

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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड कमलेश जयंतभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 967/JPR/2024  
निर्धारण वर्ष/Assessment Year : 2012-13

Om Prakash Agrawal HUF 11 OM Niwas, Brahmpuri (Opp. Pondrik Park), Jaipur	बनाम Vs.	ITO, Ward 5(1), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAAHO 4615 F		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Sarwan Kumar Gupta (Adv.)  
राजस्व की ओर से/ Revenue by : Smt. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 28/08/2024  
उदघोषणा की तारीख/Date of Pronouncement: 09/09/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, A.M.

This appeal is filed by the assessee aggrieved from the order of the National Faceless Appeal Centre, Delhi [ for short NFAC/ CIT(A) ] for the assessment year 2012-13 dated 15.12.2023, which in turn arises from the order passed by the ITO, Ward-5(1), Jaipur

passed under Section 143(3) r.w.s. 147 of the Income tax Act, 1961 (in short 'Act') dated 21.10.2019.

2. The assessee has taken following grounds in this appeal;

1. The impugned order u/s 147 rws 143(3) of the I.T. Act, 1961 dated 21.10.2019 as well as the notice u/s 148 and action or proceedings u/s 147/148 are illegal, bad in law, barred by limitation, without jurisdiction, without approval/satisfaction from the proper or competent authority, against the principle of natural justice and various other reasons or and further contrary to the real facts of the case hence the same may kindly be quashed.

2. Rs.3,80,000/- : The Id. CIT(A) has grossly erred in law as well as on the facts of the case in confirming the addition of Rs.3,80,000/- made by the Id. AO on account of cash deposited in the bank account during the year. The Ld. AO and CIT(A) both have also erred in not considering the vital facts and material available on record in their true perspective and sense available on record. Hence the addition so made by the Id. AO and confirmed by the Id. CIT(A) is also being contrary to the real facts of the case and not according to the provision of law, hence the same may kindly be deleted in full.

3. The Id. AO has grossly erred in law as well as on the facts of the case in charging the interest u/s 234A, B,C. The interest so charged is being totally contrary to the provision of law and on facts of the case and hence same may kindly be deleted in full.

4. That the appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing.”

3. At the outset of hearing, the Bench observed that there is delay of 152 days in filing of the appeal by the assessee for which

the Id. AR of the assessee filed an application for condonation of delay with following prayers:

“1. In this connection it is submitted that the applicant is HUF and a regular IT assessee. In this assessment u/s 147 rws 143(3) was completed by the Id. ITO Ward 5(1), Jaipur on dt. 21.10.2019. where addition of Rs. 3,80,000/- was made on account of cash deposit. Against which assessee filed the appeal and during the hearing assessee filed the Ws and paper book time to time. The Id. CIT(A) has dismissed the appeal of the assessee or confirmed the order of the Id. AO and CIT(A) has passed the order on dt.15.12.2023. The order was received was not served upon the assessee physical but it appears sent on email. However as per date of order the appeal was to be filed on or before 14.02.2024 but the same is being filed on by 11.07.2024 i.e by delay of about 5 month. Although actually there is no delay if following facts are being considered.

2. The reason of late filing was that the assessee is a HUF, the order was probably sent on the email id:- bhasker swarnkar@rediffmail.com which belongs to counsel, it may be possible that while registering the PAN this email id has been mentioned. As on being asked it has come to know that this email id was the counsel's old email id and he is not using this email id and has been escaped to be seen or was not in the habit to check this old email id regularly that is why later on the email id has been changed on the e-portal and in the returns filed by the assessee for the later years, the assessee has given its email id which is neelkamal marbel@yahoo.com and this email id available with the department. Further that is why in the form 35 also the counsel had given his new email id reswarnakr@gamil.com, thus while issuing the notices and orders these both new email id was available with the CIT(A) and department. And no notices or orders were received on these neelkamal marbel@yahoo.com and reswarnakr@gamil.com. despite the order was sent on old email id. As the counsel at whose email id the notices or order were sent has not seen the email or escaped from him due to above reasons and the counsel is now Sr. citizen and not feeling well. Thus the assessee has never come earlier about the orders, recently when the assessee asked to the other counsel who filed the appeal submission about the status of the appeal, then on 06.07.2024 he has checked the portal and has come to know that the CIT(A) has passed the order on dt.15.12.2023. The assessee were under impression that they would have been received orders and notices on new email id.

3. That thereafter our counsel has started to prepare the appeal and the appeal has been prepared on 09.07.2024 and sent to us for sign.

4. Thus there was no also negligence's of either assessee nor the counsels who was the under impression that the order will be received on new email id. Thus due to above reason the appeal could not be filed within time. In support of these contention an affidavit of the Karta of HUF is enclosed.

5. It is submitted that the Hon'ble Supreme Court in the case of Collector, Land & Acquisition v. Mst. Katiji & Others (1987) 167 ITR 471 (SC) has advocated for a very liberal approach while considering a case for condonation of delay. The following observations of the Hon'ble Court are notable:

"The legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression sufficient cause employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But, the message does not appear to have percolated down to all the other Courts in the hierarchy."

The said judgment is a leading case on the subject and has a binding force on all the officers subordinate thereto.

6. The action or inaction by an assessee, on the advice of its counsel. whether correct or incorrect, if caused a delay, has been held to be reasonable and sufficient cause in these cases also. Kindly refer N. Balakrishnan v. M. Krishna Murthy (1998) 7 SCC 123 published in 30 BCAJ 922, Concord of India Insurance Co. Ltd. v. Smt. Nirmala Devi and Anothers 118 ITR 507.

That it is also settled that for the mistake of the Counsel, the party cannot be suffered. Reliance on Mahaveer Prasad Jain v/s CIT, 172 ITR 331(MP), Concord India Insurance Co. Ltd v/s Smt. Nirmala Devi, 118 ITR 507(SC), Kripa Shankar v/s CIT/CWT 181 ITR 183(All), N. Balakrishnan v/s M. Krishanmurthy 7 SSC123.

7. The Hon'ble Jaipur Bench of ITAT has also condoned the dealy in the case of Ganesh Himalaya Pvt.Ltd. v. ACIT 22 Tax World 415 (Jp) where the filing was delayed because the son of the Managing Director had become victim of some misdeeds committed by the Holigans, particularly when on the similar points in the earlier four years, the appeals were filed in time.

In the instant case also, the appeal could not be filed in time because of the above reasons which were bonafide and was a sufficient cause and there was no melafide intention.

8. Recent Decision of Apex Court: in a recent decision, the apex court have again reiterated that the expression "sufficient cause" should receive a liberal construction. The Hon'ble court have also held that advancing of substantial justice should be of prime importance. Kindly refer Vedbai vs. Shantaram Baburam Patil & Others 253 ITR 798 (SC)."

Prayer: In view of above facts and circumstances and with the sympathy and settled legal position, the delay so caused may kindly be condoned."

4. The Id. AR of the assessee in addition submitted that the reasons of late filling is on account of the non-service of the order on the email id. The assessee has submitted the email id on record namely [neelkaml\\_marbel@yahoo.com](mailto:neelkaml_marbel@yahoo.com) and [rctwarnakr@gmail.com](mailto:rctwarnakr@gmail.com) on which no notice was served. The assessee in support of the contention filed an affidavit.

5. The Id. DR also submitted that considering the explanation reasons advanced are not sufficient to condone the delay. Revenue cannot serve the notice to the assessee as per various choices from time to time. The assessee has time and again preferred to give different e-mail and has not corrected the e-mail on the portal. Therefore, the delay may not condoned.

6. We have heard the contention of the parties and perused the materials available on record. The prayer by the assessee for condonation of delay of 152 days has merit as the notice on the email id was not served to the assessee and thereby the delay in filing the appeal has occurred. Thus, the delay of 152 days in filing the appeal by the assessee is condoned in view of the decision of Hon'ble Supreme Court in the case of Collector, Land Acquisition vs. Mst. Katiji and Others, 167 ITR 471 (SC) held that there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also, the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. As the assessee is prevented by sufficient cause we condone the delay.

7. The fact as culled out from the records is that information was received from DDIT(Inv.)-III, Jaipur vide letter No. 3303 dated 22.03.2019 that cash deposits of Rs. 3,80,000/- in State Bank of India had been taken place in his account.

The assessee had filed his ITR declaring total income of Rs. 1,78,880/- on 07.06.2012 u/s 139(1) of the Act for A.Y. 2012- 13 not disclosing the cash deposits. Therefore, notice u/s 148 was issued on 30.03.2019 after recording reasons and obtaining approval from the Pr. CIT-2, Jaipur. The notice u/s 148 was duly served upon the assessee through speed post. In response to notice u/s 148, the assessee e-filed his return of income at Rs. 1,78,880/- for A.Y. 2012-13 on 11.06.2019. Notices u/s 143(2)/142(1) of the IT Act issued and served upon the assessee through speed post. In response to this, the assessee filed information/details, which was examined by Id. AO.

8. During the assessment proceedings, the assessee was asked to file evidence/details regarding cash deposited of Rs. 3,80,000/- vide Notice u/s 142(1) of the IT Act dated 27.08.2019.

The case was fixed for 31.07.2019. On this date the assessee has filed a reply through mail stating that:-

*"Cash deposit in bank is out of cash sale proceedings and realization of new and old credit sale from of debtors and looking to the volume of sales and cash deposited, the cash deposited in bank is self justified."*

The reply filed by the assessee has been considered but found not tenable by the AO, as the assessee has not filed any documentary evidence to show the source of cash deposited in the bank account. Hence a show cause along with Notice u/s 142(1) of the Act dated 16.09.2019 was issued and served upon the assessee through ITBA Portal fixing the case for hearing on 23.09.2019 and asked why not cash deposit of Rs. 3,80,000/- be disallowed and added to his total income.

In response of the above, no reply furnished by the assessee. Again, a final show cause dated 04.10.2019 issued and served through ITBA portal asking the source of cash deposited. Further, no reply submitted by the assessee either through mail or through speed post. Therefore, the unexplained cash deposit of Rs. 3,80,000/- was added back in total income of the assessee u/s 68 of the IT. Act, 1961.

9. Aggrieved from the said action of the Assessing Officer, assessee preferred an appeal before the Id. CIT(A)/NFAC. The relevant finding of the Id. CIT(A) is as follows:

“6.3 Thus it was imperative on the appellant to explain the source of cash deposit. The appellant has failed to prove that the transaction was genuine. He failed to explain the source of the deposits. Having failed to discharge his onus and explain the source of cash deposits the addition has aptly been made by the AO. In view of these backdrops, the AO while initiated the re-assessment proceedings and in completing the assessment proceedings u/s 144 r.w.s 147 of the Act, has not committed any illegality in any manner as alleged by the appellant. The impugned addition made by the AO, u/s 68 of the Act, as undisclosed income of the appellant, is fully justified and sustainable in the eyes of law. Therefore, the ground(s) Nos. 1 and 2 of appeal are dismissed.”

10. As the appeal of the assessee has been dismissed by Id. CIT(A), the assessee has preferred the present appeal challenging the order of assessment on technical ground as well as on merits of the case.

To support the various grounds so raised by the Id. AR of the assessee, has filed the written submissions in respect of the various grounds raised by the assessee and the same is reproduced herein below:

“FACTS: 1. The brief facts of the case are that the appellant-assessee is a regular I.T assessee, for the year he has filed its return of income declaring the total income of Rs.1,78,881/- on dt. 30.07.2012(PB1-2). Having income from trading or business of Marble. The Id.AO has issued the notice u/s 148 on dt. 30.03.2019 on the reason that ” *As per*

*information available on record, assessee has cash deposited of Rs.3,80,000/- in bank account, thus I have reason to believe that the income of Rs.3,80,000/- has escaped assessment within the meaning of Sec. 147/- of the IT Act.”* Copy of reasons recorded is enclosed (PB3-6). In response to the notice u/s 148 the assessee has again filed its return of income declaring the same income of Rs.1,78,881/- on dt. 11.06.2019 (PB7-8). And also asked for providing the reasons recorded.

Thereafter the assessee has filed the objection against the initiation the proceedings u/s 147/148 on dt. 09.07.2019 (PB11-12) also order sheet (PB14).

Thereafter the Id. AO has issue the notice u/s 142(1) and other notices, the assessee has filed the reply and details vide page 1 para 2 of the assessment order.

The Id. AO has asked about the sources of cash deposited in the bank account. In response thereto the assessee has submitted that cash deposit in the bank account is out of cash sales proceedings and realization of new and old credit sale from of debtors and looking to the volume of sales and cash deposited, the cash deposited in the bank is self justified.

However the Id. AO did not feel satisfy with the reply and alleged that the assessee has not submitted any documentary evidences in support of the cash deposits in the bank account, while the assessee has submitted all the details. The Id. AO has noted that during the course of assessment proceeding, on examination of books of accounts, it is found that cash opening balance was of Rs.1,42,593.92 and cash received on 15.06.2011 of Rs.6,520/-, thus total comes to Rs.1,49,113.92 and an amount of Rs.2,00,000/- in cash deposited resulted in negative cash balance. The Id. AO has alleged that therefore the unexplained cash deposited of Rs.3,80,000/- is added back in the total income of the assessee u/s 68.

In first appeal assessee filed the detailed WS, paper Book and legal position of law. However the Id. CIT(A) did not consider the same in their true perspective and sense and confirmed the addition by stating that “Thus it was imperative on the appellant to explain the source of cash deposit. The appellant has failed to prove that the transaction was genuine. He failed to explain the source of the deposits. Having failed to discharge his onus and explain the source of cash deposits the addition has aptly been made by the AO.

From perusal of para 6 of the statement of facts, quoted above, it is apparent that the objections of the appellant (assessee) of the present

appeal were disposed of by the AO on 11.07.2019 i.e. prior to passing of the Assessment order.”

Hence this appeal.

#### SUBMISSIONS:

1. Incorrect or wrong Reasons: 1 At the very outset it is submitted that the reasons recorded or information on which the proceeding has been initiated itself was wrong, incorrect and without material on record at the time of recording of reasons. Because in the reasons recorded the Id. AO mentioned that ” *As per information available on record, assessee has cash deposited of Rs.3,80,000/- in bank account, during the year or F.Y. 2011-12 thus I have reason to believe that the income of Rs.3,80,000/- has escaped assessment within the meaning of Sec. 147/- of the IT Act.*”

However the assessee has deposited total of Rs.9,87,900/- in the bank account in whole year the deposit of cash of Rs.3,80,000/- was till 15.06.2011, thereafter assessee has also deposited cash of Rs.6,07,900/- time to time vide PB21,24,27,42,49,55,56,57 and this fact have not been disputed by the Id. AO because he was having the bank statements and cash book.

Thus when the very reasons are wrong or incorrect then all the proceedings are invalid.

1.2 Hence when the very basis of reason for reopening itself wrong, incorrect and without material and altogether reverse then all the proceedings are void –ab-initio and liable to be quashed.

1.2.1 On this preposition we would like to draw your kind attention on direct decision Honble Gujrat High Court in the case of Mumtaz Hazi Mohamad Memon v/s ITO 408 ITR 268(Guj.) on the very same issue, wherein the Honble Court has held that

“11. 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 income also offered his share of the declared sale consideration to tax as capital gain. The Assessing Officer may have dispute with respect to computation of such capital gain, 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.

12. 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 are that the 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, 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 gain."

1.2.2 In the case of *Vijay Harish Chandra Patel vs. ITO 400 ITR 167(Guj.) (2018)* where it has been held that "When very basis for reopening no longer survives, assumption of jurisdiction u/s 147 by AO by issuing notice u/s 148 was without authority of law and could not be sustained.

However the Id. AO nowhere stated that what documents he was having with him at the time of recording the reason for the information that there was cash deposits of Rs.55,00,000/-. Hence the observation are wrong and baseless and her own and liable to be ignored.

2.2.3 Recently the Honble ITAT Jaipur Bench Jaipur in the case of *Smt. Sushila Chahch v/s ITO* in ITA No. 683/Jp/2019 dt. 30.03.2021 has quashed the notice as well as assessment order under the same facts and circumstances of the case copy of order is enclosed. Where it has been held that "In light of aforesaid discussion and following the decision referred supra, where the very foundation for reopening the case is vitiated given that the assessee has filed her return of income disclosing the transaction of sale of immovable property for the specified consideration and offering the same to tax, there cannot be any reasons to believe that income has escaped assessment for the very same transaction the assumption of jurisdiction u/s 147 cannot be sustained and the subsequent proceedings are hereby directed to be set-aside. Also refer *Shri Narain Dutt Sharma vs ITO* (ITA No.203/JP/2017 dated 07.02.2018).

1.2.5 Also refer recent decision of Honble Delhi High Court in the case of *Catchy Prop-Build(P.)Ltd v/s ACIT [2022] 145 taxman.com 510 (Delhi) dt.17.10.2022.*

*1.2.6 In the case of Rames Bhojprasad Gupta vs. ITO ITA No. 476/SRT/2019, Feb 7, 2022 (2022) 64 CCH 0090 SuratTrib it has been held That Reassessment—Reopening of assessment—AO on basis of AIR information noted that assessee made deposit in his bank account in PNB—AO recorded that in response to notice under section 148; assessee neither filed return of income nor responded—Assessing Officer ultimately by-passing assessment order made addition on account of undisclosed cash deposits PNB'—Assessing Officer also disallowed disallowance under Chapter-VI-A by taking view that no such deduction claimed in original return of income and no evidence to substantiate such deductions were filed—CIT(A) observed that pattern of withdrawal support contention of assessee is that deposit in bank were pertaining to business of its scrap—Accordingly, accepted transaction—CIT(A) on basis of pattern of deposit and withdrawal in PNB concluded that assessee shifted a part of his business turnover to undisclosed bank account—CIT(A) calculated profit on account of undisclosed sales, credit in bank account and accordingly worked out addition and directed Assessing Officer that while computing income of assessee—Held, Assessing Officer recorded that assessee filed return in his return of income and revised return of income, as "It was also noted by undersigned that assessee had returned income of Rs.3,56,170/- in his return of income and in revised return of income, assessee returned income of Rs.5,00,660—Thus, during re-assessment, Assessing Officer was very well aware i.e., return was filed by assessee—AO recorded that on verification of details in ITD, it was seen that assessee has not filed return and assessee has not complied with verification letter—Assessing Officer has not recorded as to how said notice was served upon assessee or not—Reasons recorded was provided by AO vide letter dated 21.09.2017 which was received by assessee on 23.09.2017 and subsequently assessment order passed on 29.09.2017 by taking view that despite repeated notice and show cause assessee was not made proper compliance—On similar ground of reasons of reopening wherein Assessing Officer recorded that assessee has not filed return and in fact, return was filed by assessee, re-assessment were held as invalid by co-ordinate Bench of this Tribunal, in case of Rinakumar A. Shah ( ITA No. 172/AHD/2017 holding that Assessing Officer may have dispute with respect to computation of such capital gain, he cannot simply dispute fact that assessee did not file return—Entire reasoning recorded by AO for initiation of reassessment proceeding and issuance of notice under section 148 was on wrong and incorrect facts that assessee has never filed return of income, and in fact, it was filed—Initiation of reassessment proceeding u/s.147 and notice under section 148 and all subsequent proceedings and orders have been issued, conducted,*

*passed without having valid jurisdiction, and therefore, same are bad-in-law and hence, same is quashed—CIT(A) estimated income @ 51.84% on account of undisclosed sales—Assessee claimed that he has shown book net book profit @ 11.45% and in subsequent year Assessing Officer has made addition @ 10% of net profit in assessment order passed under section 143(3)—It is settled law that only profit element embedded in undisclosed sale or purchases is to be added not substantial part of transaction—When in subsequent assessment year in AY 2011-12, AO himself made addition only @ 10% of net profit in assessment order passed under section 143(3); book profit shown by assessee @ 11.45% for year under consideration was reasonable and justified—Therefore, assessee also succeeded on merit—Assessee's appeal allowed.*

*1.2.7 The Honble Jurisdictional Raj. High Court in the case of ABDUL MAJEED vs. INCOME TAX OFFICER in D.B. Civil Writ Petition No. 7853/2022 Jun 29, 2022 (2022) 114 CCH 0245 RajHC (2022) 216 DTR 0305 (Raj), (2022) 327 CTR 0733 (Raj) it has been held “ Reassessment—Issuance of notice under section 148 after proceedings under Section 148A (d)—Writ petition seeks to assail correctness and validity of order passed by respondent, whereby, after initiating proceedings under Section 148A (d) on formation of an opinion that income chargeable to tax has escaped assessment, authority proceeded to issue notice under Section 148—Respondent issued notice under clause (b) of Section 148A on basis of certain information which suggested that income chargeable to tax for assessment year 2015-2016 has escaped assessment within meaning of Section 147—Notice stated that assessee did not disclose this amount of cash deposit during relevant financial year and, therefore, on that basis, proceedings are required to be initiated—Competent authority proceeded to pass an order for issuance of notice under Section 148—Thereafter, a notice under Section 148 has been issued to petitioner-assessee—Held, After amendment carried out in income tax under Finance Act, 2021, even before proceedings under Section 148 could be drawn, law requires an order to be passed under Section 148A by conducting an enquiry in manner provided under Section 148A and satisfaction to be arrived at on basis of material available on record that income chargeable to tax has escaped assessment for relevant assessment year—Provision is explicitly clear that Assessing Officer shall, before issuing any notice under Section 148, conduct enquiry, details of which have been contained in Sub Clause (a) (b) & (c), which requires seeking prior approval of specified authority with respect to information; providing an opportunity of being heard to assessee and consideration of reply of assessee—Sub-Clause (d) of Section 148A mandates that after conducting enquiry by affording an opportunity of hearing and consideration of reply, authority shall decide, on basis of material available on record, including reply of assessee, whether or not it is a fit case for issuance of notice under Section 148, by passing*

*an order—Notice which was issued to petitioner-assessee by invoking jurisdiction under Section 148A(d) by authority was based on information regarding undisclosed cash deposits reflected by various transactions, which according to authority, was more than Rs.52,00,000—However, when petitioner-assessee filed his reply, he clearly disclosed that total amount of cash deposits in bank by him was only Rs.19,39,000/- and not Rs.52,75,000/- as alleged in notice—Assessee along with his reply annexed complete bank statements showing all debit and credit transactions—Total transactions, which have been shown, do not exceed amount as has been stated by petitioner-assessee—While considering reply and bank statements, competent authority did not dispute transactions, which were placed before it along with reply filed by petitioner- assessee—Therefore, very basis of initiation of proceedings that income exceeding more than Rs.50,00,000/- had escaped assessment, was factually not correct—But then, authority thereafter, without disputing transactions, proceeded to pass an order for issuance of notice under Section 148—Provisions contained in Section 148A (d) referred to hereinabove, clearly show that decision has to be taken on basis of material available on record—Material available on record before authority did not disclose any cash deposit or any other transactions which can be said to have escaped assessment, which was more than Rs.50,00,000—Had it been a case of opening of case within a period of three years having elapsed from end of relevant assessment year, order of authority could be well justified on touch stone of legal requirement as embodied under Section 148A—However, in present case, undisputedly it is a case where more than three years have elapsed from end of relevant assessment year—In that case, in order to initiate proceeding under Sections 148, it is not only required to be shown that some income chargeable to tax has escaped assessment, but also that it amounts to or is likely to amount to Rs.50,00,000/- or more than for that year—Only on basis that cash deposits of Rs. 19,39,000/- chargeable to tax have escaped assessment, without anything more, authority was not justified in jumping to conclusion that assessee may have more bank accounts—If such an interpretation is placed on provision of Section 148A (d) with reference to expression ‘material available on record’, then in that case, it will open flood gate and even without availability of any material, authority would be initiating proceedings under Section 148, which will completely frustrate object of incorporation of Section 148A in Act—It is well settled principle of interpretation that taxing statute is required to be construed strictly—Impugned order and proceedings are unsustainable in law—Assessee’s petition allowed”.*

Here the facts and position are the same hence the assessment order liable to be quashed. As the Id. AO has issued the notice on the wrong reasons, as there was cash deposits in the bank was of Rs.9,87,900/- in full year and the Id. AO has wrongly stated the cash deposits in the bank was of Rs.3,80,000/- for whole year, while the cash deposits as

stated of Rs.3,80,000/- was till 15.06.2011 while there was also cash deposits of Rs.9,87,900/- after 15.06.2011 in the bank account time to time. And the Id. AO has not speak a single word on the same in the assessment order. Otherwise the Id. AO must have recorded in the reason that there is cash deposits in the bank account till 15.06.2011 is Rs.3,80,000/- and there is cash short of Rs.50,886/- (Rs.2,00,000/- less 1,49,594) and the notice if any can be issued for the escaped income of Rs.50,886/- as per the version of the Id. AO or for Rs.9,87,900/- for the total cash deposits in the whole year. And before issuing the notice u/s 148 no material has been inquired or examined, if the inquiry was made before issuing the notice u/s 148 then the reasons recorded would be different

Also refer Rajhans Processor v/s UOI in DB c Civit Writ Petition No. 16985/2021 dt. 05.01.2023 of Raj. High Court.

Thus the reassessment proceeding on the basis of wrong or incorrect reason and wrong material are illegal and liable to be quashed.

*2. No income escaped: further it is submitted that the notice u/s 148 can be issued only when there is any escape of income because S. 147 provides that If the Assessing Officer has reason to believe that an income chargeable to tax has escaped assessment for any assessment year, here the assessee has not escaped any income because the assessee has never deposited the undisclosed or unexplained money in the bank account. Which shows that there was no escapement of income by the assessee, as the assessee is having business and trading, the sale proceed has been deposited. Hence if there is neither the escapement of income by the assessee nor proved then the notice issued u/s 148 is invalid.*

Further only cash deposited in the bank account cannot confer the valid jurisdiction u/s 148 , as there was no nexus between the prima facie inference arrived in reasons recorded and information. The information is restricted only to the cash deposited in the bank account but there is no material tangible, credible, cogent and relevant material to form a reason to believe that cash deposited in the bank account represent the escaped income, when other side the material available that the assessee is doing the trading of marble and day to day cash sale also there which has been deposited time to time in bank after cash accumulation. Hence reopening is invalid illegal on the basis without material in the hands of the assessee and also after ignoring the material which support the case of the assessee.

*3. Reason to believe and not reason to suspect:*

*3.1 It is further submitted that even under the amended law by the finance act 1989 the condition precedent or words, which continues right since inception till date, are "reason to believe" and not "reason to suspect". The word "believe" has to be understood in contradistinction*

*of suspicion or opinion. Belief indicates something concrete or reliable. Kindly refer Gangasharan & Sons Pvt. Ltd. 130 ITR 1 (SC), and ITO v. Lakhmani Mewal Das, (1976) 103 ITR 437 (SC).*

*3.2 The belief of the Officer should be as to escapement of income and the belief should not be a product of imagination or speculation. There must be reason to induce the belief. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court (Sheo Nath Singh v. AAC, (1971) 82 ITR 147 (SC)).*

*In the case of Mukesh Modi & Ors. vs. DCIT 366 ITR 418 (Raj) held that Evasion of tax was menace to society but Assessee contributing to the exchequer in form of tax could not be allowed to suffer on mere pretence that it had evaded payment of tax. Rowing and fishing enquiry in hands of AO on mere suspicion or change of opinion could not satisfy expression "reason to believe" exposing Assessee for reopening of assessment. Notice for reopening of assessment was not in consonance and in conformity with under Section 147 and made specified notice vulnerable. High Court pointed that, reasons given by AO for issuance of notice for Re-assessment were not plausible and convincing. In fact order, where objections were rejected by AO, was not self-contained speaking order. Upon perusal of the order, it was amply clear that the same contains conclusions and is bereft of reasons.(para 12)*

*3.3 Notices issued to Assessee by AO under Section 147/148 were not satisfying the pre-requisites for same. There was no whisper in the notice, or iota of proof that while issuing same. AO had reason to believe that any income chargeable to tax had escaped assessment for the assessment year. Notice issued by AO simply for his own verification and to clear his doubts and suspicions to re-examine the material which were already available on record at time of passing of t earlier assessment orders. The legislature under Section 147 has not clothed AO with such jurisdiction therefore the action could not be upheld in the background of facts of instant case. One more redeeming fact which had direct nexus with the subsequent re-assessment proceedings and ramification of the same had culminated into re-assessment orders was the impugned order where AO rejected the objections submitted by Assessee pursuant to notice under Section 147/148. Order passed by AO in this behalf was not a speaking order which could not be sustained. In view of legal infirmity in the notice under Section 147/148 and laconic order of AO while rejecting objections Assessee the consequential assessment Orders were liable to be annulled.(para16).*

*Prayer: Thus in view of the above facts, circumstances and the legal position of law the proceedings so initiated and assessment so passed may kindly be quashed.*

GOA-2: Addition of Rs.3,82,000/-on account of cash deposit in the bank account u/s 69A as alleged unexplained money.

FACTS: Kindly refer Add. GOA

**SUBMISSIONS:**

1. Correct facts and transaction has not been taken in true perspective and sense: As the assessee was having income from trading of marbles, during the year he has declared the total turnover of Rs.27,02,533/- (PB19, 3) copy of sales register is also enclosed (PB59-84)and also having purchase of 22,41,581/- in support we are also enclosing herewith trading accounts (PB19). Copy of cash book is also enclosed in our support (PB20-57). And on perusal of the bank statements (PB86-101) it will shows that all the entries matching and supporting the case of the assessee regarding the sources of cash deposit in the bank account.

2. Further on perusal of the bank statement it is also admitted facts that the cash deposited has been utilized in the purchase which has not been doubted by the Id. AO and CIT(A). The Id. AO has neither disputed the purchase nor the sales or turnover, other hands they doubted the cash deposit in the bank account which were from the same sales, which has been admitted and assessed by him, all these shows his contradictory approach.

3. The Id. AO has only see the credit (deposits) entries other side he has ignored the debit (used for purchase or withdrawal) entries and for reaching on the result both the entries is to be seen.

4.1 On the allegation of the Id. AO that on examination of books of accounts, it is found that cash opening balance was of Rs.1,42,593.92 and cash received on 15.06.2011 of Rs.6,520/-, thus total comes to Rs.1,49,113.92 and an amount of Rs.2,00,000/- in cash deposited resulted in negative cash balance. In this regard it is submitted this allegation is totally incorrect from the looking of the case book which has been filed before the Id. AO and has been examined. As on15.06.2011 there was opening balance of Rs.2,34,273.92 and the cash inflow on this date was of Rs.6,520/- and the cash out flow was of Rs.2,03,868/- leaving the positive i.e + cash balance of Rs.36,925.92 on 15.06.2011. Vide cash book (PB 26-29). Hence the Id. AO has stated the wrong facts and made the addition.

4.2 Further one moment if the Id. AO was correct, then he should have made the addition only of Rs.50,886.08 only not of entire cash deposit of 3,80,000/- as his allegation was only for Rs.50,886.08. As he himself admitted that on 15.06.20211 opening balance was of Rs.1,42,593.92 and cash received on 15.06.2011 of Rs.6,520/-, thus total comes to Rs.1,49,113.92 and an amount of Rs.2,00,000/- was deposited on 15.06.2011 also vide his notice dt. 16.09.2019 (As annexure-A), hence

the negative balance according to him was only of Rs.50,886.08. This at the worst he should have made addition only to this extent. As per the notice, assessment order and the cash book the opening balance of Rs.1,42,593/- on dt. 15.06.2011 is coming after cash deposits of Rs.1,00,000/- on dt.13.04.2011 and Rs.80,000/-on dt. 10.05.2011 then how the addition of Rs.1,80,000/- of earlier accepted cash deposits and sources can be added. Although there was no negative balance in support we have filed the summary of cash book vide PB58 which is clearing the entire position.

4.3 Interestingly the Id. CIT(A) has also confirmed the addition and action of the Id. AO without seeing all the above facts, material, evidences, which is clearly appearing from his order at page 13 wherein he only stated that "Thus it was imperative on the appellant to explain the source of cash deposit. The appellant has failed to prove that the transaction was genuine. He failed to explain the source of the deposits. Having failed to discharge his onus and explain the source of cash deposits the addition has aptly been made by the AO".

But he failed to bring and controvert the above facts and details nor rebutted the same. Further the order passed or based on the wrong facts and material liable to be quashed in fully.

5. Thus there was clean sources of deposits and the lower authorities has ignored the same. In support we are enclosing herewith the both the bank statements, purchase details, sales details cash book trading account ITR etc. And the Id. AO has ignored all these rather he has proceed on mere assumption, presumption, suspicion only on the reasons to sustained his reopening stands.

6. No supporting material with AO: When the assessee in support had all the above evidences to prove the genuineness and correctness of the deposits made in his bank account during the year. And it is also important to note that the deposits is not in one time, rather it was regularly in the whole years. The availability of cash represented from the sales made during the year. The transactions are duly reflected in said bank accounts and the transaction is verifiable from the relevant records. Other side the Id. AO has not filed a single evidence in his support except in his own assumption, presumption, guess work and suspicion and blindly ignored these very vital facts or evidences of the case and proceeded on their own guess work, assumption, presumption and suspicion and it is the settled legal position that no addition can be the basis of suspicion, assumptions' and presumption. An allegation remains a mere allegation unless proved. Suspicion may be strong however cannot take the place of reality, are the settled principles kindly refer Dhakeshwari Cotton Mills 26 ITR 775 (SC) also refer R.B.N.J. Naidu v/s CIT 29 ITR 194 (Nag), Kanpur Steel Co. Ltd. v/s CIT 32 ITR 56 (All). Also refer CIT v/s Kulwant Rai 291 ITR 36( Del). In

CIT v/s Shalimar Buildwell Pvt Ltd 86 CCH 250(All) it has been held that the AO made the addition merely on **suspicion** which was not desirable in the eye of law.

7. It is submitted that assessee had discharged his duty to explain the deposits made in her bank account by furnishing the written explanation along with supporting evidences as above and their business or trading is never doubted. Other side onus lay upon the AO has not discharged with the evidences. Merely raising doubt and suspicion on the recorded transactions cannot be taken a valid basis to disown his claim, which are based on documents/papers and records. Documentary evidences furnished clearly clarifies that on occasion at the time of deposit in bank account, assessee was having cash in hands form and cash sales of cash which is also not disputed. Entire transaction of withdrawal and deposit are duly reflected in the bank account of the assessee and are verifiable from relevant records. The Id. AO has not brought on record the evidence that the assessee has utilized these cash any other assets or any other mode.

8. When source of cash deposit is explained and it is evident that it is the own cash of the assessee from the sales which has been deposited in bank account, then there is no question of making addition under the unexplained money u/s 69A of the IT act 1961. On this preposition kindly refer *Krishna Agarwal vs. ITO* in *ITA No. 53/JODH/2021 dt. Sep 7, 2021 (2021) 63 CCH 0048 Jodh Trib(Supra)*.

9. Here we would like to submit that while doing a judicious act by a person (here the AO) should also keep in mind the circumstance, facts, general approach, status etc. . He should not restrict to himself only to the evidence where the same is not possible. Here the AO restricted to himself only evidence and ignored the circumstance, facts, general approach, status etc. Kindly refer the decision of *Mange Ram Mittal v/s ACIT 105 TTJ 594(Del)(SB)*. Hence we pray your honor to kindly consider our contention in the interest of natural Justice and delete entire addition.

10. Further how the Id. AO can said that all the cash deposited in the bank account were other than to the cash sales and the Id. AO has not stated that where the cash sales has been utilized by the assessee, when the Id. AO has not denied the cash sales rather accepted and assessed.

11. Further the no addition can be made u/s 68 on account of deposits in the bank account because the bank account cannot be termed as books accounts of the assessee is also a settled legal position of law. Kindly refer *Vinod Behari Jain & Ors v/s ITO 306 ITR 392(Del Trib.)* , *Bhaichand H. Gandhi 141 ITR 67(Bom.)*, *Ms. Mayawati v/s DCIT 113 TTJ178(Del.)*, *Chaturbhai Mangabhai Kachhia v/s ITO* ITA No.

2510//Ahd/2010(Ahd-B Trib), Kamalakar Reddy v/s ITO in ITA No. 242/Ahd/2007, ACIT v/s Jitu Builders (P) Ltd ITA No. 3747/Ahd/2007 with CO No. 367/Ahd/2007, ITO v/s Kamal Kumar Mishra 143 ITD 686(Luck B Trib).

12. In view of the above facts, submissions and legal position the addition so made may kindly be deleted in full and oblige .”

11. To support the contention so raised in the written submission reliance was placed on the following evidence / records :

S.No.	Particulars	Page No.
1.	Copy of IT return with Computation of total Income Filed u/s 139.	1-3
2.	Copy of reasons recorded u/s 148.	4-6
3.	Copy of IT return with Computation of total Income Filed u/s 148.	7-8
4.	Copy of letter to AO for providing reasons.	9-10
5.	Copy of objection filed against the reopening the case.	11-12
6.	Copy of order sheet.	13-16
7.	Copy of letter to AO with details, i.e sales details bank statement.	17-58
8.	Copy of Sales register and Bank statement.	59-101
9.	Copy of WS to CIT(A)	102-111A

12. The Id. AR of the assessee in addition to the above written submission and documents so relied upon submitted that the reasons recorded are not correct. In fact, the assessee has filed the return of income, whereas reasons recorded stated the fact that the assessee has not filed ITR.

So far as the merits of the case, assessee has filed the details of the sale made by the assessee, the source of deposit of cash is duly supported by sale and therefore, separate addition of deposit the cash into bank account cannot be made. The Id. AR of the assessee vehemently submitted that utmost the amount of Rs. 50,886.08/- should be added as contended by the Id. AO in para 2 of annexure to the notice dated 16.09.2019.

13. Per contra, the Id. DR relied upon the order of AO as well as of Id. CIT(A). The Id. DR also argued that the addition has been made by the Id. AO after detailed examination of the records so reproduced by the assessee and as it is alternatively pleaded by the Counsel that the addition of Rs. 50,886.08/- be made as the records so produced are not complete and correct and therefore, she supported the order of Id. CIT(A).

14. We have heard the rival contentions and perused the material placed on record. The bench noted that in this case the addition of Rs. 3,80,000/- made. The assessee contended that the deposit of

cash is sourced from the sales that has been booked for which the profit is also taxed by the revenue.

At the same time the bench noted from the records so produced before the Id. AO the Id. AO noted that that the assessee has filed the details of sales along with sales register and bank statement. The Id. AO did not find any specific defects except that he observed that the copy of cash book submitted by the assessee wherein opening balance was shown at Rs. 1,42,593.92 and cash received on 15.06.2012 at Rs. 6,520/-. Thus the total balance of Rs. 1,49,113.92/- was available with the assessee but he has deposited out of cash balance a sum of Rs. 2,00,000/-. So, there is a deficit of Rs. 50,886.08/- for which the assessee could not substantiate the source with tangible material that this cash is out of regular transactions recorded in the books so produced. Therefore, we feel that in the case of the assessee additions of Rs. 50,886.08/- should be sustained instead of Rs. 3,80,000/-.

In terms of these observations, ground No. 2 raised by the assessee is partly allowed.

Ground No. 3 raised by the assessee is charging of interest u/s 234A, B, C of the Act which is consequential in nature and

therefore, it does not require any adjudication ground No. 4 being in general in nature does not require any adjudication.

Ground No. 1 raised by the assessee is challenging the reopening of the assessment. Since, we have considered the appeal of the assessee on merits. We do not deem it fit to adjudicate this ground at this stage and at the same time the assessee could not convince the bench about the exact grievances on the grounds so raised.

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

Order pronounced in the open court on 09/09/2024.

Sd/-  
( संदीप गोसाई )  
(Sandeep Gosain)  
न्यायिक सदस्य / Judicial Member

Sd/-  
( राठौड कमलेश जयंतभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 09/09/2024

\*Ganesh Kumar, Sr. PS

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

1. अपीलार्थी / The Appellant- Om Prakash Agrawal HUF, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 5(1), 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 Nos. 967/JPR/2024}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar