IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC-2 : NEW DELHI
(Through Virtual Hearing)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.2821/Del/2019
Assessment Year: 2010-11

Simranpal Singh Suri, JG-1/77, Vikaspuri, New Delhi.	Vs	ITO, Ward 45(5), New Delhi.

PAN: AKZPS3760Q

(Appellant) (Respondent)

Assessee by	:	Shri V.K. Sabharwal, Advocate
Revenue by	:	Shri Farath Khan, Sr. DR
Date of Hearing	:	15.03.2021
Date of Pronouncement	:	12.05.2021

ORDER

This appeal filed by the assessee is directed against the order dated 3rd January, 2019 of the CIT(A)-15, Delhi, relating to assessment year 2010-11.

2. Facts of the case, in brief, are that the assessee is an individual and engaged in the business of civil works contracts. In this case, information was available on ITD System regarding cash deposits of Rs.14,52,000/- in IDBI Bank account. The AO, on the ground that no return for the year under consideration was filed, reopened the assessment u/s 147 after obtaining necessary administrative approval of the PCIT, Delhi-15, New Delhi after recording the following reasons:-

ñAs per information available with the undersigned, the assessee has entered into transaction of cash deposit amounting to Rs. 14,52,000/- in various banks during the year.

Since the assessee has not filed his/her ITR for the A.Y. 2010-11, the source of cash deposit in saving bank account amounting to Rs. 14,52,000/- remained unexplained. Therefore I have reason to believe that the income of the assessee to the extent of Rs 14,52,000/- for Asstt. Year 2010-11 has escaped assessment and hence it is a fit case for initiation of proceedings in terms of section 147 of the Income Tax Act, 1961.

It is pertinent to mention that in the case of Raymond Woollen Mills Ltd. 236 ITR 34 (SC), the Hon'ble Apex court has held that in determining whether commencement of reassessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.ò

3. Accordingly, notice u/s 148 of the Act dated 31.03.2017 was issued and served upon the assessee. Notice u/s 142(1) of the IT Act dated 7th June, 2017 was also issued but the same was returned unserved with the postal remarks óNo such person.ô Again, notice u/s 142(1) dated 11th July, 2017 was issued and served upon the assessee fixing the case for hearing on 18th July, 2017 on which date the assessee appeared himself and furnished the acknowledgement of ITR filed for the impugned year, i.e., A.Y. 2010-11. The AO, thereafter, asked the assessee to furnish complete copy of income-tax return and all bank statements for the year under consideration and the case was accordingly adjourned for hearing on 26th July, 2017. The AO, thereafter, issued notice u/s 133(6) dated 11th July, 2017 to IDBI Bank calling for certain information and the bank informed about the cash deposits of Rs.14,52,000/-. Subsequently, the AO noted that the assessee has also deposited cash of Rs.1,54,500/- in ICICI Bank account. Thus, the total cash

deposit was Rs.16,06,500/-. The AO asked for various details from the assessee to substantiate the various expenses claimed. Since the assessee did not provide the relevant details before him, the AO rejected the book results and made an addition of Rs.7,57,728/- being 25% of various expenses claimed in the P&L Account of Rs.30,30,911/-.

3.1 The assessee challenged the addition before the CIT(A), however, the ld.CIT(A) was also not satisfied with the arguments advanced by the assessee and upheld the addition made by the AO.

4. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

> ñ1. That the order passed u/s 144/147 of the Income Tax Act 1961 on 22.12.2017 is perverse to the law and to the facts of the case, because of non-receipt / service of the primary / mandatory notice claimed to be issued on 08.08.2017 and fixed for hearing on 21.08.2017, which the Ld. CIT(A) has mentioned that the same was issued only in Para-4.1 of his order and not adjudicated about its service thereof.
>
> 2. That the orders passed u/s/ 144/147 of the Income Tax Act 1961 are further not tenable as legal under the law and to the facts of the case because of getting / granting the approval u/s 151 by the Pr. CIT, New Delhi in a mechanical manner without application of his own independent satisfaction thereupon to the information provided.
>
> 3. That the order passed u/s 144/147 of the Act was further illegal under the law and to the facts of the case, because the reasons on which the provision of law was invoked u/s 147 of the .Act ceased to survive while passing the order on 22.12.2017, as the additions have been made on ad hoc disallowance of expenses to the extent of 25%.
>
> 4. That the Assessing Officer and Ld, CIT(A) failed to appreciate while passing the orders, that the appellant was in possession of proper books of accounts alongwith the supporting bills / vouchers in respect of the

expenditure claimed, for which the ledger copies were also filed and placed upon records, therefore, ad hoc disallowances thereof (a) 25% was not justified under the law and to the facts of the case as without the support of any material having nexus to the extent of its disallowance thereof @ 25%.

5. That the appellate order passed by the Ld. CIT (A) was farther not correct under the law and to the facts of the case, because of not appreciating and taking into consideration that the appellant has produced the complete books of accounts and also filed copies of bank statement, detail of expense vouchers, detail of purchase etc. alongwith the Written Submission filed on 08.09.2018.

6. That the net profit assessed at Rs, 9,03,360/- after disallowing Rs. 7,57,728/- which is ad hoc @ 25% of total expenses of Rs. 30,30,911/- was not correct under the law and to the facts of the case, because of not supported with any cogent material either collected or ever placed upon records, having nexus to the disallowance of expenses to the extent of 25% thereof, though in the earlier year, the have been allowed as claimed.

7. That no proper and reasonable opportunity if any has ever been afforded by the Assessing Officer or by the Ld. CIT(A) prior to make and uphold the illegal and impugned ad hoc additions of Rs. 7,57,728./- after disallowing expenses @ 25% on lump sum basis.

8. That the order passed is further suffers from infirmity as laconic and ironic in nature because no proper opportunity if any was given by the Assessing Officer to the appellant to produce the bills and vouchers, though as per order sheet, the date and time was given at 11:00 A.M. on 21.12.2017, when the counsel of the appellant appeared at 11:00 A.M., he was told to appear at 03:00 P.M. as the officer was busy, when the counsel again appeared at 03:00 P.M., he was informed that the orders have already been passed, as such, the action of the Assessing Officer taken was arbitrary and against the principle of natural justice.

9. That the rejection of books of accounts and invoking provision of law contained u/s 145(3) of the Act was further against the law and to the facts of the case, therefore, not tenable, because of not appreciating that the appellant is maintaining proper books of accounts, bills and vouchers as per law, according to which the ITR has been filed.

10.That while passing the orders by the Assessing Officer, he has not taken into consideration the facts and figures as already available with him pertaining to earlier years regarding the ratio of turnover, gross profit, net profit etc, deduced, derived and declared therefrom.

11.That charging of interest u/s 234B and initiating penalty proceedings u/s 271(1)(b) and u/s 271(1)(c) of the Act alongwith u/s 271F, are further illegal as against the law and to the facts of the case.

12.That the appellant assails his right to amend, alter or change any grounds of appeal at any time even during the course of hearing of this instant appeal.ò

5. The ld. counsel for the assessee strongly challenged the order of the AO and the CIT(A). He submitted that the reopening of the assessment was bad in law since the premises of such reopening was that the assessee has not filed the return of income whereas the AO in the assessment order himself has noted that the assessee has filed the return of income, since he has made the addition to the returned income of Rs.1,58,905/- as income from business declared by the assessee and Rs.137/- as óIncome from other sourcesô declared by the assessee. Referring to the copy of the permission taken u/s 151, copy of which is placed at pages 2 and 3 of the paper book, he submitted that such permission granted by the higher authorities are also not in accordance with the law. Relying on various decisions, he submitted that when the approval was given on wrong facts and the approval has been given in a mechanical manner, such reassessment is bad in law because the very foundation of such reopening was on the basis of wrong appreciation of facts.

5.1 So far as the merit of the case is concerned, the ld. counsel submitted that the assesseee is a contractor and although proper bills and vouchers were maintained, but, no due opportunity was granted to the assessee by the AO for producing the details. In any case, the disallowance @ 25% under the facts and circumstances of

the case is on the higher side. He accordingly submitted that both legally and factually the addition made by the AO and sustained by the CIT(A) is not justified.

6. The ld. DR, on the other hand, heavily relied on the orders of the AO and the CIT(A). So far as the validity of reopening of the assessment is concerned, he submitted that the assessee has made cash deposit of Rs.14,52,000/- in various bank account during the year. The assessee has not filed the return of income for the impugned assessment year. Further, the approval has also been given by the higher authorities after being satisfied with the reasons recorded by the AO. Therefore, there is proper satisfaction. So far as the merit of the case is concerned, the ld. DR submitted that the assessee has not produced the bills and vouchers despite number of opportunities granted. Therefore, the addition made by the AO and sustained by the CIT(A) is fully justified.

7. I have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions relied on by the ld. counsel in his written synopsis. As mentioned earlier, the case of the assessee was reopened on the ground that the assessee has made cash deposit of Rs.14,52,000/- in various bank accounts during the year and the assessee has not filed her return of income for A.Y. 2010-11. However, a perusal of the paper book filed on behalf of the assessee shows that the assessee has filed the return of income for the impugned assessment year on 30th March, 2011, vide receipt No.0000014393.

Thus, it is seen that the AO has recorded a wrong fact in his reasons that the assessee has not filed the return of income. Further, a perusal of the approval given by the Jt. Commissioner shows that he has given approval by observing as under as per clause 12 of the proforma:-

> ñYes, I am satisfied with the reasons recorded by the Assessing Officer that it is a fit case for issue of notice u/s 148 of the IT Act, 1961.ò

8. Similarly, the PCIT, while giving his approval has observed as under:-

> ñI have gone through the reasons recorded by the authorities below. After going through the same, I am satisfied that the present case is a fit case for issue of notice u/s 148 of the IT Act.ò

9. A perusal of the above shows that the superior authorities have not applied their mind and had given approval in a mechanical manner.

9.1 It has been held in various decisions that reopening of the assessment on wrong set of facts makes such reopening a nullity. The Hon'ble Delhi High Court in the case of PCIT vs. RMG Polyvinyl (I) Ltd., 396 ITR 5, has held that reopening of the assessment on wrong set of facts makes the assessment a nullity. Similar view has been taken by the coordinate Benches of the Tribunal in the case of Shri Dheeraj Yadav vs. ITO vide ITA No.6701/Del/2019, order dated 01.01.2021, M/s Bull Riders Financial Services (P) Ltd. vs. ITO, vide ITA No.1891/Del/2017, order dated 10th February, 2020.

10. Even otherwise also, the approval in the instant case has been given in a mechanical manner on wrong facts that the assessee has not filed his return of income as contained in column No. 8(a) and 11 of the said proforma. The Hon'ble Delhi High Court in the case of Yum! Restaurants Asia Pvt. Ltd. vs. DDIT(2), reported in (2008) 99 taxmann.com. 457, has held as under:-

> "Section 151 of the Income Tax Act 1961 - Income escaping assessment - sanction for issue of notice - Assessment Year 2006-07 - Where both Additional Director of Income Tax and Director of Income Tax appeared to have concurred with reasons for reopening assessment but without applying their minds to fact that return originally filed was only processed under section 143(1) and not u/s 143(3), impugned notice for reassessment was liable to be quashed [in favour of assessee]

11. Similar view has been taken by the coordinate Benches of the Tribunal in various other decisions to the proposition that when approval was given mechanically by the superior authorities, the assessment so framed is liable to be quashed.

12. The other plank of argument of the ld. counsel is that reopening of the assessment was made on the ground that the assessee has made cash deposit of Rs.14,52,000/- in IDBI during the year and, therefore, the same has escaped assessment and it is a fit case for initiation of proceedings in terms of section 148 of the Act. However, in the final order the AO has not made any such addition based on which the reopening was made, but, has made addition by disallowing part of the expenses on estimate basis. The Hon'ble Delhi High Court in the case of Ranbaxy Laboratories vs. CIT, ITA No.148/2008 has observed as under:-

ñ18. We are in complete agreement with the reasoning of the Division Bench of Bombay High Court in the case of Jaganmohan Rao (supra). 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 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 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 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 Section 80 HH 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 Section 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 Section 80 HH and 80-I which as per our discussion was not permissible. Had the Assessing Officer proceeded not to make dis-allowance 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 Section 80 HH and 8-I as well.ò

13. Even otherwise also, I find, the AO at para 4 of the order has mentioned as under:-

> ñon 08.08.2017 the assessee appeared and furnished copy of ITR in response to notice u/s 148 of the Income Tax Act 1961. The assessee was provided notice u/s 143(2) of the Act on 08.08.2017 itself and the case was fixed for hearing on 21.08.2017.ò

14. This shows that the notice u/s 143(2) was issued to the assessee on the very same day on which the assessee appeared and furnished copy of ITR in response to notice u/s 148 of the IT Act. It has been held in various decisions that when the notice u/s 143(2) is issued to the assesseee on the very same day on which the assessee filed the return in response to notice u/s 148 stating that the return already filed may be treated as return in response to notice u/s 148, such notice issued u/s 143(2) on the very same day has to be treated as invalid and assessment is vitiated due to non-application of mind by the AO. Therefore, on all counts the reassessment proceedings initiated by the AO and upheld by the CIT(A) in my opinion is not in accordance with the law. I, therefore, quash the reassessment proceedings and the grounds raised by the assessee are allowed. Since the assessee succeeds on the legal grounds, the grounds challenging the addition on merit are not being adjudicated being academic in nature.

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

The decision was pronounced in the open court on 12.05.2021.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 12th May, 2021.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi