

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "SMC", LUCKNOW**

[Through Virtual Court]

BEFORE SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

ITA No.693/LKW/2019

A.Ys. 2010-11

Shri Vikram Singh, Vill. Khadara, Post, Kumarganj, Faizabad PAN BOKPS 1534Q	Vs.	ITO-II Faizabad
(Appellant)		(Respondent)

Appellant by	Shri Prashant Kumar Verma, Advocate
Respondent by	Shri Ajay Kumar, DR
Date of hearing	06/09/2021
Date of pronouncement	20/09/2021

ORDER

This is an appeal filed by the assessee against the order of Id. CIT(A)-I, Lucknow dated 17.10.2019. The revised grounds of appeal taken by the assessee are reproduced below:

- "1. Because, the facts and circumstances of the case Id. CIT(A), has wrongly upholding the order of Id..AO, because the Id. AO has reopened the case on the basis of Cash Deposits of the appellant bank accounts but the addition was made on the basis of G.P. ratio, hence the assessment order framed by the AO liable to be quashed.*
- 2. Because, the assessment order impugned in the present appeal stands wholly vitiated as there can be no reason to believe on the basis of AIR information that income has escaped assessment u/s 147/143(3) on the ground of mere cash deposits in bank account amounting Rs.11,00,000/- therefore, the entire assessment proceedings made by the Id. AO and same is upheld by the Id. CIT(A) are liable to be quashed.*

3. *Because, the Id. CIT (A) -1, has considered the additional grounds of appeal during the appeal proceedings with NTPC (SC) Judgements, but in our order, she has not considered the same, after 11 or more hearing and after two remand reports therefore, the entire proceedings of the case is totally not justified by law.”*

2. Though the assessee has taken three grounds of appeal but at the time of hearing only Ground No.1 was argued which is on a legal issue. The Id.AR at the outset regarding Ground No.1 submitted that case of the assessee was reopened u/s. 147 of the Act for deposits in the bank amounting Rs.11,00,000/- and in this respect was our attention paper book pg.1 where copy of reasons recorded by the Assessing Officer were placed. Inviting our attention to the assessment order it was submitted that Assessing Officer did not make any addition on account of deposits of cash and instead has made addition on account of N.P. ratio which is not in accordance with law and reliance in this respect was placed on the judgment of CIT vs. Jet Airways (I) Ltd., 331 ITR 236. It was submitted that the addition cannot be made on any other issue during reassessment proceedings if the addition is not made on the basis of which the case was reopened u/s 147 of the Act.

3. The Id. DR, on the other hand submitted that in the case of Director of Income tax (IT)-II vs. Black & Veatch Prichard, Inc., [2019] 107 taxmann.com 290 (SC) where the Hon'ble Bombay High Court in the case of Jet Airways (Supra) has been followed but the Hon'ble Supreme Court has admitted the SLP filed by the Revenue and in this respect filed a copy of order of Hon'ble Supreme Court admitting the SLP and therefore it was argued that the ground taken by assessee be dismissed therefore this ground of appeal cannot be allowed in favour of the assessee.

4. I have heard the rival parties and have gone through the material available on record. I find that it is an undisputed fact that the case of the assessee was reopened on the basis of AIR information regarding deposits of Rs.11.00 lacs in the bank account of the assessee. A copy of reasons recorded is placed in P.B. pg. 1. It is also undisputed fact that addition was not made on account of Rs.11.00 lacs and rather addition has been made on the basis of net profit ratio to the turnover. The Hon'ble Bombay High Court in the case of Black & Veatch Prichard Inc. (Supra) following the judgment of Jet Airways (Supra) has decided the issue against the Revenue. However, Hon'ble Supreme Court vide order dated 14.09.2018 has admitted the SLP filed by the Revenue. However, mere admission of SLP by the Hon'ble Supreme Court will not amount to overruling of its earlier judgment in the case of Jet Airways(Supra). The Hon'ble Bombay High Court in the case of Jet Airways (Supra) has held as under:

“14. The rival submissions which have been urged on behalf of the Revenue and the assessee can be dealt with, both as a matter of first principle, interpreting the section as it stands and on the basis of precedents on the subject. Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under s. 147 and following the issuance of a notice under s. 148, the AO has the power to assess or reassess the income, which he has reason to believe had escaped assessment and also any other income chargeable to tax. The words "and also" cannot be ignored. The interpretation which the Court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used

the word "or". The legislature did not rest content by merely using the word "and". The words "and", as well as "also" have been used together and in conjunction.

15. The Shorter Oxford Dictionary defines the expression "also" to mean 'further, in addition, besides, too'. The word has been treated as being relative and conjunctive. Evidently, therefore, what Parliament intends by use of the words "and also" is that the AO, upon the formation of a reason to believe under s. 147 and the issuance of a notice under s. 148(2) must assess or reassess : (i) 'such income'; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the AO has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the AO to independently assess only that income which comes to" his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under s. 148(2), the AO accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of s. 147 w.e.f. 1st April, 1989 clearly stipulated that the AO has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.

16. In CIT vs. Sun Engineering Works (P) Ltd. (1992) 107 CTR (SC) 209 : (1992) 198 ITR 297 (SC) : (1992) 64 Taxman 442

(SC), the Supreme Court dealt with the following question of law in the course of its judgment :

"Where an item unconnected with the escapement of income has been concluded finally against the assessee, how far in reassessment on an escaped item of income is it open to the assessee to seek a review of the concluded item for the purpose of computation of the escaped income ?"

*The issue which arose before the Supreme Court was whether, in the course of a reassessment on an escaped item of income could an assessee seek a review in respect of an item which stood concluded in the original order of assessment. The Supreme Court dealt with the provisions of s. 147, as they stood prior to the amendment on 1st April, 1989. The Supreme Court held that the expression "escaped assessment" includes both "non-assessment" as well as "underassessment". Income is said to have escaped assessment within the meaning of the section when it has not been charged in the hands of an assessee during the relevant assessment year. The expression "assess" refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of s. 147. The expression "reassess" refers to a situation where an assessment has already been made but the AO has reason to believe that there is underassessment on account of the existence of any of the grounds contemplated by Expln. 1 to s. 147. The Supreme Court adverted to the judgment in *V. Jaganmohan Rao vs. CIT (1970) 75 ITR 373 (SC)*, which held that once an assessment is validly reopened, the previous underassessment is set aside and the ITO has the jurisdiction and duty to levy tax on the entire income that had escaped assessment during the previous year. The Court held that the object of s. 147 enures to the benefit of the Revenue and it is not open to the assessee to convert the reassessment proceedings as an appeal or revision and thereby seek relief in respect of items which were rejected earlier or in respect of items not claimed during the course of the original assessment proceedings.*

*17. The judgment in *V. Jaganmohan Rao vs. CIT (supra)* dealt with the language of ss. 22(2) and 34 of the Act of 1922 while the judgment in *Sun Engg. Works (P) Ltd. (supra)* interprets the*

provisions of s. 147 as they stood prior to the amendment on 1st April, 1989.

18. The effect of the amended provisions came to be considered in two distinct lines of precedent on the subject. The first line of authority, to which a reference has already been made earlier, adopted the principle that where the AO has formed a reason to believe that income has escaped assessment and has issued a notice under s. 148 on certain specific issues, it was not open to him during the course of the proceedings for assessment or reassessment to assess or reassess any other income, which may have escaped assessment but which did not form the subject-matter of the notice under s. 148. This view was adopted in the judgment of the Punjab & Haryana High Court in *Vipan Khanna (supra)* and in the judgment of the Kerala High Court in *Travancore Cements Ltd. (supra)*, This line of authority, would now cease to reflect the correct position in law, by virtue of the amendment which has been brought in by the insertion of Expln. 3 to s. 147 by Finance (No. 2) Act of 2009. The effect of the Explanation is that once an AO has formed a reason to believe that income chargeable to tax has escaped assessment and has proceeded to issue a notice under s. 148, it is open to him to assess or reassess income in respect of any other issue though the reasons for such issue had not been included in the reasons recorded under s. 148(2).

19. The second line of precedent is reflected in a judgment of the Rajasthan High Court in *CIT vs. Shri Ram Singh (2008) 217 CTR (Raj) 345 : (2008) 306 ITR 343 (Raj)*. The Rajasthan High Court construed the words used by Parliament in s. 147 particularly the words that the AO 'may assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings' under s. 147. The Rajasthan High Court held as follows :

". . . it is only when, in proceedings under s. 147 the AO, assesses or reassesses any income chargeable to tax, which has escaped assessment for any assessment year, with respect to which he had 'reason to believe' to be so, then only, in addition, he can also put to tax, the other income, chargeable to

tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under s. 147.

To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under s. 147, the AO were to come to the conclusion, that any income chargeable to tax, which, according to his 'reason to believe', had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the AO entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the AO may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under s. 147."

20. Parliament, when it enacted the Expln. (3) to s. 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Expln. 3 to s. 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain Courts that the AO has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Expln. 3 consequently provides that the 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 under s. 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd. (supra) and of the Punjab & Haryana High Court in Vipan Khanna (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh (supra), Expln. 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT vs. Atlas Cycle Industries (1989) 180 ITR 319 (P&H) : (1989) 46 Taxman 315 (P&H). The decision in Atlas Cycle Industries (supra) held that the AO did not have jurisdiction to proceed with the reassessment, once he found that the two

grounds mentioned in the notice under s. 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries (supra) and of the Rajasthan High Court in Shri Ram Singh (supra) would not be affected by the amendment brought in by the insertion of Expln. 3 to s. 147.

21. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under s. 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the AO could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Expln. 3 by the Finance Act (No. 2) of 2009. However, Expln. 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of s. 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Sec. 147 has this effect that the AO has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under s. 148, he 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. If he intends to do so, a fresh notice under s. 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

22. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in s. 147(1) and on the basis of the precedent on the subject. We agree with the submissions which has been urged on behalf of the assessee

that s. 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the AO may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Expln. 3 to s. 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh (supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of s. 147(1) as they stood after the amendment of 1st April, 1989 continue to hold the field.

23. In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall, accordingly, stand answered against the Revenue and in favour of the assessee. The appeal is, accordingly, dismissed. There shall be no order as to costs."

5. In view of above facts and circumstances and in view of judicial precedent relied on by the Id. AR Ground No.1 of the appeal is allowed and Since I have allowed relief on Ground No.1 rest of the grounds has become infructuous.

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

(Order pronounced in the open court on 20/09/2021)

**Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER**

Aks –
Dtd. 20/09/2021

Copy of order forwarded to:

- | | |
|--|---------------------------|
| <i>(1) The appellant</i> | <i>(2) The respondent</i> |
| <i>(3) Commissioner</i> | <i>(4) CIT(A)</i> |
| <i>(5) Departmental Representative</i> | <i>(6) Guard File</i> |

By order

Assistant Registrar