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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 6036/2022 & CM APPLs.18121-18122/2022**

SUNIL JAIN ..... Petitioner

Through: Dr.Pankaj Garg, Advocate with Mr.Yaksh Garg and Mr.Vishal Chaudhary, Advocates.

versus

INCOME TAX DEPARTMENT THROUGH NATIONAL FACELESS ASSESSMENT CENTRE, DELHI AND ANR ..... Respondents

Through: Mr.Ruchir Bhatia, Advocate.

\+ **W.P.(C) 6034/2022 & CM APPLs.18117-18118/2022**

SUNIL JAIN ..... Petitioner

Through: Dr.Pankaj Garg, Advocate with Mr.Yaksh Garg and Mr.Vishal Chaudhary, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 67 1 DELHI ..... Respondent

Through: Mr.Ruchir Bhatia, Advocate.

% Reserved On : 24th May, 2022
Date of Decision: 22nd July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J:

1. Present writ petitions have been filed challenging the reassessment notice dated 28th March, 2021 issued under Section 148 of the Income Tax Act, 1961 [for short 'the Act'] and the assessment order dated 27th March, 2022 passed under Section 147 read with Section 144B of the Act for the Assessment Year 2017-18.

FACTS:

2. The relevant facts of the present cases are that the Petitioner filed his return of income for the Assessment Year 2017-2018 on 22nd July, 2017 showing a returned income of Rs.28,42,430/-. The case of the Petitioner was selected under limited scrutiny (computer aided scrutiny selection) by the respondent department and accordingly a notice dated 24th September, 2018 was issued under Section 143(2) of the Act by the Assessing Officer against the Petitioner raising queries regarding cash deposit made by the Petitioner during the demonetisation period.

3. An assessment order dated 26th December, 2019 was passed by the Assessing Officer under Section 143(3) of the Act for the concerned assessment year 2017-18 at an income of Rs.57,17,430/- making an addition of Rs. 28,75,000/- to the returned income of the Petitioner under Section 69A of the Act on the ground that the Petitioner was not able to satisfactorily explain the source of the fund for the cash deposit of

Rs.34,54,500/- made by him in his bank account held with the Corporation Bank during the demonetisation period.

4. Being aggrieved by the assessment order dated 26th December, 2019 the Petitioner preferred an Appeal which is currently pending adjudication before the CIT (A) at NFAC.

5. During the pendency of the appeal for the year under consideration before the NFAC, the respondent issued the impugned reassessment notice dated 28th March, 2021 under Section 148 of the Act seeking to reassess the income of the petitioner for the Assessment year 2017-2018 *qua* cash deposit of Rs.12,50,000/- made in the Punjab National bank. The Petitioner filed his return of income in response to the reassessment notice on 21st April, 2021 at the returned income of Rs.28,42,430/-. Subsequently, several notices under Section 143(2) of the Act and Section 142(1) of the Act were issued to the petitioner for seeking information regarding the source of another cash deposit of Rs.12,50,000/-. It is the Petitioner case that he had furnished a detailed reply dated 10th January, 2022 to the notices explaining that the cash deposits of Rs.12,50,000/- made in the joint accounts held by the Petitioner with his wife in Punjab National Bank and Bank of India were made out of the cash that was inherited by his wife upon death of her father.

6. The petitioner was subsequently issued show cause notices dated 15th March, 2022 and 25th March, 2022 and the impugned reassessment order dated 27th March, 2022 was passed under Section 147 read with Section 144B of the Act assessing the income of the Petitioner at Rs.69,67,430/- by making an addition of Rs.12,50,000/- on account of unexplained income.

7. Aggrieved by the impugned notice dated 28th March, 2021 issued under Section 148 of the Act, the Petitioner filed W.P.(C) 6034/2022

challenging the notice before this Court. However, the petitioner failed to get the said writ petition listed before this Court immediately. The petitioner subsequently filed W.P.(C) 6036/2022 impugning the assessment order dated 27th March, 2022 passed under Section 147 of the Act. Both the petitions were listed for the first time on 13th April, 2022.

SUBMISSIONS OF THE PETITIONER

8. Learned counsel for the petitioner stated that the original assessment was validly framed vide order dated 26th December, 2019 after true and full disclosure by the Petitioner and therefore the issuance of the impugned notice by the Respondents during the pendency of the appeal before the CIT(A) was impermissible as it amounted to a mere change of opinion.

9. He further submitted that the impugned notice was null and void as it was an encroachment on the exclusive jurisdiction of the Commissioner (Appeals), in terms of Section 251 of the Act and was therefore liable to be quashed. He stated that the assessment order dated 26th December, 2019 was framed with additions made on the basis of cash deposit in bank accounts and if certain amounts were left to be added then in such a situation after passing of the assessment order, the power to do so lay with the CIT(A) exclusively. Learned counsel for the petitioner stated that the impugned notice had been issued by the Respondents without appreciating that the income of Rs.57,17,430/- considered by the Respondent in the show cause notice dated 15th March, 2022 was already under dispute being subject matter of an appeal before the CIT (A) at NFAC. He stated that the assessment had been reopened on the basis of review and re-appreciation of the same material which were subject to verification in the course of original

assessment proceedings under Section 143(3) which was not permissible in law. He also pointed out that transactions of cash deposits were disclosed by the Petitioner to the authorities in his replies submitted to the assessing officer during the proceedings under scrutiny assessment as well as his income tax returns. He emphasised that no additions on the basis of the same were made during scrutiny proceedings by the authorities.

10. In support of his submission, learned counsel for the petitioner relied on the decision of this Court in the case of ***Gurinder Mohan Singh Nindrajog v. Commission of Income Tax, (2012) 348 ITR 170 (Delhi)*** wherein it has been held as under:-

> *"While framing an assessment under section 143(3) of the Act, any of the following situation may occur:*
> ……..
> *(c) he makes no addition in respect of some of the items, though in the course of hearing before him holds a discussion of such items of income;*
> ……..
> *(e) further another situation may arise, where an item or items of income or expenditure, incurred and claimed is not at all considered and an assessment is framed, as a result thereof, a prejudice is caused to the Revenue, or*
> ……..
> *In category falling in (c) and (e), the Commissioner of Income-tax has been empowered to take an appropriate action under section 263 of the Act… There can be situations where an item has been dealt with in the body of the order of assessment and the assessee being aggrieved from the addition or disallowances so made, had preferred an appeal before the Commissioner of Income-tax (Appeals) against the said addition and disallowance, the said disallowance and addition being the subject-matter of appeal before the Commissioner of Income-tax (Appeals) in such cases, the Commissioner of Income-tax (Appeals) has been empowered*

under section 251(1)(a) of the Act to enhance such an income where the Assessing Officer had proceeded to make addition or disallowance by dealing with the same in the body of order of assessment by under assessing the same as the same was the subject-matter of the appeal as per the grounds of the appeal raised before him. In other words, the Commissioner of Income-tax (Appeals) has a power of enhancement in respect of such item or items of income which has been dealt with in the body of the order of the assessment, and arose for his consideration as per the grounds of appeal raised before him, being the subject-matter of appeal."

11. Learned counsel for the petitioner also relied on the decision of the Bombay High Court in the case of ***Ardor Technopark Ltd. v. Dr. Zakir Hussein, Deputy Commissioner of Income Tax (2004) 271 ITR 50 (Bom)*** wherein it was held that the Assessing Officer cannot reopen the assessment on account of income escaping assessment when the commissioner had reopened assessment under Section 263 of the Act. The relevant extract of the decision in ***Ardor Technopark Ltd.*** (supra) is reproduced herein below:

"26. The operation of both these sections is some what similar in the sense if the Commissioner under s. 263 of the Act finds that the assessment order is prejudicial to the Interest of the revenue he can reopen the issue, at the same time, the Assessing Officer, under ss. 147 and 148 of the Act can reopen assessment if he has a reason to believe that Income chargeable to tax has escaped assessment. Therefore, virtually both the provisions are for reopening the assessment, one at the level of the Commissioner and, other at the level of the Assessing Officer. Now the question is: Whether Assessing Officer can reopen the assessment on account of income escaping assessment, especially, when the Commissioner has reopened the assessment by setting aside the original one and on remand the proceedings are pending

before the Assessing Officer for assessment afresh.

35. At this stage, let us consider the strength of the submissions advanced by Mr. Desai, appearing for the revenue that proceedings under s. 147 are distinct and separate from proceedings under s. 263. Merely because proceedings under s. 263 are initiated by issuing a notice in that behalf, the Assessing Officer is not debarred from initiating proceedings under s. 147 as held by the Madhya Pradesh High Court in the case of C.I.T. v. GulamRasool (supra).

36. The law laid down in the said judgment is not at all applicable to the facts of the present case. It is no doubt true that operation of both these sections is somewhat similar in the sense if the Commissioner under s. 263 of the Act finds that the assessment order is prejudicial to the interest of the revenue he can reopen the issue, at the same time, the Assessing Officer, under ss. 147 and 148 of the Act can reopen assessment on account of income having escaped assessment. Sections 147 and 148 can be pressed into service to reopen assessment so long as the proceedings under section 263 are not finally terminated. In other words, during the pendency of such proceedings, the powers under ss. 147 and 148 to reopen assessment can always be exercised. But once the assessment in so far as it is prejudicial to the interest of the revenue is set aside by the Commissioner of Income Tax and the Assessing Officer is directed to make fresh assessment regarding grant of depreciation after examining all the aspects, the question of income escaping assessment would arise only when the reassessment order is passed by the Assessing Officer. In the present case, admittedly, reassessment pursuant to the order of the Commissioner of Income Tax has not yet been finalised. Therefore, during the pendency of the reassessment proceedings it is not open to the Assessing Officer to presume that the income has escaped assessment. The decision of the Madhya Pradesh High Court in the case of

GulamRasool (supra) does not support the contention of the revenue. In that case, notice under s. 148 was already issued by the Assessing Officer prior to the issuance of notice under s. 263 of the Act. In that case, the Tribunal had held that the Commissioner of Income Tax was not justified in invoking jurisdiction under s. 263 when the Income Tax Officer had already issued notice of reopening the assessment under s. 147/148 of the Act. In that context it was held by the Madhya Pradesh High Court that both ss. 147/148 and s. 263 are for reopening the assessment one at the level of Income Tax Officer and other at the level of Commissioner of Income Tax. It was further held that both the authorities can invoke their powers after the assessment order, but both are not exclusive of each other. In the present case, the facts are altogether different. Firstly, in the present case, the notice under s. 148 has been issued after the order under s. 263 was passed. Secondly, the reassessment pursuant to the order under s. 263 has not been finalised at the time of issuance of notice under s. 148 of the Act. Therefore, the decision of the Madhya Pradesh High Court in the case of GulamRasool (supra) does not support the case of the revenue. "

12. He further stated that the impugned assessment order had been passed in violation of principles of natural justice as the Respondents did not consider the detailed replies filed by the Petitioner during the proceedings.

COURT'S REASONING

13. Having heard learned counsel for the parties, this Court is of the view that in the present cases, the reassessment notice under Section 148 deals with the alleged cash deposit of Rs.12,50,000/- made by the assessee in the Punjab and National Bank and Bank of India. The cash deposit of Rs.12,50,000/- was not adjudicated upon in the Section 143(3) proceedings. In fact, the Assessment Order dated 26th December, 2019 deals with another

cash deposit of Rs.34,54,500/- made by the assessee in the Corporation Bank and accordingly an amount of Rs.28,75,000/- was added to his returned income after considering his reply. Consequently, the assessing officer did not consider the cash deposits of Rs.12,50,000/- in Punjab National Bank and Bank of India during scrutiny assessment proceedings. A Full Bench of this Court in the case of ***CIT vs. Usha International Ltd. [2012] 348 ITR 485 (Delhi)*** while answering the question "what is meant by the term change of opinion?" has held as under:

> *"Thus if a subject matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and therefore, it is the case of —change of opinion. When at the first instance, in the original assessment proceedings, no opinion is formed, principle of —change of opinion cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion."*

14. This Court in the ***Gurinder Mohan Singh Nindrajog (supra)*** while holding that the Commissioner (Appeals) has the power to enhance such an assessment which was dealt by the Assessing Officer during scrutiny assessment proceedings and was subject matter of appeal, also held that the appropriate action can be taken in a situation under Section 147 of the Act where the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry. The relevant portion of the said judgment is reproduced hereinbelow:-

"While framing an assessment under section 143(3) of the Act, any of the following situation may occur:

……..

(d) yet, there can be another situation where the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry;

……..…

(f) where an item of income which ought to have been taxed remained untaxed, and there is an escapement of income, as a result of the assessee's failure to disclose fully and truly all material facts necessary for computation of income.

……..

In the category of cases falling under clauses (d) and (f), appropriate action under section 147 of the Act can be taken to tax the income which has escaped assessment or had remained to be taxed."

15. Further, the reliance placed by the learned counsel for the Petitioner on the decision in ***Ardor Technopark Ltd*** (supra) is misplaced, as in the aforementioned case both the proceedings under Sections 263 and 148 of the Act were initiated on the same issue, namely, claim of 25% depreciation on tin packaging. However, in the present cases, the proceeding under Section 148 of the Act had been initiated on the basis of cash-deposits of Rs.12,50,000/- made in Punjab National Bank and Bank of India whereas in the assessment under Section 143(3) of the Act, the addition of Rs.28,75,000/- was made on the basis of cash deposit of Rs.34,54,500/- in Corporation Bank. Consequently, the transaction under consideration before the Appellate Authority under Section 251 of the Act is a different transaction than the one under consideration in the reassessment proceedings.

16. The aforementioned case is also distinguishable because the present cases do not pertain to a proceedings under Section 263 of the Act but rather a proceedings under Section 251 of the Act pending before the CIT(A).

17. This Court is also of the opinion that just because the Appellate Authority has the power to modify an assessment order with regard to a source of income that has not been considered during assessment proceedings does not mean that the jurisdiction of the authorities under Section 148 of the act would be excluded when the issue involved in the proceeding under Section 148 of the Act is not the same as that being considered under Section 251 of the Act. The power under Section 148 of the Act is an independent power and would not stand excluded on exercise of powers of appellate jurisdiction by the CIT(A) under Section 251 of the Act and that too in an Appeal filed by the Assessee *qua* cash deposit of Rs.34,54,500/- in his Corporation Bank account.

18. Moreover, the impugned reassessment notice has been issued within four years from the relevant assessment year and the only requirement to be satisfied is reason to believe.

19. *Prima facie*, the contention of the Petitioner that the details of the cash deposits had been disclosed by him in the income tax returns is not correct, as the assessee in his return of income in row 14 "***Detail of all the bank accounts held in India at any time during the previous year (excluding dormant accounts)***" has only mentioned detail of cash deposited in the Corporation Bank account and has not mentioned cash deposits in any other bank accounts.

20. The Supreme Court in ***Commissioner of Income Tax and Ors. Vs. Chhabil Das Agarwal, (2014) 1 SCC 603*** has held that as the Income Tax

Act, 1961 provides complete machinery for assessment/reassessment of tax, assessee is not permitted to abandon that machinery and invoke jurisdiction of High Court under Article 226. This Court is further of the view that the present cases do not fall under the exceptional grounds on which a writ petition is maintainable at the interim stage in tax matters.

21. Consequently, considering that the assessment order under Section 147 of the Act has already been passed in the present cases, the contentions and submissions advanced by the petitioner must be agitated before the appropriate authority.

22. Accordingly, the present writ petitions are dismissed with liberty to the Petitioner to raise all its contentions and submissions before the Appellate Authority.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

JULY 22, 2022
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