**IN THE INCOME TAX APPELLATE TRIBUNAL**
**AMRITSAR BENCH, AMRITSAR (SMC)**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

**I.T.A. No. 445/Asr/2016**
Assessment Year: 2004-05

| | | |
|---|---|---|
| Jaspal Singh s/o Swaran Singh,<br>45 GF, B-Block,<br>Ranjit Avenue Flats,<br>Amritsar<br>[PAN: ABQPS 7190G] | vs. | Income Tax Officer,<br>Ward-5(2), Amritsar |
| **(Appellant)** | | **(Respondent)** |

Appellant by : Sh. Padam Bahl (C.A.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 07.02.2019
Date of Pronouncement: 08.05.2019

**ORDER**

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the Order by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) dated 28.2.2016, dismissing the assessee's appeal contesting his assessment u/s. 144 r/w s. 147 of the Income Tax Act, 1961 ('the Act' hereinafter) vide order dated 21.12.2011 for the Assessment Year (AY) 2004-05.

2. The appeal is delayed by a period of 87 days, having been filed on 29.08.2016 as against the due date of 03.06.2016. The condonation application dated 11.10.2016 explains the delay as on account of the assessee having moved an application u/s. 154 before the ld. CIT(A) immediately on the receipt of the impugned order on 04.04.2016, praying that the addition could not be at Rs.14.20

lacs, as confirmed, as the same, representing the price of the shop allotted to the assessee during the year, was however paid for only at Rs.2.70 lacs during the year, having been acquired on instalment basis. As such, the addition, even if sustained in principle, as it was, could not exceed the amount actually paid (Rs.2.70 lacs), a grievance projected per Ground 10 of the assessee's appeal before the ld. CIT(A), who though had failed to consider the same while confirming the addition effected in assessment, i.e., for Rs. 14.20 lacs. The assessee, it was submitted by the ld. counsel, Sh. Bahl, was awaiting the rectification order in-as-much as, if favorably considered, as indeed it ought to have been, the assessee would not be required to raise this issue in further appeal, which would then be restricted, as is the case, only to the legal ground/s, also raised in first appeal. The ld. CIT(A) disposed the assessee's application vide order dated 30.5.2016, which was received in the first week of July 2016 and the instant appeal, assuming only the legal ground/s, filed on 29.8.2016 i.e., within 60 days of the receipt of the order u/s. 154 dated 30.5.2016. This, therefore, it was averred by him, constituted a reasonable ground for the delay The ld. Departmental Representative (DR), Sh. Charan Dass, would object. The assessee's grievance with the impugned order is in respect of the legal grounds challenging the assessment. As such, the same could be preferred independent of the rectification application which was in respect of the quantification of the addition made, being, rather, as contended, in view of a mistake apparent from record, i.e., the extent of the actual payment made by the assessee during the relevant year toward the purchase price of the shop acquired by him during the year. The assessee had, he continued, it was apparent, accepted the order of the first appellate authority, adopting the legal recourse available *qua* the mistake apparent from the record inflicting the same. The decision to appeal there-against on the legal ground is only an after-thought, which is sought to be camouflaged or impressed with a genuine reason by taking advantage of the

rectification provision which the assessee had invoked. That is, nothing prevented the assessee from filing the appeal assuming the legal ground/s, which he finally does, in time, in-as-much as the assessee's grievance *qua* the impugned order is confined thereto. Sh. Padam Bahl would, in rejoinder, object. The assessee had to, it was explained, necessarily await the order u/s. 154, as it could well be that the ld. CIT(A) did not accept the assessee's claim for the restriction of the impugned addition to Rs.2.70 lacs, i.e., the price of the shop (Rs. 14.20 lacs) acquired on an easy installment plan, to the extent actually paid for during the relevant previous year, in which case the assessee would have to assume a ground in its respect. Assuming such a Ground, it was explained, in an appeal filed in time would have precluded him, as also pre-empt his application u/s. 154, as the ld. CIT(A) would, as is the normal disposition of an adjudicating authority, dismiss the assessee's said application stating that the same is not maintainable in view of the assessee having filed an appeal before a higher forum. The *bona fides* of the assessee's conduct are apparent.

3. I have heard the parties, and given my careful consideration to the matter.

Vide the impugned order the ld. CIT(A) upheld the action of the Assessing Officer (AO) in bringing the assessee's investment in a shop acquired during the year to tax. The assessee's legal plea/s challenging the assessment was rejected. His objection on the quantum of the addition, in-as-much as only a part of the bargain price was paid during the year, raised per Ground 10 of his appeal before him, was not considered by the ld. CIT(A). It was this that formed the subject matter of the assessee's rectification application to him. There was, accordingly, no need, both in law and on facts, for the assessee to have awaited the outcome of the said application in filing an appeal challenging his order on the legal aspect/s. Why, even if the assessee wished to, at the same time, safeguard his interest on the

quantum of the addition, all that he was required to do was to raise a grievance ***qua*** the non-adjudication of Gd. 10 of the appeal by the first appellate authority. If, therefore, the assessee, as a matter of strategy thought it fit to seek rectification – a separate matter altogether entailing only a mistake/s apparent from record, it cannot be said that there was sufficient cause for the three month delay in filing the appeal. Why, for all we know, the said rectification application may have remained undisposed by the ld. CIT(A) for months, as in fact is usually the case. The assessee's explanation defeats his case in-as-much as it clarifies that the reason for the delayed filing of the appeal before the tribunal, rather than extraneous, beyond the assessee's control, was on account of a deliberate thought of action plan by him. That the filing of appeal was an after-thought, i e., after obtaining the section 154 order from the ld. CIT(A), as apprehended by the ld. DR, also cannot be ruled out.

Be that as it may, I am inclined to admit the appeal. The reason is two-fold. The explanation, whatever its' merits, is ***bona fide***. The ld. CIT(A) was appealed both on the legal ground/s since rejected, as also on merits (of the addition). While, the assessee lost on both, his challenge to the quantification, made separately, was lost sight of by the ld. CIT(A) while deciding the appeal on the merits of the addition. As a matter abundant caution, as it would appear, the assessee sought rectification prior to preferring an appeal, which otherwise could be raised during the hearing of the appeal, challenging the quantification of the addition sustained, or in appeal against the section 154 order, i.e., were the assessee to be unsuccessful in obtaining the rectification sought. The charge of ***mala fides*** by the Revenue is based on suspicion, perhaps considering that the assessee admits to have adopted, on own violation, a particular course of action. The second reason is that the said course – whatever be its' merits, is, without doubt, only as per the advice of the assessee's legal counsel. The same should not

therefore operate to the detriment of the assessee (refer: *Concord of India Insurance Co. Ltd. v. Nirmala Devi and Ors.* [1979] 118 ITR 507 (SC)). The appeal was accordingly admitted, and the hearing in the matter proceeded with.

4. On the merits, though the appeal raises three grounds, as under, the same, as per Sh. Bahl, project a single grievance:

'1. That the learned Commissioner of Income Tax (Appeal)-2 Amritsar has grossly erred in confirming the order passed by Income Tax officer Ward 5(2) Amritsar u/s. 148 of Income Tax Act.

2. That both learned Commissioner of Income Tax (Appeals)-2 Amritsar and the learned Assessing Officer have failed to appreciate that the reasons recorded by the Assessing Officer and the reopening of the case was illegal.

3. That both learned Commissioner of Income Tax Appeals)-2 Amritsar and the AO has grossly erred in not appreciating that the notice u/s. 133(6), 147/148 and notice u/s. 142(1), 143(2) and Assessment Order were never validly served on the assessee.'

4.1 Explaining his case, Sh. Bahl would submit that the AO is wrong in stating, in the reasons recorded, which finds statement in the assessment order, that the assessee did not file his return of income for the relevant year and, on that basis, inferring that the impugned investment by the assessee, which he incorrectly claims at Rs.14.20 lacs, is unexplained. The assessee had in fact, filed his return of income for the year on 26/5/2004. How could, then, he would argue, the AO have a reason to believe that the impugned sum had not been disclosed, i.e., without reference to the assessee's return, and had therefore escaped assessment?

A perusal of the assessment order, stating the reasons recorded u/s. 148(2), shows that the AO, prior to forming his belief as to the escapement of income, sought information from the assessee u/s. 133(6) of the Act, including about the filing of the return for the relevant year. The same being not responded to, he inferred the assessee to have not filed any return of income for the year. The said notice u/s. 133(6), Sh. Bahl would explain, was not received by the assessee, who

had since left the said address. Toward this, he would point to the assessee's return for the subsequent years, beginning AY 2005-06, filed with the same Range (Range-V, Amritsar). In fact, even the return for AY 2004-05, the relevant year, was filed stating the same address, different from that on which the notice u/s. 133(6) was sent by the AO. His attention was at this stage was drawn by the Bench to section 139A(5)(d) of the Act. Upon enquiry as to if the assessee had intimated the change in address, as obliged to u/s. 139A(5)(d), he replied in negative, though sought time to respond on the legal import of the said non-compliance. It was explained to him that the AO, in communicating with the assessee, would only be acting on the basis of the information on his system, i.e., the address specified under the assessee's Permanent Account Number (PAN), which stands to be changed only upon the said intimation, which also explains the placement of the requirement to communicate the change in address in section 139A, which section concerns PAN.

The assessee, on the next date of hearing, sought to raise a new ground, i.e., as to the non service of notice u/s. 148(1), in-as-much as the service of the said notice, claimed to be per affixture, was not done by observing the required procedure in its' respect. As regards the address stated in the PAN card, the same was not, it was submitted, the same address as stated in the assessment order as well the notices u/ss. 133(6), 142(1), 148, and at which address the same were accordingly sent, i.e., '16, Chand Avenue, Amritsar.' The address as per PAN is: '45B, GF, Ranjit Avenue, Amritsar'. The admission of the new ground was denied as the same would increase the scope of the controversy attending the appeal, with the relevant facts not on record. The assessee had in fact already raised the issue of the service of notices u/ss. 133(6) 142(1) and 148(1), and on that basis, challenged the legal validity of the assessment (Gd. 3).

4.2 As regards the aspect of the service, the same has already been examined by the ld. CIT(A), who found that the notices u/ss. 133(6) 148(1) and 142(1), addressed to '16 Chand Avenue, Amritsar', as validly served in-as-much as it was not shown, as claimed, to be the assessee's old address, dismissing the assessee's Gd. 5 before him. The address mentioned in the assessee's return for AY 2004-05, as well as the returns (and the assessment orders) for AYs 2005-06 to 2011-12, is 'Shop No. 1, Nehru Shopping Complex, Lawrence Road, Amritsar' (PB pgs. 11-16). It is further clear that the addresses at which these notices were sent by the AO is neither the address as per the return for the relevant year nor that as per PAN. There is, at the same time, nothing to show that the address at which these notices were sent is no longer the assessee's address, i.e , of he having left it, with nothing to that effect brought on record even at the appellate stage. For all one may know, the said address may be the assessee's address as per the return for AY 2003-04, the immediately preceding year. The claim of the assessee of having left that address long ago, as claimed, cannot therefore be accepted and, accordingly, the ld. CIT(A) cannot be said to have faulted in this regard. The question of the validity of the service apart, it is, however, clear that the assessee did not receive the notice u/s. 133(6) or the subsequent notice u/s. 148(1). The assessee has also not intimated the change in his address, i.e., from that as stated in his PAN, as required u/s. 139A(5)(d); he having shifted his residence to 82B, GF, Ranjit Avenue, Amritsar in December, 2008 (PB pgs. 20-21), so that a notice at the address stated in the PAN would also not have been received by the assessee. ***The question, however, is, would the assessee be better placed than he is now had he had received the said notices***? The allotment of the shop, which is by Amritsar Improvement Trust, Amritsar for Rs.14.20 lacs, under an installment scheme, of which Rs.2.70 lacs has been paid during the current year – which though is a matter of quantification and, besides, subsequent, in contradistinction to the

'reason to believe', is not denied, nor the fact that the same is not per the disclosed sources of income. The assessee's not filing the return at the address specified in PAN is perhaps also the reason for the AO to be able to not locate his return on his system, inferring him to have, accordingly, not filed his return for the relevant year. There was, therefore, from the standpoint of the AO, proper communication to the assessee, who had failed to reply. An adverse inference in law would therefore follow (*Union of India v. Rai Singh Deb Singh Bist & Anr*. [1973] 88 ITR 200 (SC)). How could, then, the reasons recorded be assailed, at which stage all that is relevant is a honest, *prima facie*, opinion, of the income chargeable to tax escaping assessment (refer, inter alia, *Asst. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd*. [2007] 291 ITR 500 (SC); *Raymond Woollen Mills Ltd. v. ITO* [1999] 236 ITR 34 (SC)). Neither the 'reason/s recorded' nor the issue of notice u/s. 148(1), conferring jurisdiction for reassessment, is thus invalid.

4.3 Further, the jurisdiction to assess stands thus validly assumed in the instant case upon issue of notice u/s. 148(1) on 24/3/2011 (*Upadhyaya (R.K.) v. Shanabhai P. Patel* [1987] 166 ITR 163 (SC)), referred to during hearing, as also explained earlier in *Jai Hanuman Trading Co. v. CIT* [1977] 110 ITR 36 (P&H)(FB); *CIT v. Sheo Kumari Debi* [1986] 157 ITR 13 (Patna)(FB), to cite two. Per the latter of the two, rendered following *Jai Hanuman Trading Co*. (supra), the departure from the 1922 Act was noted by the Hon'ble Patna High Court. Alluding to the principles of interpretation of statutes, it noted the clear distinction between the words 'issue' and 'service', distinctly used by the Legislature, as well as the anomaly that may arise if the word 'issue' was to be read as 'service'. Reading the two as synonymous, it explained, would be to render nugatory the evil sought to be remedied by section 149 of the Act. The use of separate and distinct words in the statute, it observed, was with a view to remedy the evil perpetrated by the long

delayed and studied avoidance of the service of the notices by the assessees whose income had escaped assessment. Here one cannot help but refer to the similar sentiment expressed by the Hon'ble jurisdictional High Court in ***Jasbir Singh*** (infra) and ***V.R.A. Cotton Mills (P.) Ltd. v. Union of India*** [2013] 359 ITR 495 (P&H). Both the Hon'ble jurisdictional and the Patna High Court dissented from the decision in ***Shanabhai P. Patel v. Upadhyaya*** [1974] 96 ITR 141 (Guj), which was subsequently reversed by the Apex Court. Service under the Act (referred to as a new Act), it held, is not a condition precedent to confer jurisdiction to the Income-Tax Officer (ITO), though is one for making the order of assessment. This would also meet the assessee's reliance on ***CIT v. Ramendra Nath Ghosh*** [1971] 82 ITR 888 (SC).

4.4 It was at this stage enquired with the assessee's counsel, Sh. Bahl, as to the prejudice, if any, caused to the assessee on account of the non-service of the aforesaid notices. The reason is simple. The function of a notice is to put the noticee to notice that the proceedings in his case have been initiated, affording him an opportunity to comply with the said notice as well as to present his case in the matter. Lack of notice as explained in ***Estate of Late Rangalal Jajodia v. CIT*** [1971] 79 ITR 505 (SC), noted with approval in ***CIT v. Jai Prakash Singh*** [1996] 219 ITR 737 (SC), to which reference was made by the Bench during hearing, rendered after a review of the judicial precedents, including ***Maharaja of Patiala vs. CIT*** (1943) 11 ITR 202 (Bom), also quoting therefrom, would not annul the proceedings but render the same procedurally infirm, i.e., a curable defect, so that the proceedings would have to be restored to the stage at which the irregularity had occurred, even as explained by the Apex Court per the decisions by its' larger benches, as in ***Guduthur Bros. v. ITO*** [1960] 40 ITR 298 (SC) and ***Supdt., Central Excise v. Pratap Rai*** [1978] 114 ITR 231 (SC). Where the notice remained

undisposed, it was explained in ***Guduthur Bros.*** (supra), it did not cease to be operative. The proceedings, lawfully initiated, shall travel to the point where the illegality supervened. The ITO had the jurisdiction to continue the proceedings from that stage. Further, as explained in the latter case, whenever an order is struck down as invalid being in violation of the principles of natural justice there is no final decision of the cause and fresh proceedings are left open. All that is done is that the order assailed by virtue of its inherent defect is vacated but the proceedings are not terminated. No prejudice could be explained as caused to the assessee by Sh. Bahl. It was specifically clarified with him as to if the proceedings be restored back to the AO for extending an opportunity of hearing to the assessee? This is as even assuming (without admitting – the same being even otherwise outside the scope of the appeal) the affixture as not proper, so that there had been no proper service of notice u/s. 148(1), it would only imply that the proceedings had to be restored back to the file of the AO to cause service thereof and proceed from that stage onwards. There is, it was explained, no time limit under the Act for the service of notice after its issue in time, with, further, the time limit for framing the assessment being reckoned from the date of its service (153(2); also see ***Prakash Electric Company v. ITO*** [2008] 118 TTJ 539 (Bang)). As such, the logical consequence of non-service, would be to cause it's service, the whole purport of which is to grant opportunity to the assessee to state his case. ***Sh. Bahl would answer in the negative.*** This is understandable as the assessee has already availed sufficient opportunity to explain his case, with, in fact, the addition restricted to the amount admittedly paid during the current year (Rs.2.70 lacs), which aspect of assessment, i.e., addition on quantum as sustained, has not even been agitated in appeal. Restoration, entail as it does time and effort, is not an empty formality, and must achieve some substantive purpose.

Reference in this context may also be made to the decision in ***CIT v. Jasbir Singh*** [2014] 103 DTR 427 (P&H), referred to by the ld. Sr. DR during hearing. In the facts of that case, the AO could not get the current residential address of the assessee and, accordingly, the notice was served through affixture at the Dharmshala of the village, which had, on account of the acquisition of the village land by PUDA, been converted into a residential colony. The assessment was, accordingly, framed u/s. 144 in view of the non representation by the assessee. The matter was in appeal set aside to the AO for framing the assessment afresh after hearing the assessee. And whereupon; the assessee being admittedly in receipt of compensation (on compulsory acquisition of the land in the said village), was assessed by way of long term capital gains. The Tribunal quashed the proceedings in further appeal on the basis that the notices u/s. 148 and section 143(2) had not been served on the assessee or his agent. The Hon'ble High Court, in further appeal by the Revenue, reversed the order by the tribunal. It opined that, true, there had been no proper service of notices. That would not however mean that the whole proceedings would get quashed and the assessee escape his liability to the capital gains tax. That is, merely because of some error in the service of notice, the statutory liability of the assessee to pay tax would not get over. Service, a procedural matter, would not operate to cause or enable the assessee to escape his statutory liability to tax, which had indubitably accrued against him on the receipt of the compensation. The matter was accordingly restored back to the file of the AO to start the proceedings afresh after seeking appearance of the assessee either in person or through a power of attorney. ***That is, to take up the proceedings from the stage of issuance of a notice u/s. 148(1).*** The said decision, it shall be noted, is in sync with the law in the matter per the decisions by the Apex Court cited supra.

4.5 Coming back to the issue of service of notice u/s. 148(1), a question of fact, the same assumes relevance as, in its absence, the matter would necessarily have to travel back to the file of the AO to enable him to provide opportunity to the assessee to join the proceedings and state his case, and frame the assessment accordingly per a speaking order. In this regard, the Revenue, on its' part, has also not shown that the address at which the said notice was sent was the assessee's current address at the relevant time, the date of its issue, i.e., as per its' record. The same is clearly not either the assessee's business or residential address, nor as that stated in the PAN. The service of notice u/s. 148(1) cannot, accordingly, be regarded as proper. Even as no prejudice survives or is even claimed, the notice u/s. 148(1) remains uncomplied with in consequence. Needless to add, the AO shall also take into account the income as already returned by the assessee.

4.6 In view of the foregoing, the matter setting aside the assessment, is restored back to the file of the AO for the purpose. That is, to proceed from the stage of the issue of notice u/s. 148(1), which is undisposed. The decisions by the Hon'ble Apex Court and the jurisdictional High Court, cited supra, completely answer the questions arising in this case, including that *qua* the validity of the reasons recorded. I decide accordingly.

5. In the result, the assessee's appeal is allowed for statistical purposes.

*Order pronounced in the open court on May 08, 2019*

Sd/-
(Sanjay Arora)
Accountant Member

Date: 08.05.2019
*/GP/Sr. Ps.*
Copy of the order forwarded to:
(1) The Appellant: Jaspal Singh s/o Swaran Singh,
45 GF, B-Block Ranjit Avenue Flats, Amritsar

(2) The Respondent: Income Tax Officer, Ward-5(2), Amritsar
(3) The CIT(Appeals)-2, Amritsar
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

True Copy
By Order