

आयकर अपीलिय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL,**  
**INDORE BENCH, INDORE**  
**BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER**  
**AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.511/Ind/2018**

**Assessment Year 2008-09**

Shri Sarwar Mohd. Khan, 402, Queen’s Palace, In front of N.R.I Colony, Kohefiza, Bhopal	Vs.	ACIT 2(1), Bhopal
(Appellant)		(Respondent )
PAN ANPPK7336R		

Revenue by	Shri Lal Chand, CIT
Assessee by	Shri S.S. Solanki, CA
Date of Hearing	5.2.2020
Date of Pronouncement	20.2.2020

**ORDER**

**PER MANISH BORAD, AM**

The above captioned appeal filed at the instance of the assessee pertaining to Assessment Year 2015-16 is directed against the orders of Ld. Commissioner of Income Tax (Appeals)-II (in short 'Ld.CIT(A)'), Indore dated 24.12.2018 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 13.12.2017 framed by ITO -5(5), Indore.

**2.** The assessee has raised following grounds of appeal;

1. That the learned CIT (A) erred in' rejecting the claim of the assessee regarding wrong reopening of the case u/s 148. The reopening so made being illegal and wrong, the order so passed requires to be quashed.

WITHOUT PREJUDICE TO THE ABOVE

2. That the learned CIT(A) erred is not allowing Expenses of Rs.39,40,000/- being Brokerage paid to DSP Fingerprint Ltd of Rs. 38,40,000/- for assisting In sale of land, and the same has being already taxed in the hands of DSP Fingerprint Ltd by the department. And other transfer expenses of Rs.1,00,000/- being expenses related to the sale of Land. The claim of assessee being legal and proper.' deduction for the same requires to be allowed.

The appellant craves leave to add, amend alter or otherwise raise any other d of appeal.

**3.** Brief facts relating to this issue are that the assessee is an individual earning income from other sources. The return for Assessment Year 2008-09 filed on 24.6.2009 declaring income of Rs.23,80,135/-. Case selected for scrutiny under and Notices u/s 143(2) and 142(1) of the Act were served upon the assessee. Assessment completed u/s 143(3) of Act at Rs. 63,20,135/- after making addition of Rs.39,40,000/- on account of long term capital gain to the declared income. Penalty proceedings u/s 271(1)(c) for concealment of income was also initiated. The case was reopened by issuance of notice u/s 148 was issued to the assessee. In response to the notice assessee filed return declaring the same income as

was declared in the original return of income. The assessment u/s 143(3) r.w.s. 148 of the Act was completed on the income of Rs.63,20,140/-. Aggrieved assessee preferred appeal before Ld. CIT(A) but could not succeed.

**4.** Now the assessee is in appeal before the Tribunal.

**5.** Ld. Counsel for the assessee submitted as under :-

1.1 The assessee filed his return of income declaring total income of Rs. 23,80, 135/-.

1.2 The AO vide order u/s' 143(3) dated 21.8.2010 assessed the Total Income at Rs. 63,20,135/- by adding Rs. 39,40,000/- as Long Term Capital Gain.

1.3 Against the addition made by the AO vide his order u/s 143(3) dated 21.8.2010, the assessee filed an appeal before learned CIT (A) agitating the addition of Rs. 39,40,000/- made by him. The appeal is still pending with learned CIT(A).

1.4 Notices u/s 148 was issued for alleged violation of the provisions of Section 54F by withdrawing a sum of Rs. 26,00,000/- from the amount deposited under capital gain scheme. However, no addition was made under this head and the income assessed vide order u/s 143(3)/147 remained at Rs. 63,20,135/-. Copy of reasons for initiating proceedings u/s 148 is enclosed.

1.5 Aggrieved the assessee filed an appeal before Learned CIT(A) raising following grounds:-

(i) Challenging the reopening u/s 147

(ii) Addition of Rs. 39,40,000/-- made as Long Term Capital Gain.

1.6 Learned CIT (A) vide his order dated 31.3.2016 dismissed ground no. 1 by relying on the decision of Hon'ble Supreme Court in the case of ITO vs. Biju Patnaik. As regard addition of Rs. 39,40,000/- (38,00,000/- + Rs. 1,00,000/-) he dismissed the ground by holding that the assessee has preferred an appeal against order u/s 143(3) on the same issue.

1.7 We have filed an application before learned CIT(A) Bhopal on 24.9.2019 for fixation of the appeal. However, the same has not been fixed till today.

1.8 Now coming to ground No. 1 in which wrong reopening of the case was challenged, our submissions are as under:-

(a) In the present case, in the reasons recorded it was stated that as the assessee has withdrawn a sum of Rs. 26,00,000/-, he has contravened the provisions stipulated in Section 54F, the exemption claimed by the assessee u/s 54F in A.Y 2008-09 is liable to be withdrawn.

(b) In the order u/s 143(3)/147, no addition on this issue was made. The fact is that no addition at all was made by the AO in order u/s 143(3)/147. The assessed income remained same at Rs.63,20,140/- as was in order u/s 143(3) dated 30.12.2010. That when no addition was made in order u/s 143(3)/147 other than the one which was made in order u/s 143(3), the order passed u/s 147 is null and void.

(c) Further if assessing officer does not assess income for which reasons were recorded u/s 147, he cannot assess other income

u/s 147. For this proposition reliance is placed on following decisions:-

(i) Hon'ble High Court of Bombay in the case of Commissioner of Income Tax vs. Jet Airways (I) Ltd reported in 78 CCH 0365 Mum HC.

(ii) Hon'ble High Court of Delhi in the case of Ranbaxy Laboratories Limited vs. ,Commissioner of Income Tax reported in ITA No. 148/2008 Del HC.

(iii) Hon 'ble IT AT Kolkata Bench "B" in the case of Dipti Mehta vs. ITO Ward 43(2) reported in ITA No. 2032/Ko112018 Kol Trib.

1.9 That proviso 3 to Section 147 reads as under:-

{[Provided also] that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matter of any appeal, reference or revision, which is chargeable to tax and has escaped.}

That as per the proviso mentioned above, income which are not the subject matter of the appeal can only be assessed or reassessed. In the case of assessee, an appeal has been preferred before learned CIT(A) on which alleged addition was made.

The notice so issued u/s 147 and other so passed u/s 148 is therefore, illegal and wrong. The same, therefore require to be quashed.

2.0 Now coming to Ground No. 2. That the assessee has entered into

an agreement with DSP Fingerprint Ltd according. to which brokerage of Rs. 38.40 Lacs was agreed to be paid to the broker i.e DSP Fingerprint Ltd. This agreement was executed on 6.7.2007.

2.1 Vide cheque no. 917764 dated 14.8.2007 of ICICI Bank Ltd, the assessee made payment of brokerage of Rs.38.40 Lacs.

2.2 (i) Brokerage amount of Rs. 38,40,000/- ( $38,40,000/- \times 5 = 1,92,00,000$ ) was assessed by the AO in the hands of M/S DSP Fingerprint Ltd vide order u/s 143(3) dated 30.12.2010.

(ii) Learned CIT (A) vide his order dated 18/11/2011 in the case of DSP Fingerprint Ltd dismissed the appeal and confirmed the addition of Rs. 1,92,00,000/- made by the AO.

(iii) Hon'ble ITAT Indore Bench vide its order dated 12.6.2012 dismissed the appeal of DSP Fingerprint Ltd.

(iv) Not only this, the penalty of Rs. 58,00,000/- imposed by the AO was also confirmed by Hon'ble ITAT Indore Bench vide its order dated 20.5.2016.

2.3 (i) That the assessee has paid brokerage of Rs. 38.40 lacs under an agreement with DSP Fingerprint Ltd.

(ii) The payment was made through account payee cheque. On merits, the assessee has rightly claimed the brokerage of Rs. 38.40 lacs.

(iii) Further brokerage of Rs. 38,40,000/- was assessed in the hands of DSP Fingerprint Ltd.

(iv) When the income has been assessed in the hands of party to whom brokerage is paid, deduction for the same requires to be

allowed to the assessee.

6. Ld. Departmental Representative vehemently argued supporting orders of both the lower authorities. However Ld. Departmental Representative could not controvert the fact that in the reassessment proceedings no addition was made for the reasons recorded u/s 148 of the Act and also could not controvert that the addition made in the reassessment proceedings stands already made in the regular assessment proceedings u/s 143(3) of the Act and the assessee's appeal before Ld. CIT(A) is pending for adjudication.

7. We have heard rival contentions and perused the records placed before us and carefully gone through the judgments relied by the Ld. Counsel for the assessee.

8. We will first take up the legal issue raised in Ground No.1 wherein the assessee has challenged CIT(A) finding rejecting the claim of the assessee regarding wrong reopening of the case u/s 148 of the Act. Ld. Counsel for the assessee relying on the written submission contended that the reopening so made is illegal and wrong and the order so passed requires to be quashed.

9. We observe that the case of the assessee was selected for scrutiny and after serving notices u/s 143(2) of the Act on 21.8.2010 assessment was completed u/s 143(3) of the Act on 30.12.2010 after making addition of Rs.39,40,000/- on account of denial of claim of cost of acquisition made by the assessee. Assessee has challenged this addition of Rs.39,40,000/- by way of filing appeal to Ld. CIT(A) which is still pending to be disposed.

10. Subsequently notice u/s 148 of the Act dated 22.2.2011 was served on the assessee recording the reason that the assessee had violated the provisions of Section 54F of the Income Tax Act by way of withdrawing Rs. 26,00,000/- from the amount deposited under the Capital Gain Account Scheme. This amount was withdrawn on 29.9.2010 and it was liable to be taxed for Assessment Year 2011-

12. In the assessment completed u/s 143(3) r.w.s. 147 of the Act Ld. A.O also categorically observed that the assessee's non compliance to the provisions of Section 54F of the Act by withdrawing an amount of Rs.26,00,000/- before the expiry of time provided in Section 54F of the Act is no more in dispute as the assessee has offered it to tax in the Income Tax Return filed for



Assessment Year 2011-12. In the reassessment proceedings Ld. A.O made no new addition except the addition of Long Term Capital Gain of Rs.39,40,000/- which was initially made in the assessment proceedings u/s 143(3) of the Act completed on 30.12.2010.

11. So the undisputed fact remains is that no addition was made by the Ld. A.O in the reassessment proceedings for the reasons recorded in the notice issued u/s 148 of the Act. The question before us is that in this situation whether the impugned reassessment proceedings are valid in the eyes of law.

12. We find that similar issue came up for adjudication before various Hon'ble Courts and it has been consistently held that if after issuance of notice u/s 148 of the Act the Ld. A.O accepts the contentions of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income.

13. Hon'ble High Court of Bombay in the case of Commissioner of Income Tax vs. Jet Airways (I) Ltd reported in 78 CCH 0365

Mum HC held as under:-

*"AO may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice; however, if after issuing a notice under s. 148, the AO accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income."*

14. Hon'ble High Court of Delhi in the case of Ranbaxy Laboratories Limited vs. Commissioner of Income Tax reported in ITA No. 148/2008 Del HC held as under:-

*"In view of our above discussions, the Tribunal was right in holding that the Assessing Officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings are initiated but he was not so justified when the reasons for the initiation of those proceedings ceased to survive. Consequently, we answer the first part of question in affirmative in favour of Revenue and the second part of the question against the Revenue."*

15. Hon 'ble IT AT Kolkata Bench "B" in the case of Dipti Mehta vs. ITO Ward 43(2) reported in ITA No. 2032/Ko1/2018 KolTrib 'held as under:-

*"We note that in the present case in hand, the facts on the basis of which*

*the reasons were recorded by AO for invoking jurisdiction for reopening the assessment was that the assessee had taken accommodation entries for loss of Rs. 2,71,500/- from Mahasagar Group of Cases which fact led the AO to the belief that income has escaped assessment. However, in the reassessment order the AO has not made any addition/disallowance on this Issue. So, without making any addition/disallowance on this accommodation entry for loss of Rs. 2,71,500/-, the AO ought not to have proceeded to re-assess the assessee on other incomes like the addition of STCG and disallowance u/s 14A of the Act. The jurisdictional fact which empowered the AO to invoke the jurisdiction to reopen by issue of notice u/s. 148 r.w.s, 147 -of the Act as deciphered from the reasons recorded is the accommodation entry of loss of Rs.2,71,500/-. So, when AO desired to reopen this assessment year, he had information of assessee in receipt of accommodation entry of loss from Mahanagar Group, which fact was recorded to re-open the assessment. This precise fact was the foundation ITA No. 2032/Kol/2018 Dipti Mehta AY- 2010-11 based on the information from Director of income Tax and the AO recorded the reason which warranted him to hold the belief that income chargeable to tax has escaped assessment and thereafter, the AO usurped the jurisdiction to reopen the assessment. In other words is the 'income' which according to the AO escaped assessment while recording reasons for reopening assessment u/s 147 r.w.s. 148 of the Act. This 'income' which AO records in his reasons recorded has escaped assessment and which constituted the bedrock/basis for reopening is the jurisdictional fact which empowered him to usurp the jurisdiction to reopen and reassess the escaped income as contemplate u/s 147/148 of the Act. So, when that income which was the foundation on which he based his belief of escapement of income is absent/disappeared then the AO's very usurpation of jurisdiction is on non-existing jurisdictional fact which renders his usurpation of jurisdiction to reopen the assessment legally untenable and so null in the eyes of law and therefore, the assessee*

*succeeds and therefore, we quash the reassessment made by the AO without jurisdiction."*

16. In the light of above stated judgments, the ratio laid down by various Hon'ble Courts and Coordinate Bench and examining facts of the instant case in the light thereof, we can conclude that assessment order passed u/s 143(3) r.w.s. 147 of the Act dated 8.11.2011 deserves to be quashed as it is illegal and bad in law since the Ld. A.O has not made any addition on the "reasons to believe" recorded in the notice issued u/s 148 of the Act and has himself admitted that the reasons so recorded are not coming in the purview of the escaped income because the early withdrawal of the amount deposited in the Capital Gain account before the expiry of the time period provided u/s 54F of the Act has been offered to tax by the assessee and shown as income for Assessment Year 2011-12.

17. Further addition of Rs. 39,40,000/- made in the reassessment proceedings was already made during the course of original assessment proceedings. The assessee has challenged the disallowance of cost of acquisition of the property denied by the Ld. A.O. in the appeal filed to Ld. CIT(A), who has still not adjudicated

the issue on merit.

18. We therefore quash the reassessment proceedings and allow the legal issue raised by the assessee in Ground No.1.

19. Apropos Ground No.2 which is raised on merits we find it to be merely academic to adjudicate the same since we have already quashed the reassessment proceedings and impugned addition of Rs.39,40,000/- is still pending before Ld. CIT(A) for adjudication in the appeal filed against the original assessment u/s 143(3) of the Act. We therefore dismiss Ground No.2 as infructuous.

20. Thus appeal of the assessee is allowed on legal ground itself.

The order pronounced in the open Court on 20.02.2020.

Sd/-

**( KUL BHARAT )**  
**JUDICIAL MEMBER**

दिनांक /Dated : 20 February , 2020  
/Dev

Sd/-

**(MANISH BORAD)**  
**ACCOUNTANT MEMBER**

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)  
concerned/ DR, ITAT, Indore/Guard file.

By Order,

Asstt.Registrar, I.T.A.T., Indore