

आयकर अपीलीय अधिकरण, बी खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI-“B”, BENCH

सर्वश्री राजेन्द्र, लेखा सदस्य एवं शक्तिजीत डे, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Shaktijit Dey, Judicial Member

आयकर अपील सं./ITA No.6590/Mum/2013, निर्धारण वर्ष/Assessment Year-2002-03

Mahendra C. Gala R. Sanghvi & Co. CA's , 104 Rizvi Chambers, No.2 Jain Mandir Marg Off Hill Road, Bandra (W) Mumbai-400 050. PAN:AABPG 6454 F	Vs	ACIT-19(3) Room No.305, 3rd Floor Piramal Chambers Mumbai-400 012.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by

:Shri Rajesh Sanghavi

राजस्व की ओर से/ Revenue by

:Shri Maurya Pratap-(DR)

सुनवाई की तारीख Date of Hearing

: 08- 10 -2015

घोषणा की तारीख / Date of Pronouncement

: 14-10-2015

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 11.09.2013 of CIT(A)-18, Mumbai, the Assessee has filed the present appeal.

Assessee, an individual, engaged in the business of, manufacturing and trading of readymade garments and fabrics filed its return of income declaring total income at Rs.10,18,990/-, on 26.10.2002. The return was processed u/s.143(1) of the Act. The case was re-opened u/s. 147 of the Act and a notice u/s.148 was issued on 27.3.2009. the assessment u/s. 143(3) r.w.s 147 of the Act was completed on 31.12.2009 determining the income of the assessee at Rs.11.16 lacs.

2. Effective Ground of appeal deals with the validity of reopening of assessment u/s. 147 of the Act and the next ground deals with the merits of the case. We would like to adjudicate the jurisdictional issue before deciding ground No.2.

The reasons recorded by the AO for reopening the assessment read as under :

“In this case, it has been found that assessee had obtained accommodation bills from Manoj Mills Prop. Rakesh Kumar Gupta of Rs.97,217/- and from Shri Ram Sales and Synthetics Prop. Hema Gupta of Rs.6,55,098/- (closing balance as on 31.3.2003) for which Rakesh Gupta and Smt. Hema Gupta agreed. They gave statement under oath during survey conducted on their premises on 13.2.2000 and therefore, admitted that they were in the business of providing accommodation bills only for which they charged 1% commission and they are not involved in actual trading. These bills are given for purpose of inflating expenses only and thus evading taxes.”

The assessee objected the reopening of the assessment. However, the AO completed the assessment. Referring to the statements recorded during the survey proceedings, carried out in the case of Rakesh Kumar Gupta and family members, he made an addition of Rs.97,217/- to the income of the assessee.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was contented that the AO had, in the reason recorded, not mentioned as to where or what sources did he get the information that the assessee had obtained bogus bills from Rakesh Gupta/Hema Gupta, that reason was more of a suspicion story rather than any tangible reason, that the information was not based on any evidence, that the reasons did not state that any alleged bill was issued to the assessee, that the AO had not stated that the assessee had inflated his expenses or had evaded tax, that he had made casual observations based on unfounded/ unverifiable sources. The assessee relied upon the cases of Kelvinator India (228 CTR 488); German Remedies Ltd. (287 ITR 494); GKN Driveshafts (I) Ltd. (259 ITR 19). Considering the objections raised by the assessee, the FAA forwarded the same to the AO for verification and report. The AO, vide letter dated 12.8.2013, submitted his remand report wherein he stated that the copy of the reason supplied to the assessee was unsigned, that the extract of the reasons recorded was given to the assessee, that the signed copy of the reasons recorded was being submitted, that the re-opening of the assessment was duly approved by the Addl CIT, that as per the satisfaction records the information in possession at the time of reopening was for Rs. 7.52 lacs (Rs. 97,217 + Rs. 6,55,098/-), that the JCIT vide his letter dt. 23.12.2009 held that reopening were not ab initio void, that the objections raised before the AO were submitted by the assessee before the JCIT. Finally, he upheld the re-opening.

4. Before us, Authorised Representative (AR) stated that the assessee was provided an unsigned and undated reasons, that the assessee had objected the re-opening, that the objections were not dealt by the AO, that FAA had not considered the factors relevant for deciding the appeal. He referred to page no. 29 of the paper book. He relied upon the cases of German Remedies Ltd. (287 ITR 494), GKN Driveshaft (India) Ltd. (259 ITR 19). Departmental Representative (DR) supported the order of the FAA.

5. We have heard the rival submissions and perused the material before us. We would like to discuss some of the cases wherein the issue of reopening has been dealt with. In the case of Hemant Traders (375 ITR 167) there was an allegation that there was a group of assessee engaged in whole sale trading of potato on commission basis, that a survey was conducted on the basis of the allegation that the group of assessee were resorting to hoarding of potatoes and making huge profits by fluctuating the day-to-day price of potatoes in the market, that notices under section 148 were issued to the assessee for the assessment years 2009-10 to 2011-12. The assessee filed a writ petition challenging the issuance of notice u/s. 148 of the Act. The Hon'ble Court decided the matter as under:

“The pre-condition for issuing notice under section 148 of the Income-tax Act, 1961, is satisfaction in terms of section 147 that an income chargeable to tax has escaped assessment in the relevant AY.....that neither the survey report nor any other material indicated that any income chargeable to tax for the relevant assessment years had escaped assessment. The Assessing Officer, therefore, had nothing before him which would enable him to record his belief that any such escapement had taken place. In the circumstances, the reasons recorded and which pertain to all the assessment years prior and subsequent to the survey could not satisfy the requirement in law. This was not how the power under section 147 should be exercised. It is to be exercised and in exceptional cases. It should not be exercised as a manner of routine and merely because some survey of this nature had taken place. At any point of time and when there was shortage of potatoes in the market, that such powers of survey were invoked. If nothing had been found therein which would indicate escapement of income and chargeable to tax then the basis for reopening ought not be such survey actions and the report. Something more was required in law for the Assessing Officer to exercise his powers. The Assessing

Officer could not be allowed to continue the proceedings and which may cause undue harassment and embarrassment to the assessee. When there was absolutely no material to institute the proceedings or issue the notices proposing reassessment of income then it is the duty of the court to interfere and quash the proceedings at the threshold.”

In the case of Vidya Sagar(305 ITR124),the Hon’ble P & H High Court had held that the AO is bound to furnish reasons within a reasonable time,that on receipt of reasons,the assessee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order.Similarly,the Hon’ble Calcutta High Court in the case of Debashish Moulik (370 ITR 660)has held that at the time of issuance of a notice under section 148 of the Act,the AO should have reason to believe that any income chargeable to tax had escaped assessment for any AY.,that the assessee is entitled to counter those reasons by filing a reply,that it has to be adjudicated upon by the AO by a reasoned order,before he proceeds to make the assessment. In the case of MGM Export(323ITR331)the Hon’ble Gujarat High Court,found that upon receipt of the reasons recorded,the assessee preferred objections, both on jurisdiction and on the merits,that the assessee passed the assessment order without disposing the objections.The Hon’ble Court held that the AO was required to decide the preliminary objections and pass a speaking order disposing of the objections raised by the petitioner,that until such a speaking order is passed,the AO could not undertake re-assessment.Accordingly,the reassessment order was quashed and set aside

We would also like to refer the case of Haryana Acrylic Manufacturing Co.(308ITR38).In that case the Hon’ble Delhi High Court was dealing with the petition filed by the assesseechallenging the re-opening the assessment.Deciding the appeal the Court held as under:

....on the facts the reasons which were supplied to the petitioner were different from the reasons purportedly recorded in the form attached to the counter-affidavit. The petitioner took the specific plea that in the absence of any allegation that the petitioner had failed to disclose fully and truly all material facts necessary for assessment, the Assessing Officer had no jurisdiction to issue the notice under section 148 and initiate action under section 147 after four years from the end of the relevant assessment year. If the authorities had regarded the reasons noted in the said form to be the actual reasons, it would have been very easy for the Assessing Officer to have countered this objection by simply referring to the reasons noted in the form and saying that the allegation of failure to disclose was very much there. Even assuming that the actual reasons were those as noted in the said form, it was obvious that the reasons were never communicated to the petitioner and it was only for the first time in the course of the writ petition that those reasons had surfaced. Therefore, the notice under section 148 as well as all the proceedings subsequent thereto were liable to be quashed.(emphasis supplied).

The Hon’ble P & H High Court in the case of Varsha Goyal (319ITR92)has dealt with the matter where the assessee had filed a return of income which was processed u/s.143(1)(a)of the Act,after search operations were conducted in the residential premises of the assessee.Later on,a notice under section 148 of the Act was issued for re-assessment.The FAA confirmed the order for reopening the assessment,whereas he Tribunal held that the reopening of assessment by the AO u/s.147 of the Act was unjustified. On appeal,the Court held as follow:

“...that in spite of the fact that all the documents and material were available with the Assessing Officer when the return of income was filed and processed, no specific items of jewellery and particulars of shares which in his opinion had escaped assessment were mentioned. Merely recording the reason that examination of the seized records revealed that the assessee had made huge investments in the purchase of shares and other movable and immovable assets without mentioning in his note what items of jewellery and which share certificates were not recorded in the books of account was not sufficient for reopening the assessment. Therefore, the Tribunal was right in holding

that the Assessing Officer was not justified in reopening the assessment under section 147 / 148 of the Income-tax Act, 1961.”

We find that in the matter of Paramjit Kaur(311 ITR 38),the assessee had filed her original return declaring nil income.The AO initiated reassessment proceedings on the basis of information received from the survey circle that the she had got prepared a demand draft for a sum of Rs.83,040/-which was not accounted in the books of account of the assessee.On appeal by the assessee,the FAA upheld the validity of the notice u/s.148 of the Act,but set aside the assessment on the addition made by the AO and remitted the matter to him to frame a fresh assessment.On second appeal,the Tribunal held that since the AO failed to incorporate the material and its satisfaction for reopening the assessment,the same was invalid.On a reference,the Hon’ble P&H High Court held as under:

“... the Assessing Officer had not examined the information received from the survey circle before recording his own satisfaction of escaped income and initiating reassessment proceedings. The Assessing Officer had thus acted only on the basis of suspicion and it could not be said that it was based on belief that the income chargeable to tax had escaped income. The Assessing Officer had to act on the basis of “reasons to believe” and not on “reasons to suspect”. The Tribunal rightly concluded that the Assessing Officer had failed to incorporate the material and his satisfaction for reopening the assessment and therefore the issuance of notice under section 148 of the Act for reassessment proceedings was not valid.”

We find that in the reasons supplied to the assessee,at the time of issuing unsigned reasons the AO had not mentioned anything as what was the basis of arriving at the conclusion of escapement of income,that also in the reasons recorded he had not mentioned that the escapement of income was due to failure of the assessee to disclose truly and fully the material facts,that the assessee had raised objection to re-open the matter,that the AO did not deal with the objections and passed the order,that the FAA called for report from the AO,that the reasons mentioned in the report and submitted to the FAA were different from the reasons supplied to the assessee,that the AO himself admitted that the assessee was supplied only gist and same was unsigned,that the AO had not annexed the statements of Guptas while submitting the report to the FAA-though he had mentioned that same are annexed,that the FAA ignored the basic issue raised by the assessee with regard to the jurisdiction.Considering the various factors-like supplying unsigned reasons,existence of two different sets of reasons for issuing 148 notice,not adjudicating objections raised by the assessee,reopening of assessment after a very long period, relying on the statements of third party that were not confronted to the assessee etc.-we are of the opinion,that the notice u/s.148 had been issued without the jurisdictional foundation u/s.147 being available to the AO and that the notice and the subsequent proceedings were without jurisdiction.Holding the assessment invalid,we reverse the order of the FAA. Effective ground of appeal is decided in favour of the assessee.

As a result,appeal filed by the assessee stands allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on 14th October,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 14 अक्टूबर,2015 को की गई।

Sd/-

Sd/-

(शक्तिजीत डे / **Shaktijit Dey**)

(राजेन्द्र / **RAJENDRA**)

न्यायिक सदस्य / **JUDICIAL MEMBER**

लेखा सदस्य / **ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 14.10.2015

व.नि.स.Jv.Sr.PS.