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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 919/JP/2017
निर्धारण वर्ष/Assessment Years : 2008-09

Smt. Prabha Saxena, D/o Sh. Jamuna Prasad, Purana Shahar, Near Futa Darwaja, Dholpur.	बनाम Vs.	The ITO, Ward-4, Bharatpur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ARCPS 3771 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rajeev Saxena (Adv.)
राजस्व की ओर से/ Revenue by : Shri J.C.Kulhari (JCIT)

सुनवाई की तारीख Date of Hearing : 18/06/2018
उदघोषणा की तारीख/Date of Pronouncement : 06/08/2018

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of ld. CIT(A), Udaipur dated 25.10.2017 for assessment year 2008-09 wherein the assessee has taken the following grounds of appeal as under:-

"1. That the learned Commissioner of Income Tax (Appeals), has grossly erred both in law and on facts in upholding the initiation of the reassessment proceedings under section 147 of the Act, which proceedings have been initiated without satisfying the

statutory preconditions as envisaged under section 147 of the Act, and hence initiation of the reassessment proceedings is bad in law.

2. That the learned Commissioner of Income Tax (Appeals), has grossly erred both in law and on facts that initiation of reassessment proceedings was without jurisdiction.

3. That the learned Commissioner of Income Tax (Appeals), has grossly erred both in law and on facts in enhancing the income of the appellant to Rs. 3,50,000/- and bringing to tax the aforesaid sum u/s 25AA and 25B of the Act failing to appreciate that since computation of income under the head income from house property was not the issue before the learned AO as such, same being new source of income was beyond the subject matter of appeal and hence enhancement of income by the aforesaid sum is outside the scope of section 251 of the Act and as such, without jurisdiction.

4. That the learned Commissioner of Income Tax (Appeals), has grossly erred both in law and on facts in enhancing the income of the appellant without issuing a specific show cause notice to the appellant and hence enhancement made was without jurisdiction.

5. That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that sum of Rs. 5,00,000/- relates to mainly rent which could not be collected because the owners were residing outside Dhaulpur and this rent was neither unrealized rent nor arrear of rent.

6. That the learned Commissioner of Income Tax (Appeals) has failed to notice that that income from house property as aforesaid of each year was below the taxable limit hence not liable to be taxed in that year and hence no return of income was filed.

7. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in initiating the proceedings u/s 271(1)(c) of the Act."

2. Briefly the fact of the case are that the assessee along with her two brothers and two sisters have inherited a property situated at Dushhera Road, Sarai Gajra, Dholpur, Rajasthan, later known as Asha Hotel which is 150 years old ancestral property and the same was sold on 18.03.2008 through a registered sale deed registered with Sub-Registrar, Dholpur, Rajasthan for Rs. 40,00,000/- . The Assessing Officer thereafter issued notice U/s 148 on 27.03.2015 which reads as under:-

"As per information gathered by the department, the assessee and his Brothers and Sisters has sold property named Asha Hotel of Rs. 40,00,000/- during the year under consideration and the share of the assessee of Rs. 8,00,000/-. The assessee has not explained of above sale amount and the Assessee has not filed return of income
Therefore, I have reasons to believe that income chargeable to tax of Rs. 8,00,000/- (share of the assessee) has escaped assessment in view of the explanation 2(a) of the section 147 of the Income Tax Act, 1961."

3. In response, the assessee filed her return of income on 05.05.2015 disclosing income of Rs. 8,140/-. In the computation of income, the assessee has shown total sale consideration of the property at Rs. 65,00,000/- and her 1/5 share at Rs. 13,00,000/- and the proportionate share of cost of acquisition at Rs. 13,96,720/- taking 1981-82 as the base year and shown long term capital loss of Rs. 96,730/-. The Assessing Officer accepted the total sale

consideration at Rs. 65,00,000/- and her 1/5 share at Rs. 13,00,000/-, however, the cost of acquisition was recomputed on the basis of the value of another property which was sold in 1988 at Rs 10,02,000. Accordingly, the AO recomputed the long term capital gain at Rs. 2,98,000/- as against long term capital loss of Rs. 96,730/- computed by the assessee. On appeal, the ld. CIT(A) considered the sale consideration of the property as per sale deed at Rs. 40,00,000/- instead of Rs 65,00,000 and taking the cost of acquisition as computed by the AO at Rs. 10,02,000/- worked out the long term capital loss of Rs. 2,02,000/-. Further, the ld CIT(A) held the balance consideration of Rs. 25,00,000/- towards unrealized rent including use of furniture and fixtures, and the appropriate share of the assessee arising therefrom amounting to Rs. 5,00,000/- was brought to tax U/s 25AA r.w.s. 25B of the Act after allowing deduction of 30% under the head "income from his property".

4. Being aggrieved the assessee is now in appeal before us. It was submitted by the d. AR that the reasons recorded by the Assessing Officer that Rs. 8,00,000/- has escaped assessment is wholly misconceived as property sold was a capital asset as such, whole of the sale consideration cannot be adopted as income of the assessee and if at all, any income would be chargeable, it is only the capital gain after allowing deduction for cost of acquisition which at best can be held to have escaped assessment. It was submitted that if the government approved rate is applied for determining the cost of acquisition, there would be actual capital loss instead of capital gain and as such foundation for the assumption of jurisdiction is bad in law. It was

submitted that it is settled law U/s 147 of the Act that burden is on the Revenue to establish that income of the assessee has escaped assessment and unless such burden is discharged by the Revenue, onus does not shift to the assessee. It was submitted that in the instant case there is no material much less tangible material which could enable the AO to form a prima facie belief that income of the assessee had escaped assessment. It was submitted that merely because the appellant has sold a property does not lead to conclusion that income of the assessee has escaped assessment. It was submitted that sale of property by the appellant and non filing of the return by the appellant, can give reason to suspect however without any other material, same cannot be form the basis of reasons to believe. It was further contended that the approval for the initiation of the proceedings has also been granted mechanically by the ld. Additional Commissioner of Income Tax and in support reliance was placed on the decision of Pr. CIT vs. N.C. Cables Ltd 88 Taxmann.com 649 and Hon'ble Supreme Court in case of CIT vs. S. Goyanka Lime & Chemical Ltd. (2015) 64 Taxmann.com 313 It was further contended by the ld. AR that in order to comply with the notice issued U/s 148 of the Act, the assessee has duly filed her return of income, however, the Assessing officer has not provided reasons recorded for reopening assessment to the assessee even though the same were requested by the assessee. It was submitted that due to non-furnishing of reasons by the AO, the assessee could not file her objections to the reopening of the assessment proceeding. It was submitted that the same is against the law laid down by the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd. vs. ITO & Ors. 125 taxman 963.

5. The ld. D/R is heard who has vehemently argued the matter and relied on the order of the lower authorities.

6. We have heard the rival contentions and perused the material available on record. As per reasons recorded U/s 148 the Assessing Officer has noted that as per information gathered by the Department, the assessee and his brothers and sisters had sold property named Asha Hotel for Rs. 40,00,000/- during the year under consideration and the share of the assessee comes to Rs. 8,00,000/-. It is further recorded by the Assessing Officer that the assessee has not explained the said sale transaction and the assessee has not filed her return of income. Therefore, he has reasons to believe that income chargeable to tax amounting to Rs. 8,00,000/- has escaped assessment in terms of Explanation- 2(a) of Section 147 of the Act. In our view, the Assessing Officer is duly ceased of the information in the form of the sale deed registered with the Sub registrar, Dholpur, Rajasthan and the assessee's share in the sale deed is also determined to the extent of 1/5 share. There is, therefore a definitive and a live link between the information in possession of the Assessing Officer and formation of believe that the income in the form of capital gain on the sale of the property has escaped assessment. As far as the assessee's contention that whole of the amount of Rs. 8,00,000/- is not the income in the hands of the assessee and where the cost of acquisition is taking into consideration, it will result in long term capital loss as against long term capital gain. In our view, at the time of issuance of notice U/s 148 of the Act, what is required is formation of a prima facie belief that certain income has escaped assessment and as far as determination of the actual income

and allowing necessary allowances/deductions are concerned, the same is a matter of verification and quantification which is carried out during the course of reassessment proceedings. Merely because the quantum of income which is finally determined is lower than the amount specified in the reasons, the same cannot be the basis for challenging the initiation of reassessment proceedings U/s 147 of the Act.

7. Regarding another contention of the ld AR that the sanction has been granted by the Additional CIT mechanically before initiation proceedings U/s 147 of the Act, it is noted that the Additional CIT, after going through the material/documents brought to his notice by the AO, has stated in so many words that "yes, he is satisfied that it is fit case for issuance of notice U/s 148 of the Act". The said approval cannot be said to have been granted mechanically, rather in our view, the ld. Additional CIT has applied his mind before granting the approval to the Assessing Officer to initiate the proceedings U/s 147 of the Act. The decisions relied by the ld. AR are distinguishable on facts and does not support the case of the assessee.

8. Now coming to the other contention raised by the ld. AR that inspite of requesting the Assessing Officer to provide the reasons which has been recorded before reopening the assessment proceedings, the Assessing Officer has not provided the reasons to the assessee, the entire reassessment proceedings have been vitiated and bad in law and not in conformity with the law laid down by the Hon'ble Supreme Court and various High Courts from time to time.

9. In the instant case, the reassessment proceedings were initiated by issue of notice under Section 148 of the Act for the impunged assessment year. The assessee has filed her return of income and has requested for the reasons leading to the reopening of assessment under Section 148 of the Act. Before the CIT(A) also, the assessee has contended that reasons for reopening the assessment proceedings were not supplied to the assessee. The said contention of the assessee could not be controverted before us on behalf of the Revenue. In these facts of the case, the only issue which requires adjudication is that whether the non-communication of the reasons recorded for issuing notice under Section 148 of the Act, inspite of a specific request made by the assessee for providing reasons for issuing the notice under Section 148, renders the whole reassessment proceedings vitiated and void in law.

10. In case of GKN Driveshafts (India) Ltd. vs. ITO & Ors. (supra), the Hon'ble Supreme Court held as under:-

> *"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under s. 148 of the IT Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.*

6. *Insofar as the appeals filed against the order of assessment before the CIT(A), we direct the appellate authority to dispose of the same, expeditiously.*

With the above observations, the civil appeals are dismissed."

11. The above judgment of the Hon'ble Supreme Court has been followed by various Hon'ble High Courts while dealing with the issue of recording of reasons or supply of recorded reasons to the assessee.

12. In the matter of Gehna vs UOI reported in 267 ITR 782, the Hon'ble Rajasthan High Court held as under:

"Where a notice under section 148 of the Income-tax Act, 1961, is issued, the proper course of action for the noticee is to file the return and, if he so desires, to seek reasons for issuing the notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order."

13. In the case of Mithlesh Kumar Tripathi reported in 280 ITR 216, the Hon'ble Allahabad High Court has held as under:

"The statute confers jurisdiction and empowers the Assessing Officer under section 148(2) of the Act to reopen assessment proceedings. Section 148(2) expressly requires "recording of reasons" which has a definite purpose (and is not a mere formality on paper), i.e., to avoid arbitrariness or biased or mala fide action by the taxing authorities. Section 148(2) is silent regarding communication of reasons. The provision has to be interpreted in a manner which makes it meaningful and purposive. Keeping the object of the Legislature in

mind, the courts, including the Supreme Court, have interpreted the section by laying down that reasons have to be communicated, as otherwise the same will remain a mere formality with no ultimate purpose or object to be served. There is also nothing in section 148(2) of the Act indicating expressly or otherwise, that an assessee can ask for reasons to be communicated only after he has filed a "revised return" in response to the notice under that section. The recording of reasons and "obtaining approval" to give notice may be "administrative action" but the very act of giving notice backed by good and valid reasons under section 148(2) of the Act is a quasi-judicial function. If reasons are supplied along with the not ce under section 148(2), it will obviate unnecessary harassment to the assessee as well as to the Revenue by avoiding unnecessary litigation which will save courts also from being involved in unproductive litigations. Above all it will be in consonance with the principles of natural justice."

14. In the matter of Haryana Acrylic Manufacturing Co. reported in 308 ITR 38, the Hon'ble Delhi High Court has held as under:

"23. Secondly, let us assume for the sake of argument that the 'actual' reasons were those as noted in the said form. Then why did the Assessing Officer communicate a different set of reasons to the petitioner ? Did he think that the supplying of reasons and the inviting of objections were mere charades? Did he think that it was a mere pretence or a formality which had to be gotten over with? At this point, it would be well to remember that the Supreme Court in GKN Driveshafts (India) Ltd.'s case (supra) had specifically directed that when a notice under section 148 of the said Act is issued and the noticee files a return and seeks reasons for the issuance of the notice, the Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the reasons, the noticee is entitled to file objections to the issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. These are specific directions given by the Supreme Court in all cases where notices under section 148 of the said Act are issued. Surely, the Assessing Officer could not

have construed these specific directions to be a mere empty formalities or dead letters? There is a strong logic and purpose behind the directions issued by the Supreme Court and that is to prevent high-handedness on the part of Assessing Officers and to temper any action contemplated under section 147 of the said Act by reason and substance. In fact, even section 148 (2) stipulates that the Assessing Officer shall, before issuing any notice under the said section, record his reasons for doing so. The Supreme Court has only carried forward this mandatory requirement by directing that the reasons which are recorded be communicated to the assessee within a reasonable period of time so that at that stage itself the assessee may point out any objections that he may have with regard to the initiation of action under section 147 of the said Act. The requirement of recording the reasons, communicating the same to the assessee, enabling the assessee to file objections and the requirement of passing a speaking order are all designed to ensure that the Assessing Officer does not reopen assessments which have been finalized on his mere whim or fancy and that he does so only on the basis of lawful reasons. These steps are also designed to ensure complete transparency and adherence to the principles of natural justice Thus, a deviation from these directions would entail the nullifying of the proceedings. Assuming as we have done that the 'actual' reasons were those as noted in the said form, it is obvious that the reasons were never communicated to the petitioner and it is only for the first time in the course of the present writ petition that those 'reasons' have surfaced. Therefore, if he proceeded on the assumption that the 'actual' reasons were those as noted in the said form, the proper course of action as directed by the Supreme Court in GKN Driveshafts (India) Ltd.'s case (supra), has not been followed. It would mean that the reasons which were supplied to the petitioner were not the actual reasons and the objections which were taken by the petitioner were not to the actual reasons and the speaking order dated 2-3-2005 which was passed was also neither on the basis of the actual reasons nor the objections to the actual reasons. The entire process would be a sham and would amount to making a mockery of the law as settled by the Supreme Court. Therefore, for this reason also, the notice

under section 148 as well as all proceedings subsequent thereto as also the order dated 2-3-2005 are liable to be quashed."

15. In the matter of Trend Electronics reported in 379 ITR 456, the Hon'ble Bombay High Court has held as under:

"8. We find that the impugned order merely applies the decision of the Apex Court in GNK Driveshafts (India) Ltd. (supra). Further it also follows the decision of this Court in Videsh Sanchanr Nigam Ltd. (supra) in holding that an order passed in reassessment proceedings are bad in law in the absence of reasons recorded for issuing a reopening notice under Section 148 of the Act being furnished to the assessee when sought for. It is axiomatic that power to reopen a completed assessment under the Act is an exceptiona power and whenever revenue seeks to exercise such power, they must strictly comply with the prerequisite conditions viz. Reopening of reasons to indicate that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment which would warrant the reopening of an assessment. These recorded reasons as laid down by the Apex Court must be furnished to the assessee when sought for so as to enable the assessee to object to the same before the Assessing Officer. Thus in the absence of reasons being furnished, when sought for would make an order passed on reassessment bad in law. The recording of reasons (which has been done in this case) and furnishing of the same has to be strictly complied with as it is a jurisdictional issue. This requirement is very salutary as it not only ensures reopening notices are not lightly issued. Besides in case the same have been issued on some misunderstanding/misconception, the assessee is given an opportunity to point out that the reasons to believe as recorded in the reasons do not warrant reopening before the reassessment proceedings are commenced. The Assessing Officer disposes of these objections and if satisfied with the objections, then the impugned reopening notice under Section 148 of the Act is dropped/withdrawn otherwise it is proceeded with further. In issues such as this, i.e. where jurisdictional issue is involved the same must be strictly complied with by the authority

concerned and no question of knowledge being attributed on the basis of implication can arise. We also do not appreciate the stand of the revenue, that the respondent-assessee had asked for reasons recorded only once and therefore seeking to justify non-furnishing of reasons. We expect the state to act more responsibly."

16. In light of the above discussions, considering the entirety of facts and circumstances of the case, even though the proceedings have been validly initiated by issuance of notice U/s 148 of the Act, however, giving the fact that the reasons so recorded have not been supplied to the assessee even though the same were being specifically asked during course of reassessment proceeding, a fact which remain undisputed before us, the reassessment proceedings have become vitiated and liable to be set aside respectfully following the decisions of the Hon'ble Supreme Court and other High Courts referred supra.

17. The other grounds raised by the ld. AR regarding unrealised rent/ arrears of rent have thus become academic and have not been adjudicated upon.

In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 06/08/2018.

Sd/-	Sd/-
(विजय पाल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 06/08/2018.

*Santosh

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

1. अपीलार्थी/The Appellant- Smt. Prabha Saxena, Dholpur.
2. प्रत्यर्थी/ The Respondent- ITO, Ward- 4, Bharatpur.
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 No. 919/JP/2017}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar