IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR
(through web-based video conferencing platform)

BEFORE SHRI SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER &
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 200/JAB/2014
(Asst. Year: 2005-06)

Assistant CIT, Circle Sagar, Sagar.	vs.	Kamlesh Kumar Sahu, Jawaharganj, Sagar (MP) [PAN: AOFPS 4325 H]
(Appellant)		(Respondent)

Appellant by	:	Shri S.K. Halder, Sr. DR
Respondent by	:	Shri Sanjay Seth, FCA
Date of hearing	:	22/03/2022
Date of pronouncement	:	27/05/2022

O R D E R

Per Sanjay Arora, AM:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-1, Jabalpur ('CIT(A)' for short) dated 25/07/2014, allowing the assessee's appeal contesting his assessment under section 144 read with section 147 of the Income Tax Act, 1961 ("the Act", hereinafter), dated 18/01/2013 for Assessment Year (AY) 2005-06.

The background facts

2. The brief facts of the case are that the assessee, who did not file any return of income u/s. 139 of the Act for the relevant year, was originally assessed at an income of Rs. 5,53,790 (and agricultural income of Rs. 1,56,800) vide order u/s.

147 dated 20/12/2007 (PB pgs. 128-130)/pg. 2 of the impugned order – IO). Subsequently, notice u/s. 148(1) was issued on 28/03/2012 on the basis of the Annual Information Report (AIR) as to cash deposits aggregating to Rs. 1,94,60,381 in his saving bank account (s/b 14759) with Federal Bank Ltd. (at Lucknow) during the relevant year. The assessee failing to respond thereto, as well as to the various opportunities allowed, the impugned assessment was framed by bringing the entire sum deposited in the said bank account to assessment. The assessee, in first appeal, found favour with the ld. CIT(A), who accepted both the contentions raised by the assessee before him. Firstly, that there was no service of notice u/s. 148(1) dated 28/03/2012 and, in any case, only in breach of section 149, so that the assessment as made was without jurisdiction and, thus, a nullity in law; the relevant findings being as under: (pg. 32)

> "In view of the above legal position, it is held that there was no valid service of notice u/s. 148 and the jurisdiction was not correctly assumed by the AO. Accordingly, the assessment made is hereby annulled."

On the merits of the addition made, it was found that the relevant bank account was opened on the same day (31/12/2003) when a search panchnama was prepared at Sagar in respect of search at the assessee's residence, which was signed by him (assessee). The veracity of the account belonging to the assessee was thus in grave doubt. The addition was accordingly deleted, holding as under:

> "Even on merit, it is seen that there is a single addition on account of AIR information, regarding deposits allegedly appearing in a particular bank account opened on 31/12/2003 at Lucknow. But the undisputed fact is that on the same date a search panchnama was prepared at Sagar where the assessee was present and duly signed the same. How was it possible for assessee to be present in two places at the same time? Hence the veracity of the account belonging to the assessee is also in grave doubt. A perusal of the so-called bank account also shows that in the same, there are both withdrawals and deposits. The correct course of action in case of such an account was to add the peak credit. Instead, the AO has chosen to add all the credits in the account. This also reflects poor appreciation of accountancy and law. Hence, even on merit, the addition does not deserve to succeed."
>
> (pgs. 32-33)

Arguments

3. The arguments before us were on the same lines, i.e., as the case of either party delineated hereinabove.

Discussion/findings

4. We have heard the parties and perused the material on record. We shall take up each of the two findings by the ld. CIT(A), which form the basis of his order, appealed against by the Revenue before us.

5.1 In our view, the finding of the impugned assessment being without jurisdiction and, thus, a nullity in law, is misplaced, both on facts and in law. The jurisdiction to assess or reassess, even as observed by the Bench during hearing, gets assumed on the issue of a notice u/s. 148(1), and not on it's service, as explained by the Apex Court in *Upadhyaya v. Shanabhai P. Patel* [1987] 166 ITR 163 (SC) as well as prior thereto by several Hon'ble High Courts. The time limit u/s. 149 is again with reference to the issue of notice u/s. 148, and not it's service. There is no dispute in the instant case *qua* the issue of notice u/s. 148(1) – which is on 28/3/2012, and which (dispute) concerns only its' service, whether on 29/03/2012 or thereafter. It is, rather, only a notice issued that could be served. The jurisdiction to proceed to assess u/s. 147, thus, stands validly assumed in the instant case. This, however, is not the end of the matter as the same is to translate into an assessment, and which cannot be without putting the assessee to notice, i.e., service of notice on him. The assessee in the instant case denies receiving any of the notices issued, and which also explains he not joining the assessment proceedings, resulting in it being u/s. 144, i.e., a best judgment assessment. It is for this reason that the time limitation for the completion of assessment is under law prescribed with reference to service of notice, and not it's issue, *so that the same would run only upon the service of notice u/s. 148* (sec. 153(2)), and which is both reasonable and understandable, as it is only after service of notice that the opportunity of being heard, a vital ingredient for an 'assessment', could be said to

be satisfied, and the assessment completed – within the time frame provided by law, after hearing him. As such, even assuming non-service of the said notice, the only course available in law is it's service, for which no time limitation, i.e., after it's issue, stands stipulated in law. Nothing, therefore, turns on the claim of non-service or an invalid service of notice, in which either case there is in law 'no service'. The matter, accordingly, would warrant being restored back to the file of the Assessing Officer (AO) to, firstly, cause the service of notice u/s. 148(1) dated 28/03/2012 on the assessee and, thereupon, conclude the assessment within the time framed provided by the extant law.

5.2 We may, next, discuss the aspect of 'service' of the notice u/s. 148(1) dated 28/03/2012, stated by the Revenue to be served on 29/03/2012, i.e., on facts. Why, to begin with, we wonder did the ld. CIT(A) did not call for the assessment record, and verify for himself if the said notice was indeed, as claimed, served on 29/03/2012, which would also exhibit the person on whom it, where so, was, and when. There is, it is to be appreciated, no scope for any presumption when the facts are available and, rather, on the Revenue's – who admittedly also sent the said notice per registered post on 30/3/2012, record. Two, the assessee's main plank in denying service, as submitted before the ld. CIT(A), is of it being marked to a wrong address, i.e., C/o Hotel Sonam and Smart Bar, Link Road, Gujarati Bazar, Sagar (MP). The assessee, toward this, relies on the address mentioned in his return for the preceding as well as the succeeding years, as indeed for the current year, which is a different address, being, Sahuniwas, Jawaharganj, Sagar (MP). *How, one wonders, the assessee, claiming non-receipt of notice, know the address at which it was marked*? On a further query by the Bench as to how, then, did the assessee receive the assessment order, also marked at the same address, i.e., as mentioned in the impugned notice and, further, being on 30/01/2013, within a reasonable time of it's making, Shri Seth, the ld. counsel for the assessee, would submit that the same being an address 'related' to the assessee, was passed on to

him. There is also clear reference to the service of show cause notice dated 30/11/2012 (on 07/12/2012) as well as the notice seeking explanation *qua* the AIR information, in the assessment order. *Would that, therefore, mean that while assessment order was conveyed to the assessee, the earlier notices, including u/s. 148(1) dated 28/03/2012, were not*? That would be wholly presumptuous and inconsistent with the normal course of conduct. A perusal of the assessee's returns show him to be a partner in 'Sonam Hotel-Bar', and which explains the mention of the stated address. At this stage, the assessee was enquired by the Bench to state the address communicated u/s. 139A, i.e., the PAN data base at the relevant time, as any change therein is to be intimated by the assessee to the AO u/s. 139A(5)(d). As per rule 127 of Income Tax Rules, 1962 ('the Rules' hereinafter), read out during hearing, it is perfectly valid for the Revenue to communicate with the assessee at the said address (r. 127 (2)(a)(i)), as also clarified by the Apex Court even without reference to the said rule in *Pr. CIT v. I-Ven Interactive Ltd*. [2019] 418 ITR 662 (SC). In fact, it is again this address that finds mention in Form 35 (i.e., memorandum of appeal filed by the assessee before the first appellate authority), both at para 1 and para 14 thereof, being the sections of the said Form seeking information from the appellant on his '*name and address*' and '*address at which notice may be sent to him*' respectively. *That is, the assessee himself conveys this (the stated) address, as his address and, further, for the purpose of communication, to the Revenue*. Why, even the replies furnished by the assessee before the first appellate authority, i.e., during the appellate proceedings, *state the alleged 'wrong' address as the assessee's address* (reply dated 23/2/2014 / PB pgs. 121 – 126); dated 27/2/2014 / PB pgs. 87 – 92)! Shri Seth, on being enquired by the Bench in this regard, was unable to furnish any satisfactory answer. *How could he then claim the said address as a wrong address, and on that basis claim non-service of notice u/s. 148(1)*? Rather, as we observe, there is no specific challenge to the service of notice u/s. 148(1) in the grounds of appeal before the ld. CIT(A). The same is clearly an afterthought, with a view to take advantage of the

fact that the address stated by the assessee in his returns of income was different. The CIT(A), we are afraid and, rather, sorry to say, has not taken cognizance of the materials before him nor, as afore-stated, called for the assessment record to verify the assessee's claim as to non-service for himself, in deciding the matter. We have also clarified that there has been a valid assumption of jurisdiction for making the instant assessment upon issue notice u/s. 148(1) on 28/03/2012, on the validity of which, i.e., it's issue, there is no dispute? Even the assessee's affidavit dated 22/02/2014 (PB pgs. 175-176) only states of non-service (of the notice u/s. 148(1)) by 31/3/2012, i.e., does not speak of non-service absolutely, which claim would, in view of s. 27 of the General Clauses Act, 1897 (also referred to in the IO), be even otherwise untenable in view of the admitted service through registered-post dated 30/3/2012.

5.3 For the reasons afore-stated, there is in our view no basis to hold non-service of notice u/s. 148(1), validly issud, on the assessee. We, accordingly, reverse the finding as to it's non-service, as indeed his decision as to the nullity of the impugned assessment, by the ld. CIT(A). We decide Revenue's Ground 1, challenging the annulling of assessment, in it's favour.

6.1 Having upheld the legality of the assessment under reference, we may at this stage remit the matter back to the file of the ld. CIT(A) for adjudication on the merits of the sole addition made in the impugned assessment, even if by causing, yet again, service of the notice u/s. 148(1) – for which no time limit is prescribed, to allay any doubt in the matter, i.e., as an abundant exercise. So, however, as the ld. CIT(A) has also decided the appeal on merits (of the addition made), the hearing of the appeal was, with the consent of the parties, proceed with, in terms of r. 11 of the Income Tax (Appellate Tribunal) Rules, 1963. Having annulled the assessment, his decision on merits is to be regarded as without prejudice, and which is further upon remanding the matter back to the AO, so that there has been

due adjudication by the first appellate authority after hearing the assessee in the matter.

6.2 The ld. CIT(A) found the Revenue's case on merits untenable as the assessee was present at his residence at 'Sagar' on 31/12/2003, the date of the search, as evidenced by his signature, duly witnessed, on the search panchanama (PB pgs. 177-178). He could he then possibly be at Lucknow, 600 KM away, on the same date, and during banking hours, as it appears from the signature, again duly witnessed, on the bank account opening form (PB pgs. 170-171 / pgs. 32-33 of the IO). We are, however, for the reason/s that ensue, not in agreement with the ld. CIT(A), i.e., insofar as his decision, in view of the said inconsistency of facts, goes. True, it cannot be disputed that the assessee was at Sagar, MP on 31/12/2003 from 4:00 - 4:45 pm. Equally, inasmuch as the assessee has not authorized any other person for the purpose and opened the bank account himself, signing the account opening form in the presence of two independent witnesses ostensibly on that day, he can be said to be at Lucknow during banking hours on 31/12/2013. That is, it does not follow, as the ld. CIT(A) infers, that the said bank account does not belong to the assessee, which, to our mind, would be jumping to a conclusion and without the necessary appraisal and investigation of facts. The account opening form is usually signed in the bank premises or, in any case, in the presence of the bank officials. Either, therefore, the account opening form was not signed by the assessee at Lucknow, or has not been on 31/12/2003. The subscription of the said date beneath his signature on the account opening form also does not appear to be in his hand, again raising questions and issues, either way, i.e., if it is in his hand or not. The KYC documents furnished for account opening, including photograph, being of the assessee, it cannot be that the signature is of the any other person, i.e., other than the assessee. *That is, excludes the possibility of impersonification*. All this does not, then, without anything more, give rise to the inference, as the ld. CIT(A) draws, that the form has not been

signed by Sh. Kamlesh Sahu, the assessee. He has also not delved into or issued a finding in the matter of the veracity of the signature, also contested by the assessee before him in the remand proceedings. And replied to by the AO per his remand report. Rather, any misstatement in the form, including the signature, which the assessee claims as not his, points to the complicity of the bank, in the presence of whose officials the signatures, both of the account holder and the witnesses, are affixed. The assessee, as indeed the witnesses – who have not put any date below or adjacent to their signatures, cannot also be absolved of complicity. None of them have been examined in the matter, even as the revenue authorities have adequate powers for the same, including toward issue of commission, summons, etc. Rather, the Act contains prosecution provisions as well. There is, under the circumstances, a crying need for further probe. *How, for example, one wonders, does the assesse know or claim that it is his cousins who are involved and behind all this*? Even so, did he, on becoming aware of the same, approach the bank, informing it of the correct state of affairs, inasmuch as opening the account of another, much less through impersonification and forgery, as alleged, is illegal. This is the first thing that any man of prudence, acting reasonably under the circumstances, would, absolving himself in the matter. Was the matter, constituting an economic offence, reported to the police or other investigating agencies, either by the assessee or even the bank, which has no vested interest in the matter, and the ownership of the money, as distinct from the bank account, of no concern thereto? Again, why would somebody open an account in the name of another and, further, transmit money through it? Why, in the first place would the bank allow this, which cannot be without it's knowledge and indeed active support, all of which has criminal implications? The ld. CIT(A), whose powers in the matter of assessment are co-terminus with that of the assessing authority and, further, having held that there was no service of notice u/s. 148(1), ought to have upon causing the same; there being no occasion therefor at the assessment stage, made or caused further inquiry in the matter, and has allowed the inchoate state of

affairs to persist, resulting in it being several years before the matter comes up for hearing before us, the next appellate authority. It is incumbent and surely in the interest of justice that the matter is decided on merits upon considering the entirety of the facts and circumstances, all of which we are sure have even yet not been brought on record, and decided issuing definite findings of fact/s. The money trail, inasmuch as it would throw light on the beneficiary of the funds deposited in account, which enquiry could be extended to date, is another vital aspect, which remains unexamined.

6.3 The assessee, before us, states of the destination of funds, i.e., SIMB Company (Rs. 50 lacs) and current account (CA) # 1376 (with the same bank) (Rs. 144.60 lacs), being a 'firm/concern/s' belonging to his 'cousins', with whom he did not share good relations, and who were behind the whole exercise (i.e., of opening the bank account in the assessee's name and, further, deposit and transfer of funds therein), with a view to put him in a problem. That, then, affords another reason to inquire further in the matter, inasmuch as there is admittedly involvement of persons related to the assessee. Further, why, in that case, one may ask, would they deposit their own money (in cash) in the assessee's account, and then transfer the same (funds), through the banking channel, to their own concern/s, *admitting thus a liability to the assessee to that extent*? That is, they would, by doing so, be incurring a debt to the assessee to that extent in respect of their own capital. *Only a senile could be expected to do so*. Even as far as the income-tax law is concerned, they would be hard put to prove the nature and source of the corresponding credits in their accounts u/s. 68, further jeopardising themselves. Rather than, therefore, putting the assessee in a 'problem', as the assessee states, they would be, on the contrary, doing themselves a great disfavour. Why, even the tax liability on the assessee is liable to be discharged from the said debt. And to consider that the persons knowing and managing the said concerns/accounts have not been put to question! As explained in *CIT vs. Chinnathamban K.* [2007] 292 ITR 682 (SC), where a deposit stands in the name

of a third person, and that person is related to the assessee, the proper course would be to call upon the person in whose books the deposit appears or the person in whose name the deposits stands, to explain such deposit.

6.4 The impugned order is a cryptic order, based only on the account opening form. It does not taken into account even the details submitted by the assessee in the remand proceedings, and equally detailed replies by the AO, both gone through during the hearing, and all of which ought, but have not been, weighed in by the ld. CIT(A) before arriving at his decision. The law deems the money in the assessee's account as belonging to him, and where unexplained as to its nature and source, as his income for the relevant year (ss. 69/69A)(see, inter alia, *Chuharmal v. CIT* [1988] 172 ITR 250 (SC)). The operation of the account, including who/s operate (ed) it, would be relevant in ascertaining the facts. Even his observation with regard to only the 'peak value' being liable to be subject to tax is without any factual or legal basis. That it is the entire credit that would stand to be assessed u/s. 68 has been confirmed by the Apex Court. It is only on a clear finding of the funds under reference being rotated through the said account, which would itself require additional facts to be established and, further, give rise to several questions to be answered, that it could be said that it is only the peak value that would require being taxed, which is yet another reason for him to have required the matter to be inquired into. Even as the same represents well-settled law; application of ss. 68/69/69A. et. al. being essentially matters of fact, reference in this regard may be made to *Jhamatmal Takhatmal Kirana Merchants v. CIT* [1999] 152 CTR 311 (MP); *CIT v. Vijay Agricultural Industries* [2007] 294 ITR 610 (All), to cite two.

6.5 In our clear view, the only unmistakable inference is that the matter is factually indeterminate and, further, the Bank, which is definitely involved in the matter, has not been questioned at any stage, again pointing to the need for a detailed investigation in the matter. By Banks' involvement, we may clarify, we do not necessarily mean that it is not – though improbable, the assessee's account, in

which case we would not remand the matter, but that it could be limited to the date of opening of the account. The apparent is to be regarded as real, and the onus to establish that it is not so is on the person alleging so. The burden of proof that the account is not his, is therefore on the assessee. His explanation of having been put in a problem (by his cousins) does not, at least *prima facie*, appear valid. Two, the destination of the funds under reference is not unknown; rather, clear, so that the ownership of funds, which the transferee of funds would not but be aware of, cannot remain in suspense. The deposit of cash, much less in huge sums, is again an aspect, of which one, least of all the bank, cannot claim to be oblivious of. Our afore-stated observations ought to be regarded as preliminary, with a view to highlight the complete state of factual indetermination that marks the case at present and, consequently, the pressing need for further probe and inquiry, as well as the areas to be. The matter is accordingly set aside to the file of the AO for adjudication on the strength of and by issuing definite findings of the fact, i.e., per a speaking order after allowing the assessee a reasonable opportunity of being heard in the matter and, needless to add, within the time frame permissible by the amended statute. We are conscious that, in doing so, we are in effect converting a section 144 assessment into a section 143(3) assessment, impermissible in law, and would not have so done but for, even as he annuls the assessment, a cryptic, without prejudice decision by the ld. CIT(A) *qua* this addition, also entailing admission of additional evidence, followed by remission of the matter to the assessing authority, not under challenge before us. As such, a decision on merits, after proper examination of evidences and hearing both the sides, is the only course warranted in the interest of justice. We have already highlighted the various aspect of the matter that need to be enquired into. As explained by the Apex Court in *CIT v. Walchand & Co. (P.) Ltd*. [1967] 65 ITR 381 (SC), the Tribunal is to deal with and determine questions which arise out of the subject-matter of the appeal in light of the evidence, and consistently with the justice of the case.

7. We may, before parting this order, also state that we observe that the AO has, while finalising the impugned assessment, adopted the income as returned by the assessee u/s. 148(1) on an earlier occasion (on 13/6/2006), and not as assessed earlier u/s. 147, on 20/12/2007, as ought to be case, unless, of course, the same has been revised since. This is particularly so as no part of the income assessed in reassessment (i.e., cash deposits for rs.194.60 lacs) stands included by the assessee per his return furnished on 13/6/2006 or assessed vide order dated 20/12/2007. The assessee is, however, at liberty to place his objection, if any, thereto, before the AO, in which case he shall dispose the same per a speaking order.

8. We decide accordingly.

9. In the result, the Revenues' appeal is allowed and allowed for statistical purposes.

Order pronounced in open Court on May 27, 2022

Sd/-	sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Dated: 27/05/2022
vr/-

Copy to:

1. The Appellant: Asst. CIT, Circle Sagar, Sagar (MP)
2. The Respondent:Shri Kamlesh Kumar Sahu, Jawaharganj, Sagar (MP)
3. The CIT-1, Jabalpur.
4. The CIT(A)-1, Jabalpur (MP)
5. The Sr.D.R., ITAT, Jablapur
6. Guard File.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Jabalpur.