

आयकर अपीलिय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.Nos.299 & 300/Vizag/2013
(निर्धारण वर्ष / Assessment Years: 2007-08 & 2008-09)

DCIT, Circle-2(1),
Vijayawada

(अपीलार्थी / Appellant)

Dr. M.J. Naidu,
Vijayawada

[PAN No.ADOPM6280H]
(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri S.R.S. Narayan, DR
प्रत्यार्थी की ओर से / Respondent by : Shri C. Subrahmanyam, AR
सुनवाई की तारीख / Date of hearing : 31.05.2017
घोषणा की तारीख / Date of Pronouncement : 18.08.2017

आदेश / ORDER

PER D.S. SUNDER SINGH, Accountant Member:

These appeals filed by the revenue are directed against orders of the CIT(A), Vijayawada dated 8.2.2013 for the assessment years 2007-08 & 2008-09.

2. The assessee filed return of income for the assessment year 2007-08 on 29.10.2007 disclosing total income of Rs.12,54,340/- and the

same was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called as 'the Act'). For the assessment year 2008-09, the return was filed on 29.9.2008 declaring total income of Rs.50,56,022/- and the same was processed u/s 143(1) of the Act on 31.3.2010. Subsequently, a survey u/s 133A of the Act was conducted in the case of assessee on 12.2.2009. Consequent to survey, the assessing officer re-opened the assessments u/s 147 of the Act and issued notice u/s 148 of the Act.

3. The assessee filed objections for issue of Notice u/s 148 and the objections were addressed by the A.O and completed the assessment u/s 143(3) r.w.s.147 on total income of Rs.2,34,41,630/- for the assessment year 2007-08, and of Rs.1,98,67,630/- for the assessment year 2008-09. The major additions were related to the estimation of collections and recasting of income and expenditure account under various heads. Aggrieved by the order of the assessing officer, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) quashed the notice issued u/s 148 of the Act as per the following discussion:

"6.1. It is seen from the records that there was an action under section 133A on 12.02.2009 in the business premises of the appellant, wherein certain discrepancies were found. In such a back ground, the appellant has come forward in making some disclosure to cover up the impugned discrepancies for the assessment year 2009-10 and filed the return, which was completed under section 143(3) on which there is no dispute. At that point of time returns

filed for the assessment years 2007-08 and 2008-09 based on the books maintained and in whose cases assessments have been completed by accepting the returned position. It is the contention of the appellant that the books, papers, material impounded at the time of survey did not belong to these assessment years impugned. As per the appellant on a fine morning he was visited by a reassessment notice under section 148 for both the assessment years. As a citizen obeying the law of the land, he has filed the same old returns and sought for reasons for the reopening of the assessments completed already. The AO has replied as under:

"In this case, a survey u/s. 133A was conducted on 12-02-2009. During the course of survey, books of account were impounded. Statements were recorded from the assessee on 13-02-2009 and 16-02-2009. Considering the material impounded and the statements given by the assessee, / have reason to believe that income chargeable to tax has escaped assessment for the assessment year

.....

6.2. It may be recalled here that in course of the appellate proceedings, it is argued by the appellant's AR that the reasons recorded were vague and based on the assessment made for the earlier assessment year 2009-10. It is argued that the income determined for the assessment year 2009-10 was taken as base and extrapolated the additions to these assessment years, which are not on a concrete finding by the AO and a positive finding as a result of action under section 133A. In fact, the A.O. has based his findings for the assessment year 2009-10, and extrapolated the same to these impugned assessment years. Thus, the basis for reopening is imaginary, suspicion, guesswork, surmises etc, rather than material.

6.3. It transpires from the records that the reasons recorded by the AO, as noted supra do not specifically mention any income having escaped from assessment. The reasons recorded are general in nature without any concrete foundation. It is well settled principle that there must be material available with the AO which could lead to the formation of reasons to believe that any income had escaped assessment. The AO should have referred to such material in the reasons recorded. This is mandatory as per Section 148(2). The material must have nexus with the formation of belief. If the material is irrelevant, then formation of belief would not be legally correct and hence re-opening will not be justified. In the present case, the reasons do not show that the AO had any material with him. Whatever is mentioned in the assessment order has no relevance with the escapement of income. There is no nexus of any material with the escapement of income.

6.4. Thus, in my considered opinion, the AO was in error in initiating reassessment proceedings, without having any material in his possession and accordingly I do not have any hesitation to quash the same. Once, it is held that based on the material available on record, the AO has no jurisdiction to reopen the impugned assessments, it is academic to go into the merits of the additions made in the reopened assessments. Most of the additions were extrapolated based on the assessment made for the assessment year 2009-10, without any material for both the assessment years under consideration. In these circumstances, I have also considered the additions made by the Assessing Officer on account of estimation of in-patient and out-patient collections, cash credits u/s.68 of the Act, unexplained expenditure u/s.69 and salary disallowance, and I opine that they do not deserve any merit on the facts of the case as well as in law. Accordingly, all such additions are deleted."

Aggrieved by the order of the Ld.CIT(A) the revenue is in appeal before us.

4. Appearing for the revenue, the Ld. D.R. argued that a survey u/s 133A of the Act was conducted in this case and during the course of survey, it was found that the assessee was understating the receipts relating to both inpatient and outpatient receipts and the same is evident from the statement recorded during the course of survey. The Ld.AR further argued that the assessing officer also has furnished some examples of patients. The assessee also was suppressing the receipts relating to the surgery charges, implant charges, which is supported by the statement recorded during the course of survey. The assessee is constructing hospital building and the books of accounts of the assessee though stated to be maintained in the tally package not updated and

this fact was accepted by the assessee. Therefore, the Ld. D.R. argued that the assessing officer has rightly reopened the assessment and the CIT(A) has committed an error by quashing the notice u/s 148 of the Act. The D.R. has requested the interference of this Tribunal and pleaded to set aside the CIT(A) order and restore the AO's order.

5. On the other hand, the Ld. A.R. of the assessee argued that the A.O. has recorded very flimsy reasons for reopening of the assessment. The Ld.AR submitted that there is no clarity on the reasons recorded. The AO did not mention the defects in the books of accounts, the items of income or particular source of income or expenditure stated to be escaped or omitted to be accounted was furnished in the reasons recorded by the assessing officer. From plain reading of the reasons recorded by the A.O., it is established that the A.O. has not made out a case for escapement of income within the meaning of section 147 of the Act which invites for reopening of assessment. The assessing officer merely reopened the assessment with surmises, assumptions and presumptions. The Id D.R referred the understatement of income in his arguments but the AO has not made any reference to the items of income understated in the reasons recorded. The Id.AR further argued that the Ld.D.R is trying to improve the reasons but the reasons already

recorded cannot be improved by giving explanation. The A.O. not even referred the material impounded with relevant reference to suppression of income. Further, the assessee has maintained the regular books of accounts which was impounded by the department. This fact was brought to the notice of the assessing officer in the statement recorded but neither the assessing officer verified the books of accounts available with the A.O. nor found any difference or defects in the books of accounts. Therefore, the Ld. A.R. argued that there was no case for reopening of assessment and the issue of notice u/s 147 of the Act is bad in law and the Ld.CIT(A) has rightly quashed the said notices. The Ld. A.R. relied on the decision of CIT Vs. Kelvinator India (SC) [320 ITR 056].

6. We have heard the rival submissions and perused the material placed on record. Assessing Officer has recorded the reasons for reopening the assessment as under :

"In this case, a survey u/s 133A was conducted on 12.2.2009. During the course of survey, books of account were impounded. Statements were recorded from the assessee on 13.2.2009 and 16.2.2009. Considering the material impounded and the statements given by the assessee, I have reason to believe that income chargeable to tax has escaped assessment for the assessment year....."

6.1. On perusal of the reasons recorded it is evident that the assessing officer has recorded very vague and reasons which are general in nature. No specific material, which indicated the escapement of income was brought on record. Similarly defects if any in the books of accounts maintained by the assessee was also not mentioned. No specific items of income or the receipts which escaped from income was brought on record in reasons, leave alone the quantum. For both the assessment years, the reasons are identically worded, leaving the assessment year blank for guess work of the assessee. Surprisingly the same reasons were recorded in both the cases of M. Madhavi and Dr. M.J.Naidu. The assessing officer has not mentioned any material which was impounded in the case of the assessee indicating escapement of income. No finding was given by the assessing officer with regard to the overstatement of expenditure, understatement or suppression of the receipts, suppression of any assets or overstatement of liability which leads to escapement of income. From plain reading of the reasons recorded by the assessing officer shows, that the reasons were recorded, without application of mind and merely because the survey was conducted and the assessing officer wants to reopen the assessment without having any tangible material. It is settled issue that even in the cases where the assessments were completed u/s 143(1), for reopening of the

assessments, there should be reason to believe that the income has escaped assessment. There is a vast difference between the issue of notice u/s 143(2) and notice issued u/s 148. For reopening the assessment and issue of notice u/s 148, the assessing officer should have a reason to believe that the income chargeable to tax has escaped assessment. For having a reason to believe there must be tangible material which indicates income escaped assessment. Mere suspicion, or the surmises or merely because of survey is conducted the assessing officer is not permitted to reopen the assessment. There should be strong belief based on material is required for reopening the assessment u/s 147. Suspicion or guess work is not sufficient to reopen the assessment u/s 147 of the I.T.Act. Though the statements were recorded and the material was impounded the assessing officer did not mention specifically which part of the statement and what material impounded constitutes basis for formation of reasonable belief for escapement of income in the reasons recorded. The nexus of the statement recorded and the impounded material for escapement of income was not brought on record in the reasons. Even the assessing officer did not mention the assessment year and it was left blank which shows the casual attitude of the assessing officer in reopening the assessment. The assessing officer cannot improve the reasons already

recorded, subsequently by referring to the books of accounts or the explanations. Hon'ble Gujarat High Court in the case of Hindustan Unilever Ltd. Vs. Army Wadkar, ACIT [268 ITR 332] held that *reopening notice is to be justified on the basis of reasons recorded at the time of issuing the impugned notice. The impugned notice must stand or fail on the reasons recorded. Thus, reasons recorded cannot be supplemented by further reasons or filing an affidavit or making oral submissions. The reasons are made on the point of assessing officer and must be self explanatory and should not keep the assessee guessing. It cannot be justified on the basis of inferences or interpretations.* Similarly in the case of Sambag Vs. ITO (74 taxman.com 16) held that *where the assessing officer has no material to suggest that the assessee company had received accommodation entries against cash receipts, the notice for reopening the assessment based on such reasons was completely wrong and has to be set aside.* The Hon'ble ITAT Coordinate Bench, Ahmedabad in the case of ITO Vs. Vapi Vadva Vs. Amit Kesava has adjudicated the issue on similar facts and held that *the important point is that even though the reasons recorded may not necessarily prove the escapement of income at the stage of recording the reasons, such reasons must point out to income escaping the assessment or not merely need any inquiry which may require adjudication of income*

escaping assessment. In the present case, at best the case of the assessing officer falls in the second category. Further [71 taxman.com 256] (Ahd), Hon'ble Bombay High Court in the case of Kubuchandani Health Parks (P) Ltd. Vs. ITO, Ward 6(3)(4) [68 taxman.com 91] Bombay held that *notice u/s 148 would be without reasons for absence of reasons to believe that income had escaped assessment even in case where assessment has been completed earlier by intimation u/s 143(1).* Hon'ble Madras High Court in the case of PVP Ventures V Corporate Circle 5(2) Chennai [65 taxmann.com 221] has held *that justification for reopening the assessment has to be tested only on the strength of recording reasons for reopening the assessment u/s 148.* From the above discussion and judicial pronouncements, recording of proper reasons and the application of mind is necessary which must be bonafide and not in mechanical manner. Where the notice issued without application of mind on the part of the assessing officer, the same is liable to be quashed. The reasons recorded by the assessing officer must disclose the process of reasoning by which he hold the reason to believe that the income chargeable to tax has escaped assessment for the relevant assessment year. The material relied upon by the assessing officer should appear on the record. In the instant case, it is clear that the assessing officer has recorded vague and

general reasons without application of mind. The assessing officer did not establish or whisper from the reasons recorded regarding the escapement of any income. It appears from the reasons recorded that assessing officer has reopened the assessment merely because survey was conducted in this case which is not permissible in law. Therefore, we do not find any reason to interfere with the order of the Ld.CIT(A) and the same is upheld. Appeal of the revenue is dismissed. Since we upheld the quashing of notice by the Ld.CIT(A) and dismissed the appeal of the revenue, we consider it is not necessary to adjudicate the assessment on merits.

7. In the result appeal of the revenue for the assessment year 2007-08, 2008-09 are dismissed.

The above order was pronounced in the open court on 18th Aug 2017.

Sd/-
(वी. दुर्गराव)
(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 18.08.2017

VG/SPS

Sd/-
(डि.एस. सुन्दर सिंह)
(D.S. SUNDER SINGH)

लेखा सदस्य/**ACCOUNTANT MEMBER**

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

1. अपीलार्थी / The Appellant – The DCIT, Circle-2(1), Vijayawada
2. प्रत्यार्थी / The Respondent – Dr. M.J. Naidu, M/s. M.V.S. Accident Hospital, 33-25-32, Bellapu Sobhanadree Rao Street, Suryaraopet, Vijayawada
3. आयकर आयुक्त / The CIT, Vijayawada
4. आयकर आयुक्त (अपील) / The CIT (A), Vijayawada
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, VISAKHAPATNAM

