IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI N.K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 455/DEL/2022 [A.Y. 2012-13]

Shri Achal Kumar Malhotra V-17/17, DLF Phase -3 Gurgaon	Vs.	The Pr. C.I.T. Faridabad

PAN : AEVPM 1744 G

(Applicant) (Respondent)

Assessee By : Shri Sudesh Garg, ADv
Shri Sahil Agarwal, CA

Department By : Shri Ishtiyaque Ahmed, CIT- DR

Date of Hearing : 24.05.2022
Date of Pronouncement : 31.05.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the ld. PCIT, Faridabad dated 31.01.2022 pertaining to Assessment Year 2012-13.

2. The sum and substance of the grievance of the assessee is that the PCIT grossly erred on facts and in law in assuming jurisdiction u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] and further erred in holding the assessment order dated 27.11.2019 framed u/s 143(3) r.w.s 147 of the Act as erroneous and prejudicial to the interest of the Revenue.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record duly considered.

4. Briefly stated, the facts of the case are that the assessee is an IFS Officer and during the impugned year, he was posted as India's Ambassador to Armenia. The assessee filed return of income for the impugned year on 31.07.2012 declaring income of Rs. 7,83,900/-.

5. On the basis of information available, proceedings u/s 147 of the Act were initiated and accordingly, statutory notices were issued and served upon the assessee.

6. Reasons for reopening the assessment were recorded as under:

"1. The assessee' has filed. his return of income for the A.Y. 2012-13 declaring income from other sources at Rs 1.2! .000 .

2. As per the information received from ACIT. Circle-64-1, New. It has been found that tire assessee has invested Rs. 69,00,000/- in FDR during Financial Year 2013-12 relevant to A.Y. 2012-13.

3. The data available with ITD system was analyzed in this case and on analyzing the data, it has been transpired that the source of FDR in the bank account and interest there on remains unexplained as the same exceeds to returned income which has been declared by the assessee for the year under consideration.

4. Since, return of income filed by the assessee is not substantiating sources of FDR made bv the assessee and also the assessee did not file any explanation in response to the letter issued, it is clear that the FDR of Rs. 69,00,000/- made by the assessee with his bank account, is liable to be treated as unexplained income of the assessee from undisclosed sources. Furthermore, it is evident that there is a "Live Link" between the material available on record and foe escaped Income, as mentioned above.

5. In this case, no assessment was made for A.Y. 2012-13 and the only requirement to initiate proceeding u/s 147, is reason to believe which has been recorded in tins case. It is pertinent to mention

here that in this case foe assessee has not explained foe sources of FDR and interest there on in spite of proper opportunity provided to sources of foe same do not substantiate sources of FDR of Rs. 69,00,000/- during the year under consideration. No capital receipt is appearing in the return of income. In view of the above, foe provisions of clause (a) of Explanation 2 of section 147 are applicable to facts of the case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

6. In this case, no assessment was made for A.Y, 2012-13 and the only requirement initiate proceeding u/s 147, is reason to believe which has been recorded in this case. It is pertinent to mention here that in this case the assesses has not explained the sources of at Rs. 69,00,000/- No capital receipt is appearing in tine return of income, in view of die above, the provisions of clause (a) of Explanation 2 of section 147 are applicable to facts of the case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

7. Keeping in view the statutory provisions, legal principles, and factual matrix that die 1TR filed by the assessee is not substantiating the sources of FDR during the year under consideration at Rs. 69,00,000/- remains unexplained. Therefore, I have reason to believe that die income to the extent of Rs.

69,00,000/- chargeable to tax, has escaped assessment for the assessment year 2012-13 within the meaning of section 147 of die Income Tax Act, *1961*. In order to assess the above income or any other income which conies to .my notice subsequently in the course of assessment proceedings u/s 147, I proceed to initiate proceedings u/s 147 of the I.T. Act, 1961 in die case for A.Y. 2012-13.

8. In this case, more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 148 is being obtained separately from Principal Commissioner of Income Tax as per die provisions of section 151 of die Act.

(Pawan Yadav)
Income tax officer Ward 1(1),
Gurgaon

7. During the course of reassessment proceedings, requisite information was furnished by the assessee alongwith documentary evidences which were checked and placed on record and after verification, returned income was accepted by the Assessing Officer vide order dated 27.11.2019 framed u/s 143(3) r.w.s 147 of the Act.

8. Assuming jurisdiction conferred upon him, the PCIT issued show cause notice dated 24.12.22021 which reads as under:

> **Subject:** Notice for Hearing in respect of Revision proceedings u/s **263** of the **THE INCOME TAX ACT, 1961** - Assessment Year **2012-13**.
>
> In this regard, a hearing in the matter is fixed on **06/01/2022** at **03:00 PM**. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded oh the basis Of your written submissions/representations filed in this office, on or before the said due hate, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: **incometaxindiaefiling.gov.in**
>
> The assessment in this base was completed u/s 143(3)/147 of the Income Tax Act, 1961 vide order dated 27.11.2019 by the Assessing Officer at returned Income of Rs.7,83,900/-.
>
> 2. On perusal of the assessment records of the aforesaid assessee for the A.Y. 2012-13, following discrepancies are noticed:

"On perusal of assessment record, it has been observed that you have sold a flat vide sale deed dated[19.)2.2011on a consideration of Rs.67,00,000/- and earned capital **ga/n** to the tune 'df'Rs.4 **7,**66,502/- after claiming indexed cost of acquisition of flat of **0** •? Rs.19,33,498/-. Thereafter, in order to avail deduction u/s 54 of the IT Act, 1961, you **X** have purchased a house property as on 14.12.2011 ^n a consideration of Rs.98,00,000/- in the name of his wife Smt. Anita Malhotra."

3. Shri Pawan Yadav, Income Tax Officer,Ward-1(1), Gurugram has neither examined this legal issue nor made any enquiry. He did not examine or raise the legal issue regarding the relief claimed u/s 54 of Income Tax Act, 1961 during advance the benefit of the said section to an assessee who purchased the agricultural land even in the name of a third person. Wherever the Legislature intended it to be so, it had specifically provided under the provision. The term "assessee" is qualified by the expression "purchased any other land for being used for agricultural purposes", which necessarily means that the new asset which is purchased has to be in the name of the assessee himself for seeking exemption under section 54B of the Act. The purchase of agricultural land by the assessee in his son or grandson's name, therefore, cannot be held entitled to exemption under section 54B of the Act.

11. We may make **a** brief reference to the decision relied upon by counsel for the assessee. Learned counsel mainly relied upon the decision in V. Natarajan [2006] 287 ITR 271 (Mad), with reference to section 54 of the Act.

12. The Madras High Court in V. Natarajan's case [2006] 287 ITR 271 was dealing with a case relating to section 54 of the act wherein the assessee who after selling hjs residential house had purchased another residential house in his wife's name, the court had concluded that the assessee in such circumstances **was** entitled to exemption under section 54 of the Act. After giving our thoughtful consideration, we are unable to accept the view as laid down in V. Natarajan's case [2006] 287 ITR 271 (Mad)."

7. The Assessing Officer during assessment proceedings neither raised any query on this legal issue nor examined its applicability of facts of your case as given above. The Hon'ble Punjab & Haryana High court held very clearly & categorically that to claim exemption u/s 54, the assessee has to purchase the property in his own name. The Assessing Officer did not follow the judgment of the jurisdictional High Court. In view of above deduction claimed u/s 54 of the Act by you to the tune of Rs.47,66,502/- needs to be disallowed and should be added back to the taxable income of The assessee under the • head -Long Term Capital Gains.

8. On the basis of discrepancies, it is observed that the assessment framed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 is without proper perusal, examination & investigation of relevant information and records as required under Income Tax Act, 1961 and is prima facie erroneous and pre-judicial to the interest of revenue.

9. You are hereby offered an opportunity of being heard in accordance with the provisions of section 263 of the Income Tax Act, 1961 and thereby required to attend the office of the undersigned at **2nd Floor, New CGO Complex, Biock-B, NH-4, Faridabad-121001 on 06.01.2022 at 03:00pm** either in person or by a representative duly authorised in writing in this behalf. You or your authorised representative may produce or cause there to be produced at the said time any documents, information and any other evidence on which you may rely in support of assessment proceedings.

4. The Hon'ble High Court of Punjab& Haryana in the case of Sh. Kamal Kant Khamboj Vs ITO ward 3, Haryana has observed that purchase of immovable property by assessee in the name of his wife would not qualify for exemption U/s 54 B. It held as under: -

> "In the present case, the assessee alongwith his brother sold agricultural land in Village Ratoli, Yamuna Nagar for Rs.

72,00,000/- on 09-10-2006. Out of his half share, he purchased another agricultural land for Rs. 35,51,000/- in the name of his wife on 15-5- 2007. As the value of the said land was more than that of the land sold, he did not disclose any long-term capital gain and claimed exemption under Section 54B of the Act. Notice under Section 148 of the Act was issued to the assessee. Exemption under Section 54B of the Act **was** not allowed to the assessee on the ground that the land **was** not purchased by the assessee in his own name. The CIT(A) as well as the Tribunal both dismissed the appeals filed by the assessee. Since the issue has already **Vi/** been concluded againsttheassessee by this Court in Jai Naryan's case (supra) and the Tribunal has also followed the said judgment, learned counsel for the appellant has not been able to controvert the applicability of the said decision or to show any error in the findings recorded by the Tribunal except to rely upon pronouncement of the High Courts referred to in the earlier part of this judgment., Consequently, finding no merit in the appeal, the same Is hereby dismissed"

5. Similarly,theHon'bleHigh Court of P& H in the case of Jai Naranyan Vs ITO (306ITR335|;observed as under: - V-vi?

"The Madras High Court in V Natarajan's case, [2006] 287 ITR 271 was dealing with a case relating to section 54 of the

Act wherein the assessee who after selling his residential house had purchased another residential **house** in his wife's name. The court had concluded that the assessee in such circumstances **was** entitled to exemption under section 54 of the Act. After giving our thoughtful consideration, we are unable to accept the view as laid down in **V.** Natarajan's case, [2006] 287 ITR 271 (Mad)."

6. Further, the Hon'ble High court of P&H in the case of CIT Vs Dinesh Verma reported in [2015] 60 taxmann.com 461 (Punjab & Haryana); 233 Taxman 409 (P&H) as follows: -

"In interpreting the words contained in a statute, the court has not only to look at the words but also to look at the context and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. The word "assessee" occurring in section 54B must be interpreted in such a manner as to accord with the context and subject of its usage. A reading of section 54B of the Act nowhere suggests that the Legislature intended to your reply. You may furnish the information in writing in this office personally or by post or by email **faridabad.pcit@incometax.gov.inandior** submit orally during the hearing on the said date and time. **However, it is specifically informed that personal attendance is not mandatory.**

> 10. It is requested that you must submit your reply for a proper & judicious consideration and appreciation of your version/facts on the issue. In case no explanation/reply is received on or before the appointed date, it shall be presumed that you have nothing further to say in the matter and proceedings u/s 263 of the Income Tax Act, 1961 may be considered on the basis of the material(s) on record.

9. The PCIT framed order dated 31.01.2022 by treating the assessment order dated 27.11.2019 as erroneous and prejudicial to the interest of the Revenue and set aside the same and directed the Assessing Officer to pass fresh assessment order and recomputed the assessee's income after making further enquiries as directed by him in his order dated 31.01.2022.

10. In our considered opinion, for exercise of power u/s 263 of the Act, it is mandatory that the order passed by the Assessing Officer should be erroneous and prejudicial to the interest of the Revenue. A perusal of the assessment order shows that the returned income was accepted by the Assessing Officer and no addition was made for reasons recorded at the time of issue of notice u/s 148 of the Act.

11. This is an undisputed fact that the issues which prompted the Assessing Officer to reopen the assessment were duly considered and reply of the assessee was accepted and no addition was made. This fact has also not been disturbed by the PCIT in his order u/s 263 of the Act.

12. In our considered opinion, the Assessing Officer could not have made the addition on the issues raised by the PCIT in his order as no addition was made on account of reasons recorded for reopening the assessment.

13. The Hon'ble High Court of Delhi in the case of CIT Vs. Software Consultants I.T. Appeal No. 914 of 2010 order dated 17.01.2012 21 Taxmann.com 155 was seized with the following question of law:

> "Whether the Tribunal was right in law in holding that the CIT had wrongly invoked the jurisdiction u/s 263 of the Act."

14. The Hon'ble High Court, on facts similar to the facts of the appeal under consideration, held as under:

"9. One of the contentions, which has been accepted by the tribunal is that the order of the Assessing Officer cannot be regarded as erroneous even if the Assessing Officer had failed to carry out necessary verification and required enquiries in respect of the share application money, as no addition has been made on account of the reasons for reopening, which were recorded before issue of notice under Section 148 of the Act. It has been held that the Assessing Officer could not have made an addition on account of share application money as no addition has been made on account of FDRs of Rs.20 lacs. The tribunal has noticed and recorded that in the reasons for reopening it was mentioned that the assessee had made investment in form of FDRs of Rs.20 lacs but in the assessment order passed under Section 147/143(3) of the Act it has been held that the respondent assessee had been able to show and establish the genuineness of and capacity to make the said investment.

10. Similar issue had arisen before this Court in Ranbaxy Laboratories Limited versus CIT, (2011) 336 ITR 136 (Delhi). In the said case, the Division Bench had also examined Explanation 3 to Section 147, which was inserted by Finance (No. 2) Act of 2009 with retrospective effect from 1st April, 1989. Reference was made to the decision of the Bombay High Court in CIT versus Jet Airways India Limited, (2011) 331 ITR 236 (Bom.) in which it has been held as under:

"The effect of section 147 as it now stands after the amendment of 2009 can, therefore, be summarised as follows : (i) the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year ; (ii) upon the formation of that belief and before he proceeds to make an assessment, reassessment or recomputation, the Assessing Officer has to serve on the assessee a notice under sub-section (1) of section 148 ; (iii) the Assessing Officer may assess or reassess such income, which he has reason to believe, has escaped assessment and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section ; and (iv) though the notice under section 148(2) does not include a particular, issue with respect to which income has escaped assessment, he may none the less, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section."

11. Thereafter, the High Court referred to the decision of the Rajasthan High Court in the case of CIT versus Shri Ram Singh, (2008) 306 ITR 343 (Raj.) in which it has been observed as under:

"It is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax which has escaped assessment for any

assessment year, with respect to which he had 'reason to believe' to be so, then only, in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under section 147.

To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his 'reason to believe', had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

12. The Division Bench in Ranbaxy Laboratories Limited (supra)considered the judgment of the Supreme Court in the case of V. Jagmohan Rao versus CIT and EPT, (1970) 75 ITR 373(SC) and CIT versus Sun Engineering Works Private Limited, (1992) 198 ITR 297 (SC) and has then elucidated:

"18. We are in complete agreement with the reasoning of the Division Bench of the Bombay High Court in the case of CIT v.

Jet Airways (I) Limited [2011] 331 ITR 236 (Bom). We may also note that the heading of section 147 is "income escaping assessment" and that of section 148 "issue of notice where income escaped assessment". Sections 148 is supplementary and complimentary to section 147. Sub-section (2) of section 148 mandates reasons for issuance of notice by the Assessing Officer and sub-section (1) thereof mandates service of notice to the assessee before the Assessing Officer proceeds to assess, reassess or recompute the escaped income. Section 147 mandates recording of reasons to believe by the Assessing Officer that the income chargeable to tax has escaped assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. As per Explanation 3 if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 regarding assessment or reassessment of the escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For

every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under section 148.

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 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."

13. On the second aspect raised by the Commissioner of Income Tax with regard to the Assessing Officer accepting the loss return of Rs.1,02,756/-, we are of the view that the same did not require exercise of revisionary power under Section 263 of the Act. The observations of the Assessing Officer were only to the extent of stating that he had accepted the return. Benefit of carry forward of loss can be claimed in case a return is filed under Section 139(1). It is not the case of the Revenue that the assessee had tried to claim benefit of carry forward of loss on the basis of the order passed under Section 147/143(3) of the Act.

14. For exercise of power under Section 263 of the Act, it is mandatory that the order passed by the Assessing Officer should be erroneous and prejudicial to the interest of the Revenue. In the present case, the Assessing Officer did not make any addition for the reasons recorded at the time of issue of notice under Section 148 of the Act. This position is not disputed and disturbed by the Commissioner of Income Tax in his order under Section 263 of the Act. Sequitur is that the Assessing Officer could not have made an addition on account of share application money in the assessment proceedings under Section 147/148. Accordingly, the assessment order is not erroneous. Thus, the Commissioner of Income Tax could not have exercised jurisdiction under Section 263 of the Act.

> 15. The question of law is accordingly answered in affirmative against the Revenue and in favour of the assessee. There will be no order as to costs."

15. As mentioned elsewhere, the facts of the case in hand are pari materia same as the facts considered by the Hon'ble High Court [supra]. Therefore, we have no hesitation in setting aside the order of the PCIT dated 31.01.2022 and restore that of the Assessing Officer dated 27.11.2019.

16. In the result, the appeal of the assessee in ITA No. 455/DEL/2019 is allowed.

The order is pronounced in the open court on 31.05.2022 in the presence of both the rival representatives.

Sd/-	**Sd/-**
[N.K. CHOUDHRY]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 31st May, 2022.

VL/

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	