आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, AHMEDABAD

(Conducted Through Virtual Court)

BEFORE MS.ANNAPURNA GUPTA, ACCOUNTANT MEMEBER
AND
T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.1915/Ahd/2013
Assessment Year : 2008-09

Varij Builders P.Ltd. 2, Sejal House Nr. Maninagar Railway Station Maninagar Ahmedabad 380 008. PAN : AACCV5656Q	Vs	ITO, Ward-8(4) Ahmedabad.

ITA No.2008/Ahd/2013
Assessment Year : 2008-09

ITO, Ward-8(4) Ahmedabad.	Vs	Varij Builders P.Ltd. 2, Sejal House Nr. Maninagar Railway Station Maninagar Ahmedabad 380 008

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Ms.Nupur Shah, AR and Shri Dhiren Shah, AR
Revenue by :	Shri Rameshkumar L. Sadhu, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 09/02/2022**
घोषणा की तारीख /**Date of Pronouncement: 16/02/2022**

आदेश/O R D E R

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER:

These are cross appeals one filed by the assessee in ITA No.1915/Ahd/2013 and another filed by the Revenue in ITA No.2008/Ahd/2013 against order dated 9.5.2013 passed by the Ld.Commissioner of Income-tax (Appeals)-XIV, Ahmedabad [in short referred as "Ld.CIT(A)"] relating to the assessment year 2008-09.

2. Original grounds of appeal raised by the assessee are as follows:

> *"1. The Ld. CIT(A) has erred in law and on facts in confirming the addition of unexplained cash credit u/s.68 of the Act of Rs.92,00,000/- on account of share application money received in cash.*
>
> *2. The Ld.CIT(A) as well as the Ld.AO failed to properly considered the submissions made by the appellant company."*

Thereafter, the assessee filed additional grounds, which are as follows:

> *"1. Thus, the ld. A.O. has erred in law and on facts in making the addition of unexplained cash credit u/s. 68 of the Act of Rs. 2,67,00,000/- on account of share application money received in cash which did not form part of the reasons recorded. Reliance is placed on the following judicial pronouncement :-*
>
> > *i) Commissioner of Income-tax- II v. Mohmed Juned Dadani [2013] 30 taxmann.com 1 (Gujarat)*
>
> *2. The Ld. AO has erred in law by issuing notice u/s. 143(2) of the Act on 08.02 2010 which was prior to return of income filed by the appellant company in response to notice issued u/s. 148 of the Act on 22.04.2010 as the notice u/s. 143(2) of the Act is to be issued after filing of return of income.*
>
> *3. The Appellant craves leave to add, alter, amend any ground of cross objection.*
>
> *4. Hence, in the interest of natural justice, the appellant company requests to admit the above additional legal ground of appeal which is legal in nature, in view of the settled decision of the Hon'ble Supreme Court of India in the case of NTPC 229 ITR 383 (SC)."*

3. Brief facts of the case are that the assessee is private limited company engaged in the business of construction and real estate. The assessee has filed its return of income on 30.9.2008 declaring NIL income, and the same was processed under section 143(1)(a) of

the Income Tax Act, 1961 (hereinafter referred as "the Act") on 12.3.2010 and accepted returned income. However a notice under section 148 of the Act was issued on 3.12.2009. The assessee filed its objection for reopening of the assessment, which has been disposed by the AO vide order sheet entry dated 26.2.2010. Thereafter, notices under section 143(2)/142(1) of the Act were issued from time to time and assessment was completed mainly on share application of Rs.92.00 lakhs received in cash from various persons and receipt of unsecured loan amounting to Rs.1.75 crores wherein the assessee has failed to prove their iden ity, genuineness and credit-worthiness of the parties and hence added as the unexplained income under section 68 of the Act. The AO also initiated penalty under sections 271(1)(c) and 271E of the Act.

4. Aggrieved against the assessment order, the assessee preferred an appeal before the C mmissioner of Income-tax (Appeals)-14, Ahmedabad [herein after referred as "Ld.CIT(A)"] wherein by a detailed order confirmed addition of Rs.92 lakhs on account of share application received in cash and deleted addition of Rs.1.75 crores received in cheque payment, and thereby partly allowed assessee's appeal.

5. As against the appellate order both the assessee and the Revenue are in appeals before the Tribunal.

6. The ld.counsel for the assessee by taking us through additional grounds raised before the Tribunal for the first time, and also took us through page no.63 of the paper book wherein reasons for reopening of the assessment were recorded is reproduced as under:

"REASON FOR REOPENING THE ASSESSMENT U/S.147 OF THE I.T.ACT

In this case, return of income was filed for AY 2008-09 vide E-filing on 21.3.2009 acknowledgement No.60018330210309 declaring total income at Nil and copy of Hit filed has also been filed on 27.3.2009.

2. In the case of M/s.Vyom Developers / Vishal Developers, survey proceedings carried on 10.2.2009 and they have offered undisclosed income of Rs.15 crores. It from the impounded material that the group is having association with the asssessee company i.e. Varij Builders Pvt. Ltd.

3. It is seen that as per balance-sheet total balance with the bank is shown at Rs.10,12,354/- and cash in hand is shown at Rs.15,89,455/-. It is found from the statement of affairs that no accrued income is offered to tax against bank deposits.

4. In view of the above, I have reason to believe that income chargeable to tax has escaped assessment.

5. Notice u/s.148 of the IT Act is issued.

Sd/-
(P. ANILKUMAR)
Income Tax Officer,
Ward-8(4), Ahmedabad

Dt.3.12.2009"

7. The ld.AR contended that the AO failed to record proper reasons as to what income chargeable tax has escaped from assessment, and what extent of income has escaped from the assessment. In the absence of the same, the reasons are not validly recorded, and therefore, the entire –reassessment proceedings is liable to quashed. In this connection, the assessee has relied upon jurisdictional High Court judgment in the case of CIT Vs.Mohmed Juned Dadani, (2013) 30 taxamnn.com and five other judgments to support his case.

8. In reply, the Ld.DR replied that the AO has recorded proper reasons before initiating re-assessment proceedings, and there is clear cut escapement of income on account of share application

money paid in cash of Rs.92 lakhs which was also confirmed by the ld.CIT(A). Therefore, reopening of the assessment within four years is good in law and does not require any interference, however, the Ld.DR has not objected the additional grounds raised by the assessee.

9. We have perused records placed before us including paper book filed by the assessee. As can be seen from the reasons recorded by the AO, he has referred that as per the balance sheet, total balance with the bank is to the tune of Rs 10,12,354/- and cash in hand is shown at Rs.15,89,455/-, but no accrued income is offered to tax against the bank deposits. By only observing this, he has reasons to believe that the income has escaped the assessment.

10. In this connection, it is pertinent to note relevant provisions of sections 147, 148 & 149 of the Act as under:

> *"Section 147. If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).*
>
> *.... ....*
>
> *[Issue of notice where income has escaped assessment.*
>
> *Section 148. Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:*

Provided

…. *…..* *……*

Section 149. (1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:

Provided …. …. ….

11. As per section 147, the AO has reasons to believe that any income liable to tax has escaped assessment for any assessment year, then he can issue notice under section 148 after satisfying section 149 which prescribed time limit for issuance of notice and quantum of escaped income. But in the present case, the AO has made an observation that no accrued income is offered to tax against bank deposits by the assessee. Further, the AO has not quantified what extent of income has escaped from taxation relevant to the assessment year 2008-09, whereas addition made by the AO are on account of share application money received and unsecured loan availed by the assessee, which are not formed in the reasons recorded by the AO. Hence, the reasons recorded does not satisfy provisions of section 148 which says AO has reasons to believe that there is escapement of income.

12. Now, so far as the issue of recording reasons for reopening of assessment is settled by various judgments, and no more *res integra*. Jurisdictional High Court in the case of CIT Vs. Mohmed Juned Dadani (supra) upheld the decision of ITAT, Ahmedabad Benches by observing as under:

"4. We thus find that in the instance case no assessment was made in respect of income for which the Learned Assessing officer recorded reasons to belief to issue notice under section 148(2) of the Act. Moreover, we find that no discussion also was made in the impugned order about that income. Thus we find that the income in respect of which reassessment notice was issued by the Learned Assessing officer was not found by him as income escaped from assessment. Therefore, in view of the above settled position of law the order under appeal is without jurisdiction and bad in law. We therefore, cancel the re-assessment order under appeal and allow this ground of appeal of the assessee."

12.1 Similarly, Hon'ble Madras High Court in the case of Martech Peripherals P.Ltd Vs. DCIT (supra) held as under:

"19. In the instant case, the reasons supplied by respondent No. 2 vide communication dated 25.07.2012 showed that the notice under Section 148 of the Act to reopen the assessment was issued on account of reduction in the investments made in mutual funds (from Rs. 2,52,00,000/-, for the year ending 31.03.2007 to Rs. 2,26,21,274/-, for the year ending 31.03.2008), which had not been shown/offered to tax in the form of gain or loss, on account of the sale of investments made in mutual funds. This information, perhaps, was available on record, as the assessee, in his objections dated 30.08.2012, adverted to the fact that the reduction in investment was brought about consequent to redemption being made at par. Respondent No. 2 having, perhaps realised the futility of going down this path and, having, during the course of reassessment proceedings, discovered this aspect of the matter, chose to tax the forfeited share application money, on the ground that, it was a receipt, which was taxable in the hands of the petitioner/assessee under the provisions of Section 28(iv) of the Act.

20. The petitioner/assessee, however, challenges this action of the respondents/Revenue, on the ground that it was not permissible for the respondents/Revenue to tax the forfeited share application money, by taking recourse to provisions of Section 147 read with Section 148 of the Act, unless it assesses to tax that income with reference to which the Assessing Officer had formed reason to believe (within the meaning of Section 147), that it had escaped assessment.

21. To my mind, a careful reading of Section 147 of the Act would show that it empowers an Assessing Officer to reopen the assessment, if, he has reason to believe, that any income chargeable to tax has escaped assessment for the relevant year, "and also bring to tax", any other income, which may attract assessment, though, it is brought to his notice, subsequently, albeit, in the course of the reassessment proceedings.

21.1 To put it plainly, the purported income discovered subsequently during the course of reassessment proceedings, can be brought to tax, only, if the escaped income, which caused, in the first instance, the issuance of notice under Section 148 of the Act, is assessed to tax.

22. Explanation 3, to my mind, supports this approach, which emerges upon a plain reading of the said provision, along with the main part of Section 147 of the Act. The emphasis in this behalf is on the expression "and also bring to tax" appearing in the main part of Section 147 in relation to the right of the Revenue to assess taxable income discovered during reassessment proceedings. In my view, Explanation its 3, clearly, expounds that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment and such other issue, that comes to his notice subsequently, albeit, in the course of proceedings held under Section 147 of the Act. In other words, if, notice for reopening of the assessment was issued on one aspect, and in the course of reassessment proceedings another aspect was discovered, the reassessment order would be valid, only if, the aspect, which led to the reopening of assessment, continues to form part of the reassessed income.

12.2 Delhi High Court in the case of Ranbaxy Laboratories Vs. CIT (supra) has held as under:

"19. In the present case, as is noted above, the Assessing Officer was satisfied with the justifications given by the assessee regarding the items viz., club fees, gifts and presents and provision for leave encashment, but, however, during the assessment proceedings, he found the deduction under sections 80HH and 80-I as claimed by the assessee to be not admissible. He consequently while not making additions on those items of club fees, gifts and presents, etc., proceeded to make deductions under sections 80HH and 80-I and accordingly reduced the claim on these accounts.

20. *The very basis of initiation of proceedings for which reasons to believe were recorded were income escaping assessment in respect of items of club fees, gifts and presents, etc., but the same having not been done, the Assessing Officer proceeded to reduce the claim of deduction under sections 80HH and 80-I which as per our discussion was not permissible. Had the Assessing Officer proceeded not to make disallowance in respect of the items of club fees, gifts and presents, etc., then in view of our discussion as above, he would have been justified as per Explanation 3 to reduce the claim of deduction under sections 80HH and 80-I as well.*

21. *In view of our above discussions, the Tribunal was right in holding that the Assessing Officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings are initiated but he was not so justified when the reasons for the initiation of those proceedings ceased to survive. Consequently, we answer the first part of question in affirmative in favour of revenue and the second part of the question against the revenue."*

12.3 Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd. held as under:

"16. *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 Act (No. 2) 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.

18. *In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall, accordingly, stand answered against the revenue and in favour of the assessee. The appeal is accordingly, dismissed. There shall be no order as to costs."*

13. Going through the ratio of the judgments rendered by various High Courts and including that a jurisdictional High Court judgment, respectfully following the same, we hold that reopening of assessment is bad in law and therefore we quash reassessment order made by the AO. Consequently, grounds of appeal of the assessee are allowed on the preliminary issue and we are not adjudicating other grounds.

14. The Department in ITA No.2008/Ahd/2013 has raised the following grounds:

1a). The Ld. Commissioner of income-Tax (Appeals)-XJV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.1,75,00,000/- out of total addition of Rs.2,67,00,000/- made on account of unexplained cash credit u/s. 68 of the Act.

1b). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts by ignoring the fact

that Assessee was unable to produce these depositors even during the remand proceedings & nor provide any fresh address from where actual inquiry could be made. Hence, neither the identity of depositors nor their creditworthiness was proved by Assessee either during the course of assessment / remand or appellate proceedings.

2). On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.

3). It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored."

15. Regarding the Revenue's appeal, as we have already quashed re-assessment order for the Asst Year 2008-09 as invalid while deciding appeal of the assessee (supra), consequentially, appeal of the Revenue becomes *infructuous*, and the same is accordingly dismissed.

16. In the result, assessee's appeal is allowed; whereas the appeal of the Revenue is dismissed.

Order pronounced in the Court on 16th February, 2022 at Ahmedabad.

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad, dated 16/02/2022

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