

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

श्री वी. दुर्गराव, 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.296-298/Vizag/2013
(निर्धारण वर्ष / Assessment Years: 2006-07, 2007-08 and 2008-09)

DCIT, Circle-2(1)
Central Revenue Building
M.G.Road
Vijayawada 520 002

Smt. M.Madhavi
W/o Dr.M.J.Naidu
M/s. M.V.S.Accident Hospital
33-25-32, Bellapu
Sobhanadree Rao Street
Suryaraopet
Vijayawada – 520 002

[PAN.ACPPM3417J]

(अपीलार्थी / Appellant)

(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri S.R.S.Narayan, DR
: Shri C.Subrahmanyam, AR

सुनवाई की तारीख / Date of Hearing

: 10.08.2017

घोषणा की तारीख / Date of Pronouncement

: 18.08.2017

आदेश / ORDER

PER D.S. SUNDER SINGH, Accountant Member:

These appeals are filed by the revenue against orders of the
Ld. Commissioner of Income Tax (Appeals), [Ld.CIT(A)], Vijayawada
dated 15.2.2013 for the assessment years 2006-07, 2007-08 & 2008-09.

Since the issues involved in these three appeals are common they are clubbed and heard together and decided by passing a common order for the sake of brevity and convenience.

2. The assessee filed return of income on 30.10.2006 for the assessment year 2006-07 disclosing total income of Rs.1,79,365/- besides agricultural income of Rs.3,02,697/- and the same was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called as 'the Act'). The assessee is deriving income from M/s Teja Pharmacy, salary and house property. A survey u/s 133A of the Act was conducted in the business premises of the assessee on 12.2.2009 and during the course of survey the statement u/s 133A was recorded from the assessee. Subsequently, statement on oath was recorded on 13.02.2009 from the assessee. Basing on the findings of the survey and observations made during the course of survey, the assessing officer reopened the assessment by issue of notice u/s 148 of I.T.Act. The assessee filed objections and the objections were addressed by the Ld.AO and completed the assessment u/s 143(3) by an order dated 27.12.2010 on total income of Rs.28,58,970/-. Three assessment years i.e 2006-07, 2007-08 and 2008-09 are involved for which the assessing

officer issued the notice u/s 148. 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. The assessee went on appeal before Ld.CIT(A) and the Ld.CIT(A) quashed the notice issued u/s 148 of the I.T.Act. Hence, 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 is constructing hospital building at D.No.33-25-32 in Kasturbaipet, Vijayawada, commenced on 26.11.2005 and completed the construction by 31.05.2007. During the course of survey in the statement recorded she has stated that an amount of Rs.1.00 cr. was spent for construction and explained the source of Rs.70 lakhs as bank loan but she did not explain the sources for the remaining amount. She also stated in the statement that she did not maintain any manual books of accounts for construction but was recorded in tally package. And the tally package was not updated. Even from the computerized cash book complete data was not forthcoming. She also did not explain the gifts stated to be received from her brother and mother the occasions on which the gifts were received etc. The

contents of the statement indicated the escapement of income and hence the assessing officer has rightly reopened the assessment. 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.

5. On the other hand, the Ld. A.R. of the assessee argued that the A.O. has recorded the very flimsy reasons for reopening of the assessment. No defects in the books of accounts, the head of income, items of income or expenditure stated to be omitted to be accounted was furnished in the reasons recorded by the assessing officer. From the 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 assessee is maintaining the regular books of accounts and the books of accounts were maintained in tally package which was impounded by the department. Though the books of accounts were not updated the vouchers and the bills are in the possession of the assessee with which the books could be updated. The entire information was produced before the AO at the time of survey as well as during the

assessment proceedings. The assessing officer merely reopened the assessment with surmises, assumptions and presumptions. The Ld D.R stated that the understatement of income was one of the reasons for reopening the assessment in his arguments but the A O has not made any reference in the reasons recorded. The Id.AR further argued that the Ld.D.R is trying to improve the reasons but the reasons cannot be improved by giving explanation. The A.O. not even referred the specific material impounded which indicates the suppression of income. Further, the books of accounts are maintained by the assessee which was impounded by the revenue. 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 issue of notice u/s 147 of the Act and the Ld.CIT(A) has rightly quashed the notice. The Ld. A.R. relied on the decision of Hon'ble Supreme Court in th case 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 the reasons which are general in nature. No specific material, defects or the specific source of income or receipt was mentioned leave alone the quantum. For all the three assessment years, and for both the assesses i.e Mr.M.J Naidu and M.Madhavi the reasons are identically worded, leaving the assessment year blank for guess work of the assessee. 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, 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 the purpose of 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. On mere suspicion, or on surmises the assessing officer is not permitted to reopen the assessment merely because the survey was conducted. 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. The nexus of the statement recorded and the impounded material for the 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 412 (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 section 52 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 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), we consider it is not necessary to adjudicate the assessment on merits.

7. In the result appeal of the revenue for the assessment year 2006-07, 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)

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

न्यायिक सदस्य/**JUDICIAL MEMBER** लेखा सदस्य/**ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 18.08.2017

L.Rama, SPS

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

1. अपीलार्थी / The Appellant – The DCIT, Circle-2(1), Vijayawada
2. प्रत्यार्थी / The Respondent – Smt. M.Madhavi, W/o 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

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM