IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI

SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.172/Del/2020
Assessment Year: 2010-11

Sh. Kunwar Pal Singh, C/o- Sanjeev Anand & Associates 77, Navyug Market, Ghaziabad	**Vs.**	Income Tax Officer, Ward-1(3), Ghaziabad
PAN :AWYPS8593C		
(Appellant)		**(Respondent)**

Assessee by	Dr. Rakesh Gupta, Advocate Sh. Somil Agarwal, Advocate
Department by	Sh. Anuj Garg, Sr. DR

Date of hearing	28.03.2024
Date of pronouncement	04.04.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

This is an appeal by the assessee against order dated 15.10.2019 of learned Commissioner of Income Tax (Appeals), Ghaziabad, for the assessment year 2010-11.

2. In ground no. 1 and 2, the assessee has challenged the validity of the assessment order passed under section 147/144 of the Income-tax Act, 1961 (in short 'the Act'). Since, the issue

raised in these two grounds are purely legal and jurisdictional issue going to the root of the matter, we proceed to decide them at the very outset.

2. Briefly the facts are, the assessee is a resident individual. For the assessment year under dispute, the assessee filed his return of income on 24.12.2010 declaring total income of Rs.1,63,000/-. Subsequently, based on AIR information indicating that in the year under consideration, the assessee had deposited cash amounting to Rs.46,34,231/- in his savings bank account, the Assessing Officer reopened the assessment under section 147 of the Act. Alleging that the assessee did not comply with notices issued under sections 148 and 142(1) of the Act, the Assessing Officer proceeded to complete the assessment ex-parte, to the best of his judgment, invoking the provisions of section 144 of the Act. While doing so, he added back an amount of Rs.95,24,077/- representing both cash and cheque deposits made in the bank account during the year under consideration. Against the assessment order so passed, the assessee went in appeal before learned first appellate authority, inter alia, challenging the reopening of the assessment under section 147 of the Act.

However, learned first appellate authority upheld the validity of the proceedings under section 147 of the Act. On merits, learned first appellate authority granted partial relief to the assessee by deleting the addition made of cheque deposits.

3. Before us, learned counsel appearing for the assessee drew our attention to the reasons recorded for reopening of assessment under section 147 of the Act. He submitted that the reopening of assessment is based on wrong assumption of facts, hence, the proceedings are vitiated. He submitted, though, the assessee has filed the return of income for the year under consideration under section 139(1) of the Act, however, the Assessing Officer has observed that no return of income has been filed by the assessee. Thus, he submitted, the reasons having been recorded on wrong assumption of facts, the reopening should be declared as invalid. In support of such contention, learned counsel relied upon the decision of the Coordinate Bench in case of Shri Anuj Chaudhary Vs. ITO, ITA No. 3453/Del/2018, order dated 12.01.2024.

4. Learned Departmental Representative submitted, due to complete non-cooperation on the part of the assessee, the Assessing Officer had no other option but to proceed for

completing the assessment under section 144 of the Act to the best of his judgment. He submitted, the observation of the Assessing Officer that the assessee had not filed return of income is a minor mistake, hence, will not vitiate the proceedings.

5. We have considered rival submissions and perused the materials on record. On going through the reasons recorded for reopening of assessment under section 147 of the Act, it is observed that the assessment has been reopened based on the fact that in the year under consideration the assessee has deposited cash amounting to Rs.46,34,231/- in his savings bank. The Assessing Officer has further observed that the assessee has not furnished the Income Tax Return for assessment year 2010-11. Whereas, facts on record clearly reveal that the assessee, indeed, has furnished his return of income under section 139(1) of the Act for the assessment year under dispute. Thus, it is established on record that while recording the reasons for reopening of assessment, the Assessing Officer has not thoroughly examined the materials available in his own record.

6. It is further observed that the return of income for the impugned assessment year was filed by the assessee before the

very same Assessing Officer. Had he examined the assessment record properly certainly, he could have verified the return of income filed by the assessee and ascertained whether the deposits made in the bank account were reflecting in the return of income or not. Thus, it is evident, the Assessing Officer has reopened the assessment on wrongful assumption of facts. This, in our view, vitiates the initiation of proceedings under section 147 of the Act, which ultimately culminated in passing of the assessment order under section 147/144 of the Act.

7. Our aforesaid view gets support from the decision of the Coordinate Bench in case of Shri Anuj Chaudhary Vs. ITO (supra), wherein the Bench has observed as under:

> *"8. Based on the aforesaid two factual incorrect assumptions made by the ld AO while recording the reasons, the AO had come to conclusion that cash deposit of Rs. 13,47,000/- made in the saving bank account would constitute income escaping assessment in the hands of the assessee, warranting reopening u/s 147 of the Act. Once, it is clearly established that the very basis of assumption of jurisdiction by the ld AO for reopening the assessment was based on incorrect facts, the entire foundation of reason to believe of the ld AO goes. Once, the foundation goes, the entire reopening deserves to be quashed. This view of ours is further fortified by the decision of the coordinate bench of Mumbai Tribunal in the case of ITO Vs. M/s. Champaklal Mathurbai Mehta in ITA No. 2253/Mum/2022 and CO No. 130/Mum/2022 for AY 2011-12, wherein, the Mumbai Tribunal by placing reliance on the decision of Hon''ble Bombay High Court order dated 15.12.2021, decision of the Hon''ble Delhi High Court in the case of Deepak Wadhwa Vs. ACIT reported in 435 ITR 699 and decision of the Hon''ble Gujarat High Court in the case of Mumtaz Haji Mohamad Menon Vs. ITO reported in 408 ITR 268 had quashed*

the reopening proceedings. The relevant observation of the order of the Mumbai Tribunal are as under:-

> *"3.2. Aggrieved, the Revenue is in appeal before us. From the perusal of the reasons recorded reproduced supra, we find that the reopening was made on the mistaken assumption that assessee had not filed his return of income for A.Y.2011-12. Factually, the return of income was already filed by the assessee on 21/07/2011. Moreover, there was a letter dated 25/07/2015 issued by the Id. AO to the assessee for A.Y.2010-11 calling for reasons for not filing income tax return for A.Y.2010-11. This letter is enclosed in page 13 of the paper book. In response to the said letter, the assessee's representative had vide letter dated 03/08/2015 had addressed to the Id. AO stating that assessee is a senior citizen aged about 83 years old and had filed his income tax returns from A.Y.2011-12 onwards and had enclosed the copy of ITR acknowledgement thereon. This letter is enclosed in page 14 of the paper book. We find that the Id. AO had referred to the aforesaid two letters in the reasons recorded stating the same as the reason to conclude that assessee had not filed return of income for A.Y.2011-12. This fact is evident from the reasons recorded reproduced supra.*
>
> *Factually, the notice dated 25/07/2015 was issued by the Id. AO for A.Y.2010-11 calling for income tax return from the assessee. The reply letter dated 03/08/2015 from the assessee to the Id. AO clearly states that assessee is a senior citizen aged about 83 years and had filed his income tax returns from A.Y.2011-12 onwards. The Id. AO goes by the incorrect assumption of fact that assessee had not filed his income tax return for A.Y.2011-12 that subsequently in the same reasons, he acknowledges the fact that assessee had filed his return of income on 21/07/2011. From the perusal of the entire reasons recorded by the Id.AO for reopening the assessment, we have absolutely no hesitation to hold that the entire reopening had been triggered by the Id. AO based on complete incorrect assumption of fact that no return of income was filed by the assessee for the A.Y. 2011-12, wherein a financial transaction of purchase of property was made. The letter to assessee by the Id. AO calling for income tax return based on report received in the non-filers list was never issued by the Id. AO for A.Y. 2011-12 i.e. the year under consideration before us. Factually it was issued only for A.Y.2010-11 as stated supra. Hence, we hold that the reasons recorded for reopening has been made without application of mind by the Id. AO. Now the moot question that arises for our*

consideration is as to whether the reopening which is made based on incorrect assumption of fact and non-application of mind by the Id. AO could be held to be valid. This issue has been addressed by the Hon'ble Jurisdictional High Court in the case of Dhiren Anantrai Modi vs. Income Tax Officer in Writ Petition No.3224 of 2019 dated 15/12/2021. For the sake of convenience, the entire order is reproduced hereunder:-

> *"1. Petitioner is impugning notice dated 26th March, 2019 issued under Section 148 of the Income Tax Act, 1961 (the Act) and the order dated 22nd October, 2019 disposing petitioner's objections to the re-opening.*
> *2. Petitioner has challenged notice dated 26th March, 2019 on various grounds including non application of mind by the Assessing Officer while issuing notice.*
> *3. We have considered the petition with documents annexed thereto, reply filed by respondent and also heard Mr. Gandhi and Mr. Pinto.*
> *4. On bare perusal of the reasons it is quite evident that the reasons are based on totally erroneous and in correct facts and without non Purti Parab 2/4 420-WP-3224-2019.doc application of mind. In the reasons it is stated "The assessee is an individual and the Return of Income for A.Y. 2012-13 was filed on 24 th September, 2012 declaring total loss of Rs. 4,21,11,382/- and the same was processed by the C.P.C.....It is pertinent to mention here that in this case the assessee had filed return of income for the year under consideration but no assessment as stipulated under Section 2(40) of the Act was made and the return of income was only processed under Section 143(1) of the Act. In view of the above, provisions of clause (b) of explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment".*
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> *5. The fact is the return of income for A.Y. 2012-13 filed by petitioner on 24th September, 2012 has been assessed under Section 143(3) of the Act and the Assessment Order dated 31st March, 2015 has been passed. Therefore, the Assessing Officer has proceeded on erroneous factual basis that the return of income was only processed under Section 143(1) of the Act. That displays total non application of mind. In fact, petitioner's allegations that Respondent No.1 has sought to re-open the assessment on incorrect factual position that the return of income was only processed*

under Section 143(1) of the Act has not even been denied in the affidavit in reply which is filed by the same Assessing Officer. In paragraph no.2 of the affidavit in reply which is in response to paragraph no.1 and 2 of the Purti Parab 3/4 420-WP-3224-2019.doc petition, Respondent No.1 simply says that these are factual in nature and the notice under Section 148 dated 26th March, 2019 and the order disposing the objections and the notice dated 22nd October, 2019 are issued in pursuance of the objective of completing reassessment in accordance with the procedures laid down.
On this ground alone, the notice dated 26th March, 2019 has to be set aside.

6. Moreover, Mr. Gandhi submitted that despite repeated requests for copy of the sanction under Section 151 of the Act, the same has not been provided. The averment to that effect in the petition has not even been denied in the affidavit in reply and respondent, in the affidavit in reply has not even bothered to annex the sanction obtained which gives us a feeling that the said Mr. Ramesh C. Meena who issued notice under Section 148 of the Act containing errors of facts and who has filed affidavit in reply does not wish to produce the same. We have to, therefore draw adverse inference against respondent that if it is disclosed it may be prejudicial to the interest of Revenue.

7. One wonders whether the sanctioning authority under Section 151 of the Act also would have even applied his mind because the reasons recorded as noted above itself displays non application of mind by the Assessing Officer. Therefore, either no sanction as contemplated under Purti Parab 4/4 420-WP-3224-2019.doc Section 151 of the Act has been obtained or the same was granted mechanically without application of mind to the facts because if only the Assessing Officer had placed the entire file before the sanctioning authority he would have pointed out the error in the reasons for re-opening.

8. In the circumstances, petition is allowed in terms of prayer clause (a) which read as under:
(a) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction, order or a writ, including a writ in

> *the nature of 'Certiorari", calling for the records of the case and, after satisfying itself as to the legality thereof, quash and set aside the Notice u/s 148 dated 26.03.2019, Ex. "H" herein, the order disposing objections dated 22.10.2019, Ex. "K" herein passed by the Respondent and also the Notice/summons dated 22.10.2019, Ex. "L" herein issued by the Respondent.*
>
> *9. Petition disposed."*

3.3. Similarly, the Hon'ble Delhi High Court in the case of Deepak Wadhwa vs. ACIT reported in 435 ITR 699 had also occasion to consider the similar issue wherein it was observed as under:-

> *5.2. As far as the other aspect is concerned, in our view, since the proof put in place by the petitioner-assessee with regard to the acknowledgment of return filed for the assessment year 2011-12 has not been disputed by the Revenue, as noticed above, the challenge to the impugned notice and the impugned order will have to be sustained.*
>
> *61 Therefore, for the foregoing reasons, we are inclined to quash the impugned notice dated March 27, 2018 as also the impugned order dated September 28, 2018. It is ordered accordingly.*

3.4. Similar view was taken by the Hon'ble Gujarat High Court in the case of Mumtaz Haji Mohamad Menon vs ITO reported in 408 ITR 268 wherein it was held as under:-

> *"In this context, we have noted that the reasons proceeded on two fundamental grounds. One, that the property in question was sold for a sum of Rs. 1,18,95,000; and two, that the assessee had not filed the return and that therefore his 1/3rd share out of the sale proceeds was not offered to tax. Both these factual grounds are totally incorrect as is now virtually admitted by the Revenue. It is undisputed that the assessee had actually filed the return of income for the said assessment year and also offered his share of income of the declared sale consideration to tax as capital gains. The Assessing Officer may have dispute with respect to computation of such capital gains, he cannot simply dispute the fact that the assessee did file the return. Importantly, even the second factual*

assertion of the Assessing Officer in the reasons recorded is totally incorrect. He has referred to said sum of Rs. 1,18,95,000 as a sale price of the property. The assessee had produced before the Assessing Officer, the sale deed in which, the sale consideration disclosed was Rs. 50 lakhs.

The Assessing Officer may be correct in pointing out that when the sale consideration as per the sale deed is Rs. 50 lakhs but the registering authority has valued the property on the date of sale at Rs. 1,18,95,000 for stamp duty calculation, section 50C of the Act would apply, of course, subject to the riders contained therein. However, this is not the cited reason for reopening the assessment. The reasons cited assessee filed no return and that 1/3rd share of the assessee from the actual sale consideration of Rs. 1,18,95,000 therefore, was not brought to tax. These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually incorrect, the Revenue simply cannot hope to salvage the impugned notice. Through the affidavit-in-reply a faint attempt has been made to entirely shift the centre of the reasons to a completely new theory, viz., the possible applicability of section 50C of the Act. The reasons recorded nowhere mentioned this possibility. Reasons recorded, in fact, ignored the fact that the sale consideration as per the sale deed was Rs. 50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gains. In the result, the impugned notice is quashed. The petition is disposed of."

3.5. In view of the above, we do not find any infirmity in Id. CIT(A) quashing the re-assessment proceedings. Hence, the ground raised by the Revenue challenging the validity of quashing the re-assessment is dismissed. Since the entire re-assessment is quashed, there is no need to go into other grounds raised by the assessee on merits.

3.6. The other contentions raised by the assessee in his cross objections are also left open since the re-assessment has been quashed. 4. In the result, appeal of the Revenue is dismissed and Cross objection of the assessee is dismissed as infructuous."

9. Respectfully following the same, we have no hesitation to quash the reassessment by holding that assumption of jurisdiction u/s 147 of the Act in the instant case is based on incorrect facts recorded

thereon. Accordingly, ground Nos. 1 and 2 raised by the assessee on the legal issue are allowed. Since, relief is granted on the legal issues by quashing the reassessment, adjudication of other grounds raised by the assessee on merits would become academic in nature. No opinion is rendered thereon and they are left open."

8. In view of the aforesaid, we have no hesitation in holding that the proceedings initiated for reopening of assessment under section 147 of the Act are invalid. Consequently, the assessment order passed in pursuance thereof has to be declared as invalid. Accordingly, we do so by quashing assessment order. The impugned order of learned first appellate authority is hereby set aside.

9. Since, we have decided the legal issue raised in ground nos. 1 & 2 in favour of the assessee, the grounds on merits having become purely academic, do not require adjudication.

10. In the result, appeal is allowed, as indicated above.

Order pronounced in the open court on 4th April, 2024

Sd/-	***Sd/-***
(M. BALAGANESH)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 4th April, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi