

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA BENCH “SMC”, KOLKATA**

**BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.721/Kol/2022
Assessment Year: 2009-10**

Deepak Bajaj 77, S.P. Mukherjee Road, Gd. Floor, Kalighat, Kolkata- 700026. PAN: AEEPB 5525 K (Appellant)	Vs.	ITO, Ward-40(1), Kolkata (Respondent)
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Present for:

Appellant by : Shri Dilip Chatterjee, Advocate
Respondent by : Smt. Ranu Biswas, Addl. CIT, Sr. DR

Date of Hearing : 29.03.2023

Date of Pronouncement : 21.04.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal by the assessee is arising out of the order of CIT(A)-12, Kolkata vide Order No. 40/CIT(A)-12/Kol/Ward-40(1)/2014-15 dated 09.06.2016 against the assessment order passed u/s 143(1)/147 of the Income-tax Act, 1961 (hereinafter referred to as ‘the Act’).

2. Grounds taken by the assessee are as under:

i. For that and the facts and circumstances of the case and in law, Ld CIT(A) -12 Kol passed an order while failed to offer any opportunity of being heard, rebuttal, and representing the case /issues involved in the grounds of appeal during course of hearing, hence such act is liable to be void ab-initio, cancelled, and order quashed.

ii. For that and in the facts and circumstances of the case and in law , Ld CIT(A)-12 Kol while passing the impugned order, should have taken in to the considering the nature of assessment, and pre-conditions of the proceedings u/s 147 of the IT Act 1961, hence failure on the part of CIT(A)-12 Kol renders such order is unlawful, unsustainable in the eyes of law, a patent mistake, against the rules of natural justice,

hence liable to be set aside. (relied on the order of ITAT B Bench Kol, dated 31st March 2022 in ITA No- 75/Kol/2020)

iii. For that and in the facts and circumstances of the case and in law, Ld. CIT(A)-12 Kol should have considered Gr no-1 before concluding the matter in the event of non-serving the notices due to postal fault, and in absence of appearance at the hearing, though the appellant/assessee normally stayed at the address mentioned in the appeal petition.

iv. For that and under the facts and circumstances of the case and in Law . Ld CIT(A)-12 Kol, failed to discharge the lawful duty to serve such notices to other address fixing hearing, which is available in records, is a matter of facts as well as fault on the part of authority below, renders whole act is liable to be void ab initio and set aside.

v. For that and under the facts and circumstances of the case and in law, CT(A)-12 Kol, erroneously passed order as failed to consider the issues whether the “ Reason recorded to believe escapement of income and said Copy of Reasons recorded "was duly served on the appellant/assessee is the pre-condition before initiation of proceedings and issuing notice u/s 147 and 148 of the IT Act 1961 is a serious/ grave question of fact as well as law, accordingly the action taken as well as order passed over looking that matter is liable to be set aside. (followed by order of ITAT-B-Bench Kol, dated 31" March 2022 in ITA No-73/Kol/2020)

vi. For that and under the facts and circumstances of the case and in law CIT(A)-12 Kol, while passing an order in absence of the appellate/assessee should have noted the fact whether the copy of "Reason to believe of escapement of income “ was duly served on the assessee by AO, during the course of assessment proceedings initiated /s 147 of Act 1961 hence the act of the authority below liable to be set aside, and action taken thereof is void ab initio, unsustainable in the eyes of law.

vii. For that and under the facts and circumstances of the case and in law, the present appellant craves liberty to take any further ground/grounds or annul, modify, the same during the course of final appeal hearing.”

2.1. Brief facts of the case are that assessee is engaged in the business of television software in the name of “Beyond Reels’. Case of the assessee was reopened by issuing a notice u/s 148 of the Act dated

04.10.2012. Assessee filed his return in response to the said notice, reporting total loss of Rs. 6,92,232/-. Reopening proceedings were initiated on the assessee since he failed to furnish return of income. Assessee challenged the proceedings initiated u/s 147. In the course of assessment proceedings, ld. AO noted that assessee has made certain payments for artist remuneration on which required TDS has not been done and, therefore, he disallowed an amount of Rs. 13,41,360/- u/s 40(a)(ia) of the Act. Similar addition of Rs. 9,60,363/- was made for non-deduction of tax at source in respect of studio hire charges and of Rs. 7,30,832/- in respect of interest paid on unsecured loans on which no TDS was done. Another disallowance of Rs. 45,845/- was made by taking 5% of the expenses towards car hire charges, conveyance and depreciation, on account of personal use.

3. Aggrieved, assessee went in appeal before the ld. CIT(A) who dismissed the same by observing that assessee has failed to submit documentary evidence and explanation in support of the grounds raised in his appeal.

4. Aggrieved, assessee is in appeal before the Tribunal.

5. Before advertng on the appeal, we note that impugned order of ld. CIT(A) is dated 09.06.2016 which the assessee has claimed to receive it on 02.12.2022, which is almost six and half years after the passing of the said order. In this respect, assessee has placed on record an explanation vide letter dated 15.12.2022. According to this, assessee claimed that assessee was not aware of the disposal of his appeal since no notices were received by him, fixing the hearing by ld. CIT(A). Later, on receipts of demand notice from the ld. AO, it came to the knowledge of the assessee that his appeal has been disposed of, for which no order has been received by him. Assessee then made a request in the office of ld. CIT(A) as well as ld. AO for obtaining a copy of the impugned order of

ld. CIT(a) which was made available to him on 02.12.2022. Thereafter, assessee presented his appeal before the Tribunal on 13.12.2022. There is no delay in filing the present appeal before the Tribunal by the assessee considering the date of receipt of order as on 02.12.2022.

6. Before us, ld. counsel for the assessee laid emphasis on ground no. 5 to submit that notice u/s 148 was served on the assessee without the copy of the reasons to believe, recorded for initiating the proceedings. According to ld. counsel, it is a pre-requisite that reasons to believe recorded by the ld. AO for initiating the proceedings u/s 148 r.w.s. 147 are to be supplied along with the notice u/s 148. Ld. Counsel emphasized on the fact that reasons to believe recorded by the ld. AO have not been served on the assessee which was agitated at the time of assessment proceeding also. Ld. counsel referred to recent application dated 22.09.2022 submitted before the ld. AO i.e. ITO, Ward-40(1), Kolkata praying for supply of copy of reasons to believe, recorded for initiating the proceedings u/s 148 r.w.s. 147 of the Act. Ld. Counsel thus, strongly agitated that the impugned proceedings u/s 147 are not in accordance with the provisions of law, more particularly in terms of the directions given by Hon'ble Supreme Court in the case of GKN Drive Shaft India Ltd. vs ITO 259 ITR 19 (2003) (SC).

6.1. Ld. Counsel also placed reliance on the decision of the co-ordinate bench of ITAT, Delhi in the case of Balwant Rai Wadhwa vs ITO in ITA 4806/Del/2010 dated 14.01.2011 wherein it was held that issuance of the notice communication and furnishing of reasons would go hand in hand. The reasons are to be supplied to the assessee before the expiry of period of six years. If it has not been done then validity u/s 148 could not be upheld. It was also held that the notice would be served at any point of time before the expiry of six years, if AO has reasons to believe that income has escaped assessment but, such reasons are also to be

communicated to the assessee before the expiry of limitation otherwise validity of such notice could not be sustainable. In this case, the assessment was quashed.

6.2. Per contra, ld. Sr. DR submitted that reopening has been validly done. Assessee participated in the assessment proceedings before the ld. AO and never agitated on the issue i.e. being raised before the Hon'ble Bench.

7. We have heard the rival contentions and gone through the material placed on record. From the perusal of the assessment order, we observe that there is no mention about the reasons to believe which were recorded for initiating the proceedings u/s 148. Also, there is no mention about the supply of copy of reasons to believe as recorded by the ld. AO, to the assessee. Before the ld. CIT(A), assessee could not make any submission as he never received notices for the dates for which hearings were fixed.

7.1. Before us, ld. counsel for the assessee has referred to a letter filed by the assessee under duly acknowledged seal from the office of ITO Ward-40(1), Kolkata praying for supply of copy of reasons to believe recorded by the ld. AO. From the decision of Hon'ble Supreme Court in the case of GKN Drive Shaft India Ltd. (supra), we note that Hon'ble Supreme Court mandated the Assessing Officer to furnish reasons within a requisite time. On receipt of reasons, the assessee is entitled to file objection to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the present case before us, ld. counsel is contesting that this mandate given by the Hon'ble Supreme Court has not been complied with by the ld. AO and, therefore, the assessment completed and demand so raised is liable to be quashed, as bad in law.

7.2. We do find force in the submissions made by the ld. counsel based on facts available on record and the mandate given by the Hon'ble Supreme Court in the case of GKN Drive Shaft India Ltd. (supra). We also gainfully draw support from the decision of co-ordinate bench of ITAT, Delhi in the case of Balwant Rai Wadhwa (supra) which has also dealt with the issue of non supplying of reasons to believe along with the notice u/s 148 of the Act to the assessee.

7.3. The relevant extract from the said order of co-ordinate bench of ITAT, Delhi is reproduced as below:

"The contention of the assessee is that Hon'ble Delhi High Court has held that if the reasons recorded by the AO for reopening of assessment has not been supplied or served within 6 years then it will be construed that no valid notice has been served upon the assessee within 6 years. The authoritative observation made by the Hon'ble High Court in this connection read as under :-

24. Thirdly, it could be argued that the reasons supplied to the petitioner in September, 2004 be disregarded so also the objections filed by it as also the impugned order dated 2-3-2005 and the reasons noted in the said form be now taken as the reasons for the issuance of the notice under section 148 and the petitioner may now prefer his objections, if any, and thereupon the Assessing Officer be directed to pass a speaking order. In other words, such an argument requires us to sweep all the proceedings emanating from the supply of reasons in September 2004 and culminating in the passing of the order dated 2-3- 2005 'under the carpet', as it were. And, starting the process as per the directions given in GKN Driveshafts (India) Ltd.'s case (supra) afresh considering the reasons noted in the said form to be the actual reasons for the issuance of the notice under section 148. If we were to accept this argument, we would have to ignore the directions given by the Supreme Court in GKN Driveshafts (India) Ltd.'s case (supra) that the Assessing Officer is bound to furnish reasons within a reasonable time. The notice under section 148 was issued on 29-3-2004. The petitioner filed the return and sought reasons by its letter dated 11-5-2004. If the date of filing of the counter-affidavit in this writ petition is taken as the date of communication of the reasons which forms part of the said form, a copy of which is Annexure-A to the counter-affidavit, then the date of

supply of reasons, based on this argument, would be 5-11- 2007. This immediately makes it clear that the Assessing Officer, who was bound to furnish his reasons within a reasonable time, did not do so. The period which elapsed between 11-5-2004, when the petitioner made the request for communicating the reasons, and 5-11-2007, the date when the counter-affidavit was filed, can certainly not be regarded as a reasonable period of time. Apart from this, we must not forget the provisions of section 149 which prescribes the time-limit for a notice under section 148. Section 149(1)(b) stipulates the outer limit of six years from the end of the relevant assessment year where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees one lakh or more for that year. This means that a notice under section 148, in the present case, could not, in any event, have been issued after six years from the end of the assessment year 1998-99, i.e., after 31-3-2005. In whichever way we look at it, a notice under section 148 without the communication of the reasons therefor is meaningless inasmuch as the Assessing Officer is bound to furnish the reasons within a reasonable time. In a case, where the notice has been issued within the said period of six years, but the reasons have not been furnished within that period, in our view, any proceedings pursuant thereto would be hit by the bar of limitation inasmuch as the issuance of the notice and the communication and furnishing of reasons go hand-in-hand. The expression 'within a reasonable period of time' as used by the Supreme Court in *GKN Driveshafts (India) Ltd.'s case (supra)* cannot be stretched to such an extent that it extends even beyond the six years stipulated in section 149. For this reason also, even assuming that we overlook all that has happened between 11-5-2004, when the petitioner sought the reasons, and 5-11-2007, when the said form annexed to the counter-affidavit was filed in this court, the validity of the notices under section 148 issued on 29-3-2004 and any proceedings pursuant thereto cannot be upheld."

5. A plain reading of the above exposition of law at the end of Hon'ble Jurisdictional High Court make it clear that issuance of the notice and the communication and furnishing of reasons would go hand in hand. The reasons are to be supplied to the assessee before the expiry of period of 6 years. If it has not been done then validity u/s 148 could not be upheld. It is not in the income tax proceeding alone. In any proceeding say, civil or criminal, if a summon is issued to the defendant / respondent, is not accompanied with the copy of plaint or complaint then it is to be construed that no valid service of notice has been effected upon the defendant or the respondents whichever may

be the case. The notice could be served at any point of time before the expiry of 6 years, if AO has reasons to believe that income has escaped assessment but, such reasons are also to be communicated to the assessee before the expiry of the limitation otherwise validity of such notice could not be sustainable. Being a subordinate authority to the Hon'ble High Court, we are bound to follow the authoritative exposition of law at the end of Hon'ble High Court . In view of the above discussion, we allow ground No. 2 of the assessee wherein he has pleaded that notice u/s 148 has not been served within the period of limitation upon the assessee. The assessment is not sustainable. It is quashed.

6. Since on the strength of Hon'ble Delhi High Court's decision, we have held that a valid service of notice has not been effected upon the assessee and the asstt. order is not sustainable, we do not deem it necessary to examine the other issues, whether reopening is justified or not. In other words whether AO has reasons to believe that income has escaped assessment or not. We also do not deem it necessary to examine whether assessee has established that he has received genuine gifts or not. Both these issues are academic in view of our finding on ground no. 2 taken by the assessee.

8. Considering the above discussion, we allow the ground no. 5 of the assessee and quash the assessment so made. Since the jurisdictional issue has been held in favour of the assessee, holding assessment order as not sustainable, we do not deem necessary to examine and adjudicate upon other grounds of appeal raised by the assessee.

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

Order pronounced in the open court on 21.04.2023.

**Sd/-
(SONJOY SARMA)
JUDICIAL MEMBER**

**Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER**

Kolkata, Dated: 21.04.2023.
Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Deepak Bajaj.
2. The Respondent: ITO, Ward-40(1), Kolkata.
3. The CIT,
4. The CIT (A)
5. The DR

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata