

**IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH, AGRA**

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
MS. ANNAPURNA MEHROTRA, ACCOUNTANT MEMBER

ITA No.134/Ag/2014
Assessment Year:2003-2004

Sh. Anugrah Varshney,
9/3, Katra Street,
Aligarh,

Vs.

The Income Tax Officer,
Ward (4),
Aligarh

PAN: AEMPV4261E

(Appellant)

(Respondent)

Appellant By	: Sh. Dipendra Mohan Ms. Prathna Jalan
Respondent By	: Sh. Waseem Arshad
Date of hearing	: 09/02/2016
Date of Pronouncement	: 05/04/2016

ORDER

PER ANNAPURNA MEHROTRA A.M.

This appeal has been filed by the assessee against the order of Ld. CIT(A) Muzaffar Nagar dt. 20/01/2014. The assessee has raised the following grounds of appeal:

1. That the Hon'ble C.I.T (Appeals) has erred in law and on facts in sustaining the reassessment order passed u/s 147/143(3) of the I.T. Act, 1961 even when no addition has been made on the issue which was recorded in reasons to believe for initiating re-assessment proceedings by the Ld. A.O.
2. That the Hon'ble C.I.T(Appeals) has erred in law and on facts in not appreciating that no notice u/s 148 was ever served on the appellant.
3. That the re-assessment order passed u/s 148 of the I.T. Act, 1961 is void-ab-initio.
4. That the Hon'ble C.I.T (Appeals) has erred in law and on facts in sustaining the addition u/s 68 on account of gift received amounting to Rs. 5,00,000/- even when the identity, creditworthiness and genuineness of the transaction was proved by the appellant.
5. That the Hon'ble C.I. T (Appeals) has erred in law and on facts in sustaining the addition u/s 68 amounting to Rs. 15,47,000/- on account of unexplained deposits in the overdraft account.

6. *That the order passed by the authorities below is bad in law and against the facts of the case.*

7. *That any other relief or reliefs deemed fit in the facts and circumstances of the case may be granted.*

2. The facts relating to the case are that the assessee is an individual who filed his return of income for the impugned AY declaring income of Rs.1,33,810/-. Subsequently proceedings under section 147 were initiated and assessment was framed on the assessee making addition of Rs. 5.00 Lacs on account of gift received by treating the same as not genuine and Rs. 15,47,000/- on account of unexplained cash credits.

3. The assessee filed an appeal before the Ld. CIT(A) who dismissed the appeal of the assessee vide his order dt. 20/01/2014.

4. Aggrieved by the same the assessee filed the present appeal before us.

5. Ground No. 1 raised by the assessee is against the validity of the assessment order passed under section 147. The plea raised by the assessee in this ground is that since no addition has been made on the income which the AO had reason to believe had escaped assessment, the reassessment order passed was bad in law.

6. Before us Ld. AR pleaded that the reasons for reopening the assessment was that interest expenses had been claimed against LIC commission and income from other sources, which the AO believed was not allowable since there was no nexus between the expenses and the income earned and further that the assessee had wrongly claimed indexation on sale of UTIMEP-92.

Ld. AR drew our attention to the order sheet entries of the case and more specifically to the order sheet entry dt. 30/05/2005 which recorded the reason for the reopening of the case. The same is reproduced here under :

The assessee has shown income from LIC Commission and income from other sources viz interest income, dividend income. As against such income of Rs.

1,24,678/-, the assessee has claimed deduction of interest paid on LIC Loan and O.D. A/c. There is no nexus of earning income with payment of such interest. Hence claim of deduction on account of payment of interest is not allowable. This practice is being done in this group of cases. Similar disallowances have been made in scrutiny assessment of Shri. Anurag Varshney, A.Y. 2001-02 and 2002-03 and Shri. Anupam Varshney A.Y. 2002-03, both brothers of the assessee. The assessee has also claimed indexation of sale of UTIMEP-92, which is an asset covered U/s 80CCB. No indexation is allowable u/s 45(6) on sale of such asset.

With the above facts, I have reason to believe that income of the assessee chargeable to tax has escaped assessment. Such income shall be assessed under section 147. With these reasons, notice u/s 148 is being hereby issued.

Ld. AR thereafter drew our attention to the assessment order passed under section 147 and stated that the addition made was on account of unexplained gift amounting to Rs. 5,00,000/- and unexplained cash credit of Rs. 15,47,000. Thus the Ld. AR stated that no addition on account of the issue raised in the reasons recorded were made. Ld. AR thereafter drew our attention to the provisions of section 147 and pointed out that it specifically stated that addition could be made on account of the issue on which the reopening was resorted and also on other income which has been found to have escaped assessment, during the course of reassessment proceedings. Ld. AR thereafter stated that the interpretation of the same is that it is only if addition on account of income which has been found to have escaped assessment as per the reasons recorded is made that addition on account of any other income can be made. Ld. AR drew our attention to the judgment of the Hon'ble Bombay High Court in the case of Jet Airways India vs CIT 331 ITR 236, the Hon'ble Delhi High Court decision in case of Ranbaxy Laboratories Ltd. Vs. CIT 336 ITR 136 and to the decision of the Agra Bench of the Tribunal in the case of ITO Vs. Smt. Urmila Singhal in ITA No. 286/Ag/2011 dt. 20/07/2012, in support of his contention.

7. Ld. DR on the other hand argued that the decision in the case of Jet Airways India vs CIT and Ranbaxy Laboratories Ltd. Vs. CIT relied upon by the AR pertained to those Assessment years, when Explanation 3 was not on the statute. Ld. DR further stated that merely because no addition was made on the issue raised in the reason recorded for reopening the validity of the proceedings

under section 147 could not be challenged or held to be bad in law. Ld. DR stated that the reason recorded need not be conclusive on the issue of escapement of income and may result in addition not being ultimately made but the same does not render the reason invalid and hence the proceeding under section 147 also.

8. We have heard the rival submissions carefully and perused the material placed on record before us.

9. At the outset it may be stated that this ground was not raised before the Ld. CIT(A) and is for the first time being raised before us. The Ld. AR pleaded that since it is a legal ground and in view of the decision of the Hon'ble Supreme Court in the case of NTPC Ltd. Vs. CIT (1998) 229 ITR 383, the same ought to be entertained.

10. We have considered the submission of the assessee and being a legal ground arising from the facts found by the authorities below, we admit the same to be adjudicated upon.

Coming to the fact of the case, undisputedly reopening was resorted to, as per the reasons recorded and reproduced above, for disallowance of interest expenses claimed against LIC Commission and income from other sources. Further the claim of indexation on sale of UTI Mutual Fund was also not allowable as per the reasons recorded.

The assessment we find, has been framed making addition on account of unexplained cash credit and unexplained gifts and no addition on account of the income which were found to have escaped assessment as per the reasons recorded, has been made.

We hold that in this case the AO had no jurisdiction to subject to tax unexplained gifts and cash credits and frame the impugned assessment. The

Hon'ble Bombay High Court in the case of Jet Airways(I)Ltd.(supra) had interpreted the provision of Section 147 on first principle and held that as per section 147, upon formulation of a reason to believe u/s 147, and following the issuance of a notice u/s 148, the AO has the power to assess or reassess the income which he has reason to believe has escaped assessment and any other income chargeable to tax. The word 'and' used in the section is important and results in an interpretation that it is only along with income which the AO has formed reason to believe has escaped assessments that any other income can be brought to tax. Independently any other income cannot be assessed to tax. It is only when in proceedings u/s 147, the AO, assesses or reassesses any income chargeable to tax which has escaped assessment for any assessment year, with respect to which he had reason to believe to be so, then only in addition, he can also put to tax any other income, which has escaped assessment and comes to his notice subsequently in the course of proceedings u/s 147. The Hon'ble court held at para 14-15 of its order as follows:-

“ 14. The rival submissions which have been urged on behalf of the Revenue and the assessee can be dealt with both as a matter of first principle, interpreting the section as it stands and on the basis of precedent on the subject. Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has power to assess or reassess the income which he has reason to believe had escaped assessment, and also any other income chargeable to tax. The words “and also” cannot be ignored. The interpretation which the court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words “assess or reassess such income and also any other income chargeable to tax which has escaped assessment”, the words “and also” cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word “or”. The Legislature did not rest content by merely using the word “and”. The words “and” as well as “also” have been used together and in conjunction.

15. The Shorter Oxford Dictionary defines the expression “also” to mean further, in addition besides, too. The word has been treated as being relative and conjunctive. Evidently therefore, what Parliament intends by use of the words “and also” is that the Assessing officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess: (i) such income; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words “such income” refer to the income chargeable to tax which has escaped assessment, and in respect of which the Assessing Officer has formed a reason to believe that it has escaped

assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceeding as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from April 1, 1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceeding. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter. "

The Hon'ble High Court further held that Explanation 3 to section 147 only lifts the embargo placed by judicial decisions on the making of an assessment or reassessment on grounds other than those recorded in the reasons for reopening.

The Hon'ble High Court while dealing with Explanation 3 to section 147, held at para 22 of its order as follows:-

"22. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148. Setting out the reasons, for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance (No.2) Act of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."

Thus the Hon'ble High Court held that the word "and also" used in section 147 was used in a cumulative and conjunctive sense, meaning thereby that it is only if additions are made on account of incomes found to have escaped assessment as per reason recorded, that any other income which has escaped assessment and comes to the notice subsequently during assessment proceedings can be brought to tax. The Hon'ble High court held at para 23 of its order as follows:-

"23. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter for first principle, based on the language used in section 147 and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147 as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion to Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh [2008] 306 ITR 343. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147 as they stood after the amendment of April 1, 1989, continue to hold the field."

The Hon'ble Delhi High Court following the above decision of the Bombay High Court has also upheld this view in Ranbaxy Laboratories Ltd. Vs. CIT(2011) 336 ITR 136.

The argument of the Ld. DR that the ratio propounded in Jet Airways (Supra) and Ranbaxy Laboratories (Supra) does not apply since those cases related to assessment years when Explanation 3 to section 147 was not on the statute, we find has not merit since in the above mentioned decisions the Court has interpreted the provision of section 147 on first principle to hold that only if addition are made on account of income which the AO had reason to believe had escaped assessment that any other addition can be made. It is not Explanation 3 which had been interpreted in favour of the assessee in these

cases. In fact we find that Explanation 3 empowers AO's to make assessment on any matter which comes to their notice during assessment proceedings. But the same alongwith section 147 has been interpreted as stated above. Therefore, the presence or absence of Explanation 3 to section 147 does not nullify the interpretation given by the courts in the above stated judgments. Further the argument of the Ld. DR that the reason is not rendered invalid merely because no addition has been made on account of incomes which the AO had reason to believe had escaped assessment, is also of no consequence, since as is evident from the order cited above, the courts have not held the reasons to be invalid in such cases and quashed the proceedings. The validity of the reasons had not been in issue in these cases, but the courts have interpreted the provisions of section 147 on first principles and held that the AO had no power to assess any other income to tax unless addition is made of income which he had reason to believe had escaped assessment.

11. Respectfully following the above judgments, we hold that in the absence of any addition having been made on incomes which the AO had reason to believe had escaped assessment, no addition of any other income could have been made and that the AO had exceeded his jurisdiction in passing the impugned order u/s 147. The same is liable to be quashed. We quash accordingly.

Further since the order has been quashed on legal issue, we are not adjudicating on the merits of the case.

12. In the result appeal of the assessee is allowed.

Order pronounced in the Open Court.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated :05/04/2016

AG

Copy to: The Appellant, The Respondent, The CIT, The CIT(A), The DR

Sd/-
(ANNAPURNA MEHROTRA)
ACCOUNTANT MEMBER