

आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकरअपील सं./ ITA No.334/Chny/2024.
(निर्धारणवर्ष / Assessment Year: 2007-2008)

Cheyur Ramakrishnan Rajkumar,
No.7/4, Meenakshi P.S
Sivasamy Road,
Mylapore,
Chennai 600 004.

Vs. The Income Tax Officer,
Business Ward II(3)
Chennai.

[PAN: ACCPR 4434P]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri. R. Subramanian, C.A.,
: Shri. ARV Srinivasan, IRS, Addl.CIT.

सुनवाई की तारीख/Date of Hearing

: 19.06.2024

घोषणा की तारीख /Date of Pronouncement

: 27.08.2024

आदेश / ORDER

PER MANU KUMAR GIRI (Judicial Member)

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi in order No.ITBA/NFAC/S/250/2023-24/1058910243 (1) dated 20.12.2023. The assessment was framed by the Income Tax Officer, Business Ward II(3), Chennai for the assessment year 2007-2008 u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 30.03.2014.

2. The assessee raised the following grounds of appeals:-

"1. For that the order of the Commissioner of Income Tax (Appeals) is contrary to law, facts and circumstances of the case and at any rate against the principles of equity, natural justice and fair play.

2. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the order of the Assessing Officer is without jurisdiction.

3. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the reassessment order passed u/s.143(3) read with section 147 is bad in law.

4. For that the Commissioner of Income Tax (Appeals) failed to appreciate that reopening and consequent reassessment is bad in law.

5. For that the Commissioner of Income Tax (Appeals) failed to appreciate that there exist no reasons for reopening the case of the appellant and hence the reopening as well as the consequent reassessment are bad in law.

6. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the reasons for reopening does not indicate escapement of income and the reasons are vague and hence the reopening as well as the consequent reassessment are bad in law.

7. For that Commissioner of Income Tax (Appeals) failed to appreciate that the reopening was done on mere change of opinion and hence the assessment is liable to be quashed. The test of change of opinion would be applicable even in a case where the return was processed u/s.143(1).

8. For that Commissioner of Income Tax (Appeals) failed to appreciate that no fresh tangible material came into the possession of the Assessing Officer for the issuance of the notice u/s.148 and hence the assessment is liable to be quashed.

9. For that Commissioner of Income Tax (Appeals) failed to appreciate that the information that were available at the time of filing the return of income was the basis of reopening and hence the reopening and consequent reassessment is bad in law.

10. For that Commissioner of Income Tax (Appeals) failed to appreciate that the there is no live link between the formation of a belief that income has escaped assessment and the reopening of the assessment and hence the reopening and consequent reassessment is bad in law.

11. For that the Commissioner of Income Tax (Appeals) failed to appreciate that there is no sanction as per section 151 and hence the reopening and consequent reassessment is bad in law.

12. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the sale of agricultural land is exempt.

13. For that the Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in considering the sale of agricultural land as income from capital gain.

14. For that the Commissioner of Income Tax (Appeals) ought to have considered the fact that the said agriculture land is not a capital asset within the meaning of section 2(14) of the Income Tax Act, 1961.

15. For that the Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer in treating the sale consideration as income from capital gain without considering the explanation and the evidences submitted by the appellant.

16. For that the Commissioner of Income Tax (Appeals) failed to appreciate that when income is exempt, loss is to be ignored and hence the same has not been offered in the return.

17. For that the Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer in holding that the agricultural activity should have been actually carried out on the land in the last two years prior to the sale, by importing the spirit of the other provisions of the Act section namely section 54B and 10(37), etc. where such conditions are stipulated.

18. For that the Commissioner of Income Tax (Appeals) ought to have accepted the plea of the appellant that sale of agricultural land is exempt.

The above grounds are taken without prejudice to one another. For these grounds and such other grounds that may be urged before or during the hearing of the appeal it is most humbly prayed that this Hon'ble Income Tax Appellate Tribunal may be pleased to

(a) Quash the assessment order and / or

(b) Delete the addition made under the head income from capital gain to the tune of Rs.2,33,99,360/- and/or

(c) Pass such other orders as this Hon'ble Income Tax Appellate Tribunal may deem fit".

3. Facts relating to re-opening of assessment u/s.148 of the Act are as under:-

"The assessee filed his Return of Income for the A.Y. 2007-2008 on 31-07-2007 admitting total income of Rs 2,89,915/-. The Return of Income was processed u/s 143(1) of the Income tax Act (in short "the Act") accepting the Return of income filed by the assessee.

Notice u/ 148 of the Act dated 24-08-2012 was issued and served on the assessee. With reference to the same the assessee vide his letter date 17-03-2014 had requested this office to treat the Return of Income filed on 31-07-2007 as the Return of Income filed in lieu of the notice issued u/s 148 dated 24-08-2012.

In continuation of the assessment proceedings notice u/s 143(2) and 142(1) notices were issued to the assessee and details were called for. In response to the same, the assessee's authorised representative Shri R.A. Viswanath Chartered Accountant appeared and submitted the details called for.

Notice u/s 142(1) of the Income Tax Act 1961 dated 20-02-2014 was issued and the copy of the same is reproduced below:

"Please refer to this office notice issued u/s 148 of the income Tax Act 1961 dated 24-08-2012. In connection with the same, you are requested to file your Return of Income for the A-Year 2007-2008. Further as per the following reasons mentioned below the assessment was reopened and the reason is furnished below:

"As per the Bank statement it is ascertained that the during the FY 2006-2007 relevant of the AY 2007-2008, the assessee had sold lands at

Thiruvathoor village near cheyyur for Rs.4,32,66,711/-. The lands claimed to be agriculture in nature. The assessee has not offered any income derived from Agricultural activity. Further the evidences like CHITTA, ADANGAL & patta copies in support of Agricultural operation were not furnished by the assessee”.

4. The AO in assessment order observed as under:-

“It was ascertained that during the A-Year 2006-2007 the assessee had sold lands measuring 41.7 acres of land situated at THIRUVATGHOOR village Cheyyur Taluk. Whereas the assessee had not offered any agricultural income for the Assessment year 2007-2008 and earlier years. Whereas the above said lands was claimed as agricultural lands and capital gain exemption was claimed. "Since any agricultural income was not offered there was every reason to believe the income chargeable to tax had escaped from the assessment under the head of capital, and the assessment was reopened under-section-147 of the Act 1961”.

The Id. Assessing Officer on merits treated the sale of land as capital asset and disallowed the exemption claimed by the assessee. In the first round, the matter was travelled upto the Tribunal on both counts i.e. on legal issues as well as on merits of disallowances.

5. The Tribunal in first round of appeal in ITA No.1332/Mds/2016 vide order dated 23.11.2016 had given the following direction to the Id. CIT(A):-

“This appeal of the assessee is directed against the order of the commissioner of Income-tax (Appeals)-2, Chennai dated 02.03.2016 pertaining to assessment year 2007-08

2. The grievance of the assessee in this appeal is with regard to action of the Ld. CIT(A) in confirming the order of the AO in considering the sale of agricultural land as income from capital gains

2.1 Before us, the assessee raised the additional grounds stating that the CIT(A) erred in not adjudicating the grounds raised on validity of reopening of assessment. The assessee also filed petition for admission of additional grounds by placing reliance in the decision Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT (229 ITR 283), wherein it was held that a legal ground can be raised at any stage of appeal. Thus, he prayed for admission of additional ground. Hence, we are inclined to admit the additional ground for adjudication.

3. The facts of the issue are that assessee sold a land measuring 41.7 acres of land situated at Thiruvatghoor village Cheyyur Taluk and the capital gains arise out of this transaction was claimed by the assessee as exempted. Further, the AO in reopening of assessment by issue of notice u/s 148 of the Act dated 24.08.2012 and thereafter treated the capital gains arising out of sale of agricultural land under the head "capital gains". Though the assessee claimed as exempted from tax, as being an agricultural land, the assessee challenged before the Ld. CIT(A) regarding the addition-made-by-the AO on merits and also raised ground No. 4 before the Ld. CIT(A) regarding reopening of assessment is bad in law. However, the Ld. CIT(A) decided the issue against the assessee on merits and not dealt with the issue regarding reopening of assessment

4. Now, the assessee contended that the issue relating to reopening of assessment is going to root of the matter of the assessment and it is to be decided first before deciding the issue relating to taxability of capital gains on transfer of agricultural land.

5. We have heard both the parties and perused the material on record. In our opinion, there is a force in the argument of Ld. A.R. Accordingly, we are inclined to remit the issue regarding reopening of assessment to the file of Ld.CIT(A) and to give findings of it after giving opportunity of hearing to the assessee. At this stage, we refrain from going to other grounds raised by the assessee.

6. In the result, the appeal of the assessee is partly allowed for statistical purpose."

6. The assessee pursuant to direction of the Tribunal order dated 23.11.2016 filed detailed submissions before the Id. CIT(A) on legal/jurisdictional issues which are reproduced as under:-

"01. The Return of Income in the instant Case was filed on 31st July 2007 and the same was processed u/s 143(1) and accepted by the Department. There were no Notices or any communication from the Department for more than 4 years thereafter.

02. The Appellant/Assessee, was served with Notice dated 24th August 2012 u/s 148 proposing to reopen the Assessment on the pretext that Income under the head Capital Gains had escaped Assessment. Subsequently Notices u/s 143(2) and 142(1) were issued in the years 2012 and 2014 respectively.

03. The detailed objections filed by the Appellant/Assessee were rejected by the Assessing Officer (AO) who proceeded to complete the Assessment b/s 143(3) read with 147 on 30th March 2014 determining a Taxable Income of Rs.2,36,89,275/- resulting in a Tax demand of Rs. 99,33,651/-

04. The Appellant/Assessee preferred an Appeal before the CIT(A) who vide Order dated 02nd March 2016 regrettably upheld the Order of the AO "on merits" only thus totally ignoring the Objections raised by the Assessee/Appellant in respect of the very reopening of the Assessment u/s 148.

05. The Appellant/Assessee thereafter preferred an Appeal before the Hon'ble Income Tax Appellate Tribunal, Chennai (ITAT) which vide Order dated 23rd November 2016 had remitted the matter back to the CIT(A) to examine the Objections raised by the Appellate/Assessee challenging the reopening u/s 148. The Hon'ble ITAT while remitting the matter back to the CIT(A) had observed

QUOTE

"...We have heard both the parties and perused the material on record. In our opinion there is a force in the argument of the learned A.R. Accordingly we are inclined to remit the issue regarding the reopening of the Assessment to the file of the Learned CIT(A) and to give findings of it after giving opportunity of hearing to the Assessee..."

UNQUOTE

06. Pursuant to the ITAT Order dated 23rd November 2016, the Appellant/Assessee is now before the Learned CIT(A) to put forth and reiterate its Objections in respect of the very reopening of the Assessment u/s 148 which is contrary to facts and further not supported by law.

B. SUBMISSIONS/OBJECTIONS OPPOSING THE REOPENING u/s 148

07. At the outset, the Appellant/Assessee had filed the Return along with complete details and enclosures relating to the Income returned. It is that full and complete disclosure of all materials facts along with documentary evidence that enabled the Assessing Officer (AO) to process the Return u/s 143(1) and accept the same.

08. It is on record that the matter was put to a quietus for more than 4 years and in the interregnum period neither was there any communication from the Department in respect of the Assessment Year in question nor was any Notice issued u/s 143(2) for which the last date was 30th September 2008.

09. The AO suddenly brought the matter to life after more than 4 years by issuing a Notice u/s 148 on 24th August 2012 based on materials which were always in its possession from the time the Return was filed in July 2007 on the basis of which the Return was processed and accepted u/s 143(1).

10. The AO, after considerable lapse of time further issued Notices u/s 142(1) and 143(2) which should have issued in the first place before September 2008 itself if there were any issues in relation to the Assessment.

11. The Appellant/Assessee had filed detailed Objections questioning the reopening u/s 148 as also the Notices issued u/s 143(2) & 142(1) and had explained the merits of the Case in his favour. The same were rejected without deliberations and the assessment completed u/s 143(3) rw 147 with no fresh materials or information in his possession but on the basis of documents which were always available with the Department right from July 2007 when the Return was filed.

12. The proposal to reopen the Assessment by issuing a Notice u/s 148 without fresh and tangible material, being bad in law, is untenable and should have been SET ASIDE by the Learned CIT (A) when the matter was taken in Appeal before him. Instead the Learned CIT(A) totally chose to ignore the matter in toto to the detriment of the Appellant/Assessee.

13. The Assessment was completed in 2007 based only on complete facts, figures and documents available along with the Return. Even granting that the AO had any issues thereafter, the right course would have been to issue a Notice u/s 143(2) and call for necessary information and then complete the Assessment u/s 143.

14. It is submitted that the Income Tax law does not vest the AO with any power of "Review" and the proposal to reopen the assessment after a gap of more than 4 years without any fresh and tangible material would tantamount to only "Review" which is not permissible in law.

15. The Hon'ble Supreme Court Of India in the case of C.I.T vs KELVINATOR OF INDIA (2010 320 ITR 561) has clearly held that the power to reopen must be supported by the availability of tangible fresh materials as also a live link with the formation of a belief that income chargeable to tax has escaped assessment.

16. The SC, in the above Case has further hold that availability of tangible materials alone is not sufficient and there must always be a "schematic interpretation" towards "reason to believe" failing which Section 147 would confer arbitrary powers to AO to reopen assessments on the basis of "change of opinion" which is no longer available to the AO under the Income Tax Act to reopen completed assessments

17. In line with the above, in the present case it must be stated that the all the material facts along with other details had been filed with the Return Of Income and it is not permissible for the AO, after a gap of more than four years and in the absence of any fresh tangible material to come to the conclusion that income chargeable to tax had escaped assessment.

18. In a Judgement rendered by the Special Bench of the Income Tax Appellate Tribunal, Mumbai Bench in ITA 4613/Mum/2005 in the case TELCO DADAJEE DHACKJEE LTD vs DCIT, it has been hold Section 147 & 148 are applicable to both Assessments completed u/s 143(1) as well u/s 143(3) in so far as compliance with the requirements of the provisions of the Income Tax Act by the AO are concerned.

19. In the above Case it has been held that

a. The reason to believe must have a live link in the formation of belief that income chargeable to tax had escaped assessment even when the assessment was done u/s 143(1).

b. There is no exclusion in Sec. 147 to the effect that where the return was processed u/s 143(1), it is not necessary for AO to hold or entertain a belief that Income chargeable to tax has escaped assessment for reasons recorded by him

c. The Notice to reopen the assessment u/s 148 of a ROI first processed u/s 143(1) is open to challenge on all grounds available to the Appellant.

d. Notice u/s 148 will be valid only if the reason to believe that income chargeable to tax had escaped assessment must be based on tangible material and further must have a live link or nexus with the formation of such belief.

20. The Hon'ble Supreme Court Of India in CIT vs FORAMER FRANCE (264 ITR 566 SC) has held that where there has been no failure on the part of the Assessee to make Return Of income or to disclose fully and truly all material facts necessary for the Assessment, no reopening is permissible u/s 147/148

21. Similar views have been expressed by the Hon'ble Madras High Court in CIT vs ELGI ULTRA INDUSTRIES LTD (296 ITR 573 Mad) as well as CIT vs A.V.THOMAS EXPORTS LTD (296 ITR 603 Mad) which are squarely applicable to the case on hand of the Appellant/Assessee. STAX DEXH

22. In the Notice u/s 148 dated 24th August 2012 as well as the Notice u/s 142(1) dated 20th February 2014, the AO has not referred to any "tangible & fresh material" that has come into his possession on the basis of which he has entertained a belief that income chargeable to tax has escaped assessment.

23. The lack of belief on the part of the AO obviously leads to the conclusion that the AO has no such "tangible & fresh material" before him other than the details and documents which were filed in July 2007 along with the Return of Income which cannot by any stretch of imagination form the basis on which Notice u/s 148 can be issued.

24. The Appellant/Assessee further places reliance the following Division Bench Citations of the Hon'ble Madras High Court in support of his contentions:

a. TANMAC India vs DCIT (TCA 1426 of 2007 decided on 19/12/2016)

b. Tenzing Match Works vs DCIT (TCA 702 of 2009 decided on 11/07/2019)

25. In the TANMAC Case the Hon'ble HC had held as under

QUOTE**Para 7**

"The sine qua non for the initiation of proceedings in terms of section 147 of the Act is 'reason to believe' on the part of the assessing officer that income chargeable to tax has escaped assessment....."

Para 8

"A perusal of the Reasons would indicate that the assessing officer proceeds solely on the basis of the return of income and the enclosures thereto, being the financials and the deed of partnership, to initiate proceedings for re-assessment. The aforesaid documents however are part of record and the basis on which the intimation under section 143(1)(a) has been issued on 1.12.98. The assessing officer had thus evidently applied his mind to the return and annexures even at that stage."

Para 9

"The scheme of assessment as set out in section 143 requires an assessing officer to process the return by issue of an intimation (which has been done in the present case) and thereafter issue a notice under sub-section (2) of section 143 to the assessee if the assessing officer considers it necessary or expedient to ensure that the assessee has not understated income, computed excessive loss or underpaid tax calling upon him to attend his office and require him on a date to be specified therein, to produce or cause to be produced any evidence on which the assessee may rely in support of such claim. Having done so, an assessment is to be completed in terms of section 153(1) of the Act within a period of two years from the end of the assessment year in which the income was first assessable, in this case, on or before 31.3.2001....."

Para 12

"If the assessing officer, after issuing intimation u/s section 143(1) does not issue a notice u/s 143(2) of the Act to initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of re-assessment, but of review. The reasons make it abundantly clear that the re-assessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the assessing officer since 2.11.1998 and which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit"

in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.3.2001, prior to issue of notice u/s 148. The notice under section 148 dated 9.12.2002 was thus an arbitrary exercise of power and a review of proceedings impermissible in law..."

Conclusion:

"Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment had elapsed, prior to issue of impugned notice u/s 148...."

UNQUOTE

26. In the Tenzing Match Works Case the Hon'ble HC had held as under

QUOTE

Para 4

"...There is no quarrel about the legal position as laid down by the Honourable Supreme Court in the cases of "ACIT -Vs- Rajesh Jhaveri Stock Brokers P.Ltd [2007] 291 ITR 500 (SC)", "CIT- Vs-Kelvinator India Ltd (2010) 320 ITR 561 (SC)" and "Income-tax v. Zuari Estate Development &Investment Co.Ltd. (2015) 373 ITR 661 (SC)".....

Para 8

"...In the instant case, it is not in dispute that reopening is based upon the return of income filed by the assessee at the first instance. There is no allegation against the assessee that there was failure on the part of the assessee to make a true disclosure, nor the assessing officer had relied on any tangible material, which has come to his knowledge after the filing of the return and intimation under Section 143(1), justifying reopening. Therefore, to reopen an assessment based on the return filed by the assessee, will clearly be a case of change of opinion and consequently bad in law...."

Para 9

"...In the result, the appeal filed by the assessee is allowed and the substantial question of law No.1 is answered in favour of the assessee.

UNQUOTE

To sum up

27. In the instant Case, the Appellant/Assessee has

a. Furnished the Return of Income in time

b. Disclosed all material facts and has not concealed any particulars whatsoever

c. Submitted all the relevant documents and information for Assessment completion.

d. Not been accused of concealing any information from the Department.

28. Similarly the Department has not

a. Alleged that the Assessee had failed to furnish material facts or documents

b. Issued any Notice u/s 143(2) subsequent to issuance of intimation u/s 143(1) for a period of more than 4 years.

c. Disclosed that it had obtained any fresh & tangible information for issuance of Notice u/s 148 whereby the reopening became a "Review" which is impressible.

29. In view of the Appellant having furnished all the information at the time of filing of the Return of Income and there being no "tangible & fresh material" nor a live link or nexus to form an opinion, we pray that the reopening of the assessment purely based on information available with the Department since the time of filing of the Return, be SET ASIDE

30. We further pray that the Assessment completed u/s 143(1) be left undisturbed in the light of the above factual submissions and Citations referred to herein".

7. The Id. CIT(A) after hearing the assessee has passed following order as under:-

"The appellant's main point of disagreement is that no fresh and tangible material were relied upon by the Assessing officer to resort to the reopening proceedings and that the Ld. CIT(A) ignored this vital point before coming out with his order.

From a look at the Ld. CIT(A)'s under, it is evident that there were only 2 (two) grounds of appeal, raised before him that deal with reopening, per se, namely:-

4. For that the reopening is bad in law

9. For that the Assessing officer erred in reopening the assessment on the basis of audit objection.

The above grounds raised are without specifics and it is not known how he could gather that the reopening is based on audit objection. There is no official communication to him in this regard to drive him towards such a conclusion.

As for the merit of invoking the reopening provisions, it is clear that the Assessing officer gave the assessee sufficient opportunities and it is the

appellant who did not challenge the reopening by way of requesting for the text of the 'reason to believe' note etc. There is not a whisper of doubt that he had any objections against his case being reopened.

Coming to the merit of the reopening, it is seen that the Assessing officer rightfully invoked the provisions of section 147 of the I.T. Act. The appellant is wrong to conclude that no fresh, tangible material were based upon to take recourse to the reopening. The appellant has not taken any cognisance of the Inspector's on-the-spot enquiry, followed by her report. In this case, new tangible material were certainly traced out for the purpose of the reopening and the jurisdictional Hon'ble High Court decision in Cairn India Ltd. vs DDIT-I (International Taxation) [2012] 130 taxmann.com 102 is quite relevant here. The same High Court decision in Cognizant Technology Solutions India (P) Ltd. vs ACIT, Large Tax Payer Unit, Chennai [2021]129 taxmann.com 327 opines that if from and out of the same issue and on the same material, the assessing authority identifies under assessment and other reasons contemplated u/s 147, reopening is valid.

It was incumbent upon the appellant to disclosure fall materials necessary for assessment and here the appellant has clearly been found wanting for the Assessing officer be compelled to reopen his case following the due process of law.

In view of the discussions, the facts of the case and the records available on record, right from the assessment order, the earlier appeal under and of course, the appellant's earlier and latest submission, I have no hesitation to agree to the reopening of the case u/s 147 of the I.T. Act”.

8. On further appeal before us, the Id. Counsel for the assessee contended the detailed arguments on legal issues as well as on merits of the disallowances. The Counsel referred two judgments of the Hon'ble Jurisdictional High Court of Madras in the cases of *TANMAC India vs. DCIT, Circle I, Pondicherry, (2017) 78 taxmann.com 155 (Madras)* and *M/s. Tenzing Match Works vs. DCIT, Circle I, Virudhunagar, in Tax Case (Appeal) No.702 of 2009, dated 11.07.2019.*

9. Per contra, the Id. Addl. CIT–Departmental Representative relied upon the orders of the lower authorities and prayed for dismissal of appeal on both counts.

10. We have heard the rival contentions and have already narrated the admitted facts in para 3 above. We have also perused the materials on record. The reasons narrated in assessment order are as under:-

"Facts relating to re-opening of assessment u/s.148 of the Act are as under:-

"The assessee filed his Return of Income for the A.Y. 2007-2008 on 31-07-2007 admitting total income of Rs 2,89,915/-. The Return of Income was processed u/s 143(1) of the Income tax Act (in short "the Act") accepting the Return of income filed by the assessee.

Notice u/ 148 of the Act dated 24-08-2012 was issued and served on the assessee. With reference to the same the assessee vide his letter date 17-03-2014 had requested this office to treat the Return of Income filed on 31-07-2007 as the Return of Income filed in lieu of the notice issued u/s 148 dated 24-08-2012.

In continuation of the assessment proceedings notice u/s 143(2) and 142(1) notices were issued to the assessee and details were called for.. In response to the same, the assessee's authorised representative Shri R.A. Viswanath Chartered Accountant appeared and submitted the details called for.

Notice u/s 142(1) of the Income Tax Act 1961 dated 20-02-2014 was issued and the copy of the same is reproduced below:

"Please refer to this office notice issued u/s 148 of the income Tax Act 1961 dated 24-08-2012. In connection with the same, you are requested to file your Return of Income for the A-Year 2007-2008. Further as per the following reasons mentioned below the assessment was reopened and the reason is furnished below:

"As per the Bank statement it is ascertained that during the FY 2006-2007 relevant of the AY 2007-2008, the assessee had sold lands at Thiruvathoor village near cheyyur for Rs.4,32,66,711/- The lands claimed to be agriculture in nature. The assessee has not offered any income derived from Agricultural activity. Further the evidences like CHITTA, ADANGAL & patta copies in support of Agricultural operation were not furnished by the assessee".

11. On perusal of the reasons we find that when the return of income was processed u/s.143(1) of the Act, the purported bank statement and return were already available with the Revenue. There was no new or tangible material came to

the knowledge of the Assessing Officer after order u/s.143(1) of the Act. Therefore, the Id.Assessing Officer has no jurisdiction to assume 'reason to believe' as contemplated u/s.147 of the Act on the given facts.

12. The Hon'ble Jurisdictional Madras High Court in the case of M/s. *Tenzing Match Works (supra)* held as under:-

"4. There is no quarrel about the legal position as laid down by the Honourable Supreme Court in the cases of "ACIT Vs Rajesh Jhaveri Stock Brokers P.Ltd [2007] 291 ITR 500 (SC)", "CIT Vs Kelvinator India Ltd (2010) 320 ITR 561 (SC)" and "Income tax v. Zuari Estate Development & Investment Co.Ltd. (2015) 373 ITR 661 (SC)". However, the question before us in this appeal is whether the finality attached to an assessment, pursuant to a communication under Section 143(1)(a) could be disturbed by invoking the power under Section 147 and under what circumstances it can be done.

5. This issue was considered in the case of "CIT Vs Orient Craft Ltd (2013) 354 ITR 536", wherein the Court held as follows.

13. Having regard to the judicial interpretation placed upon the expression 'reason to believe' and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words 'reason to believe' have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words reason to believe Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and

the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression 'reason to believe' in cases where assessments were framed earlier under Section 143 (3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed."

6. *This decision was followed in the case of "Principal CIT Vs Tupperware India (P) Ltd., (2016) 65 Taxmann.com 17(Delhi)". Similar view was taken in "Khubchandani Healthparks (P) Ltd., Vs Income Tax Officer, Mumbai", wherein it was held that notice under Section 148 could be challenged as being without jurisdiction for absence of reason to believe that income had escaped assessment even in case where assessment had been completed earlier by an intimation under Section 143(1). The decision in "CIT Vs Orient Craft Ltd (2013) 354 ITR 536" was followed in "TANMAC India Vs Deputy CIT, Pondicherry (2017) 78 Taxmann.com 155 (Madras)".*

7. *It is the contention of Ms.Premalatha, learned Standing Counsel that this Court, in the case of "Diebold Systems Pvt Ltd., Vs IT Officer (OSD)" in T.C.No.2153 of 2008 dated 11.07.2019, had distinguished the decision of "CIT Vs Orient Craft Ltd (2013) 354 ITR 536" and "TANMAC India Vs Deputy CIT, Pondicherry (2017) 78 Taxmann.com 155 (Madras)". It is true that this Court has distinguished the aforesaid decisions in the case of "Diebold Systems Pvt Ltd., Vs IT Officer (OSD)", on the ground that in the said case assessment was reopened based on factual material, which were available with the assessing officer subsequent to the intimation issued under Section 143(1) and to be precise, in the next assessment year, where the assessing officer found that no services were rendered by the assessee for their unit at Pondicherry. Therefore, the said decision will not aid the case of the Revenue.*

8. *The legal principle laid down in the above decision is that the language employed in Section 147 does not make any distinction between an order passed under Section 143(3) and the intimation issued under Section 143(1) and therefore, it is not permissible to adopt different standards while interpreting the words "reason to believe" Section 143(1) and Section 143(3). In the instant case, it is not in dispute that reopening is based upon the return of income filed by the assessee at the first instance. There is no allegation against the assessee that there was failure on the part of the assessee to make a true disclosure, nor the assessing officer had relied on any tangible material, which has come to his knowledge after the filing of the return and intimation under Section 143(1), justifying reopening. Therefore, to reopen an assessment based on the return filed by the assessee, will clearly be a case of change of opinion and consequently bad in law.*

9. *In the result, the appeal filed by the assessee is allowed and the substantial question of law No.1 is answered in favour of the assessee. No costs".*

13. Similarly, the Hon'ble Jurisdictional Madras High Court in the case of *TANMAC India (supra)* held as under:-

"11. The phrase "reason to believe" in section 147 relates to such other new or tangible material as may have come to the knowledge of the assessing officer pursuant to the original proceedings for assessment. The Supreme Court in CIT Vs. Kelvinator of India (320 ITR 561) states thus in the context of the "belief" that should form the basis for a re-assessment;

'We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review, he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.'

12. *If the assessing officer, after issuing intimation u/s section 143(1) does not to issue a notice u/s 143(2) of the Act to initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of re-assessment, but of review. The reasons make it abundantly clear that the re-assessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the assessing officer since 2.11.1998 and which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.3.2001, prior to issue of notice u/s 148. The notice under section 148 dated 9.12.2002 is thus an arbitrary exercise of power and a review of proceedings impermissible in law.*

13. *The Division Bench of the Delhi High Court in the case of Commissioner of Income Tax Vs. Orient Craft Ltd (354 ITR 546) deals specifically with this aspect of the matter. The substantial question of law that was dealt with by the High Court is as follows;*

'Was the Tribunal right in law in holding that in the absence of any tangible material available with the Assessing Officer to form the requisite belief regarding escapement of income, the reopening of the assessment made under section 143(1) is bad in law?'

14. *The Division Bench notes that the Supreme Court in the case of Asst. CIT V. Rajesh Jhaveri stock Brokers P. Ltd, (supra) only deals with the formation of an opinion at the time of issuance of prima facie intimation and does not indicate anywhere that a re-assessment can be initiated in the absence of a reason to believe.*

To conclude, the Division Bench holds thus:

'This judgment, contrary to what the Revenue would have us believe, does not give a carte blanche to the Assessing Officer to disturb the finality of the intimation under section 143(1) at his whims and caprice; he must have reason to believe within the meaning of the section.'

15. *There is yet another relevant aspect. Mr. Kapur, to whom the payment was made in the present case, also retired from two other firms simultaneously, M/s.Jarvis International (hereinafter referred to as "Jarvis ") and M/s Aryavartha Impex (hereinafter referred to as "Aryavartha "). The facts in the case of Jarvis, Aryavartha and TANMAC, the appellant before us, are identical. However, it appears that the Department, in the cases of Jarvis and Aryavartha, issued notices u/s.143(2) of the Act and completed scrutiny assessment proceedings within time. Thus, in those cases, when proceedings for re-assessment were initiated by issue of notice under section 148, the Tribunal in the case of Jarvis and the Commissioner of Income Tax (Appeals) in the case of Aryavartha as confirmed by the Income Tax Appellate Tribunal, took the view that the assumption of jurisdiction under section 148 was bad in law.*

16. *The facts as well as the law remain identical in all three cases. Thus merely by virtue of the non-action on the part of the assessing officer in the case of the present assessee, i.e. by his failure to issue a notice under section 143 (2) of the Act, the Department gets the advantage of another four years from 31.3.2002 to initiate proceedings for re-assessment. This obviously can neither be the proper interpretation of section 147 nor the intention of Legislature. The CIT (A) in order dated 30.09.2004 distinguishes the present case from the two others on precisely the ground stating thus:-*

'In my opinion, the Appellant's case stands on a different footing than that of Jarvis International. In that case, the original assessment was completed under section 143(3) and the Assessing Officer had duly examined the allowability of payment of Rs.5,50,000/- to Sri P.C.Kapur at the time of his retirement. After such examinations, the Assessing Officer had taken a conscious decision to allow the same as a revenue expenditure. On the other-hand, in the present case, the Appellant's assessment was not completed after scrutiny u/s.143(3). That means, the Assessing Officer did not have the opportunity to examine the allowability of Rs.5,50,000/- paid to Sri P.C.Kapur. Since there was no application of mind and consequently no conscious decision on the part of the Assessing Officer to allow this amount, it cannot be said that the reopening of the assessment was due to change of opinion.'

It is incorrect to state that the Assessing Officer had no opportunity as the statute grants him full opportunity to scrutinize the assessment if he felt it was necessary

and expedient for him to do so. Having chosen not to, he cannot resort to the provisions of S.147 in the absence of any new or fresh material indicating escapement of income.

17. A decision of the Delhi High Court in the case of CIT Vs Orient Craft Limited (354 ITR 536) had occasion to consider a similar question and the Division Bench, at Page 546, holds as follows;

“Having regard to the judicial interpretation placed upon the expression reason to believe”, and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words “reason to believe” have to be understood in a liberal manner where the finality of an intimation under section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore, it is not permissible to adopt different standards while interpreting the words “reason to believe” vis-`-vis section 143(1) and section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under section 143(3) cannot apply where only an intimation was issued earlier under section 143(1). It would in effect place an assessee in whose case the return was processed under section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny or is accepted without demur is not a matter which is within the control of the assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under section 143(1) and, thereafter, issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression ‘reason to believe’ in cases where assessments were framed earlier under section 143(3) and cases where mere intimations were issued earlier under section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed. ”

.....
The reasons recorded by the Assessing Officer reached the belief that there was escapement of income “on going through the return of income” filed by the assessee after he accepted the return under section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in CIT v. Kelvinator (supra). ”

18. The above extracts are applicable on all fours to the present case in the facts and circumstances pointed out earlier. In the light of the aforesaid discussion, we answer question of Law No.2 in favour of the assessee. In view of our conclusion on the aspect of assumption of jurisdiction, we do not see any need to go into the

merits of the case and refrain from answering the substantial question of law relating to the same. No costs”.

14. Respectfully, taking guidance from the judgments of the Hon'ble Jurisdictional Madras High Court referred supra, we are of the considered opinion that the assessment notice u/s.148 of the Act dated 24.08.2012 is liable to be quashed. Accordingly, we quash the notice issued u/s.148 of the Act dated 24.08.2012 and consequential re-assessment order is set aside.

15 Since, we have allowed the appeal of assessee on legal grounds, hence, we refrain ourselves from dealing the grounds on merit.

16. In the result, the appeal of the assessee in ITA No.334/Chny/2024 for assessment year 2007-2008 is partly allowed in above terms.

Order pronounced in the open court on 27th day of August, 2024 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai:

दिनांक Dated : 27-08-2024

KV

आदेश की प्रतिलिपि अग्रेषित /Copy to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT, Chennai/Coimbatore/Madurai/Salem.
4. विभागीय प्रतिनिधि/DR
5. गार्डफाईल/GF

Sd/-

(मनु कुमार गिरि)

(MANU KUMAR GIRI)

न्यायिक सदस्य / JUDICIAL MEMBER