* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 31st August, 2012

\+ ITA No. 1395/2008

Smt. Meera Kapoor ..... Appellant
Through: Mr. N.P. Sahni, Advocate.

versus

Commissioner Of Income Tax ..... Respondent
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

%

Facts:

1. The present appeal under section 260A of the Income Tax Act, 1961 (hereafter called "the Act") is directed against the order dated 20.03.2008 by the Income Tax Appellate Tribunal (ITAT), Delhi Bench 'C'. By the impugned order, ITAT upheld the addition of ₹.31 lacs made by the Assessing Officer (AO) holding that the appellant had failed to establish the creditworthiness and genuineness of the transaction of the impugned gift. As regards certain other gifts worth ₹.74,914/- the Tribunal restored the matter back to the A.O. The ITAT upheld the validity of the notice under section

148 of the Act, thereby dismissing the cross objections filed by the appellant. The question of law urged on behalf of the assessee is regarding the correctness of the ITAT's order, upholding the addition, and also refusing to interfere with the re-opening of assessment, by the AO.

2. The year under consideration is 1995-96; the appellant had, during the period, received a gift worth ₹.31 lacs from an NRI, Shri Jagjit Singh Kochar. The gift was received by way of Cheque no. 522348 dated 09.09.1994 drawn from the donor's NRE A/c No. 19912012 with the Bank of America, New Delhi. The appellant deposited the cheque in her savings bank account, and the amount was subsequently used by her for opening a fixed deposit on 03.02.1995. The appellant filed a return of income under Section 139(1) of the Act declaring the total income of ₹. 2,32,130/-. The return was processed under Section 143(1)(a) of the Act on 29.02.1996. Thereafter, the ACIT, Circle 30(1), New Delhi initiated reassessment proceedings under Section 147 and issued notice dated 28.03.2002 under Section 148 of the Act. The appellant was examined by the A.O. on 10.03.2003. During the reassessment, the A.O. doubted the creditworthiness and genuineness of the gift. The gifts received by the appellant including ₹.31 Lacs from the NRE A/c of the Donor and the domestic gifts worth ₹.74,914/- were deemed to be her income and were added under Section 68 of the Act. The order of the AO was challenged before the Appellate Commissioner [CIT(A)]; the latter upheld the validity of the notice under

Section 148 but directed that the addition of ₹.31,74,914/- be set aside, holding that the appellant had proved the genuineness of the gifted amount. Aggrieved, the revenue appealed to the ITAT, which upheld the addition of Rs. 31 lacs made by the A.O. Further, the Tribunal upheld the validity of the notice under Section 148 and dismissed the cross appeal of the Appellant on that score, and also allowed the revenue's appeal on merits.

Appellant's Contentions:

3. The appellant contended that the re-assessment under Section 147 is without a reasonable cause, and is merely on the directions of another officer. The provision on the face of it casts a duty on the Assessing Officer to have reasons to start with reassessment proceedings. Also, if the reasons cannot be substantiated, the reassessment under provisions of sections 148 to 153 of the Act cannot be considered to be good in law. The appellant relied on the rulings of the Supreme Court in *Chhugamal Rajpal v. S.P. Chaliha* : 79 ITR 603, wherein the Court held that to issue a notice for reassessment, it is mandatory for the Department to verify that the requirements of sections 148 and 151(2) have been complied with. Reliance was placed on the judgment in *CIT v. Atul Jain/Smt. Vinita Jain* 293 ITR 383, where the following observations, similar to the ratio in *Chhugamal* (Supra), were reiterated:

> *"..in so far as the basis for the reasons is concerned, even this is absent. The Assessing Officer did not verify the correctness of the*

information received by him but merely accepted the truth of the vague information in a mechanical manner. The Assessing Officer has not even recorded his satisfaction about the correctness or otherwise of the information or his satisfaction that a case has been made out for issuing a notice under Section 148 of the Act. Read in this light, what has been recorded by the Assessing Officer as his "reasons to believe" is nothing more than a report given by him to the Commissioner of Income Tax. As held by the Supreme Court in Chhugamal Rajpal, the submission of a report is not the same as recording of reasons to believe for issuing a notice. The Assessing Officer has clearly substituted form for substance and, Therefore, the action of the Respondent falls foul of the law laid down by the Supreme Court in Chhugamal Rajpal which is clearly applicable to the facts of these appeals."

4. The appellant relied on the judgment of the Supreme Court in *CIT v. Kelvinator of India Ltd.*, (2010) 2 SCC 723 wherein it was held that the Assessing Officer shall have the right to re-open assessment u/s 147 of the Act only if there is 'tangible material' to show that income has escaped assessment. The Assessing Officer shall not be allowed to arbitrarily re-open assessment. It was also urged that the notice served under section 148 of the Act is defective.

5. The Appellant further argued that the notice served by ACIT, Circle 30(1), New Delhi was without jurisdiction as it was ACIT, Circle 28 who had the jurisdiction. Thus, notice, which is the essential requisite for reassessment, was wrongly issued. The Appellant also contended that reliance placed on the provisions of Section 124(3) to uphold the validity of reassessment is erroneous. It was contended that the provisions of that

section are inapplicable to the present case because the appellant is not challenging the jurisdiction of the ACIT, Circle 28(1), New Delhi before which the entire proceedings under Section 147 took place and culminated in the assessment order. However, the appellant is challenging the issuance of a valid notice under Section 148 of the Act. The reason was that the notice was issued to the Appellant by an officer who did not have any jurisdiction, in her case. Thus, it is submitted by the appellant that the notice issued by ACIT, Circle 30(1) and the consequential assessment is illegal and bad in law.

6. The assessee relied on the judgment of the Supreme Court in *CIT, Gujarat v. A. Raman & Co.,* AIR 1968 SC 49, contending that the High Court has been conferred with the power to prohibit the Assessing officer from initiating re-assessment, if it is of the view that there is no reason to start with the proceedings. Reliance was also placed on *Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District I, Calcutta & Another* reported in [1961] 41 ITR 191 (SC), particularly the following observation that:

> *"5. It was held by this Court in Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District I, Calcutta & Another: [1961]41ITR191(SC) that the High Court in appropriate cases has power to issue an order prohibiting the Income-tax Officer from proceeding to reassess the income when the conditions precedent do not exist. At p. 207, K. C. Das Gupta, J., delivering the majority judgment of the Court observe :*

> *"It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences".*
>
> *6. The High Court may, therefore, issue a high prerogative writ prohibiting the Income-tax Officer from proceeding with re-assessment when it appears that the Income-tax Officer had no jurisdiction to commence proceeding."*

Thus, it is imperative to understand that reassessment without jurisdiction cannot be initiated. Any proceeding without the jurisdiction is bad in law.

7. The appellant contended that the addition aggregating to ₹.31,74,914/- which had been made by the A.O. u/s 68 of the Act was incorrect as she (the assessee) provided substantial evidence to prove the identity, creditworthiness and genuineness of the gifts received. Thus, the additions cannot be made under section 68 of the Act. It was held, on the strength of the ruling in *CIT v. Lovely Exports P. Ltd.* [2009] 319 ITR (SC.) It was submitted that the assessee had *prima facie* proved (1) the identity of the donor; (2) the genuineness of the transaction, namely, that it was transmitted through banking channels; (3) the creditworthiness or financial strength of the donor All these constituted acceptable proof or acceptable explanation by the assessee. Thus, there was reasonable cause to make additions under section 68.

8. It was argued by the Appellant that she only had to prove *prima facie* the identity of the donor, the capacity of such donor to gift the money and lastly, the genuineness of the transaction. The Supreme Court has held in the case of *Sreelekha Banerjee v. CIT* 49 ITR 112 that it has always to be borne in mind that while considering the explanation of the assessee, the Department cannot act unreasonably.

Respondent's Plea:

9. The Revenue contended, firstly, that the genuineness and creditworthiness of the transaction cannot be traced, despite the production of the evidence to prove that the donor Mr. Jagjit Singh Kochar is a wealthy man. Yet, the assessee did not file the authenticated assessment orders, Balance sheets duly certified by the authorities as prescribed in the concerned foreign country.

10. It was emphasized that there existed no relation between the donor and the assessee. The Respondent relied on the case of *Sajan Dass & Sons v. CIT* 264 ITR 435. It was held in the judgment:

> *"That a mere identification of the donor and showing the movement of the gift amount through banking channels was not sufficient to prove the genuineness of the gift. Since, the claim of the gift was made by the assessee, the onus lay on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it had been received as a gift from the donor. Having regard to the enquiries conducted by the Assessing Officer from the bank with which the assessee was admittedly confronted and bearing in mind the*

fact that admittedly the donor was not related to the assessee, the findings recorded by the Tribunal were pure findings of fact warranting no interference. The appeal is liable to be dismissed."

11. The Revenue contends that mere identification of the donor and showing the movement of gift amount through banking channel is not sufficient to prove the genuineness of the gift. It was argued that it is strange that the Appellant is, for the first time, contending in third appellate proceedings that the notice under Section 148 issued to her on 28.03.2002 by the ACIT Circle 30(1), New Delhi was illegal and void *ab initio*. The Revenue has relied on the judgment of *Phool Chand Bajrang Lal v. ITO* (1993) 203 ITR 456 (SC) wherein the following was stated by the Court:

"..We have to look to the purpose and intent of the provisions. One of the purposes of Section 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude."

The next case that the Revenue has relied upon is *Sardar Harvinder Singh Sehgal* v. ACIT (1997) 227 ITR 512 wherein the court has held that:

*"**27**. The court can examine the reasons only in a limited way. If any authority is required for this proposition one can have a look at the following decision of the apex court (ITO v. Lahkmani Mewal Das : [1976]103ITR437(SC)), wherein the Supreme Court at pages 445 and 446 pointed out as follows :*

> *" Once there exist reasonable grounds for the Income Tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the court to investigate. The sufficiency of the grounds which induce the Income Tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that the Income Tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression 'reason to believe' does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income Tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law (see observations of this court in the cases of Calcutta Discount Co. Ltd. v. ITO : [1961]41ITR191(SC) and S. Narayanappa v. CIT : [1967]63ITR219(SC) , while dealing with the corresponding provisions of the Indian Income Tax Act, 1922."*

12. The Revenue argued that the requirement of '*reason to believe*' specified in Section 147 of the Act had been fully established by it and moreover, it is not a question of substantiation and subjectivity. The reassessment under sections 147/148 should be done in good faith. Here, the Department had adequate reasons to believe that the income has escaped assessment and thus, reassessment be done.

13. Addressing the issue of jurisdiction, the Revenue argued that the assessee had herself filed her return of income on 22.12.1995 with the erstwhile Circle 7(1), New Delhi, which after restructuring of the Department was re-designated as Circle 30(1), New Delhi. The assessee was issued and served with the notice u/s 148 by the ACIT, Circle 30(1), New Delhi. Furthermore, the assessee has submitted to the jurisdiction of the ACIT, Circle 28(1), New Delhi during the assessment proceedings without raising any objections on the jurisdiction. Further, the CIT (A) after having referred to the provisions of Section 124(3) of the Act had observed that the return was filed on 28.12.1995, i.e., u/s 139(4) of the Act and the assessee's right to dispute the jurisdiction of the A.O. was lost after the period of 30 days.

Analysis and Findings

14. The Court would first deal with the question of jurisdiction. In this court's opinion, the assessee's grievance as to the legality of the notice under Sections 147/148 is unfounded. The Appellate Commissioner as well as the ITAT have in their reasoned orders, concurrently upheld the re-opening of assessment; the grounds mentioned in the "reasons to believe" cannot be faulted, having regard to the lack of particulars which existed even in the original returns. As far as the question of territorial jurisdiction, i.e. whether it was that of ITO Ward 28 or 30 is concerned, the Court notices that the assessee understood her rights correctly, and filed the returns before

the concerned officer. Also, the question was not urged earlier in the manner sought to be made out during these proceedings. Furthermore, it would be relevant to extract Sections 124(3)-(5) which provide a challenge procedure in such cases:

> *"(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer—*
>
> *(a) where he has made a return [21][under sub-section (1) of section 115WD or] under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or [21][sub-section (2) of section 115WE or] sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier;*
>
> *(b) where he has made no such return, after the expiry of the time allowed by the notice under [22][sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144] to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.*
>
> *(4) Subject to the provisions of sub-section (3), where an assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.*
>
> *(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an*

Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120."

It is apparent that the right to question the issuance of notice, under various provisions, including under Section 148, and complete assessment proceedings, inheres in an assessee, in the first instance in respect of territorial jurisdiction of the Assessing officer. However, that is not the end of the story. If the assessee fails to urge the question of territorial jurisdiction, he *cannot call it into question later*. The reason is apparently founded on public policy, not to allow questions of territorial jurisdiction to be urged and destabilize entire proceedings, once they proceed on merits. In a sense, this procedure is akin to the one mandated by Section 21 of the Code of Civil Procedure, which allows challenge to jurisdiction of the court, on issues of territoriality up to a point, after which the concerned party cannot contend prejudice. In view of this position, it is too late in the day for the assesee to contend that the AO who completed re-assessment proceedings, lacked jurisdiction to do so, under the re-structured dispensation.

15. In this case, the appellant's case is that on inspection of the assessment records it was revealed that ACIT Circle 30 (1) had recorded the following reasons for initiating proceedings under Section 147 of the Act:

> *"The Addl. Director of Income Tax (Inv) Unit CIB, New Delhi has intimated vide his letter dated 16-12-1997 bearing No. Add. DIT (Inv) NRI/Gift/JSK/97-98 that the assessee has received bogus gifts from Shri Jagjit Singh Kochar and Smt. Rubinder Singh Kochar (NRIs) against the payments made in cash along with premium. The amount of the said bogus gifts is to be assessed in the hands of the assessee which amounts to Rs. 31,00,000/-.*
>
> *Under the circumstances I have reason to believe that the income chargeable to tax has escaped assessment.*
>
> *Issue Notice under Section 148."*

It is evident that the ACIT had merely recorded the fact of some information having been received from the ADIT (Inv) that the appellant had received bogus gift of ₹.31,00,000/-. In addition, there was no other material to indicate that the AO had applied his mind to the information, or made any further inquiries, to satisfy *prima facie* that he could act on the basis of the information.

16. This Court, in *CIT v Atul Jain* 293 ITR 383 held that:

> *"The AO did not verify the correctness of the information received by him but merely accepted the truth of the vague information in a mechanical manner. The AO has not even recorded his satisfaction about the correctness or otherwise of the information or his satisfaction that a case has been made out for issuing notice under Section 148 of the Act. Read in this light, what has been recorded by the AO as the "reasons to believe" is nothing more than a report given by him to the CIT. As held by the Supreme Court in Chhugamal Rajpal, the submission of the report is not the same thing as recording*

of reasons to believe for issuing a notice. The AO has clearly substituted form or substance and therefore, the action of the respondent falls foul of the law laid down by the Supreme Court.."

In *Chhugamal* (supra), the Supreme Court spelt out the minimum requirement for recording a valid satisfaction to reopen assessments, in the following manner:

"Before issuing a notice under Section 148, the Income Tax Officer must have either reasons that by reason of the omission or failure on the part of the assessee to make a return under Section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of section 147 are satisfied, the Income Tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the Income Tax Officer to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assesse's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year…"

17. During the reassessment proceedings too, the revenue did not in any manner substantiate the suspicion which made it, in the first instance, to issue notice under Section 148 regarding the allegedly fraudulent gift

received by the assessee. Ultimately, the entire reassessment proceedings' initiation was premised on a vague suspicion. "Reasons to believe" as emphasized by the court are reasonable inferences based on objective information, verified in a *prima facie* manner. There was nothing on the record for the AO to assume that the information about the gifts in question being bogus, was believable, or reasonably credible to warrant reopening of assessment.

18. In view of the above discussion, this Court finds that the questions of law urged are to be answered in favour of the assessee, and against the revenue. The appeal, consequently has to be, and is allowed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

August 31, 2012