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

डा॰ 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. 586/JPR/2023
निर्धारण वर्ष/Assessment Years : 2009-10

Ashish Sharma 3-352, 10-B Scheme, Gopal Pura Bye-pass, Jaipur.	बनाम Vs.	Income Tax Officer, Ward-6(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ARZPS 4723 L		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri S.L. Poddar (Adv.)
राजस्व की ओर से/ Revenue by: Smt. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 31/10/2023
उदघोषणा की तारीख/Date of Pronouncement : 28/11/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by the assessee aggrieved from the order of the National Faceless Appeal Centre, Delhi [Here in after referred as (NFAC)] for the assessment year 2009-10 dated 24.08.2023, which in turn arises from the order passed by the AO, passed under Section 147/144 of the Income tax Act, 1961 (in short 'the Act') dated 16.11.2016.

2. The assessee has marched this appeal on the following grounds:-

> *"*1. In the facts and circumstances of the case notice u/s 148 was not issued on 12.03.2016 for assessment year 2009-10 as such subsequent completion of assessment is ab-initio void being notice u/s 148 issued beyond time limit.
> *2. In the facts and circumstances of the case the Learned CIT(A) has erred in confirming the addition of Rs. 10,60,074/- under the head long term capital gain made by the Learned Assessing Officer without any basis.*
> *3. In the facts and circumstances of the case the Learned CIT(A) has erred in confirming the addition of Rs. 3,98,000/- u/s 69A of the Income Tax Act, 1961 made by the Learned Assessing Officer on account of cash deposited in the bank."*

3. The fact as culled out from the records is that the assessee is as individual who has sold an immovable property of Rs. 12,00,000/- in the F Y. 2008-09. Information u/s 133(6) was called for in this regard after prior approval from Pr. CIT-II, Jaipur. The assessee has furnished written submission providing acknowledgement slip of return of income, computation of Income. On perusal of details, capital gain on the said immovable property ld. AO noted that the assessee has failed to disclose fully and truly all facts necessary. Therefore, proceedings u/s 147 was initiated in this case after prior approval from Pr. CIT-2, Jaipur vide his office letter No. 1519 dated 09.03.2016 and thus notice u/s 148 was issued on 12/03/2016.

3.1 In compliance to notice issued the assessee has filed objection on 07.04.2016. Further notice u/s 142(1) was issued on 20.06.2016. Again, the assessee has filed an objection that the notice has not been issued for the year under consideration and in fact the assessment year mentioned in the notice issued u/s. 148 is different year and the proceeding started is of the different assessment year. The ld. AO contended that the assessee has not shown the said property transaction in his return of income for the year under consideration, therefore, considering the facts and provision of section 292B of the Act, the objection raised is disposed of vide letter No. 1781 dated 02.08.2016. The assessee has not complied on the given date rather than filing the earlier objection which has already been disposed off. Further, letter was issued on 08.09.2016 for which no compliance was made rather than raising the same objection by the assessee. The assessee has also not filed any documentary evidence in respect of property transactions made during the year. Considering noncompliance on the part of the assessee against the return of income of Rs. 3,45,772/- taxable income of Rs. 18,03,846/- was determined and the assessment was completed u/s 144 of the Act.

4. Aggrieved from the said action of the Assessing Officer, assessee preferred an appeal before the ld. CIT(A)/NFAC. Apropos to the grounds so raised the relevant finding of the ld. CIT(A)/NFAC is reiterated here in below:-

> "7. Decision: background facts, assessment order, all grounds of appeal of the appellant i.e. original grounds, amended grounds and additional grounds, submission of the appellant and remand report of the AO are carefully considered. The appellant vide all these grounds of appeal has contested the validity of notice issued u/s. 148 of the act for AY 2008-09 instead of AY 2009-10, addition made under LTCG and additions made u/s.69A of the act.
>
> 7.1 The legal ground of the appellant regarding validity notice u/s.148 of the act is rebutted by the AO and the specific comments of the AO in this regard are reproduced for ready reference-:
>
> "The objection of the assessee has already been disposed off vide letter No.1781 dated 02.08.2016 during the course of assessment proceedings which is self speaking in nature. Notice u/s 148 for AY 2009-10 was issued after recording reasons and approval of competent authority. Hence, there is no legal issue/defect/omission in the instant case for issue of notice u/s 148 for the relevant AY as alleged by the assessee.
>
> Action u/s 148 was initiated by issuing notice on 12.03.2016 after approval of competent authority and thereafter, completed the assessment on 16.11.2016. Therefore, assessment order was passed within limitation as per provision of law"
>
> 7.2 From the above, it can be seen that this issue has already been raised by the assessee at the assessment proceedings itself and has been replied by the AO. Existence of section 292B in the Income Tax Act, 1961 is mainly for the purpose of protecting the Revenue of the Government as well as the interests of the assessee from the claim of invalid of certain statutory and non statutory documents on certain grounds of mistakes. The mistake of mentioning wrong assessment year in the notices is duly covered under section 292B of the act. Hence the claim of the appellant in this regard is not acceptable. All relevant grounds of appeal in this regard are dismissed.

7.3 The submissions of the appellant with regard to the addition made under Long Term Capital Gains is sent to the AO and the comments of the AO in the remand report is reproduced below:

During the remand proceedings, the assessee has not furnished any reply on merit of case. The assessee has claimed that purchase cost of property of Rs. 1,62,662/ was mentioned in sale deed dated 23 09, 2006. However there is no corroborative evidence available on record with regards to proof of payment of Rs.1,62,662 Further the assessee failed to verify payment of conversion charges to Rs 28,330, regularization charges deposited with JDA to Rs. 23,345, lease amount of Rs.59,070 and stamp duty charges related to alleged sold property. Hence benefit cannot be allowed. Moreover assessee file copy of agreement dated 19.08.2004 with regards to construction work on plot No. 46, Sitaram Vihar, Gramm- Ganparpura, Tehsil-Sanganer but it is not reliable. There is no detail of term condition & condition of payment/rate, date of completion the work, detail of work assigned which proved that agreement is reliable and accordingly I rebutted it."

In view of the above, I am of the considered opinion that the addition made on this ground is upheld. Hence this ground of appeal is dismissed.

7.4 The submissions of the appellant with regard to the addition of Rs.3,98,000 u/s.69A of the act is sent to the AO and the comments of the AO in the remand report is reproduced below-:

“The above ground is not acceptable that the assessee did not maintained regular book of account and affairs of cash deposits and withdrawal from bank. Therefore, cash deposit out of cash withdrawal is not acceptable"

In view of the comments of the AO, I am of the considered view that the appellant has not proved beyond doubt that the cash deposits are only out of the cash withdrawals from his bank account. Hence this ground of appeal is dismissed.

8. In the result, the appeal is dismissed.”

5. As the assessee did not receive any favor from the appeal so filed before the ld. CIT(A), prefers the present appeal. The ld. AR appearing on behalf of the assessee has placed their written submission on record and the same is extracted here in below:-

"Brief facts of the Case: →

The assessee is an Individual. A notice u/s 148 vide reference number ARZPS4723L/155/4692 was issued on 12.03.2016 for Assessment Year 2008-09. Copy of the notice is available on Paper Book Page No. 1. The assessee objected, vide his letter dated 07.04.2016, that the notice received u/s 148 dated 12.03.2016 (Despatch No. ARZPS4723L/155/4692) was pertaining to Assessment Year 2008-09 for which assessment already stood completed on 28.08.2015 u/s 143(3)/148. The assessee specifically submitted that it was confusing as to why notice u/s 148 was again issued for Assessment Year 2008-09 as the assessment already stood completed on 28.08.2015, that too under section 147/143(3). Copy of letter dated 07.04.2016 is available on paper book page number 2. Copy of assessment order for ASSESSMENT YEAR 2008-09 dated 28.08.2015 is also available on Paper Book Page No. 3-4.

On being pointed out that notice received u/s 148 dated 12.03.2016 pertained to Assessment Year 2008-09, the Learned Assessing Officer realized the mistake and delivered a fresh notice u/s 148 for Assessment Year 2009-10 on 04.07.2016. However in order to save the time limit the Learned Assessing Officer backdated the notice u/s 148 dating it on 12.03.2016 with the same dispatch no. ARZPS4723L/155/4692 on which date notice for Assessment Year 2008-09 was issued. The main contention of the assessee is that notice u/s 148 for Assessment Year 2009-10 was not issued up to 31.03.2016 as such notice issued later on on 04.07.2016 is beyond limitation, as such, the entire assessment proceedings initiated u/s 148 and so completed are ab-initio void because the notice u/s 148 for ASSESSMENT YEAR 2009-10 was not issued within the time , i.e. up to 31/3/2016. The Learned Assessing Officer disposed the objection of the assessee vide letter dated 02.08.2016 stating that the mistake so committed in mentioning wrong Assessment Year 2008-09 in place of correct Assessment Year 2009-10 is covered by section 292B. In other words, the Learned Assessing Officer admitted that notice u/s 148 was issued for Assesment Year 2008-09 on 12.03.2016 and not for ASSESSMENT YEAR 2009-10. The Learned Assessing Officer has now taken the ground that although in the notice u/s 148 dated 12/3/2016, the assessment year mentioned was 20008-09, but it actually was meant for 2009-10 and such mistakes according to the Learned Assessing Officer, were covered u/s 292B, which is wrong. The disposal of objection is not in order. It is settled position of law that once no notice is issued with correct Assessment Year, the said defect is not curable u/s 292B.

Subsequently the Learned Assessing Officer completed the assessment u/s 147/144 of the Income Tax Act, 1961 on 16.11.2016 determining total income at Rs. 18,03,846/- inter-alia making addition of Rs. 10,60,074/- on account of long term capital gain on sale of plot and Rs. 3,98,000/- u/s 69A of the Income Tax Act, 1961.

Aggrieved with the order of the Learned Assessing Officer the assessee preferred appeal before the Learned CIT(A). The CIT(A), National

Faceless Appeal Centre (NFAC), Delhi, vide order dated 24/08/2023, dismissed the appeal of the assessee without appreciating the submissions made in this regard by the assessee and the documentary evidences furnished in support. The Learned CIT(A) appears to have passed the order in a mechanical way without application of mind. The Learned CIT(A) has turned a blind eye to the documentary evidences submitted by the assessee and has passed the order in the line of remand report of the Learned Assessing Officer. The Learned CIT(A) has stated that the legal ground regarding validity of notice u/s 148 has already been taken during assessment proceedings and the same has duly been replied by the Learned Assessing Officer during assessment proceedings itself. The Learned CIT(A) has further stated that existence of Sec 292 B in the IT Act is mainly for the purpose of protecting the revenue of the government as well as the interest of the assessee from the claim of validity of certain statutory and non-statutory notices and the mistake of mentioning wrong assessment year in the notice is duly covered under section 292 B of the IT Act. The Learned CIT(A) has totally ignored the submissions of the assessee in this regard, including the judicial decisions quoted in support. The Learned CIT(A) has passed the order dismissing the appeal of the assessee without controverting the evidences submitted and the case-laws quoted.

The Learned CIT(A) has also confirmed the addition of Rs.10,60,074/- on account of long term capital gain on sale of plot and addition of Rs. 3,98,000/- u/s 69A of the Income Tax Act, 1961 by quoting the relevant portion of the assessment order and without giving any finding on the issues involved. The Learned CIT(A) has not taken any cognizance of the documentary evidences submitted by the assessee in support of the cost incurred in respect of the immovable property. The Learned CIT(A) has grossly erred in dismissing the appeal of the assessee, particularly when no notice u/s 148 was issued for assessment year 2009-10 and received by the assessee and, therefore, the assessment completed was abinitio void. Further the Learned CIT(A) has also erred in confirming the additions made by the Learned Assessing Officer without giving any finding on the issues involved.

Aggrieved with the order of the ld CIT(A), the assessee is in appeal before the Hon'ble Tribunal. Individual grounds of appeal are discussed as under :-

Ground No. 1

In the facts and circumstances of the case, notice u/s 148 was not issued on 12/03/2016 for assessment year 2009-10, as such subsequent completion of assessment is abinitio void being notice u/s 148 issued beyond time limit.

Facts of the case

It is submitted that before the Learned CIT(A), the assessee had made the following detailed submission, which is quoted verbatim.

" The assessee is an individual. A notice u/s 148 vide reference number ARZPS4723L/155/4692 was issued on 12.03.2016 for Assessment Year 2008-09. The assessee objected, vide his letter dated 07.04.2016, that the notice received u/s 148 dated 12.03.2016 (Despatch No. ARZPS4723L/155/4692) was pertaining to Assessment Year 2008-09 for which assessment already stood completed on 28.08.2015 u/s 143(3)/148. The assessee specifically submitted that it was confusing as to why notice u/s 148 was again issued for Assessment Year 2008-09 as the assessment already stood completed on 28.08.2015. Copy of letter dated 07.04.2016 is available on paper book page number 2.

On being pointed out that notice received u/s 148 dated 12.03.2016 pertained to Assessment Year 2008-09, the Learned Assessing Officer realized the mistake and delivered a fresh notice u/s 148 for Assessment Year 2009-10 on 04.07.2016. However in order to save the time limit the Learned Assessing Officer backdated the notice u/s 148 dating it on 12.03.2016 with the same dispatch no. ARZPS4723L/155/4692 on which date notice for Assessment Year 2008-09 was issued. The main contention of the assessee is that notice u/s 148 for Assessment Year 2009-10 was not issued upto 31.03.2016 as such the entire assessment proceedings initiated u/s 148 and so completed are ab-initio void. The Learned Assessing Officer disposed the objection of the assessee vide letter dated 02.08.2016 stating that the mistake so committed in mentioning wrong Assessment Year 2008-09 in place of correct Assessment Year 2009-10 is covered by section 292B. The Learned Assessing Officer very specifically mentioned that notice issued for Assessment Year 2008-09 was the actual notice issued for Assessment Year 2009-10. The disposal of objection is not in order. Once no notice is issued with correct Assessment Year, the said defect is not curable u/s 292B.

It is submitted that notice u/s 148 issued on 12.03.2016 for Assessment Year 2008-09 was dispatched under dispatch No. ARZPS4723L/155/4692 and sent under postal receipts no. RR317010610IN dated 16.03.2016. Copy of this postal receipt is available on paper book page number 2. *On being pointed out the above the Learned Assessing Officer delivered notice u/s 148 on 04.07.2016 but strangely backdated it. The Learned Assessing Officer showed as if notice u/s 148 for Assessment Year 2009-10 was also issued on 12.03.2016. However the following facts disclosed that notice u/s 148 for 2009-10 was not issued on 12.03.2016 or any time before 31.03.2016: -*

(i) *The assessee had requested vide letter dated 28.01.2018 the Learned Assessing Officer to furnish a copy of dispatch register so as to verify the fact whether notice u/s 148 for 2009-10 was issued on 12.03.2016 but the Learned Assessing Officer has not furnished the copy this*

dispatch register. A copy of letter dated 28.01.2018 is available on paper book page no.3-4.

(ii) *The assessee had received notice u/s 148 for Assessment Year 2008-09 under dispatch no. ARZPS4723L/155/4692 and also postal receipt number RR317010610IN dated 16.03.2016. In these circumstances how could the Learned Assessing Officer claimed that notice u/s 148 for Assessment Year 2009-10 was also issued under the same dispatch number and under the same postal receipt number. Obviously the claim of the Learned Assessing Officer is wrong and false. The Learned Assessing Officer is trying to take shelter under the dispatch number and postal receipt number which are relevant for Assessment Year 2008-09 for the Assessment Year 2009-10 so as the save the time limit. Under the provisions of section 149 no notice u/s 148 could have been issued after 31.03.2016. Therefore to save to notice from getting time barred the Learned Assessing Officer backdated the notice. In the circumstances it is clear that notice u/s 148 was not issued on 12.03.2016. The assessee's letter dated 21.09.2016 is available on* paper book page number 5.

(iii) In the letter dated 02.08.2016 issued under dispatch no. ITO/W-6(2)/JPR/2016-17/781 dated 02.08.2016 the Learned Assessing Officer observed that the mistake in mentioning wrong Assessment Year is covered u/s 292B. Copy of letter dated 02.08.2016 is available on paper book page number 6. *The provisions of section 292B are quoted below-*

Return of income, etc., not to be invalid on certain grounds.

292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

The perusal of the aforesaid section reveals that it cures a mistake, defect or omission in a notice. In the case of the assessee the situation is different. The notice issued has been issued for Assessment Year 2008-09. No notice was issued for Assessment Year 2009-10. Under the provisions of section 292B when a notice has not been issued for a particular Assessment Year the same cannot be assumed to have been issued. This is not curable. The following case laws are quoted in support: -

(i) Nyalchand Malukchand Dagli vs. CIT 62 ITR 102 (Guj)Hon'ble Court held that the notice under s. 34(1)(a) was, therefore, clearly defective inasmuch as it was not a notice for the asst. yr. 1950-51 for which the assessment was sought to be reopened by the ITO and the notice being an invalid notice, the assessment or reassessment made by the ITO under s. 34(1)(a) was bad.

(ii) P.N. Sasikumar vs. CIT 170 ITR 80 (Ker)Hon'ble Court held that -

It is a case where "no notice" was sent to "the assessee", the "AOP" as enjoined by law. The entire proceedings are, in the circumstances, void and illegal and totally without jurisdiction. Such a fundamental infirmity cannot be called a "technical objection" or a mere "irregularity" and such vital infirmity cannot be cured or obliterated by relying on s. 292B.

(iii) CIT vs. Kurban Hussain Ibrahimji Mithiborwala 82 ITR 821 (SC)".

Hon'ble Apex Court held that -

ITO's jurisdiction depends upon issuance of valid notice—If it is invalid for any reason the entire proceeding would become void—In the notice under s. 34 the ITO sought to reopen assessment for asst. yr. 1948-49 but in fact reopened the assessment for asst. yr. 1949-50—Notice in question was invalid—ITO had no jurisdiction to reopen the assessment.".

Decision of the Learned CIT(A)

The Learned CIT(A) called for a remand report from the Learned Assessing Officer on the submissions of the assessee. These facts are discussed in para 7.1 & 7.2 of the appellate order. The same are scanned below :-

additions made u/s.69A of the act.

7.1 The legal ground of the appellant regarding validity notice u/s.148 of the act is rebutted by the AO and the specific comments of the AO in this regard are reproduced for ready reference-:

" The objection of the assessee has already been disposed off vide letter No.1781 dated 02.08.2016 during the course of assessment proceedings which is self speaking in nature. Notice u/s 148 for AY 2009-10 was issued after recording reasons and approval of competent authority. Hence, there is no legal issue/defect/omission in the instant case for issue of notice u/s 148 for the relevant AY as alleged by the assessee.

Action u/s 148 was initiated by issuing notice on 12.03.2016 after approval of competent authority and thereafter, completed the assessment on 16.11.2016. Therefore, assessment order was passed within limitation as per provision of law"

7.2 From the above, it can be seen that this issue has already been raised by the assessee at the assessment proceedings itself and has been replied by the AO. Existence of section 292B in the Income Tax Act, 1961 is mainly for the purpose of protecting the Revenue of the Government as well as the interests of the assessee from the claim of invalid of certain statutory and non statutory documents on certain grounds of mistakes. The mistake of mentioning wrong assessment year in the notices is duly covered under section 292B of the act. Hence the claim of the appellant in this regard is not acceptable. All relevant grounds of appeal in this regard are **dismissed.**

The perusal of the aforesaid paras reveals that the Learned CIT(A) has wrongly held that mentioning of a wrong assessment year in the notice u/s 148 is a curable mistake under section 292 B. The decision of the Learned CIT(A) is wrong and is against the decision of the Hon'ble Supreme Court in the case of *CIT vs. Kurban Hussain Ibrahimji Mithiborwala 82 ITR 821 (Supreme Court) and also the other decisions cited above.*

Conclusion

In view of the aforesaid discussion, the Hon'ble Tribunal is requested to declare the assessment proceedings abinitio void.

Ground No.2

In the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs. 10,60,074/- under the head long term capital gain made by the learned Assessing Officer without any basis.

It is submitted that before the Learned CIT(A), the assessee had made the following detailed submission, which is quoted verbatim.

"The Assessing Officer has passed order u/s 144 of the Income Tax Act, 1961 without providing adequate opportunity to the assessee. The entire assessment proceedings rest and have been initiated on the basis of information received by the Learned Assessing Officer that the assessee had sold a plot no. 46, Sitaram Vihar, Ganpatpura, Sanganer, Jaipur for a consideration of Rs. 12,00,000/-23.09.2008 relevant to Assessment Year 2009-10. The Learned Assessing Officer initiated proceedings u/s 148 with the issue of notice on 12.03.2016 and computed the assessment on 16.11.2016 determining capital gain of Rs. 10,60,074/-. The action of the Learned Assessing Officer is against the principles of natural justice as adequate opportunity was not provided. The Learned Assessing Officer had completed the assessment on guess work, conjecture and surmises. The Learned Assessing Officer has assumed the cost of acquisition at Rs. 1,00,000/- of plot without any basis.

2. *Reasons recorded without any substance -*

Further it is noticed that reasons recorded which are scanned below –

FORM FOR RECORDING THE REASONS FOR INITIATING PROCEEDINGS UNDER SECTION 148 AND FOR OBTAINING THE APPROVAL OF THE Pr. COMMISSIONER OF INCOME TAX

1	Name and address of the assessee	ASHISH SHARMA S/o : J.P. SHARMA B-352, 10-B, scheme Gopalpura Byepass jaipur
2	PAN	ARZPS4723L
3	Status	Individual
4	Ward/Circle	ITO, Ward 6(2), Jaipur
5	Assessment year for which the notice is to be issued u/s 148	2009-10
6	The quantum of income which has escaped assessment	Substantial income more than Rs. 1 lac.
7	Whether the provisions of Sec. 147(a) or 147(b) are applicable or both the sections are applicable	Sec. 147 of the IT Act, 1961 is applicable
8	Whether the assessment is proposed for the first time If the reply is in affirmative, please state (a) whether any voluntary return had already been filed and (b) if so, the date of filing of return	Yes Yes 31.03.2010
9	If the answer to item 8 is negative, (a) the income originally assessed (b) whether it is a case of under assessment, assessment at too low a rate, assessment which has been made the subject to excessive relief or allowing of excessive loss or depreciation	Rs 4,45,772 N.A.
10	Whether the provisions of Sec. 150(1) are applicable. If the reply is in affirmative, the relevant facts may be stated against item No. 11 and it may be brought out that the provisions of Sec. 150(2) would not stand in the way of initiating the proceedings u/s 147	N.A.
11	Reasons for the belief that the income has escaped assessment: On the basis of information available on record for the year under consideration, the assessee has sold an immovable property of Rs 12,00,000/- in the F.Y. 2008-09.	

ASHISH SHARMA S/D/o : J.P. SHARMA Add : ARZPS4723L 2009-10

	Information u/s 133(6) has been called for in this regard after prior approval from Pr.CIT-II, Jaipur. The assessee has furnished written submissions providing acknowledgement slip of return of income, computation of income. On perusal, capital gain on the immovable property has not been shown in the computation of income. Thus the assessee has failed to disclose fully and truly all material facts necessary for his assessment. Therefore, I have the reason to believe that, the above income of Rs. 7,00,000/-, which is chargeable to tax, has escaped assessment.

Date:

(Navindra Saini)
ITO, Ward 6(2), Jaipur

12	Whether the Addl/Joint CIT is satisfied on the reasons recorded by the ITO that it is a fit case for initiation of proceedings u/s 147 and issuance of notice u/s 148.	Yes

Date:

(Ajey Malik)
Addl. Commissioner of Income Tax,
Range-6, Jaipur

13	Whether the Pr. CIT is satisfied on the reasons recorded by the ITO that it is a fit case for initiation of proceedings u/s 147 and issuance of notice u/s 148.	Yes. 9/3/16

Date:

(S.K. Chowdhari)
Pr. Commissioner of Income Tax - II,
Jaipur

The Learned Assessing Officer has mentioned the sale price of property at Rs. 12,00,000/- and subsequently mentioned income at Rs. 7,00,000/- which has escaped assessment. There is no material on record, there is no reason which led the Learned Assessing Officer in forming belief that income of Rs. 7,00,000/- escaped assessment. No working has been provided as how the Learned Assessing Officer reached the figure of Rs. 7,00,000/- which is treated as the income having escaped. It is settled position of law that having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under s. 147 can be tested only by reference to the reasons

recorded under s. 148(2) of the Act and the AO is not authorized to refer to any other reason even if it can be otherwise inferred and/or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law. Reason is the sole of the order. In the absence of lawful reasons there is no heartbeat in the order and the order become lifeless. The reason should be such which speak for themselves. In the case of the assessee the reasons are not speaking one at in what manner the Learned Assessing Officer reached to be belief or concluded that income of Rs. 7,00,000/- escaped assessment. The reasons have been recorded purely on assumption, presumption and estimate basis. In view of this the recording of reasons is unlawful, illegal and unjust. The same are not in accordance with law. No notice u/s 148 should have been received on the basis of such reasons. The entire assessment proceedings are therefore vitiated and deserve to be cancelled.

3. Sanction u/s 151(2) is not in accordance with law: -

It is further submitted that the sanctioning authority u/s 151(2) which in this case is Principle CIT-2, Jaipur also erred in recording the satisfaction and granting approval to the Learned Assessing Officer for issuing notice u/s 148 on the basis of defective reasons discussed above. It is settled position of law that approval u/s 151(2) is not an empty formality. The scheme of the act has laid a check on the powers of the Learned Assessing Officer to issue notice u/s 148 indiscriminately. The following case law is quoted in support: -

(i) PCIT vs. N.C. Cables (2017) 149 DTR 90 (Del)

S. 147/ 151: The mere appending of the word "approved" by the CIT while granting approval u/s 151 to the reopening u/s 147 is not enough. While the CIT is not required to record elaborate reasons, he has to record satisfaction after application of mind. The approval is a safeguard and has to be meaningful and not merely ritualistic or formal.

(ii) AMARLAL BAJAJ vs. ASSISTANT COMMISSIONER OF INCOME TAX [ITAT, BOMBAY TRIBUNAL (E)] (2013) 60 SOT 0083 (Mumbai) (URO)

Reassessment—Validity—Sanction under section 151—Assessee filed return and assessment was completed u/s 143(3)—After four years, assessment was reopened u/s 148 to examine issues regarding loans, expenses and bills—Assessee questioned validity of notice and argued that while giving

sanction, Commissioner had mechanically accorded permission without applying his mind—Revenue submitted that approval granted by CIT was not mechanical, CIT had fully considered facts of case and after due consideration had given direction for reopening of case by writing word “approved”—Held, superior authority had to examine reasons, material or grounds and to judge whether they are sufficient and adequate for formation of necessary belief on part of AO—In instant case, CIT had simply put “approved” and signed report thereby giving sanction to AO—Nowhere had recorded satisfaction note not even in brief—Case of assessee was squarely covered by case of M/s United Electrical Co. Pvt. Ltd. Vs CIT wherein it was held that after expiry of four years from end of relevant AY, notice u/s 148 shall not be issued unless Chief CIT or CIT is satisfied, on reasons recorded by AO, that it is fit case for issue of such notice—In present case also, CIT had simply mentioned “approved” to report submitted by concerned AO—Assessment declared as void ab initio—Appeal filed by assessee allowed and cross appeal filed by Revenue dismissed.

(iii) CHHUGAMAL RAJPAL vs. S.P. CHALIHA & ORS. 79 ITR 0603 (Supreme Court)

In his report the ITO does not set out any reason for coming to the conclusion that this is a fit case to issue notice under s. 148. The material that he had before him for issuing notice under s. 148 is not mentioned in the report. In his report he vaguely refers to certain communications received by him from the CIT. He does not mention the facts contained in those communications. All that he says is that from those communications "it appears that these persons (alleged creditors) are name-lenders and the transactions are bogus." He had not even come to a prima facie conclusion that the transactions to which he referred are not genuine transactions. He appears to have had only a vague felling that they may be bogus transactions. Such a conclusion does not fulfil the requirements of s. 151(2). What that provision requires is that he must give reasons for issuing a notice under s. 148. In other words he must have some prima facie grounds before him for taking action under s. 148. Further his report mentions; "Hence proper investigation regarding these loans is necessary" In other words his conclusion is that there is a case for investigating as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice under s. 148. From the report submitted by the ITO to the CIT, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in

question, income chargeable to tax has escaped assessment for that year; nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. The ITO had no material before him which could satisfy the requirements of either cl. (a) or cl. (b) of s. 147. Therefore, he could not have issued a notice under s. 148. Further, the report submitted by him under s. 151(2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice under s. 148. The CIT had mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under s. 148. If only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under s. 148. The important safeguards provided in ss. 147 and 151 were lightly treated by the ITO as well as by the CIT. Both of them appear to have taken the duty imposed on them under these provisions as of little importance. They have substituted the form for the substance. In the result this appeal is allowed, the order of the High Court is set aside and the impugned notice quashed.—

4. Determination of capital gain is wrong: -

It is submitted that the Learned Assessing Officer was wrong in assuming the cost of acquisition of plot of Rs. 1,00,000/-. The same was purchased for a sum of Rs. 1,62,662/- vide allotment letter dated 09.08.2004. This is mentioned in the registration deed dated 23.09.2006. Copy of registration deed dated 23.09.2006 is available on paper book page number 6 to 11. This registration deed further narrates the expenditure mentioned below: -

(i) Conversion charges incurred Rs. 28,330/-. Necessary receipt dated 19.08.2004 of this amount is available on paper book page number 12.
(ii) Regularization charges deposited with JDA vide receipt no. 12540 dated 19.06.2004 of Rs. 23,345/-. Copy of which is available on paper book page number 13.
(iii) Lease amount of Rs. 59,070/- deposited on 24.09.2008 as per receipt available on paper book page number 14.
(iv) Stamp duty etc. Rs. 8620/- incurred on registration of purchase of plot.
These total to Rs. 282027/- (Index cost Rs. 3,27,537/-

Further assessee incurred expenditure in cost of improvement. The payment was made to one Shri Chote Lal. The work included leveling of the plot, filling of earth, gardening and wiring. Total expenditure

incurred is Rs. 2,93,336/-. (Index Cost of Rs. 3,55,000/-) The same was paid by 07.10.2004. Cost of agreement with Chote Lal Contractor, Photo of receipt of payment to him, ID of Shri Chote Lal are available on paper book page number 15 to 19. In view of the above the total cost of the plot sold works out as under: -

(i)	Cost of purchase of Rs.	327537/-	
(ii)	Cost of improvement	Rs.	355000/-
	Total	Rs.	682537/-

Thus as against indexation cost taken by the Learned Assessing Officer at Rs. 1,21,250/- the same works out to Rs. 6,82,537/-. The long term capital gain would work out to Rs. 5,17,463/- (1200000-682537).

It the submitted that the submissions of the assessee regarding the facts of the case are notwithstanding the legal issues raised such as no notice was issued u/s 148 for Assessment Year 2009-10 on 12.03.2016 as claimed by the Learned Assessing Officer, the reasons recorded are defective and sanction granted u/s 151(2) is unlawful."

Order of the Learned CIT(A) is a non-speaking order without considering the submissions made by the assessee.

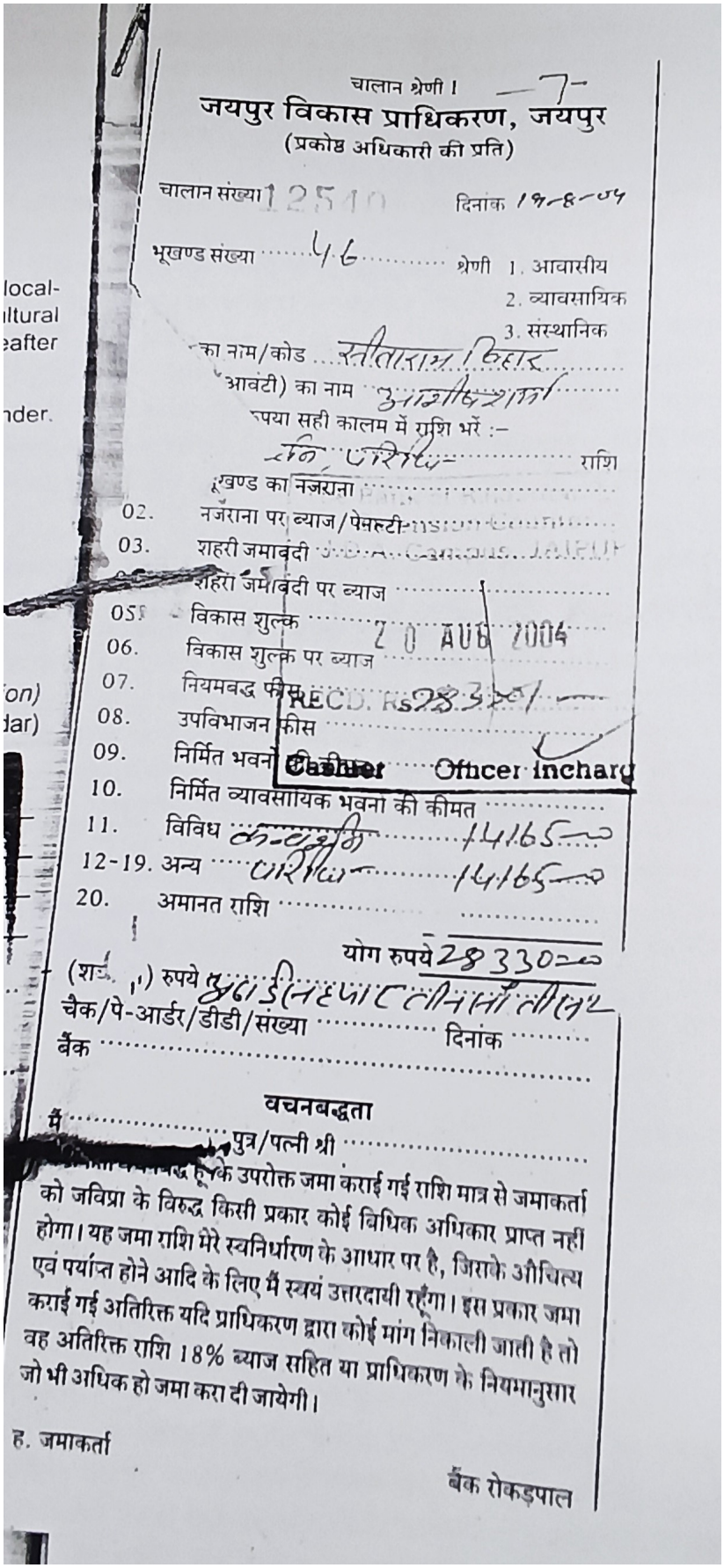
The Learned CIT(A) has passed the order totally ignoring the submissions of the assessee. The Learned CIT(A) has not given any decision on the issue that sanction u/s 151 was unlawful and illegal. The same has remained undecided. It appears that both the Learned Assessing Officer as well as the ld CIT(A) had nothing to controvert the submission of the assessee in this regard. Although the Learned CIT(A) had called for a remand report from the Learned Assessing Officer on the submissions of the assessee, but there is no murmur on this issue in the remand report of the Learned Assessing Officer or in the order of the Learned CIT(A) whether the Learned Assessing Officer had given any remarks. It is relevant to add that the Learned CIT(A) had not forwarded the copy of remand report received from the Learned Assessing Officer to the assessee for his comments. The Learned CIT(A) has acted up on the remand report without furnishing copy to the assessee and obtaining the remarks of the assessee, which goes against the principles of natural justice.

As regards the quantum of capital gain is concerned, the Learned CIT(A) has not taken into consideration the following documentary evidences submitted by the assessee in the Paper Book (copy of reply filed before the Learned CIT(A) along with paper book is available on Paper Book Page No. 5-36.

(a) Copy of registered deed dated 23/09/2006 evidencing the sale price as well as the purchase price of the property sold. In the

sale deed, it is mentioned that the plot was purchased for a sum of Rs. 1,62,662/-, which was deposited on 09/08/2004. This fact has been ignored by the Learned CIT(A). The cost of the property was required to be taken at Rs.1,62,662/-, the indexed cost of which worked out to Rs.3,27,537/- as against Rs.1,21,250/- taken by the Learned Assessing Officer. The documentary evidence could not have been ignored by the Learned CIT(A) but for total disregard to the evidences furnished by the assessee.

(b) Receipt of conversion charges of Rs. 28,330/-. Copy of this was submitted on the Paper Book for purposes of indexed cost, but the same has also been ignored. This fact is verifiable from the sale deed also. The assessee is scanning the copy of receipt issued by JDA hereunder.



चालान श्रेणी। —7—

जयपुर विकास प्राधिकरण, जयपुर

(प्रकोष्ठ अधिकारी की प्रति)

चालान संख्या 12510 दिनांक 19-8-04

भूखण्ड संख्या 46 श्रेणी 1. आवासीय
2. व्यावसायिक
3. संस्थानिक

का नाम/कोड सीताराम/बिहार

आवंटी) का नाम आशीष शर्मा

रुपया सही कालम में राशि भरें :-

		राशि
	भूखण्ड का नजराना	
02.	नजराना पर ब्याज/पेनल्टी	
03.	शहरी जमावंदी	
	शहरी जमावंदी पर ब्याज	
05.	विकास शुल्क	
06.	विकास शुल्क पर ब्याज	
07.	नियमबद्ध फीस	
08.	उपविभाजन फीस	
09.	निर्मित भवन	
10.	निर्मित व्यावसायिक भवन की कीमत	
11.	विविध	14165—
12-19.	अन्य	14165—
20.	अमानत राशि	
	योग रुपये	28330—

20 AUG 2004
RECD. Rs 28330/-
Cashier Officer Incharge

(शब्दों में) रुपये अट्ठाईस हजार तीन सौ तीस

चैक/पे-आर्डर/डीडी/संख्या ..... दिनांक .....

बैंक .....

वचनबद्धता

मैं ..... पुत्र/पत्नी श्री .....

...बद्ध हूँ कि उपरोक्त जमा कराई गई राशि मात्र से जमाकर्ता को जविप्रा के विरुद्ध किसी प्रकार कोई विधिक अधिकार प्राप्त नहीं होगा। यह जमा राशि मेरे स्वनिर्धारण के आधार पर है, जिसके औचित्य एवं पर्याप्त होने आदि के लिए मैं स्वयं उत्तरदायी रहूँगा। इस प्रकार जमा कराई गई अतिरिक्त यदि प्राधिकरण द्वारा कोई मांग निकाली जाती है तो वह अतिरिक्त राशि 18% ब्याज सहित या प्राधिकरण के नियमानुसार जो भी अधिक हो जमा करा दी जायेगी।

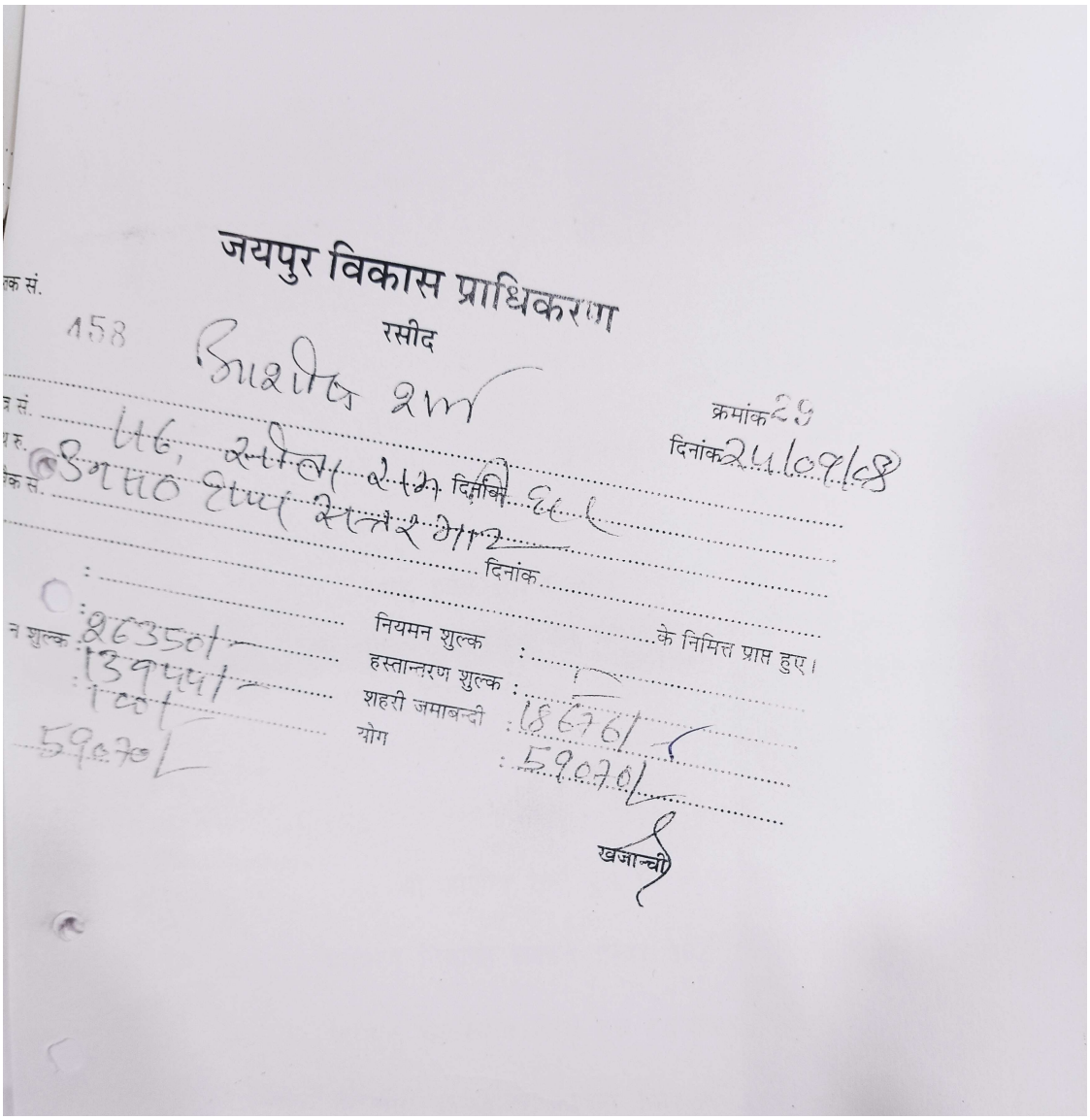
ह. जमाकर्ता

बैंक रोकड़पाल

(c) Regularization charges of Rs.23,345/- deposited on 19/8/2004 with JDA. This fact is verifiable from the sale deed also. Copy of the same is also scanned hereunder (Also available on Paper Book Page No. 29.)

/*-/*-/*-/*-/*-/ scanned papers – too lage image //*-/*-/*-/*-/-please show me

(d) Lease amount of Rs. 59,070/- deposited with JDA under receipt No. 29 dated 24/09/2008. The same was also furnished on the Paper Book and is scanned below.



(e) Stamp duty of Rs.8620/- incurred in connection with purchase of plot.

The above expenditure along with the cost of purchase of plot total to Rs. 2,82,027/- (162662+28330+23345+59070+8620). The indexed cost of the same works out to Rs. 3,27,537/-.

Besides the above, the assessee also furnished a copy of agreement with contractor Shri Chotey Lal regarding carrying out improvement in the plot for which payment was made of Rs. 2,93,336/-. The indexed cost of the same works out to Rs. 3,55,000/-. Thus, the total indexed cost of the plot works out to Rs.6,82,537/- (327537 +355000). The plot has been sold for a sum of Rs. 12,00,000/-. As such, the capital gain works out to Rs.517463/- (Rs.12,00,000 – 682537). As against this, the Learned Assessing Officer, on his assumption and presumption, has taken the cost of plot at Rs. 1,00,000/- and indexed cost of the same has been taken at Rs.1,21,250/-. The Learned Assessing Officer had wrongly worked out the capital gains at Rs.10,60,074/-, which works out correctly to Rs.6,82,537/-.

The Learned CIT(A) is totally silent on the documentary evidences furnished by the assessee on Paper Book submitted along with the written submissions. The Learned CIT(A) has been carried away by the remand report of the Learned Assessing Officer. It has already been discussed in the foregoing paras that the Learned Assessing Officer had acted carelessly. In the reasons recorded, he had mentioned the escaped income at Rs. 7,00,000/- on account of sale of plot of Rs. 12,00,000/-. Again while assessing the capital gains, he has adopted the cost price on assumption at Rs. 1,00,000/-, which is wrong. In the face of documentary evidences, it was wrong on the part of the Learned CIT(A) to have accepted the report of the Learned Assessing Officer. The capital gains requires to be restricted to Rs.5,17,463/- as against Rs.10,60,074/- assessed by the Learned Assessing Officer.

Ground No.3

In the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs. 3,98,000/- u/s 69 A of the Income Tax Act, 1961 made by the learned Assessing Officer on account of cash deposited in the bank.

It is submitted that before the Learned CIT(A), the assessee had made the following detailed submission, which is quoted verbatim.

"It is submitted that the learned Assessing Officer completed reassessment under section 144 of the IT Act without providing advocate opportunity to the assessee. It is because of this fact that the assessment has been completed ex-parte that the

assessee could not avail any opportunity to furnish his defense the Learned Assessing Officer has made additions under section 69 of Income Tax Act, 1961 of rupees 398000/- on account of deposits in Union Bank of India was not having the benefit of the another account of assessee maintained in Gram Seva Sahakari Samiti Ltd (Mini Bank).

The Learned Assessing Officer noticed that there were deposits to the tune of Rs. 4,98,000/- from 19.04.2008 to 27.01.2009. The main deposit is of Rs. 3,60,000/- on 22.10.2008. Against the total deposit of Rs. 4,98,000/- the Learned Assessing Officer gave benefit of Rs. 1,00,000/- as opening cash balance and treated the remaining amount as undisclosed investment u/s 69A and made addition of Rs. 3,98,000/-.

It is submitted that the entire deposits are fully explained. The narration in the sale deed of plot discloses that assessee received amount as under: -

Rs. 8,60,000/- by cheque on 03.10.2008 of HDFC
Rs. 2,00,000/- by cheque on 03.10.2008 of SBBJ
Rs. 1,00,000/- by cash.
Rs. 12,00,000/- Total

The cheque of amount of Rs. 8,60,000/- was deposited in Gram Seva Sahakari Samiti Ltd on 06.10.2008 and a sum of Rs. 8,60,000/- was withdrawn as cash on 22.10.2008. It is out of this withdrawal that Rs. 3,60,000/- was deposited in cash in Union Bank of India on the same date. Thus the amount of deposits of Rs. 3,60,000/- is fully explained.

It is further submitted that assessee had made withdrawal in cash of Rs. 1,40,000/- on 11.11.2007 and Rs. 10,000/- on 07.04.2008 and Rs. 45,000/- on 09.06.2008 and Rs. 12,000/- on 09.08.2008 these total to Rs. 2,15,000/-. These fully cover the deposits in Union Bank from 19.04.2008 onwards treated as unexplained by the Learned Assessing Officer. In view of this the Learned Assessing Officer was wrong in treating the deposits in the account of Union Bank as unexplained. Copy of the account no. 221 with Gram Seva Sahakari Samiti Ltd is available on paper book page number 20 to 21. *The addition deserves to be deleted."*

Order of CIT(A)

The Learned CIT(A) has not considered the detailed submissions made by the assessee and dismissed the appeal by merely stating that in the light of comments of the Assessing Officer, he is of the considered view that

the assessee has not proved beyond doubt that the cash deposits are out of the cash withdrawals from his bank account. The Learned CIT(A) is not justified in dismissing the appeal of the assessee without considering the submission of the assessee and without giving his own finding on the issue involved. The action of the Learned CIT(A) is unlawful, illegal and unjust and the same is assailed as under :-

(a) The deposit of Rs.3,98,000/- in bank account in Union Bank of India on 22/10/2008 was out of withdrawal of Rs.8,60,000/- from Gram Seva Sahkari Samiti Ltd on the same day.

The cash deposit of Rs. 3,98,000/- in the bank account of the assessee in Union Bank of India on 22/10/2008 is fully explained as the said deposit is out of the withdrawal of Rs.8,60,000/- on the same day, i.e. 22/10/2008 from Gram Seva Sahkari Samiti, which is evident from the copy of statement filed along with the Paper Book. There is no dispute that the assessee received the following cheques being consideration received on sale of plot as per sale deed :-

Rs. 8,60,000/- by cheque on 03.10.2008 of HDFC
Rs. 2,00,000/- by cheque on 03.10.2008 of SBBJ
Rs. 1,00,000/- by cash.
Rs. 12,00,000/- Total

The cheque of amount of Rs. 8,60,000/- was deposited in Gram Seva Sahakari Samiti Ltd on 06.10.2008 and a sum of Rs. 8,60,000/- was withdrawn as cash on 22.10.2008. It is out of this withdrawal that Rs. 3,98,000/- was deposited in cash in Union Bank of India on the same date. Thus the amount of deposits of Rs. 3,98,000/- is fully explained.

The Learned CIT(A) has failed to consider this submission and documentary evidence in the form of bank statement showing withdrawal of Rs. 8,60,000/- from Gram Seva Sahkari Samiti on 22/10/2008. Since the cash deposit of Rs. 3,98,000/- on 22/10/2008 in the bank account maintained with Union Bank of India was out of withdrawal of Rs.8,60,000/- on the same day from Gram Seva Sahkari Samiti, the cash deposit was fully explained and there was no case for confirming the impugned addition by the Learned CIT(A). The Learned CIT(A) has not given any reason for not accepting the explanation and documentary evidence furnished by the assessee to support his case that the cash deposit in bank account maintained with Union Bank of India was out of withdrawal from Gram Seva Sahkari samiti on the same day.

In view of the above discussion, the Hon'ble Tribunal is requested to delete the addition made by the Learned Assessing Officer and confirmed in appeal by the Learned CIT(A).

The position in respect of deposits in Union Bank and withdrawals from Gram Seva Sahkari Samiti Ltd Bank are as under, which fully explain the deposits in the Union Bank :-

Withdrawals from Gram Seva Sahkari Samiti Ltd.		Deposits in Union Bank of India	
Date of withdrawal	Amount withdrawn	Date of Deposit	Amount of deposit
11.11.2007	1,40,000	19.04.2008	15,000
07.04.2006	10,000	16.05.2008	15,000
09.06.2008	45,000	26.05.2008	15,000
09.08.2008	20,000	21.06.2008	15,000
		24.07.2008	10,000
		20.08.2008	15,000
		26.09.2008	10,000
Total	2,15,000		95,000
22.10.2008	8,60,000	22.10.2008	3,60,000
		20.01.2009	8,000
		27.01.2009	35,000
Total	8,60,000		4,03,000

The above chart discloses that the withdrawals from Gram Seva Sahkari Samiti up to 9.08.2008 are of Rs. 2,15,000/-. These withdrawals are from 11.11.2007 to 09.08.2008 and these full cover the deposits in Union Bank of India made from 19.04.2008 to 26.09.2008 of Rs. 95,000/-. Similarly, the subsequent deposits in Union Bank from 22.10.2008 to 27.01.2009 are of Rs.4,03,000/- which are fully covered by the withdrawal made on 22/10/2008 from Gram Sahkari Seva Samiti of Rs. 8,60,000/-. Copy of bank account of Gram Seva Sahkari Samiti is available on Paper Book Page No.36. and copy of the account with Union Bank of India is available on Paper Book Page No. 37-46. In view of the aforesaid position of withdrawals made from Gram Seva Sahkari Samiti, the deposits with Union Bank of India are fully explained. The addition deserves to be deleted.

(b) <u>The addition made by invoking Sec. 69A is</u> <u>unjustified and illegal.</u>

Besides the above factual position, the addition of Rs. 3,98,000/- made by the Learned Assessing Officer is wrong invoking the provisions of Sec. 69A. The provisions of Sec. 69 A 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 reveal that it is attracted and applicable only in case assessee is found to be the owner of any money, bullion, jewellery or other valuable article. In the case of the assessee, what was noticed by the Learned Assessing Officer were entries in the bank account whereas there were no balances in the bank account as on 30/03/2009. The balance in the account is only of Rs 27,144/-. Therefore, the Learned Assessing Officer could not have said that assessee was found to be the owner of Rs.3,98,000/-. In view of this, the provisions of Sec. 69A are not applicable in the case of the assessee. Provisions of Sec. 69 A are applicable when the assessee is actually found with money and is also owner of the same. Mere entries in the bank account cannot be termed as money found when there is no balance in the account. In view of this, the Learned Assessing Officer was not justified in invoking the provisions of Sec. 69A and making the additions. The same, therefore, deserves to be deleted on this ground also. The following case-laws are quoted in support :-

(1) *DURGA KAMAL RICE MILLS vs. COMMISSIONER OF INCOME TAX HIGH COURT OF CALCUTTA (2003) 183 CTR 0223, (2004) 265 ITR 0025, (2003) 130 TAXMAN 0553*

Section 69 A deals with unexplained moneys of which the assessee is found to be the owner. The material difference between section 68 and 69 A is that section 68 does not require that the amount is to be owned by the assessee. It only deals with any amount shown in the books of account of the assessee where section 69 A deals with money etc. owned by the assessee and found in is possession. Therefore, ownership is one of the consideration when the matter comes under section 69A.

(2) *COMMISSIONER OF INCOME TAX vs. K.T.M.S. MAHAMOOD HIGH COURT OF MADRAS (1997) 140 CTR 0282, (1997) 228 ITR 0113, (1997) 92 TAXMAN 0169*

In order to make the assessment under s. 69A for undisclosed income, the assessee must not only be a person, who is in

possession of the undisclosed income, but he should also be the owner of the same.

(3) *ASSISTANT COMMISSIONER OF INCOME TAX vs. JOTINDRA STEEL & TUBES LTD. IN THE ITAT DELHI BENCH 'C' (2022) 64 CCH 0042 DelTrib (2022) 94 ITR (Trib) 0359 (Delhi)*

Held that since no real money was found to be in possession and there was no mention of any name in seized document, impugned addition were merely based on presumption and was to be deleted.

In view of the above discussion, the addition made by invoking Sec. 69A deserves to be deleted. The Hon'ble Tribunal is requested to decide the appeal in favour of the assessee by considering the above submission and oblige. "

5.1 The ld. AR of the assessee in addition to the above written submissions submitted that the case of the assessee is covered based on the decision of the Hon'ble Apex Court in the case of CIT vs. Kurban Hussain Imrahimji Mithiborwala 82 ITR 821. Thus, the ld. AR of the assessee relying on the provisions of Section 292B of the Act submitted that the provisions of section does not empower the Assessing Officer to correct the assessment year which is a mistake of jurisdictional mistake cannot be curable within the provisions of Section 292B of the Act. Therefore, he submitted that the assessment made based on the issue of notice for the assessment year 2008-09 whereas the assessment is completed for the assessment year 2009-10 is required to be quashed. The ld.

AR of the assessee on the merit of the case also submitted that the assessee has already in the return of income so filed disclosed the transaction as alleged by the Assessing Officer. Therefore, even on merits the reopening of his case is on incorrect appreciation of facts.

5.2 The ld. AR of the assessee relied upon the following evidences in support of the contentions so raised:-

Sr. No.	particulars	Page No.
1.	Copy of letter dated 07.04.2016	1
2.	Copy of this postal receipt under postal receipts no. RR317010610 IN dated 16.03.2016	2
3.	Copy of letter dated 28.01.2018	3-4
4.	Letter dated 21.09.2016	5
5.	Copy of letter dated 02.08.2016	5-A
6.	Copy of Registration deed dated 23.09.2006	6-11
7.	Receipt of conversion charges of Rs. 28,330/-	12
8.	Receipt of regularization charges deposited with JDA	13
9.	Receipt of lease amount of Rs. 59,070/-	14
10	Cost of agreement with Chote Lal Contractor, photo of receipt of payment to him, ID of Shri Chote Lal	15-19
11.	Copy of the account no. 221 with Garm Seva Sahakari Samiti Ltd.	20-22

6. Per contra, the ld DR heavily relied upon the averments made in the order of the Assessing Officer. She also submitted that

the objection of the assessee considering the provisions of Section 292B of the Act the mistake observed in the notice u/s 148 of the Act is curable. The ld. AO considering the provisions of Section 292B of the Act has already informed that mistake is corrected the assessee has not made any compliance to the various notices issued and the assessment has been completed ultimately u/s 144 of the Act and similar is the case before the proceeding before the ld. CIT(A). Therefore, the appeal of the assessee has no merit is required to be dismissed considering the finding recorded in the order of the lower authorities. The ld. DR relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal 417 ITR 325 (SC).

7. In the rejoinder the ld. AR of the assessee relying on copy of reasons recorded for reopening submitted that the reasons were recorded for the assessment year 2009-10 whereas the notice was issued for assessment year 2008-09. Therefore the fact of this case is that the notice has been issued for the assessment year 2008-09 for which there is no satisfaction and the satisfaction is recorded for the assessment year 2009-10 but there is no notice u/s 148 of the act which utmost requirement of law for reopening assessment of the assessee and that issuance of notice cannot be

corrected u/s 292B of the Act. In support of the contention so raised he relied upon the provisions of this section 292B of the Act.

8. We have heard the rival contentions, perused the material placed on record and gone through the judicial precedent cited by both the parties to drive home their respective contentions. The Bench noted that the assessee has challenged the proceedings of assessment year 2009-10 and thereby completion of the assessment objecting that required notice u/s 148 of the Act for the assessment year 2009-10 has not been issued and in fact the notice for assessment year 2008-09 was issued to the assessee. The Bench noted that for acquiring the jurisdiction for the year under consideration the ld. AO relying on the provisions of Section 292B of the Act taken a view that the notice issued dated 12.03.2016 for assessment year 2008-09 be considered as the issue notice u/s 148 of the Act for assessment year 2009-10. Thus, now the apple of discord in this case as to that whether the provisions of section 292B of the Act empower the Assessing Officer to correct the assessment year of notice issued u/s 148 of the Act or not.

8.1 It is thus, imperative to deal the provisions of Section 292B of the Act and the same is reiterated hereinbelow:-

> **"292B.** No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

8.2 On bare perusal of the provisions of section 292B of the Act it is noted that the ld. AO very well within his power to correct a mistake, defect or omission in the return of income, assessment, notice, summons or other proceedings is not sufficient to invalidate and action taken by the competent authority, provided that such return of income, assessment, notice, summons or other proceedings in substance and indicate is conformity with or according to the provisions of the Act. To put it differentially, section 292B can be relied upon for resist a challenge or that to the notice etc. Only if there is a technical defect or omission in it. However, there is nothing in the plane lounge of that section from which it can empower the ld. AO to cure the jurisdictional defect in the assessment, notice, summons or other proceedings. In other

word if the notice, summon, or other proceedings taken by an authority suffers inherent lacuna affecting its jurisdiction the same cannot be overlooked by having resort to provisions of section 292B of the Act. We got support of our view from the decision cited by the ld. AR of the assessee reported in case of CIT vs. Kurban Hussain Ibrahimji Mithiborwala (supra) and recently the Hon'ble Bombay High Court also dealt with this issue in the case of Sunil Bal Krishan Gupta vs. ACIT 414 ITR 292 where in it has been held that:-

> **"7.** The issue of a notice under Section 148 of the Act is a foundation for reopening of assessment. The sine qua non for acquiring jurisdiction to reopen an assessment is that such notice should be issued in the name of the correct person. This requirement of issuing notice to a correct person and not to a dead person is not a merely a procedural requirement but is a condition precedent to the impugned notice being valid in law. Thus, a notice which has been issued in the name of the dead person is also not protected either by provisions of Section 292B or 292BB of the Act. This is so as the requirement of issuing a notice in the name of correct person is the foundational requirement to acquire jurisdiction to reopen the assessment. This is evident from Section 148 of the Act, which requires that before a proceeding can be taken up for reassessment, a notice must be served upon the assessee. The assessee on whom the notice must be sent must be a living person i.e legal heir of the deceased assessee, for the same to be responded. This in fact is the intent and purpose of the Act. Therefore, Section 292B of the Act cannot be invoked to correct a foundational / substantial error as it is meant so as to meet the jurisdictional requirement. Therefore, both the impugned notice dated 29.3.2018 and the impugned order dated 13.11.2018 are quashed and set aside. It is made clear that this order will not prohibit the Revenue from issuing a fresh notice for reassessment, if requirement of Sections 147/ 148 of the Act are satisfied, including the limitation period therein.
> **8.** Therefore, Petition disposed of in the above terms."

Thus, the court has categorically held that the before taking up a case the jurisdiction aspect of the case cannot be corrected by taking resort of provision of section 292B of the Act. Thus, on being consistent to the finding so recorded by the Hon'ble Apex Court and in the recent decision of Hon'ble Bombay High Court as cited hereinabove we do not indorse the view of the lower authorities that provisions of Section 292B of the Act empowers the ld. AO to correct such jurisdictional and fundamentally error. In this case, the ld. AO tried to invoke the provision of section 292B to correct the notice issued for assessment year 2008-09 into the assessment year 2009-10 and thus since there is no notice u/s. 148 of the Act for A.Y. 2009-10 the assessment made in this case for this year is quashed based on the above observation.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 28 /11/2023.

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judcial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 28/11/2023
*Santosh

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Ashish Sharma., Jaipur.
2. प्रत्यर्थी/ The Respondent- ITO, Ward-6(2), 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. 586/JPR/2023}

आदेशानुसार/ By order

सहायक पंजीकार/Asst. Registrar