

AO couldn't assess any other income if initial reason to believe of escaped income was just a matter of fact

Summary – The Delhi ITAT in a recent case of Indu Arts., (the Assessee) held that where AO, after issuing a notice under section 148, accepts contention of assessee and holds that income, of which he has initially formed a reason to believe that it had escaped assessment, has, as a matter of fact, not escaped assessment, it is not open to him to assess some other income

Facts

- For relevant year, assessee filed its return declaring certain taxable income. The assessment was completed under section 143(3). Subsequently, the Assessing Officer initiated reassessment proceedings and made addition to assessee's income on account of discrepancies in figures of opening stock and closing stock.
- The Commissioner (Appeals) deleted said addition. He, however, issued notice of enhancement on the ground that there were some discrepancies in the quantitative details filed by the assessee. Such discrepancies were translated into an addition of Rs. 2.36 lakhs after adding the necessary mark-up.
- On second appeal:

Held

- It is found that the Assessing Officer initiated reassessment proceedings only on the premise that income of the assessee escaped assessment to the tune of Rs. 22.57 lakh, being, the difference in the opening stock of succeeding year and closing stock of the current year. This was the sole reason and the only addition made in the assessment. It is clear that said addition has been deleted by the Commissioner (Appeals) and admittedly no appeal has been preferred before the Tribunal against such deletion. In other words, the deletion of the addition in the first appeal has attained finality.
- Thus, the question which looms large on the canvass is whether the Commissioner (Appeals) can make enhancement of income on account of discrepancy in the quantitative details. In making such an enhancement, the Commissioner (Appeals) has held that his power is coterminous with that of the Assessing Officer and, thus, he is competent to make a new addition. There is not and cannot be any doubt about the fact that the powers of Commissioner (Appeals) are coterminous with that of the Assessing Officer. He can do what the ITO can do and also direct him to do what he has failed to do.
- The principle which, therefore, emerges is that the power of Commissioner (Appeals) is absolute and extends to all such things which the Assessing Officer can do. However, there is an inherent limitation of this principle, which is, that the Commissioner (Appeals) cannot do what the Assessing Officer in the original assessment could not have done. In simple words, if the Assessing Officer

could have made a particular addition etc., which he failed to do, the Commissioner (Appeals) would be *intra vires* making such addition while disposing of the appeal filed against the assessment order.

- *Per contra*, if the Assessing Officer has not made a particular addition etc., which he was not entitled to as per law, the Commissioner (Appeals) cannot equally exercise his power to make such an addition etc. With this salutary principle in mind, it has to be examined if the action of the Commissioner (Appeals) in making the addition of Rs. 2.36 lakh can be sustained?
- A bare perusal of the provision of section 147 divulges that the Assessing Officer, in the course of assessment pursuant to notice under section 148, can make two types of additions, viz., first, the addition for which he formed reason to believe about the income chargeable to tax escaped assessment ('foundational addition') and second, any other addition which comes to his notice subsequently in the course of the proceedings under this section ('other addition'). It is trite that the 'other addition' can stand only if the 'foundational addition' is made by the Assessing Officer. The logic appears to be simple and plain. Reassessment can't be made at the drop of a hat. There must be valid reasons with the Assessing Officer on the basis of which a belief is formed that some income chargeable to tax escaped assessment. Jurisdiction to proceed with the assessment is acquired by the Assessing Officer only by virtue of such belief. It is another thing that after validly acquiring the jurisdiction, the Assessing Officer can make other additions as well.
- Thus, the making of a 'foundational addition' is *sine qua non* for making 'other addition'. Reason behind this is not far to understand, being, prohibiting the Assessing Officer from needlessly exercising the power to reassess, by initiating the assessment proceedings on a fallacious ground and then making other additions as well. To put it simply, the Assessing Officer cannot proceed with the reassessment if the grounds mentioned in the re-assessment notice are non-existent. That is why, it has been held in several cases that no 'other addition' can be made unless the 'foundational addition' is made.
- The jurisdictional High Court in *Ranbaxy Laboratories Ltd. v. CIT* [\[2011\] 12 taxmann.com 74/200 Taxman 242/336 ITR 136 \(Delhi\)](#) has held that the Assessing Officer has jurisdiction to reassess income other than the income in respect of which proceedings under section 147 were initiated but he is not justified in doing so when the very reasons for initiation of those proceedings ceased to survive. The Bombay High Court in *CIT v. Jet Airways (I) Ltd.* [\[2010\] 195 Taxman 117/\[2011\] 331 ITR 236](#), has also reiterated the same proposition by holding that the Assessing Officer 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 was not included in the notice. However, if, after issuing a notice under section 148, the Assessing Officer accepts the contention of the assessee and holds that the income, of which he has initially formed a reason to believe that it had escaped assessment, has, as a matter of fact, not escaped assessment, it is not open to him to assess some other income.
- The position which follows from the above discussion is that the Assessing Officer can make 'other addition' in the reassessment proceedings, provided, the 'foundational addition' is made. When this

proposition is taken to a next level, no different consequences will emerge, if the 'foundational addition' is itself finally deleted in an appeal. In such a scenario, the 'other addition' made by the Assessing Officer would automatically cease to stand in isolation.

- At this stage, it is pertinent to note the effect of insertion of *Explanation 3* to section 147 by the Finance (No.2) Act, 2009 with retrospective effect from 1-4-1989.
- It is palpable that the *Explanation* has not enhanced the scope of the provision. It simply embodies the position more clearly, which is already embedded in the opening part of section 147 providing that the Assessing Officer 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 this section'. The foregoing legal position about not continuing with the 'other additions', if none of the 'foundational additions' is either made or finally sustained, has not been watered down by the insertion of *Explanation 3*. Ambit of the *Explanation* is confined only to making 'other addition' and not sustaining the 'other addition', when the 'foundational addition' is not made or finally deleted.
- Reverting to the facts of the instant case, it is found that the Assessing Officer made the 'foundational addition' of Rs. 22.57 lakh which came to be finally deleted in the first appeal. In the absence of such an addition, neither the Assessing Officer nor for that purpose, the Commissioner (Appeals), exercising his coterminous power, could have made the 'other addition'.
- The situation can be viewed from another angle as well. The Assessing Officer initiated reassessment proceedings and made addition of Rs. 22.57 lakh. When the Commissioner (Appeals) held that the addition of Rs. 22.57 lakh was not sustainable, it meant that the jurisdiction of the Assessing Officer was lacking in initiating the reassessment proceedings. As a consequence of his deletion of the addition, not only the assessment order but all the proceedings flowing therefrom had the effect of becoming *null and void*. As such, he could not have gone ahead with any other issue and made enhancement of income. Making an enhancement in such circumstances would mean that though the jurisdiction of the Assessing Officer in initiating the reassessment was lacking, still, the assessment would be valid and *ex consequenti*, the addition would be sustainable. This is a totally illogical and unsound proposition. Therefore, the addition made by the Commissioner (Appeals) is deleted.
- In the result, the appeal is allowed.