

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

श्री विजय पाल राव, न्यायिक सदस्य के समक्ष

BEFORE: SHRI VIJAY PAL RAO, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 111/JP/2014  
निर्धारण वर्ष/Assessment Year : 2004-05

Ashok Kumar Agrawal Prop. M/s Gaurav enterprises, Khedla, Dausa. Jaipur.	बनाम Vs.	Income Tax Officer, Dausa
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No : ACMPA 2655 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri G.C.Jain  
राजस्व की ओर से / Revenue by : Shri Ajay Malik (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 27/12/2017  
उदघोषणा की तारीख / Date of Pronouncement : 08/03/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 02.09.2013 of CIT(A), Alwar for the assessment year 2004-05. The assessee has raised the revised grounds of appeals as under:-

*"1. That learned CIT(A) was not justified in facts & law, confirming the initiation of proceedings U/s 147, and completing the assessment which may be quashed also for the following reasons:-*

*(i) No reasons were recorded before the issue of notice u/s 148.*

*(ii) No speaking order upon the objections of the appellant was passed, and if so it was not served upon the appellant.*

*2. That, without prejudice to the above, the learned CIT(A) was not justified in confirming the addition of Rs. 210158 u/s 69C of the Act, without considering the evidence of the appellant, which may kindly be deleted.*

*3. That, the learned CIT(A), was not justified on facts and evidence placed before him, in confirming the addition U/s 68 on a/c of cash-credits at Rs. 300000/-, which may kindly be deleted,*

*4. That learned CIT(A) grossly erred in arbitrary confirming the following additions made by learned A.O. -*

*(i) Rs. 50000/- in Trading A/c, merely on estimates.*

*(ii) Rs. 22466/- out of Car exp. (including Dep.)*

*(iii) Rs. 3637/- on Estimate out of Telephone exp.*

*(iv) Rs. 10000/- on Estimate out of shop expenses,*

*(v) Rs. 7176/- out of Dalali Expenses on estimate.*

*5. That, the learned CIT(A), was not justified in facts and circumstances of the case, and not considering the evidences filed, in confirming an addition of Rs. 20000/- on account of alleged low exp. Of Household expenses.*

*6. That the learned CIT(A), was not justified in not properly by not considering the pleas of the appellant, confirming the Intt. Charges U/s 234B & 234c of the I.T. Act, 1961."*

2. Ground no. 1 is regarding validity of reopening. The assessee filed its return of income on 27.10.2004 declaring total income of Rs. 1,49,009/- which was processed u/s 143(1) of the Act. Thereafter, the AO noted that during the year under consideration the assessee entered into transactions

of purchases and payments thereof with M/s Ambica Traders, Ganesh Nagar (Bhusawar). It was found that M/s Ambica Traders was engaged in the business of bogus bill leding and had entered into such transactions with the assessee also during the period under consideration. Accordingly the AO proposed to reopen the assessment by issuing a notice u/s 148 of the Act on 31.03.2006. In response to the notice the assessee stated that the return of income filed on earlier may be treated as return filed in response to the notice u/s 148 of the Act. The AO supplied the reasons recorded for reopening of the assessment to the assessee. The assessee raised the objections against the notice u/s 148 of the Act which were disposed off by the AO vide separate order dated 29.11.2006 thereafter, reassessment was completed vide order dated 29.12.2006. The assessee challenged the action of the AO before the Id. CIT(A) but could not succeed.

3. Before the Tribunal the Id. AR of the assessee has submitted that reasons recorded by the AO are not sufficient to believe the income has escaped assessment within the meaning of section 148 of the Act. The Id. AR has thus submitted that even it can be taken as reason to belief that income has escaped assessment. The pre requisite condition of initiated proceedings u/s 148 have not been complied with and as such the action

of the AO is absolutely illegal, void and bad in law and consequently the assessment made by the AO is without jurisdiction being bad in law. In support of his contention he has relied upon the decision of Hon'ble Gujart High Court in case of **Varshaben Sanatbhai Patel vs. ITO 282 CTR 75**. The Id. AR has thus submitted that the AO was not able to bring on record any material from which it could be held that there has been escapement of income on account of failure on the part of the assessee in fully and truly disclosing the income in his return of income. He has relied upon the decision of Hon'ble Delhi High Court in case of **ITO vs. Om Exim P. Ltd. 26ITR 697**. Thus, the AO acted on such suspicion and assumption that the income chargeable to tax has escaped assessment.

4. On the other hand, d. Dr has relied upon the orders of the authorities below and submitted that on an identical issue the AO has already held for A.Y. 2003-04 that the purchases made from M/s Ambica Traders are bogus in nature.

5. I have considered the rival submissions as well as relevant material on record. The undisputed fact on record is that the assessment for the year 2003-04 was completed u/s 143(3) r.w.s. 147 of the Act on 31.03.2006 wherein the AO held that the purchases claimed from M/s Ambica Traders are bogus transaction being accommodation bills provided

by the said parties. The Notice u/s 148 of the Act for the year under consideration was issued on 31.03.2006 to assessee the income chargeable to tax which has escaped assessment to the extent of purchases claimed from M/s Ambica Traders. Therefore, the notice issued u/s 148 of the Act in light of the assessment framed for the assessment year 2003-04 after making the verification and investigation of facts by the AO cannot be said without any basis or material to form the belief because the AO during the scrutiny assessment for the A.Y. 2003-04 come to the conclusion that the purchases made from M/s Ambica Traders are bogus transaction and it would constitute a tangible material to form the belief that the income assessable to tax in respect of the transaction of purchase from the same parties has escaped assessment. It is also pertinent to note that the reopening is within 4 years from the end of the assessment year under consideration therefore, the proviso to section 147 is not attracted in this case. The decision of this Tribunal for the A.Y. 2003-04 would not help the case of the assessee as the said decision is based on a technical objections of validity of notice u/s 148 when the time to issue notice u/s 143(2) was still available with the AO. There is no such issue of sufficiency of reason either raised or considered by the Tribunal for the A.Y. 2003-04. The Hon'ble Bombay High Court in case of **Multiscreen Media P. Ltd. vs. Union of India 324TTJ 48 as well as**

**324 ITR 54** has considered this issue of validity of reopening separately based on the reopening assessments within and beyond 4 years. The Hon'ble High Court has held the reopening for the assessment years which was beyond 4 years from the end of the relevant assessment year was invalid whereas the reopening in case of assessment year where it was within the period of 4 years from the end of the assessment year was held to be valid. The relevant finding of the Hon'ble High Court in case of Multiscreen Media P. Ltd. vs. Union of India (supra) is in para 10 as under:-

*"10. In this background, the facts of the present case would have to be considered. During the course of proceedings for the assessment year 2004-05, a query was addressed by the Assessing Officer on September 7, 2006 inter alia requiring the assessee to make a disclosure of the nature of its business and details of the expenses towards market research. On November 15, 2006; the assessee was directed to furnish a justification and details of expenditure towards advertisements and sales promotion expenses. The assessee furnished the break-up of the expenses incurred towards advertisements and sales promotion and an order of assessment was passed under section 143(3). When the assessment proceedings for the assessment year 2005-06 were taken up, the Assessing Officer by his letter dated August 21, 2007 called up the assessee to furnish the ledger extracts of advertisements and sales promotion expenses/market research expenses. On November 26, 2008 a notice was issued to the assessee under section 142(1). The annexure to the notice drew the attention of the assessee to the fact that the assessee had debited advertisements and sales promotion expenses of Rs. 39.99 crores ; dealer's incentives of Rs. 50.89 crores and market research expenses of Rs. 2.73 crores. The Assessing*

*Officer noted that considering the fact that the programmes are aired by the channel, any "upside" in the revenues shall accrue to the channel company. The assessee was asked to explain why this amount should be allowed in the light of the absence of business expediency. The assessee was called upon to file a detailed explanation along with supporting documents. In the course of the assessment proceedings for the assessment year 2005-06, the assessee had filed a detailed explanation before the Assessing Officer on December 11, 2008. The assessee set out its case in regard to the allowability of its advertisements and sales promotion expenses and dealer's incentives expenses together with market research expenses under section 37(1). The case of the assessee was that the entire expenses were incurred wholly and exclusively for the purpose of its business and it was essential for the assessee to incur the expenses so as to increase its own income by way of sale of content, distribution income, advertisements as well as agency fees. The case of the assessee, therefore, was that the entire expenditure should be allowed as deduction under section 37(1) even though a third party, namely a channel company may have benefited from the same to a certain extent. The Assessing Officer while passing the order of assessment for the assessment year 2005-06 came to the conclusion after considering the submissions of the assessee that of the total expenses that were incurred, 18.75 per cent, would be allowed in the hands of the assessee while the balance shall be held as expenditure incurred on the behalf of the foreign principal of the assessee and was liable to be disallowed in the hands of the assessee. In the present case, we are not concerned with the merits of the claim of the assessee in regard to whether the expenditure that was incurred was wholly and exclusively for the purpose of the business of the assessee. What is material is that on the basis of a detailed inquiry which took place during the course of the assessment year 2005-06, the claim of the assessee of deduction of the entire expenses was not accepted and disallowance, was made to the extent of expenditure incurred over and above 18.75 per cent. The Assessing Officer did so on the basis of fresh material which came before him in view of the notice dated*

*November 26, 2008 in pursuance of which the assessee filed a detailed representation elucidating the relevant particulars of the business of the assessee and the reasons for the expenditure. Whether the Assessing Officer was justified in the decision which he took for the assessment year 2005-06 is again not a matter to be considered at this stage of the proceedings. The point is that on the basis of the additional material which was available on record, the Assessing Officer issued a notice for reopening the assessment for the assessment year 2004-05. In our considered view, the Assessing officer did have tangible material to reopen the assessment under section 147 of the Act and to form a reason to believe that income had escaped assessment. Clause (c)(iv) of Explanation 2 to section 147 creates a deeming fiction where though the assessment has been made, income chargeable to tax is underassessed. In such a case, law deems that income chargeable to tax has escaped assessment. For these reasons, we are of the view that recourse to the provisions of section 147 cannot be faulted."*

Thus, the Hon'ble High Court while passing a separate decision for the assessment year where the reopening of the assessment within 4 years held that reopening based on the assessment order of subsequent year is valid. Accordingly, in view of the facts and circumstances of the case that an identical issue was examined by the AO during the scrutiny assessment for the A.Y. 2003-04 in reassessment proceeding and consequently the initiation of proceeding for the reassessment for the year under consideration was initiated by the AO and in view of the decision of the Hon'ble Bombay High Court in case of Multiscreen Media P. Ltd. vs. Union of India (supra) I do not find any error or illegality in the reopening of the assessment under consideration. The decisions relied upon by the Id. AR

are not applicable in the facts of the present case because at the time of issuing notice u/s 148 of the Act the AO had already conducted any enquiry about the genuineness of the purchases made from M/s Ambica Traders.

6. Ground Nos. 2 and 3 are regarding the addition made by the AO u/s 69C of the Act. The Id. AR of the assessee has submitted that the additional evidence filed by the assessee in support of the claim of the assessee was not considered by the authorities below. Therefore, the AO may be directed to consider and verify the evidence filed by the assessee. On the other hand, Id. DR has relied upon the orders of the authorities below.

7. I have heard Id. AR as well as Id. DR and considered the relevant material on record. Since, the assessee is seeking the directions to the AO for proper examination of additional evidence therefore, in the facts and circumstances of the case and in the interest of justice the matter on merits is remanded to the record of the Assessing Officer for de novo adjudication after consideration of evidence filed by the assessee.

8. Ground nos. 4 and 5 are regarding addition/disallowance made on estimated basis. Since, the matter on merits has been set aside to the record of the Assessing Officer therefore, the entire issue has to be

reconsidered by the Assessing Officer after giving an opportunity of hearing to the assessee.

In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 08/03/2018.

Sd/-  
( विजय पाल राव )  
(VIJAY PAL RAO)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 08/03/2018

\*Santosh

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

1. अपीलार्थी / The Appellant- Ashok Kumar Agrawal, Dausa
2. प्रत्यथी / The Respondent- The ITO, Dausa.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 111/JP/14)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar