

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, AHMEDABAD**

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 1056/Ahd/2013

निर्धारण वर्ष/ Assessment Year : 1994-1995

Nilesh Kalidas Shah, 43, Kamdhenu Complex, Nr. Polytechnic, Ambawadi, Ahmedabad-380015 PAN : ACIPS 6595 C	Vs	ACIT, Circle-3, Ahmedabad
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Gyan Pipara, AR
Revenue by :		Shri Pravin Kumar, Sr DR

सुनवाई की तारीख/**Date of Hearing** : 15/11/2016

घोषणा की तारीख /**Date of Pronouncement**: 10/01/2017

आदेश/O R D E R

This appeal by the assessee is directed against the order of the Learned Commissioner of Income-Tax (Appeals)-6, Ahmedabad dated 21.02.2013 for Assessment Year 1994-95.

2. The concise grounds raised are to the effect that the ld. CIT(A) erred in law and on facts in...

- (i) Upholding the reassessing proceedings u/s 147/148 of the Income-tax Act;
- (ii) Confirming the addition of Rs.4,82,006/- being the unexplained investment in shares;
- (iii) Confirming the addition of Rs. 9,33,091/- as the interest paid in cash;
- (iv) Confirming addition of Rs.1,28,000/- for investment in house property.
- (v) Confirming addition of Rs.2,50,000/- being unexplained advances to S.S. Nagri.

- (vi) Confirming the additions of Rs.65,000/- and Rs.6,750/- towards unexplained investment in shares.
- (vii) Confirming the addition of Rs.4,044/- being the unexplained donation.
- (viii) Confirming the addition of Rs.2,50,000/- being the unexplained investment in the shares of Reliance Industrial Ltd.
- (ix) Confirming the addition of Rs.50,000/- being the unexplained household expenditure.

3. Brief facts of the case are that a search was carried on assessee's premises u/s 132 on 03.12.1993 and 04.12.1993. On the date of search, the return of income for A.Y. 1994-95 was not due as the previous year had not ended. A notice under section 142(1) dated 19.12.1994 was issued for filing the return of income, followed by a notice under section 148 dated 27.07.1995; in response to which the assessee filed return of income on 05.12.1996 declaring total income of Rs.5,65,660/-.

3.1 The reassessment proceedings were also commenced by the Assessing Officer by issuing various notices u/s. 142(1) and 143(2) and during the course thereof, the assessee filed the required details from time to time. As per the law, the assessment order should have been passed on or before 31.03.1998 being the limitation allowable. The Assessing Officer instead issued yet another notice u/s. 148 dated 10.03.1998, which was served on 12.03.1998, for the very same assessment year just a couple of days prior to the limitation period for passing the assessment order pursuant to first notice u/s.148 of the Act.

3.2 Since consequent to first 148 notice no assessment order was passed, the appellant objected to the validity of second notice u/s.148 dated

10.03.1998 before the Assessing Officer on the ground that the assessment proceedings pursuant to the first valid notice u/s.148 of the Act dated 27.07.1995 were already pending. Consequently, as per law, the issuance of the second notice u/s.148 of the Act dated 10.03.1998 was bad in law and without jurisdiction and hence invalid.

3.3 The Assessing Officer rejected the assessee's objections on untenable ground that the return filed on 05.12.1996 is non-est in the eyes of law and therefore a notice u/s. 148 was issued by him on 10.03.1998. Thereafter, the Assessing Officer proceeded to pass the reassessment order u/s. 143(3) r.w.s. 147 dated 27.03.2000 based on such invalid second notice u/s.148 of the Act dated 10.03.1998 determining the taxable income at Rs.26,99,554/- after making various additions and disallowances.

4. Aggrieved, the assessee preferred first appeal challenging the validity of the order passed pursuant to second notice u/s.148 and merits of the addition.

5. The Id. CIT(A) dismissed the appeal vide order dated 10.12.2000 on the basis of following observations:

"In this case several opportunities of hearing were given to the appellant time and again and this time around neither there has been any compliance nor an letter for adjournment has been received. In this view of the matter the appeal is decided on merits."

6. Aggrieved, the assessee filed an appeal before the ITAT, Ahmedabad Bench vide ITA No.475/Ahd/2001. During the course of hearing before the ITAT, an additional ground of appeal was filed as under:

"The impugned order of assessment is bad in law as the same is barred by limitation and therefore, requires to be cancelled. As vide submissions dated 26/02/2000, it has been submitted before the Assessing Officer that the notice

u/s.148 dated 10/03/1998 is bad in law as at the time of issue of this notice u/s.148, the earlier assessment in response to notice u/s.148 dated 27/07/1995 was undergoing and thus, there was time available to the Assessing Officer for completion of the assessment by 31/03/1998 and thus, the issue of notice u/s.148 dated 10/03/1998 is bad in law as on this date the original assessment has not come to an end. The present assessment being based on notice u/s.148 dated 10/03/1998 is barred by limitation and thus requires to be cancelled."

6.1 The ITAT in ITA No.475/Ahd/2001 vide its order dated 03.04.2006 held that the additional ground is pertaining to legal issue and hence in the interest of justice the same is admitted and accordingly the matter was sent back to the file of the Id. CIT(A) to decide the issue in accordance with law after verifying the various dates and providing reasonable opportunity to the assessee.

7. The Id. CIT(A), in set-aside proceedings pursuant to ITAT's order and after considering the submission filed by the assessee, called for a report from the Assessing Officer. The AO furnished the report dated 22.08.2012, a copy thereof was provided to the assessee. The assessee filed a rejoinder dated 04.09.2012 disputing the findings of the AO. Id. CIT(A), however, held that the reassessment proceedings had been validly initiated in accordance with law and he, therefore, rejected the legal ground raised on the following observations:

"4.4 As seen from the remand report, there is no dispute in the chronological events. In brief the chronological events are as follow. Notice u/s 142(1) dtd. 19/12/1994 was issued calling for the return of income. Return of income was filed on 05/12/1996 admitting income of Rs. 5,55,663/-. Notice u/s 148 dtd. 27/07/1995 was served on 01/08/1995. Appellant did not file any return of income or letter in response. Accordingly the limitation for the reopened proceedings was to expire on 31/03/1998. Before the said date, notice u/s 148 dtd. 10/03/1998 was served on 12/03/1998, stating that the return filed on 05/12/1996 in response to the notice u/s 142(1) was non-est in law. Order u/s 143(3) r.w.s. 147 was passed on 27.03.2000 which was well within time taking into account the second notice u/s 148 dtd. 10/03/1998.

4.5 Thus the issue for consideration and adjudication is whether issue of second notice u/s 148 without passing assessment order pursuant to the first notice u/s 148 is in accordance with law or not. In this connection, the following case laws are of relevance.

4.6 In the instant case the second notice u/s 148 was issued before the limitation for completion of assessment on the basis of the first notice u/s 148 expired. Therefore, it cannot be said that the issue of second notice was either to circumvent law or due to inadvertence. Appellant had not filed any return of income in response to first notice u/s 148. As held by the Supreme Court in the decision referred to above, in the absence of any express provision on the statute debarring the issue of second notice and in the absence of any return of income filed by the appellant pursuant to the first notice u/s 148, it cannot be said that the issue of the second notice u/s 148 was in contravention of the income-tax Act. Admittedly impugned order u/s 143(3) r.w.s 147 passed within the time limit taking into reckoning the date of the second notice of Sec. 148. Therefore I am of the considered view that the action of the A.O was in accordance with law.

4.7 During the course of hearing, learned A.R. relied on the case laws cited at 258 ITR 183 (Bom), 133 Taxman 71 (Mum), 80 ITD 591 (Chd.) 87 ITD 77 (Agra) (SMC), 24 SOT (Delhi) (URO) and 107 ITD 357 (Chennai). Having given my careful consideration to the ratios laid down in the said decisions, I do not find that any of these case laws is applicable to the facts of the instant case.

4.8 Accordingly, the additional ground of appeal filed by the appellant for the first time before the Tribunal and restored by the Tribunal for adjudication to this office is dismissed."

8. Aggrieved, the assessee is in second appeal. The ld. Counsel for the assessee after reiterated the facts and arguments raised before the ld. CIT(A), it was stressed that the first notice issued u/s. 148 on 27.07.1995 was valid in law since consequence proceedings were pending and neither reassessment proceedings were dropped nor reassessment was framed within the time limit relatable to this 148 notice. The second notice issued u/s. 148 dated 10.03.1998 was invalid in the eyes of law and the assessment

order framed on the extended time limit based on untenable second notice u/s. 148 dated 10.03.1998 is bad in law.

8.1 Reliance placed on the judgment of the Hon'ble Allahabad High Court in the case of G.P. Agarwal vs. ACIT, reported in 208 ITR 795, relied upon by the CIT(A) is irrelevant and not applicable to the facts of the assessee's case. In that case, remedy for rectification was available and hence the WP was dismissed on the ground of availability of alternative remedy. Likewise, the reliance on judgment of Hon'ble Supreme Court in the case of *Communidado of Chimalim vs. ITO & Ors.*, reported in 247 ITR 271, by the CIT(A) is on the contrary, in favor of the appellant.

8.2. The plea of the Ld. Counsel is that the proceedings had become barred by limitation vis-a-vis the valid first notice issued u/s. 148 dated 27/07/1995 and the issue of second notice dated 10/03/1998 would not revive the time limit. In support of the aforesaid argument, reliance is placed on the decision of the Hon'ble Gujarat High Court in the case of *Aditya Medisales Ltd Vs Deputy Commissioner of Income-tax, Circle 1(1) [2016] 73 taxmann.com 197 (Gujarat)* apart from various other decisions referred to.

9. The ld. Departmental Representative, on the other hand, strongly supported the orders passed by the ld. AO and CIT(A) contending that since the second notice u/s. 148 had been issued within the limitation period and no assessment could be made on the basis of the first notice in view of the invalid /non-est return, the assessment made after the issue of the second notice was valid in the eyes of law. There is no bar in the Act for issuing second notice of reopening and that the assessment based on second notice having been passed within the period of 6 years from the end of the

previous year, the same was valid under the Act. He also stated that the assessee had been non-cooperative throughout the proceedings.

10. I have heard the rival submissions, perused the material available on record and gone through the orders of the lower authorities. As a matter of fact the assessment proceedings pursuant to the first notice u/s.148 of the Act did not culminate into a valid order prior to issuance of the second notice under the same section i.e. u/s.148 of the Act. The Hon'ble High Court of Gujarat in the case of *Aditya Medisales Ltd. vs. DCIT, Circle 1(1) (2016) 73 Taxmann.com 197 (Guj.)* has dealt with identical question of law. The relevant findings of the Hon'ble High Court after discussing the ratio laid down by the Hon'ble Supreme court in various decisions are reproduced hereunder:

1. It can thus be seen that majority of the High Courts of the country have proceeded on the basis that when the assessment proceedings are pending pursuant to the return filed by the assessee, there would be no authority in the Assessing Officer to issue notice under section 148 of the Act. Expressed in different thoughts and language, the central concept being that when a return is filed, assessment is either being done or could be carried out by issuing notice under section 143 of the Act for which time limit has not expired, in such a case, there would be no question of income chargeable to tax having escaped assessment. Only upon completion of the assessment, or if not taken in scrutiny, upon completion of the period during which it can be scrutinised, the question of income having escaped the assessment would arise. Since the invocation of power under section 147 of the Act depends on the Assessing Officer's reason to believe that income chargeable to tax had escaped assessment, no such belief could be formed till the return is pending assessment.

6. In our case, the situation is during the pendency of first notice of reassessment, the Assessing Officer recorded separate reasons and issued a fresh notice for reassessment. Though this is not a case where the original assessment itself was pending when the notice for reopening was issued and in this context, as noted, some of the High Courts have drawn a distinction, in our opinion, there would be no material change. As long as assessment

was at large by virtue of the first notice of reopening, the question of issuing second notice for the same purpose did not arise.

7. *There cannot be two parallel assessments based on two notices. As long as first assessment is not completed, question of reassessment would not arise. Once a notice is issued under section 148 of the Act, it triggers initiation of proceedings for assessment or reassessment of income which may have escaped assessment earlier. During such assessment, any income which may come to the notice of Assessing Officer may also be brought to tax. Till this assessment is not completed, it would not be possible for him to form a belief that income chargeable to tax had escaped assessment. Until the assessment, be it original or reopened, is pending before the Assessing Officer, the question of issuing notice for reopening would not arise. As noted, in case of Ranchhoddas Karsondas (supra), the Supreme Court had taken a view that till the assessment proceedings are pending, it cannot be stated that there was escapement of income. To our mind, there is no distinction whether the pending assessment is pursuant to the return filed by the assessee originally or in response to the notice of reassessment issued by the Assessing Officer. In either case within the contours of the provisions for assessment, the assessment of the income of the assessee at the hands of the Revenue is at large.*

11. In the entirety of facts and circumstances, it is quite clear that the position of law is settled proposition that when the reassessment proceedings are pending based on a valid 148 notice, the subsequent proceedings under section 148 cannot be initiated unless earlier proceedings are brought to a logical end. In the present appeal, it is an undisputed fact that the first notice dated 27.07.1995 issued under the same section remains un-disposed of. It is also an undisputed fact that the second notice under section 148 was issued on the ground that income had escaped assessment because of the invalid/non-est return filed by the assessee. The Assessing Officer in the remand report has confirmed all the dates as mentioned in para no.13 on page 19 to 22 of the order of CIT(A) and also confirmed that no assessment was made pursuance to first notice u/s.148 dated 27.07.1995. In view of these facts and circumstances, I am inclined to quash the second notice under section 148 dated 10/03/1998 as invalid. The assessment order

dated 27.03.2000 passed in pursuance such notice is thus annulled. In view of the fact that I have annulled the assessment order itself and have treated it as annulled, I do not find it necessary to adjudicate upon any of the other grounds on merits as raised by the assessee.

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

Order pronounced in the Court on 10th January, 2017 at Ahmedabad.

Sd/-

**R.P. TOLANI
(JUDICIAL MEMBER)**

Ahmedabad; Dated 10/01/2017

Rju T., Sr. PS

आदेश की प्रतिलिपि बरेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

TRUE COPY

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad