who had no business transactions with assessee that the transactions were bogus and the amount was returned back—No link between facts found and the satisfaction arrived at by the assessing authority—Assessee at the time of his assessment has presented before the assessing authority all the material and relevant facts—Assessing authority while assessing the income of the assessee has scrutinized those facts and made the order of assessment—Impugned notice issued to the assessee and further proceedings initiated under s. 147/148 therefore liable to be quashed.

(iv) **Dhirajlal Girdhari Lal Vs. CIT (1954) 26 ITR 736 (SC)**

Suspicion not tantamount to evidence: However, the mere existence of reasons for suspicion would not tantamount to evidence. But it should not be based on mere suspicion, conjecture or guess work or on irrelevant or inadmissible material.

(v) **Bakul Bhai Raman Lal Patel vs. ITO 56 DTR 212(Guj)**
Reason to suspect cannot take place of reason to believe.

5. **No enquiry has been made from the assessee by issuing of notice 133(6) of the Income Tax Act 1961 or by deputing the inspector –**

In this case the Learned Assessing Officer has made the addition without service of notice on the assesee. Even he has not made any enquiry from the assessee by issuing notice u/s 133(6) of the Income Tax Act, 1961. The Learned Assessing Officer has should have deputed an inspector for the purpose of collecting the information from the assessee or to serve the notice to the assessee notice u/s 148 as well as 142(1) of the Income Tax Act, 1961. In the absence of all these it is nothing but a figment of imagination that all cash deposits in the bank is income of the assesssee. The reasons recorded by the Learned Assessing Officer have to be based on some solid and concrete evidence. The reasons must speak themselves. The mandatory jurisdictional requirement will not be fulfilled if the reasons do not indicate and not disclose all the material facts indicating escapement of income. It is the reasons which have to explain the material which forms the basis of reasons to believe for escapement of income. In the case there is no such material in the reasons recorded by the Learned Assessing Officer. In view of these facts and circumstances the reasons recorded by the Learned Assessing Officer are faulty and cannot lead to form a belief that there was escapement of income.

6. **It is a case of borrowed satisfaction** -

It is submitted that Learned Assessing Officer has not carried out any enquiry at his end to find out the truth. The Learned Assessing Officer has acted simply on the details available on AST system. Thus it is a case where the Learned Assessing Officer has acted on the satisfaction of other officer and not of himself. Thus the entire action of the Learned Assessing Officer is unlawful and unjust. The following case laws are quoted in support: -

(i) CIT Vs. Shree Rajasthan Syntex Ltd. (2008) 217 CTR 209 (Raj)

Reopening of assessment on borrowed satisfaction by Assessing Officer of lesser on the basis of opinion arrived at by the Assessing Officer of lessee on the same set of documents was invalid.

(ii) SIGNATURE HOTELS (P) LTD. vs. INCOME TAX OFFICER (2011) 338 ITR 51 (Delhi)

Reassessment—Reason to believe—Information received from Director of IT (Inv.) vis-a-vis accommodation entry—For reopening an assessment the AO must have "reason to believe" that certain income chargeable to tax has escaped assessment and such reasons are required to be recorded in writing by the AO—Sufficiency of reasons is not a matter which is to be decided by the writ Court but existence of belief can be subject-matter of scrutiny—Notice under s. 148 can be quashed if the "belief" is not bona fide or one based on vague, irrelevant and non-specific information—Basis of the belief should be discernible from the material on record which was available with the AO when he recorded the reason—There should be a link between the reasons and the material available with the AO—In the instant case, the first sentence of the reasons recorded by the AO states that information has been received from Director of IT (Inv.) that assessee has introduced unaccounted money amounting to Rs. 5 lacs during the relevant year as per the details given in the Annexure—Said Annexure mentions a cheque received by assessee from SS Ltd. and the account number—Last sentence states **that as per the information the amount received was an accommodation entry—Aforesaid information and the reasons are extremely scanty and vague and do not satisfy the requirements of s. 147—There is no reference to any document or statement, except the Annexure—Said Annexure cannot be regarded as a material or evidence that prima facie shows or establishes escapement of income—Further, it is apparent that the AO did not apply his own mind to the information and examine the basis of the information—He accepted the information in a mechanical manner—CIT also acted on the same basis by mechanically giving his approval—Company SS Ltd. had applied for and was allotted shares in the assessee company on payment of Rs. 5 lacs by cheque—SS Ltd. is an incorporated company and it has been allotted PAN—Facts on record do not show that SS Ltd. is a non-existing and a fictitious entity—Proceeding under s. 147 quashed.**

(ii) **Pr. CIT vs. G & G Pharma India Ltd (Delhi High Court) dated 08.10.2015**

Reopening only on the basis of information received that the assessee has introduced unaccounted money in the form of accommodation entries without showing in what manner the AO applied independent mind to the information renders the reopening void

(iii) **ITO vs. M. B. Jewellers P. Ltd (ITAT Delhi)dt. 14.11.2014**

A perusal of the above reasons demonstrate that the reasons recorded by the AO are not reasons acceptable to law. There is no independent application of mind. The AO had mechanically issued notices u/s 148 of the Act, on the basis of information allegedly received by him from the CIT, New Delhi 2. From the proforma for approval of notice, which is extracted above, it is clear that the AO was also not aware that the assessee had filed a return of income for the said AY. The ACIT has also not applied his mind. No satisfaction has been recorded by the Ld.ACIT. Only an approval is given. Thus in our view the reopening is bad in law (Signature Hotels (P) Ltd. Vs. ITO 338 ITR 51 (Delhi) followed).

(iv) **ACIT vs. Devesh Kumar (ITAT Delhi)dt. 31.10.2014**
Reopening solely on the basis of information received from the investigation wing & without independent application of mind is void.

(v) **Unique Metal Industries vs Income Tax Officer (ITAT Delhi) dated 28.10.2015**

Reopening solely on the basis of information received from another AO that the assessee has booked bogus bills but without independent application of mind to the information renders the reopening void.

(vi) **CIT Vs. SFIL Stock Broking Ltd. (2010) 41 DTR 98 (Del)**
Reassessment-Reason to believe-Reopening on directions of superior officers-50-called reasons recorded by the AO for reopening assessee's assessment comprises mere information received from Dy. Director of IT (Inv.) followed by directions of the very same officer and the Addl. CIT to initiate proceedings under s. 147-These cannot be the reasons for proceeding under s. 147/148-From the so-called reasons it is not at all discernible as to whether the AO has applied his mind to the information and independently arrived at a belief on the basis of the material before him that income had escaped assessment-Proceedings under s. 147/148 rightly quashed by Tribunal-No substantial question of law arises for consideration.

(vii) **SARTHAK SECURITIES CO. (P) LTD. vs. INCOME TAX OFFICER (2010) 329 ITR 110 HIGH COURT OF DELHI**

Where the identity of the companies who had invested in the shares of petitioner-company was not disputed and neither the reasons in the initial notice nor the communication providing reasons remotely indicated independent application of mind by AO, reassessment proceedings were unwarranted and notice issued under s. 148 was liable to be quashed.

(viii) **CIT V/s Shree Rajasthan syntax Ltd. (2008) 217 CTR 209 (Raj) S.L.P. Of The Department Dismissed S.L.P. (c) No 8167 Of 2009 Decision All 30/3/09**
Reopening of assessment on borrowed satisfaction by Assessing Officer of lesser on the basis of opinion arrived at by the Assessing Officer of lessee on the same set of documents was invalid.

7. **Action u/s 148 taken on the basis of assumption, presumption and conjectures and not on evidence: -**

In this case there does not appear to the any enquiry from the assesee or from the records of the assessee. Thus absolutely there is no material for forming belief for taking action u/s 148. The Learned Assessing Officer has taken action u/s 148 on the basis of assumption, presumption and conjectures. Whereas it is settled position of law that suspicion however strong cannot take the place of evidence. The following decisions of Apex Courts and other are cited below: -

(i) **UMACHARAN SHAW & BROS. vs. COMMISSIONER OF INCOME TAX 37 ITR 0271 (Supreme Court)**
There are many surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof in these matters.

(ii) **COMMISSIONER OF INCOME TAX vs. ANUPAM KAPOOR (2008) 299 ITR 0179 (P&H)**
It is settled law that suspicion, howsoever strong cannot take the place of legal proof. Consequently, no question of law, much less a substantial question of law, arises for adjudication

(iii) **Dhirajlal Girdhari Lal Vs. CIT (1954) 26 ITR 736 (SC)**

Suspicion not tantamount to evidence: However, the mere existence of reasons for suspicion would not tantamount to evidence. But it should not be based on mere suspicion, conjecture or guess work or on irrelevant or inadmissible material.

Therefore, you are requested to quash the assessment order passed by the learned AO u/s 144/147 of the Income Tax Act, 1961 and oblige which is totally illegal and unjustified looking to the facts and circumstances of the case as no notice u/s 148 served to the assessee.

Ground No. 2 to 4 –

2. In the facts and circumstances of the case of the Learned CIT(A) has erred in confirming the addition of Rs. 25,85,740/- made by the Learned Assessing Officer u/s 69A of the Income Tax Act 1961 on account of cash deposited in the bank account of the aseessee.

3. In the facts and circumstances of the case of the Learned CIT(A) has erred in not giving the benefit of peak credit or earlier cash withdrawal from the same bank.

4. In the facts and circumstances of the case of the Learned CIT(A) has erred in not considering the submission that the amount deposited in bank was on behalf of principal employer on account of recovery of debtors.

1. Facts of the case –

The assessee is individual and was employee in M/S TadkeshwarAgro Food Product,F-211,Road No.9E,VKI,Jaipur as salesman.He was working for firm as salesman for procuring orders on behalf of firm and collection from debtors on behalf of firm.Cash collection from debtors was deposited in his bank account and whenever collection were made from debtors he deposited the same in his bank account and returned the amount collected from debtors on behalf of employer to employer time to time.Copy of employment certificate from M/S TadkeshwarAgro Food Product ,F- 211,Road No.9E,VKI,Jaipur is available on **Paper Book Page No. 6**.

The assessee is having his bank account with State Bank of India, Phulera Branch. The entire cash was deposited in the bank was collected on behalf of M/s TadkeshwarAgro Food Product from various debtors and returned back to employer time to time. But the Learned assessing officer has not correctly appreciated the facts.There was withdrawal of equal amount from bank account.We are enclosing a copy of bank statement available on **Paper Book Page No. 7- 37**.We are also enclosing narration of each entry reflected in debit and credit in bank account **Paper Book Page No. 148 -175.**

This bank statement was also available with learned Assessing Officer.He has considered only credit side of bank and made addition of Rs.25,85,740/- which was deposited by assessee on behalf of employer and returned back to employer time to time.Even without any reply/submission from assessee,material available with ITO shows that entire amount deposited during the year were withdrawn by assessee hence, as per natural justice and basic principal of best judgement,addition, if any required, in this case can be made only peak of cash deposited as held by various high courts in various cases. As per bank statement,assessee withdrawn equal amount from bank as deposited in bank hence,no addition is called for. The action of the Learned Assessing Officer is illegal, unlawful and unjustified. The same is objected as under: -

2. **Cash deposited in bank account was out of collection from debtors of employer M/s TadkeshwarAgro Food Product where the assessee is an employee** –

The Learned Assessing Officer made the addition Rs.25,85,740/- on account of entire cash deposited in the bank. In this connection we have already submitted that amount deposited by assessee in his bank account was collection from debtors of employer for whom assessee was working as salesman.The deposited amount was withdrawn and returned back to employer firm on whose behalf same was collected from debtors. The transactions regarding amount withdrawal by the assessee has been accounted for by M/s TadkeshwarAgro Food Product in his books of accounts. We are enclosing herewith a copy oifaudited balance sheet and ITR of employer firm (M/s TadkeshwarAgro Food Product) along with list of debtors available on **Paper Book Page No. 39-56**.We are also enclosing ledgers accounts/confirmations of debtors from whom assessee collected cash against sale made to them by employer firm M/S TadkeshwarAgro Food Product,F-211,Road No.9E,VKI,Jaipur. Copies of ledger accounts/confirmations are available on **Paper Book Page No. 57-147**.Since entire amount deposited by assessee in his bank account was on behalf of employer and returned back to employer from time to

time.There was no amount which said to be income of the assessee .He was employee receiving salary in cash .He had collected amount from various debtors during performing his duty .Cash wasdeposited in his bank account as bank account of firm was in co-operative bank and no branch was available at debtor's place.Hence,he was bound to deposit cash in his bank account as per employer's instructions.Details of date wise collection from debtors and returned back to employer is herewith enclosed.Cash flow statement and bank flow statement for the year under consideration is available on **Paper Book Page No. 148-175**.From perusal of the same it would be observed that entire amount deposited by assessee on behalf of employer was returned back out of withdrawal made from bank account. In view of facts and circumstances of the case,we humbly request you that addition of Rs.25,85,740/- may please be deleted which has been added on wrong presumption that same represent income of the assessee whereas same was collection amount from debtors on behalf of employer firm M/S TadkeshwarAgro Food Product and same was also return back to the employer in the year under consideration. Above mentioned evidences are vital piece of evidence for deciding the appeal and the assessee was prevented by sufficient cause in filing the documents during course of assessment proceedings. The addition made by the assessing officer deserves to be deleted.

3. **Affidavits of assessee as well as of Shri Amit Gupta Prop. M/s Shree TadkeshwarAgro Food Product** –

It is submitted in the earlier para that the cash was deposited by the assessee in his bank account are out of amount collection from debtors of M/s Shree TadkeshwarAgro Food Product. In this regard Shri Amit Gupta Prop. M/s Shree TadkeshwarAgro Food Product as well as assessee are submitting their affidavits in which have stated the same fact that the was serving as Sales Manager with M/s TadkeshwarAgro Food Products. M/s TadkeshwarAgro Food Products is trader and manufacture (repacking) of edible oil and selling goods at small cities and town. For the purposes for sales and collection of cash from customers from outstation assessee was engaged as Sales Manager. During the financial year 2009-10 he travelled to various places such as Narena, Mahua, Sardarsahar, Duru, Kuchaman, Nawa, Pratapgarh, Nasirabad, Chaksu, Rawatsar, Mehandipur Balaji, Sambhar, Ratangarh, Kishangarh, Bassi, Viratnagar, Ranawali, Mandawar, Tunda, Aandhi, Achrol, Santhan, Bhandaraj, Noher, Data, Sikar, Khandela, Katwas, Shahpura, Kekri, Mandela, Fatehpur, Kishangarh Bass, Bairath, Sabla, Taranagar, Lalsot, Sikandara, Ajeetgarh, Churu, Hindaon, Barmet, Bahetu, Fagi, Amer, Boraj etc. and made collection totaling to Rs. 25,85,740/- and it was deposited with the firm M/s TadkeshwarAgro Food Products. And as a usual practice the assessee first deposited the collected amount on day to day basis in his own bank account so save it from theft, burglary and pick-pocketing and subsequently made withdrawal and deposited the amount in firm M/s TadkeshwarAgro Food Products. Copy of affidavits of the assessee as well as of Shri Amit Gupta Prop. M/s Shree TadkeshwarAgro Food Product are available on **paper book page no. 181 to 184.** Hence from these affidavits the fact is crystal clear that the amounts deposited in the assessee's bank are related to collection

from debtors of M/s Shree TadkeshwarAgro Food Product. The addition made by the learned AO in the hands of the assessee deserves to be deleted.

4. **Finding/Observation made by the Learned CIT(A)** –

(A) The assesee has submitted the above facts as well documents before the Learned CIT(A). After considering the aforesaid submission the Learned CIT(A) has required following documents/information by his notice dated 30.08.2022/16.12.2022 –

Notice dated 30.08.2022 –

(i) Copies of returns filed two years prior to the assessment year and two years subsequent to the assessment year, if any.

(ii) Copies of returns of the latest two years may also be furnished. Please elucidate upon your claim that the cash collected on behalf of the company was deposited to the accounts of the company. Evidence in this regard may be furnished.

Notice dated 16.12.2022 –

(i) It is seen from the bank statements that there is a corresponding ATM withdrawal immediately after the cash deposit made in the bank account. This in a way tantamount to cash withdrawal also following what has been claimed by you as cash recovered by you from various parties. Please specify the purpose for which these ATM/cash withdrawals were made.

(ii) Further, you are requested to clearly specify whether or not your returns for 02 years prior to the present assessment year and 02 years subsequent to the present assessment year were filed or not. In this regard, notice dated 30.08.2022 refers.

In response to this the assesse has filed his reply on 23.12.2022 that he is working as a salesman in M/s TadkeshwarAgro Food Product and earning salary income only which is very meagre. The assessee was not liable for filing of income tax return prior to the assessment year and two years subsequent to the assessment year under consideration. Hence, he has not filed any return of income.

The assessee has already submitted that cash withdrawal from bank was made to return back the amount to employer firm which were recovered from debtors on behalf of employer firm M/s Shree Tadkeshwar Food Product. The assessee has already submitted detailed cash flow along with submission vide submission dated 16/12/2019 and the same has been again submitted before the Learned CIT(A) duly highlighted the transaction.

Along with the above submissions the assessee had also submitted the following documents –

(i) His employment certificate with M/s Shri TadkeshwariAgro Food Product for F.Y. 2009-10.

(ii) His bank statement for F.Y. 2009-10

(iii) Affidavit.

(iv) Balance Sheet, ITR and debtors list of M/s Shri TadkeshwariAgro Food Product

(v) Ledger and confirmations of debtors by whom cash collected.

(vi) Cash flow statement and Bank flow statement

5. **Addition confirmed by the Learned CIT(A) is on wrong observation –**

After considering the reply of the assessee, the Learned CIT(A) has confirmed the addition by made the following observation. The ground-wise/para-wise reply the on the observation made by the Learned CIT(A) is as under: -

(i) Perusal of bank statement of the assessee reveals that the cash was deposited and withdrawn by ATM and that there was not even a single transaction that would have gone to prove that the amount had been returned to the assessee's purported employer. By merely saying that the money doesn't belongs to him doesn't prove that he was not responsible for the transaction happening in his account.

(ii) The so called employer's certificate about his status doesn't quantify the amount he collected in cash during the year on their behalf. Neither does it certify that he had been assigned the task of collecting money.

The assessee has submitted that he was an employee in M/s TadkeshwarAgro Food Product. He has also submitted the salary certificate received from M/s TadkeshwarAgro Food Product. He has submitted a confirmation letter from proprietor of M/s TadkeshwarAgro Food Product in which it has been stated that the assessee was also authorized to collect money from debtors located out of station. The employer has allowed to the assessee to deposit cash in his bank branch nearby debtors to avoid risk while traveling. The money deposited by the assessee (collected from the debtors of M/s Tadkeshwar) withdraw subsequently from ATM and given to the employer than necessary entries were made in debtors account against their dues. Copy of confirmation letter received from the assessee's employer is available on **Paper Book Page No. 176.** The assessee has also submitted an affidavit in which he has also stated the same facts that he was an employee of M/s M/s TadkeshwarAgro Food Product and working as a salesman. The books of accounts of M/s TadkeshwarAgro Food Product were

audited u/s 44AB of the Income Tax Act 1961. The assesssee has submitted the audit report along with ledger accounts/ confirmation from the debtors from whom the assessee has collected the money and deposited the same in his bank. If we peruse from the above ledger accounts, then it would be seen that when the assesssee has withdrawn the amounts from the bank the same was accounted for on the same date or next date with the respect debtor in the book of M/s TadkeshwarAgro Food Product. Copy of ledger accounts of debtors are available on **Paper Book Page No. 57 to 147.** Hence the observation of Learned CIT(A) that *"there was not even a single transaction that would have gone to prove that the amount had been returned to the assessee's purported employer"* is not correct. Because by submitted the leger account/confirmation of debtors the assessee has proved that the amount withdrawn from the bank was given to the assessee's employer.

(iii) His plea that he deposited cash on behalf of his employer and returned it to the company on his return to headquarters doesn't get supported by the fact that practically every time the same amount was withdrawn from an ATM.

(iv) There could not be an alternative rationale that he withdrew from the ATM to pay it to the employer. He could have well made a lump sum transfer to his employer. It is clear that these amounts were never intended to be disclosed to taxes.

In this regard it is submitted that all the withdrawals made by the assessee from the ATM near nearby the employer of the assessee. As per RBI/Bank guidelines the ATM withdrawal limit in single transaction is Rs. 20,000/- it less than Rs. 20,000/-. Hence the assessee normally withdraw Rs. 20,000/- in a single transaction. On this basis of a particular amount withdrawal from same ATM it cannot be said that the amount was not returned to the employer.

(v) The cash deposits (as seen from the narrations w.r.t. bank statement entries) were made in his account in different branches/locations of country (for e.g. (1) Vadakkenchery, Kerala, (2) Neem ka Thana, Rajasthan, (3) Bhopal, Madhya Pradesh, (4) Jhajjar, Haryana and many other branches) and ATM withdrawal were made mostly at Gundlupet (Bangalore). This fact also doesn't gell with the assessee's claim that he collects money from various debtors and deposits in his account and returned back to the employer. The question arises here is that if he went to such different locations of the country and deposited them at far flung locations what was the rationale for ATM withdrawals from an equally far flung location.

This observation of the Learned CIT(A) is not correct. The assessee has made most of the withdrawal from Jaipur Headquarter and from the ATM nearby the assessee's employer. We have obtained a certificate in this regard from the assessee's bank that the withdrawals were not made at (1) Vadakkenchery, Kerala, (2) Neem ka Thana, Rajasthan, (3) Bhopal, Madhya Pradesh, (4) Jhajjar, Haryana and many other branches) and ATM withdrawal were made mostly at Gundlupet (Bangalore). Only the bank server name is appearing in the bank

statement and most of the withdrawals were made from Jaipur Headquarter only. The Assessing Officer can verify this fact by making enquiry from bank. The truth would have come out that all the withdrawals were made in Jaipur District. In this regard we are also enclosing herewith copy of bank passbook statement available on **paper book page no. 185 to 203.** From the perusal of this statement printed by bank itself on assessee's passbook it is revealed that in the withdrawals entries name of Vadakkenchery, Kerala, Neem ka Thana, Rajasthan, Bhopal, Madhya Pradesh, Jhajjar, Haryana or Gundlupet (Bangalore) are nowhere mentioned. Hence this observation of the Learned CIT(A) is not correct which he has confirmed the addition. The addition made by the Learned Assessing Officer and confirmed by the Learned CIT(A) deserves to be deleted.

(vii) An alternative plea that was taken during the course of appellate proceedings that 'peak credit' should be arrived at points towards an indirect admission that it was his money.

(vii) The theory of peak credit also has to be rejected given that there is no evidence of the same money being deposited again. The cash, selfadmittedly, flow from different transactions.

In this regard it is submitted that as the order was passed by the Learned Assessing Officer u/s 144 of the Income Tax Act 1961 on the basis of information available with him. The Learned Assessing Officer has made the addition of Rs. 25,85,740/- on the basis of cash deposited in the bank, however the cash withdrawals entries are also there. At least the benefit of cash withdrawal must have been given by the Learned Assessing Officer. The entire cash deposited in the bank account cannot be added as income of the assessee. In a recent judgement in case of **Narayana ShibaroorShibaraya Vs ITO** in ITA No. 684/Bang/2022 dated 23/11/2022 the Honourable ITAT Bangalore has held that "if deposit of money in bank a/c is preceded by withdrawal of money from the very same bank a/c then the source of funds is prima facie demonstrated or explained by Assessee. There is plethora of decisions are also available on the same issue. But the Learned Assessing Officer has not given the benefit of earlier cash withdrawal from the same bank and made addition of Rs. 22,65,837/- of the entire cash deposits. Hence this alternate plea was rightly taken by the assessee during the course of appellate proceedings.

If we go through the bank flow statement available on **Paper Book Page No. 166 to 172** it is seen that the maximum peak balance available with the assessee is of Rs. 77,928/- on 01/10/2009. Hence the addition should not have been made by the Learned Assessing Officer more than Rs 77,928/-. But the Learned Assessing Officer as well as the Learned CIT(A) has not considered this plea of the assessee and sustained the addition made by the Learned Assessing Officer. Therefore your honor is requested to deleted the entire addition of Rs. 25,85,740/- made by the Learned Assessing Officer or restrict the addition upto Rs. 77,928/- on the basis of peak balance.

5. **No enquiry was made from the assessee -**

In this case the Learned Assessing Officer has made the addition without service of notice on the assesee. Even he has not made any enquiry from the assessee by issuing notice u/s 133(6) of the Income Tax Act, 1961. The Learned Assessing Officer has should have deputed an inspector for the purpose of collecting the information from the assessee. In the absence of all these it is nothing but a figment of imagination that all cash deposits in the bank is income of the assesssee. The addition made by the Learned Assessing Officer have to be based on some solid and concrete evidence. By not doing this the Learned Assessing Officer has violated the principle of natural justice. The following case laws are quoted in support –

(i) **Tin Box Co. v. CIT [2001] 116 Taxman 491 (SC).**

When opportunity of hearing was not properly given - Where the Tribunal had recorded that it agreed with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard, the Tribunal would not be justified in not setting aside the assessment order and remanding the matter to the assessing authority for fresh consideration after giving opportunity of hearing to the assessee.

(ii) **Shreeram Durga Prasad vs. Settlement Commission (1989) 176 ITR 169 (SC)**

The order made in violation of principle of natural justice is void and a nullity.

(iii) **A.K. Kraipak vs. UOI AIR 1970 SC 150**

The aim of natural justice is to secure justice and to prevent miscarriage of justice.

(iv) **C. Vasanntlal& Co. vs. CIT (1962) 45 ITR 206**

(v) **DhakeshwariCottom Mills Ltd vs. CIT (1954) 26 ITR 775 (SC)**

(vi) **S.L. Kapoor vs. Jagmohan AIR 1981 S C 136, 145**

The requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demand of natural justice are not met even if the very proceeded against as furnished the information on which the action is based, if it is furnished in a causal way. The person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met.

It is opened to an income tax authority to collect material to facilitate assessments even by private enquiry. But if he desired to use the materials so collected, the assessee must be informed of the materials collected and must be given an adequate opportunity of explaining it.

(vii) **CCE vs. ITC Ltd (1995) 2 SCC 38 (SC)**

Before an assessee is made liable for higher or enhanced tax he must be told on what ground he is sought to be made liable for additional tax and it must be given an opportunity of meeting those grounds. This is s the minimum requirement of the principles of natural justice.

(viii) **Swadeshi Cotton Miss Ltd. Vs. UOI (1981) 51 Comp Cas 210 (SC)**

(ix) **Maneka Gandhi vs. UOI AIR 1978 SC 597**

A quasi-judicial order made in violation of principles of natural justice is null and void.

(x) **VODAFONE INDIA LIMITED vs. UNION OF INDIA & OTHERS) HIGH COURT OF BOMBAY) (2014) 97 DTR 0441 (Bom)**

No order can be sustained passed in breach of principle of natural justice.

(xi) SUTHERLAND GLOBAL SERVICES (P) LTD. vs. UNION OF INDIA

(HIGH COURT OF MADRAS) (2016) 143 DTR 0179

Whenever the provision of an opportunity is actually turned into an empty formality by the Officer withholding necessary information or by the officer refusing to consider certain things on the specious plea that there was lack of time or resources, the opportunity provided by the show cause notices become meaningless opportunities.

(xii) **Gargi Din Jwala Prasad v. CIT [1974] 96 ITR 97 (All.).**

Principles of natural justice are applicable - The principles of natural justice are applicable to assessment proceedings. The elementary principle of natural justice is that the assessee should have knowledge of the material which is going to be used against him so that he may be able to meet it –

(xiii) **Dwijendra Kumar Bhattacharjee V Superintendent of Taxes (1990) 78 STC 393 (Gau.)**

Opportunity must be real and effective : The opportunity given to the assessee to be heard must be real and reasonable. If an assessee, who is asked to furnish certain particular or submit explanations within a specified time, prays for further time stating his difficulties and/or reasons, his prayer should be considered judiciously. Sometimes, proceedings for assessment for a number of years are taken up together and the assessee asked to appear and produce evidence in support of his returns. It might not be possible for the assessee to submit such evidence instantaneously or at short notice, and may pray for further time to do so. Such prayers cannot be summarily rejected without considering the ground given by the **assessee merely because the assessing officer is hard-pressed for time and has to complete the assessment by a specified date or for administrative expediency. Such a rejection would amount to denial of reasonable opportunity of hearing to the assessee and vitiate the assessment."**

(xiv) **Padam Chand V CST (1986) 62 STC 195 (All): MakhaliWinde Store V CST (1987) 67 STC 416 (All)**

Even where such show-cause notice was required under a statutory rule, the same was held to be mandatory and the non-issuance of such notice was held to vitiate the best judgment assessment.

(xv) **Dhanalakshmi Pictures V. CIT [1983] 144 ITR 452 (Mad.)**

(xvi) **T.C.N Menon v. ITO[1974] 96 ITR 148 (Ker.)**

Opportunity must be given to assessee - These assessee will have to be given an opportunity of being heard and a right to question the correctness or the relevancy of materials on the basis of which the ITO proposes to make the judgment assessment.

6. **Addition cannot be made on the basis of material gathered at the back of the assessee**-

The Learned Assessing Officer has made this addition on the basis of information available on ITR. But he has not supplied this information to the assessee before making the addition or not made any enquiry in this regard. The Assessing Officer proceeded to made addition on account of bank statement obtained from bank behind the back of the assessee without giving any opportunity of being heard and materials collected behind the back of the assessee cannot be read in evidence against the assessee. In the absence of any other corroborative evidence on record, the Assessing Officer was not justified in making the addition under Sec. 69A of the Act. The assessing officer has acted in a mechanical manner on the information available on ITS.

7. **Provisions of section 69A of the Income Tax Act, 1961 are not attracted: -**

The Learned Assessing Officer has made addition of Rs. 25,85,740/- u/s 69A of the Income Tax Act, 1961 treated cash deposited in the bank as unexplained money. It is submitted that provisions of section 69A are not applicable. These are quoted below: -

Unexplained money, etc.

69A. *Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article* ***is not recorded in the books of account****, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.*

The perusal of the aforesaid provisions reveals that addition can be made if the **assessee is found to be the owner of any money**, bullion, jewellery or other valuable article and

such money, bullion, jewellery or valuable article **is not recorded in the books of account**. From the perusal of this section is clearly shows that this section is applicable where the entries are not recorded in the books of accounts, whereas all the entries/transactions are recorded in the bank account of the assessee. Hence the provisions of section 69A are not applicable. The addition made invoking section 69a is unlawful, illegal and unjust. The same deserves to be deleted.

In view of the above facts and circumstances your honour is requested to deleted the addition made by the Learned Assessing Officer and oblige.

Ground No. 5 –
The Appellant requests its right to add, amend or alter all or any of the grounds of appeal on or before hearing.

Not pressed.

Your Honor is requested to decide the appeal in favour of the assessee by considering the above submission and oblige."

6. The ld. AR for the assessee also filed an application under Rule 29 of the Income Tax Appellate Tribunal Rules, 1963 is reproduced hereinbelow:-

"1. In the above regard it is submitted that the learned AO has completed the assessment u/s 148/144 of the Income Tax Act, 1961 on 04.12.2017 and the Learned CIT(A) have decided the case of the assessee on 03.01.2023 without controverting the submission and the assessee filed appeal before the Hon'ble Bench on 23.03.2023.

2. The assesseee has submitted all the required documents and details before the Learned CIT(A) but he did not accept the contention nor controvert the contention of the assessee. The assessee could not explain because of NFAC CIT(A). Therefore, it is our first chance where we can submit some credible evidences in support of our contention that the cash deposited in bank account was pertained to M/s TadkeshwarAgro Food Project and the assessee was working there as a sales manager for procuring the orders from customer and collection of cash from customer. The cash was deposited in the assessee's bank accounts and the same withdraw from the assesse's bank account from Jaipur only. In this regard we are submitted herewith affidavits of the assessee Shri Kailash Chand Yadav as well as affidavit of Shri Amit Gupta (Proprietor of M/s Shree TadkeshwarAgro Goods Projects) as an additional evidence and part of paper book page no. 181

to 184. These affidavits could not submit before the Learned AO as well as before the Learned CIT(A) for the reasons given above. The additional evidences are crucial for the discharge of justice. Therefore, these may kindly be admitted.

3. The above additional evidences are essential for admitting and adjudicating the grounds taken by the assessee for imparting justice to the assessee. It also goes to the root of the matter for deciding the appeal.

4. It is further submitted that when technicalities are pitched against the substantive discharge of justice, the later has to prevail, in a case where the bonafides are not in doubt then additional evidences should be admitted. (Maruti Civil Works Vs. ITO [2011] 136 TTJ 448 [Pune]). It is further submitted that all the judicial institutions - the Hon'ble ITAT being one of them - are respected not on account of its power to legalize injustice on technical grounds but because these are capable of removing injustice. The assessee is only furnishing supporting evidences only in support of contention that the capital gain taxes on sale consideration are not chargeable in this case when the same has not been received by the seller. These are not cooked up or manipulated in any way. In view of this the Hon'ble ITAT is requested to admit the additional evidence and consider the same favourably. The following case laws are quoted in support for the admission of the additional evidence.

5. Favourable case laws -

(i) National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 (SC)

Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee, notwithstanding the fact that same was not raised before the lower authorities.

(ii) CIT Vs. Raoraja Hanut Singh 117 Taxman 613/252 ITR 0528: (Raj)

The position is that the Tribunal can admit the additional evidence if it requires it to enable it to pass orders

(iii) Electra (Jaipur) Pvt Ltd. vs. IAC 26 ITD 236

If evidence produced by assessee is genuine, reliable and proves assessee's case than assessee should not be denied opportunity of it being produced even if he first time produces same before appellate authority.

(iv) Smt. Prabhavati S. Shah Vs. CIT 231 ITR 1 (Bom.)

Production of additional evidence-assessee taking loans from two creditors - ITO treating loans as income from undisclosed sources as summons could not be served on creditors - Assessee wanting to prove genuineness of loan by relying on fact that amount borrowed and repaid by cheques. Assessee producing Photostat copies of cheques and certificate from Bank before AAC. AAC refusing to admit additional evidence. AAC should have considered evidence produced by assessee regarding loan.

(v) CIT Vs. Gani Bhai Wahab Bhai 232 ITR 900 (MP)

There is no prohibition for taking additional evidence at the appellate stage, the only condition being that the Department should not be prejudiced and should be given reasonable opportunity to rebut this additional evidence. In this case, no such request was made by the representative of the Department whether they disputed this certificate or not. Therefore, there is no illegality committed by the Tribunal which accepted the certificate of 46 per cent of the yield. In this view of the matter, the additional evidence entertained by the Tribunal cannot be said to be bad.

(vi) Smt. Surinder Kaur Vs. ITO (2008) 118 TTJ 710 (Luck)

Where additional evidence sought to be produced before Tribunal was a certificate relating to assessee's claim for deduction of a sum and if was relevant to decide claim of assessee, same was to be admitted for substantial cause and to enable tribunal to pass appropriate order in matter.

(vii) Mascon Global Ltd. Vs. Assistant Commissioner of Income Tax (2010) 37 SOT 202 (Chennai)

Rule 29 permits the Tribunal to admit the additional evidence for any substantial cause.

In view of the aforesaid facts and decisions the Hon'ble ITAT is requested to admit the additional evidence filed by the assessee in the shape of affidavits paper book page no. 181 to 184 and decide the case favourably."

7. Per contra, the ld. DR relied upon the orders of the lower authorities.

8. We have heard the rival contentions and perused material available on record. The assessee has submitted that an affidavit duly signed and executed at page 32 of paper book wherein the fact that the assessee is an

employee is also evident from the affidavit and executed by partner of the firm Shri TadkeshwarAgro Food Product confirming that the assessee was an employee and was sent on to behalf of the firm to collect the money from the debtor so the addition of the full amount is not sustainable at all. At the same time the argument of the ld. DR that the addition made by the Assessing Officer for full amount should be sustained because explanation is not supported by any evidence and merely affidavit is placed on record will not suffice to delete the addition so made by the ld. AO. Considering the decision of the Hon'ble Apex Court in the case of Amit Parikh reported at 30 ITR 181 (SC) the affidavit submitted by the employer of the assessee and contention of the assessee cannot be brushed aside. Alternatively, looking to the fact that the money is deposited and withdrawal were made based on these non controverted facts the contention of the ld. AR of the assessee that if the explanation is not considered in full then the only addition can be sustained is that of the peak balance available with the assessee during the year under consideration. Looking to this fact and circumstances of the case and in the interest of justice we deem it fit to sustain the addition to the extent to the pick credit available with the assessee in the year under consideration. Based on this discussion the ld. AO is directed to call for the relevant working from the assessee and tax

the amount available with the assessee as peak credit as income of the assessee in addition to what has been declared as salary and interest on bank account. Accordingly the appeal of the assessee is partly allowed. The other ground raised by the assessee becomes educative in nature and therefore, is not decided.

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

Order pronounced in the open court on 11/09/2023.

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

जयपुर / Jaipur
दिनांक / Dated:- 11 /09/2023
*Santosh
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- Kailash Chand Yadav, Jaipur.
2. प्रत्यर्थी / The Respondent- ITO, Ward-1(1),Jaipur.
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File ITA No. 82/JPR/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar