आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 170/JP/2019
निर्धारण वर्ष/Assessment Years : 2008-09

Sh. Shujaat Ali Khan 2/304 Geeta Mandir, Jawahar Nagar, Jaipur.	बनाम Vs.	The ITO, Ward-6(1), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AQZPK 1866 H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Vinod Kumar Gupta (CA)
राजस्व की ओर से/ Revenue by : Smt. Monisha Chaudhory (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 15/12/2020
उदघोषणा की तारीख/Date of Pronouncement : 05/01/2021

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

The assessee has filed the present appeal against the order of ld. CIT(A)-II, Jaipur dated 19.11.2018 pertaining to assessment year 2008-09 wherein the assessee has taken the following grounds of appeal:-

"1. The impugned addition and disallowances made in the order u/s 147/143(3) of the act dated 02.02.2016 are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence, the same kindly be deleted.

2.Rs.7,17,286/-: The ld. CIT(A) erred in law as well as on the facts of the case in confirming the addition of Rs. 7,17,286/- made on account of STCG. The addition so made & confirmed by the ld. CIT(A), is contrary to the provisions of law and facts hence, kindly be deleted in full.

3. The ld. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B & 234C of the Act. The interest so charged, being contrary to the provisions of law and facts, kindly be deleted in full."

2. Briefly the facts of the case are that the case of assessee was reopened U/s 147 of the Act and notice U/s 148 was issued on 25.03.2015, in response to which ROI was filed on 16.06.2015 declaring total income of Rs.1,04,500/- as income from commission. The case was reopened on the ground of alleged sale of immovable property by the assessee for sale consideration of Rs. 7,00,000/-, the value of which was adopted at Rs.7,17,826/- by stamp valuing authority. The assessment U/s 143(3) r.w.s 147 was completed after making addition of Rs. 7,71,826/- being alleged undisclosed short term capital gain on alleged sale of immovable property after invoking Section 50C of the Act. The assessee preferred an appeal before the ld.CIT(A), which was decided by ld. CIT(A) vide order dated 19.11.2018 sustaining the findings of the AO and addition made U/s 148 of the Act. Against the said order of the ld CIT(A), the assessee is in appeal before us.

3. During the course of hearing, the ld AR submitted that the assessee is an individual drawing income from commission. During the year, total income of Rs. 1,04,500/- was earned which was below the maximum amount not chargeable to tax, therefore no return of income was filed by the assessee. During the year under consideration, the assessee got a power of attorney in his favor on 27.10.2007 from one Shri Nishikant Khopkar for sale of a property being Flat No. at 2/304, Jawahar Nagar, Jaipur. The property was owned and possessed by Shri Nishikant Khopkar. The aforesaid property was sold to Shri Amit Ahuja on 29.12.2007 by Shri Nishikant Khopkar for sale consideration of

Rs. 7,00,000/- through registered sale deed dated 29.12.2007. As the assessee was Power of Attorney holder of the seller Shri Nishikant Khopkar, therefore, the registry documents were presented by the assessee for registration as Power of Attorney holder. The AO got certain CIB information that the assessee has sold a property for sale consideration of Rs.7,00,000/- whose value taken for the purpose of stamp duty valuation has been taken at Rs.7,17,286/- and on this basis, AO entertained a reason to believe that income to the extent of Rs.7,17,286/- has escaped the assessment and the case of assessee was reopened u/s 148 after recording of reasons dated 25.03.2015.

4. It was submitted by the ld AR that after recording the above mentioned reasons, the AO obtained copy of registered sale deed from the office of Sub-Registrar-2, Jaipur, by issuing notice u/s 133(6) dated 03.08.2015. The addition of Rs.7,17,286/- was made by the AO on the ground of alleged undisclosed capital gain earned by the assessee on sale of property for Rs.7,00,000/-, whose value for the purpose of stamp duty valuation has been taken at Rs.7,17,286/- holding the assessee to be the owner of the property and invoking section 50C of the Act.

5. It was submitted by the ld AR that a perusal of the reasons recorded reveals that the AO was of belief that the assessee has sold the property for Rs. 7,00,000/- and on this ground, the action of initiation U/s 148 of the Act was taken, whereas in fact, the assessee never sold any property as he was the mere power of attorney holder acting on behalf of seller and owner of property was Shri Nishikant Khopkar. Therefore, the ground so taken by the AO to form belief of escapement is factually incorrect. To sale something in someone's own right, firstly, the person must own the same and there is no such

evidence that the assessee was having ownership of said property. Once, it is an established fact that assessee was not the owner of property, how can he sell the same. Therefore, the reasons so recorded were on wrong presumption and without looking into the correct facts of the case. In support of our contention we rely upon the decision of Hon'ble Coordinated Bench in the case of Shailesh Kumar Chaturvedi Vs ITO *(ITA No.1026/JP/2019 order dated 07.07.2020).*

6. It was further submitted that in the instant case, the reasons were recorded by the AO on 25.03.2015 on the basis of CIB information available that a property has been sold by the assessee for sale consideration of Rs.7,00,000/- and on the basis of said information and non filing of return, it was concluded that the income has escaped the assessment. After recording the reasons, a notice u/s 133(6) dated 03.08.2015 was issued to Sub-Registrar-2 to obtain the copy of Registered Sale deed of the transaction. It view of these facts, it emerges that the AO was having information from two sources viz. information received in the form of CIB Report and Information (Registered Sale deed) obtained from the Sub-Registrar by way of Notice u/s 133(6). It is important to note that the registered sale deed was obtained by the AO after recording the reasons, thus, at the time of recording the reasons, there was no tangible material in the hands of the AO to have any reason to believe that income to the extent of Rs.7,17,286/- has escaped the assessment and the AO was having the CIB Information only.

7. It was further submitted that the report of the CIB was only sufficient to make a prima facie reason to suspect that the some property has been sold by Shri Shujjat Ali Khan but it was not sufficient enough to draw a conclusion that the income has escaped the

assessment. To convert reason to suspect into reason to believe some tangible material was needed. Therefore, to reach to such a decisive finding the AO was expected to obtain the said registered sale deed, before recording the reasons, from sub-registrar or from the assessee, but nothing of this sort was done. This shows that the AO merely gone by the report of CIB. In this regard reliance is placed on the decision of Hon'ble Delhi High Court in the case of Meenakshi Overseas Pvt Ltd vs ITO (2017) 395 ITR 677 (Delhi) wherein the Hon'ble High Court held as under:

> "*The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.*"

8. It was further submitted the non availability of any tangible information at the time of recording of reasons is further supported by the fact that in the reasons, the assessee was termed at seller, whereas in the registered sale deed, the name of assessee is clearly mentioned as GPA Holder of Nishikant Khopkar. Thus, the information in the possession of AO and obtained u/s 133(6) were contradictory to each other. As mentioned above, after recording the reasons, the AO has subsequently written a letter u/s 133(6) to sub registrar-2 to obtain the

copy of Sale deed. Given that, on the basis of this transaction, AO formed a reason of escapement in the hands of the assessee, therefore, it was essential on his part to at least examine the correct facts of the transaction beforehand. There is no dispute that the AO can rely upon the information received but at the same time, where he is assuming jurisdiction u/s 147, he is required to carry out further examination to make a establish formation of belief that income has escaped, whereas, nothing of this sort was done. In support of his contentions, he has relied upon the decision of Jaipur Bench in the case of M/s. Balaji Health Care Pvt. Ltd vs. ITO *(ITA Nos. 566 & 567/JP/2018 vide order dated 30.1.2019)*.

9. It was accordingly submitted that in view of these facts and circumstances, once the AO reached to a decisive finding that the assessee has sold the property and the sale consideration of Rs.7,00,000/-whose value adopted for stamp duty valuation purpose of Rs.7,17,286/- has escaped the assessment, he was to make some inquiry to bring some tangible material rather than completely relying upon a one line information and then was to examine the correct facts to establish the nexus between the material and formation of belief that income has escaped. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons but as there was no such tangible material with the AO and only conclusions have been drawn. Therefore, in absence of these pre conditions, the assumption of jurisdiction u/s 147 has no legal basis and resultantly the assessment made u/s 148 deserves to be quashed.

10. Per contra, the ld. DR submitted that the AO was in receipt of CIB information that assessee has sold an immovable property and thus

had received sale consideration for transfer of property which was not disclosed to the department in absence of any return of income and therefore, it is a clear case of escapement of income and the AO was justified in initiating the proceedings u/s 148 which have been rightly upheld by the ld CIT(A). He accordingly supported the order passed by the lower authorities and has relied upon the findings of ld. CIT(A) wherein at para 2.3, it was held as under:-

> *"2.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. Assessee challenged the reopening proceedings. Assessing officer has information that assessee received sale consideration for transfer of property and same was not disclosed in return of income. Therefore, I upheld the action of Assessing Officer in reopening the case. This ground of appeal is dismissed."*

11. We have heard the rival contentions and perused the material available on record. It is a settled legal proposition that the satisfaction of the Assessing Officer for assumption of jurisdiction U/s 147 of the Act should be discernable from the reasons so recorded and the reasons alone should be considered for determining whether the Assessing Officer is in possession of the material/information basis which he has formed the reasonable belief that the income of the assessee has escaped assessment for the impugned assessment year. For assumption of jurisdiction u/s 147, the Assessing Officer must form a prima facie view on the basis of tangible material in his possession that there is an escapement of income, the opinion so formed may be subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion, the reasons recorded and/or the documents available on record must show a link/nexus and relevancy to the opinion formed by the Assessing Officer regarding

escapement of income and the reasons are required to be read as they were recorded by the Assessing officer. It is for the Assessing officer to disclose and open his mind through the reasons recorded by him and he has to speak through the reasons that the income chargeable to tax has escaped assessment. In the present case, the reasons recorded by the Assessing officer before issuance of notice u/s 148 read as under:-

> *"As per information available on record, during the period under consideration, the assessee has sold immovable property for consideration of Rs. 7,00,000/- which has been valued at Rs. 7,17,286/- for the purpose of charging stamp duty. On verification of record, it has been found that the assessee has not filed the return of income. Thus the assessee has failed to disclose fully and truly all material facts necessary for his assessment. Therefore, I have the reason to believe that the above income of Rs. 7,17,286/-, which is chargeable to tax has escaped assessment."*

12. On perusal of the reasons so recorded, we find that the Assessing officer had received certain information that the assessee had sold an immoveable property for consideration of Rs 7 lacs and which has been valued at Rs 7.17 lacs for the purposes of charging stamp duty. The nature and source of such information is not discernable from the reasons so recorded nor the specific of the immovable property in terms of location, size, purchaser, etc has been stated, therefore, the question that has been raised before us is about the tangible nature of such information and material in possession of the AO and the nexus thereof with formation of belief that the income has escaped assessment. It has been contended by the ld AR that the information so referred in the reasons recorded is only the CIB report received by the Assessing officer, a fact which is corroborated by the Assessing officer where he had subsequently issued a notice u/s 133(6)

to Sub-Registrar-2 to obtain copy of the sale deed. It is an admitted fact that the said notice u/s 133(6) was issued on 3.08.2015 subsequent to recording of reasons by the AO on 25.03.2015. Therefore, we find that as on the date of recording of reasons by the AO, only piece of information in possession of the AO was the CIB report that the assessee has sold certain immoveable property and the AO was not even having a copy of the sale deed or the specifics of the immoveable property, which to our mind, raises a question mark on the tangible nature of such information in terms of whether it is real or actual rather than imaginary and whether it actually relates to the assessee or not. Where the AO still wishes to rely on the report of CIB, given that such report is more of a generic report and not containing exact specifics of of immoveable property and other particulars of the transaction, it is expected that the AO on receipt of such report should carry out further examination before arriving at the prima facie view that income has escaped assessment and the matter is fit for issuance of notice u/s 148 of the Act. Such examination is required to be carried out before issuance of notice u/s 148 as the same is required for the Assessing officer to form his own independent opinion that the income has escaped assessment. In the instant case, there is no such examination and investigation carried out by the AO and infact, only after recording of the reasons, he has sought copy of the sale deed from the Sub-Registrar where the assessee has been shown as power of attorney holder of the owner of the immoveable property which again raises a question mark on the tangible nature of the CIB report. We therefore find that the AO has merely gone by the CIB report and was not even in possession of the sale deed and the exact specifics of the transaction at the time of recording of reasons and therefore, it is a

case where the proceedings are vitiated for want of tangible material in possession of the AO and lack of reason to believe which is more in the realm of suspicion rather than formation of opinion that income has escaped assessment. The reasons thus recorded and/or the documents available on record, therefore, don't show a link/nexus and relevancy to the opinion formed by the Assessing Officer regarding escapement of income. Further, even though the reopening in the present case was after the expiry of four years from the end of the relevant A.Y 2008-09, given that there was no original return of income filed by the assessee and consequent assessment, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment in terms of proviso to section 147 of the Act which is not applicable in the instant case. Similar view has been taken by the Coordinate Bench in case of **Balaji Healthcare Pvt Ltd** (supra) wherein the relevant findings read as under:

> *"20……Further, it is noted that after recording of the reasons, the Assessing officer has subsequently written a letter on 30.08.2013 to ACIT, New Delhi requesting for copy of statements of Surendra Kumar Jain,Virendra Kumar Jain at whose premises the search was conducted and P C Agarwal, so called mediator in these transactions. Given that search proceedings in respect of these two persons have formed the basis for the present reassessment proceedings in the hands of the assessee, it was essential to at least examine the statements of these three persons and seized material if any found during the course of search which in any ways indicate that these two persons have carried out certain transactions with the assessee and prima facie these transactions are suspected to be accommodation entries and not actual transactions. However, there is nothing in the reasons so recorded that the Assessing officer has gone through the statements so recorded during the course of search and the seized material to show prima facie*

linkage of assessee's undisclosed income being routed back in form of share capital. This shows that the Assessing officer has merely gone by the report of the DIT, Investigation Wing and the said report even didn't have the statements of these persons which either find mention in the report or as enclosures when the same was forwarded to the Assessing officer. Therefore, it transpires that there is no further examination which has been carried out by the Assessing officer. The fact that the assessee has filed its return of income u/s 139(1) was very much in the knowledge of the Assessing officer and the latter could have verified the transactions with the reported transactions in the financial statements and could have asked for more information to establish the necessary nexus, however nothing of that sort has been done by the Assessing officer and he has merely gone by the report of DIT, Investigation Wing. It is true that the Assessing officer can rely on the report of DIT, Investigation Wing but at the same time, where he is assuming jurisdiction u/s 147, he is required to carry out further examination and analysis in order to establish the nexus between the material and formation of belief that income has escaped assessment and in absence thereof, the assumption of jurisdiction u/s 147 has no legal basis and resultant reassessment proceedings deserve to be set-aside. Our viewis fortified by the decision of the ***Hon'ble Delhi High Court*** *in case of* ***Meenakshi Overseas Pvt. Ltd.*** *(supra) wherein it was held as under:-*

"19. A perusal of the reasons as recorded by the AO reveals that there are three parts to it. In the first part, the AO has reproduced the precise information he has received from the Investigation Wing of the Revenue. This information is in the form of details of the amount of credit received, the payer, the payee, their respective banks, and the cheque number. This information by itself cannot be said to be tangible material.

20. Coming to the second part, this tells us what the AO did with the information so received. He says: "The information so received has been gone through." One would have expected him

to point out what he found when he went through the information. In other words, what in such information led him to form the belief that income escaped assessment. But this is absent. He straightaway records the conclusion that "the above said instruments are in the nature of accommodation entry which the Assessee had taken after paying unaccounted cash to the accommodation entry given(sic giver)". The AO adds that the said accommodation was "a known entry operator" the source being "the report of the Investigation Wing".

21. The third and last part contains the conclusion drawn by the AO that in view of these facts, "the alleged transaction is not the bonafide one. Therefore, I have reason to be believe that an income of Rs. 5,00,000 has escaped assessment in the AY 2004-05 due to the failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment... "

22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow there from.

23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However,

something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

25. At this stage it requires to be noted that since the original assessment was processed under Section 143(1) of the Act, and not Section 143(3) of the Act, the proviso to Section 147 will not apply. In other words, even though the reopening in the present case was after the expiry of four years from the end of the relevant AY, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment.

26. The first part of Section 147(1) of the Act requires the AO to have "reasons to believe" that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre- condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation

of the belief or the reason to believe that income has escaped assessment."

"36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'. The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.

37. For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law."

Subsequently, the ***Hon'ble Delhi High Court*** *in case of* ***RMG Polyvinyl Ltd.*** *(supra) has held as under:-*

"12.Recently, in its decision dated 26th May, 2017 in ITA No. 692/2016 Pr. CIT v.Meenakshi Overseas, this Court discussed the legal position regarding reopening of assessments where the return filed at the initial stage was processed under Section143(1) of the Act and not under Section 143(3) of the Act. The reasons for the reopening of the assessment in that case were more or less similar to the reasons in the present case, viz., information was received from the Investigation Wing regarding accommodation entries provided by a 'known' accommodation entry provider. There, on facts, the Court came to the conclusion that the reasons were, in fact, in the form of conclusions "one after the other" and that the satisfaction arrived at by the AO was

a "borrowed satisfaction" and at best "a reproduction of the conclusion in the investigation report."

13. As in the above case, even in the present case, the Court is unable to discern the link between the tangible material and the formation of the reasons to believe that income had escaped assessment. In the present case too, the information received from the Investigation Wing cannot be said to be tangible material per se without a further inquiry being undertaken by the AO. In the present case the AO deprived himself of that opportunity by proceeding on the erroneous premise that Assessee had not filed a return when in fact it had."

In light of above discussions and in the entirety of facts and circumstances of the case, the assumption of jurisdiction and initiation of the proceedings under Section 147 of the Act to reopen the assessment proceedings does not satisfy the requirement of law and is hereby set-aside. In the result, ground no. 1 of the assessee's appeal is allowed."

13. In light of above discussions and in the entirety of facts and circumstances of the case and following the decisions referred supra, the assumption of jurisdiction and initiation of the proceedings under Section 147 of the Act to reopen the assessment proceedings are vitiated and does not satisfy the requirement of law and such action on the part of the Assessing Officer cannot be accepted and the notice under section 148 and consequent proceedings are thus set-aside. In the result, ground no. 1 of the assessee's appeal is allowed.

14. In view of the above discussions where the reassessment proceedings have been quashed and set-aside, the other grounds of appeal taken by the assessee have become academic and are thus dismissed as infructuous.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 05/01/2021.

Sd/-	Sd/-
(संदीप गोसाई)	(विक्रम सिंह यादव)
(Sandeep Gosain)	(Vikram Singh Yadav)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 05/01/2021.
*Santosh
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Sh. Shujaat Ali Khan, Jaipur.
2. प्रत्यर्थी / The Respondent- ITO, Ward-6(1), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 170/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar