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**(1990) 03 DEL CK 0056**

**In the Delhi High Court**

**Case No :** IT APPEAL NO. 5950 (DELHI) OF 1987 C. O. NO. 11 (DELHI) OF 1988

Income Tax OFFICER

APPELLANT

Vs

HAKIM SINGH GROVER.

RESPONDENT

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**Date of Decision :** 23-03-1990

**Acts Referred:**

**Citation :** (1990) 34 ITD 452

**Hon'ble Judges :** M. A. Bakshi, J.M.; M. A. Bakshi Judicial Member, J

**Bench :** Division Bench

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## Judgement

Per Shri M. A. Bakshi Judicial Member - Appeal filed by the Revenue and the cross-objection filed by the assessed directed against the order of CIT (A)-XII, New Delhi, are disposed of by this common order for the convenience.

2. In this case original assessment was completed u/s 143(3) on 20th March, 1976 on an income of Rs. 84,263 as under :

Rs.

Income from house property

12,146

Lease income from Soda-water machine

1,200

Income from unexplained investment expenditure etc.

73,425

86,771

Less : Deduction for LIP Rs.

2,508

Net income

84,263

3. This assessment order was subject matter of an appeal before CIT (A) and the ITAT and the income assessed by the Assessing Officer at Rs. 84,263 was confirmed by the Appellate Tribunal vide order dated 15th April, 1981.

4. On 18th March, 1978 a notice u/s. 148 had been issued by the Assessing Officer, as in this opinion, the income in receipt of deposits amounting to Rs. 31,000 in the name of assesseds son in Punjab National Bank, Karol Bagh, New Delhi had escaped assessment. In response to the notice u/s. 148, the assessed filed the return on 24th April, 1978 declaring the same income as originally disclosed. During the course of reassessment proceeding the assessed filed evidence regarding the source of deposits amounting to Rs. 31,000 in the name of assessed son. On being satisfied with the Explanation and evidence placed by the assessed before the Assessing Officer, the proceeding initiated u/s. 148 were filed. The assessing officer stated in the order that the assessment originally made on 20th March, 1976 on an income of Rs. 84,263 shall stand. Since a brief order has been passed by the Assessing Officer, we would like to reproduce the same for ready reference :

"The assessment in this case was completed on 20-3-1976 on a total income of Rs. 84,263 u/s. 143(3) of the Income Tax Act, 1961. This assessment was also upheld by the ITAT. This assessment was, however, reopened by issuance of notice u/s. 148 on 18-3-78. This notice was issued as there were some deposits amounting to Rs. 31,000 in the name of the assesseds son in the Punjab National Bank, Karol Bagh, New Delhi. Action u/s. 147 was Therefore taken as per office note of the ITO u/s. 144-B of the Income Tax Act, 1961. A fresh return was filed by the assessed on 24-4-76 declaring the same income as originally declared. A notice u/s. 143(2) was issued and Shri S. C. Jain C. A. attended and filed the evidence regarding these deposits totaling Rs. 31,000. The Explanation of the assessed has been placed on record. In view of this Explanation no further addition is being made and the proceeding u/s 148 are filed. The assessment originally made on 20-3-76 on an income of Rs. 84,263 stands."

5. An appeal was filed by the assessed to the CIT (Appeals) against this order of assessment. The CIT (A) directed the Assessing Officer to reconsider the Explanation of the assessed in respect of the sum of Rs. 48,691 out of Rs. 73,425 being income from disclosed sources made by the ITO in the originally order of assessment. The Revenue is aggrieved against this direction of the CIT (A) as the addition of Rs. 73,425 had earlier been confirmed by the ITAT vide its order dated 15th April, 1981.

6. The learned Departmental Representative Smt. Kumar contended that the CIT (A) has exceeded his jurisdiction by passing an order in respect of an issue decide by a superior authority, i.e., the Income Tax Appellate Tribunal. The order of the Income Tax Appellate Tribunal having become final learned Departmental

Representative contended, that it was not open to the CIT (A) to adjudicate on the issues that had already been settled by the final fact finding authority. It was accordingly urged that the order of the CIT (A), being without jurisdiction, may set aside and that of the Assessing Officer restored.

7. The learned counsel for the assessed Shri. K. R. Manjani contended that once the assessment was reopened u/s. 148(a) by issue of notice u/s. 148 on 18th March, 1978, the original assessment framed was automatically set aside and when the Tribunal passed its order on 15th April, 1981, there was no order existing in the eye of law which could be adjudicated upon by it. The proceedings having been reopened, the order passed by the ITAT in these circumstances in respect of the originally assessment was nullity and the CIT (A) fully justified in ignoring the same and in adjudicating upon the additions made by the Assessing Officer in the original assessment. The learned counsel vehemently conceded that once the assessment is re-opened the original assessment is set aside and it is open to the assessed to agitate Officer. In this connection, the learned counsel relied upon the decision of the Hon'ble Supreme Court in the case of Kundan Lal Srikishan v. CST [1987] 32 Taxman 280 and the decision of the Rajasthan High Court in the case of Kishan Gopal Prabhu Dayal v. Addl. CIT [1987] 35 Taxman 271. The learned counsel also relied upon the following decision :

1. (1983) 4 ITD 120
2. (1983) 17 TTJ 64
3. Liyaquat A. Rangoonwala v. ITO [IT Appeal No. 227 Bom. 1984.
4. Commissioner of Income Tax Vs. Shri Rangnath Bangur and Shri Purshottam Dass Bangur,
5. Sun Engineering Works (P.) Ltd. Vs. Commissioner of Income Tax,

8. In reply the learned Departmental Representative Smt. Neena Kumar contended that it is not open to the Assessing Officer to review the final decision of the superior authorities. Referring to the decision of the Supreme Court in the case of Commissioner of Income Tax, New Delhi Vs. Rao Thakur Narayan Singh, , the learned D. R. contended that it is not open to the assessing officer to go beyond to finding given by a hierarchy of Tribunal and even those of the High Court with this changing moods. Relying upon the decision of Calcutta High Court in the case of Raibahadur Chowdhury Vs. Income Tax Officer, "B" Ward and Others, the learned D. R. contended that once the Tribunal has finally decided a question that cannot be gone into by the lower authorities even in exercise of powers/s 147. The learned D. R. stated that the authorities cited by the learned counsel for the assessed are not applicable to the facts of this case. It was accordingly urged that the order of the CIT (A) may be set aside and that of the Assessing Officer restored.

9. We have given our careful consideration to the rival submissions. Under the Income Tax Act, 1961, section 143 empowers the assessing officer to frame an

assessment on the basis of material produced by the assessed and/or collected by the assessing officer. On receipt of the assessment order and the demand notice, the assessed has the right of appeal against the assessment order to the Deputy Commissioner of Appeal/Commissioner of Appeals against the order passed by the assessing officer. When an appeal is disposed of by the first appellate authority the assessed as well as the Department have the right of appeal to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal is the final fact finding authority and accordingly its decision on question of facts. Section 254(4) of the Income Tax Act, 1961 reads as under :

"254(4) : Save as provided in Section 256, orders passed by the Appellate Tribunal on appeal shall be final".

10. Reference on questions of law can, however, be made u/s 256 to the jurisdictional High Court and in certain cases to the Supreme Court u/s. 257. When the question of law decided by the High Court or the Supreme Court, the matter is referred back to the Tribunal for passing an order in the light of the decision of the respective court.

11. Section 147 empowers the assessing officer to reopen an assessment subject to certain conditions for the purpose of assessment of escaped income. The question here is as to whether the assessing officer/the first appellate authority have the power to review the orders of superior authorities. In our view, the contention of the learned counsel for the assessed that since the assessment was reopened the original assessment is set aside and it is open for the assessed to even agitate against the additions which had been confirmed by the appellate authority is not well founded. The contention that the order of the ITAT on 15th April, was a nullity as the proceeding had been reopened for re-assessment on 18th March, 1978 is also not well founded. u/s 147, the assessing officer is empowered to re-open an assessment for definite purpose of assessment or re-assessment of income having escaped assessment. The purpose of re-opening of an assessment is not review the order passed earlier by the Assessing Officer. Section 147 also does not empower the assessing officer to sit in judgment against the order passed by his superior authorities such as the Commissioner of Income Tax (Appeals) or the Income Tax Appellate Tribunal. Similarly the CIT (A) is also not empowered to sit in judgment against order of the ITAT. If the contention of the learned counsel for the assessed were to be accepted then the assessing officer would sit in judgment on the decisions of the superior authorities.

12. In the case of *Rao Thakur Narayan Singh* (supra) the Supreme Court has held that once the order of the ITAT becomes final, the finding of the Tribunal is binding on the ITO and he could not re-open the assessment over and over again to include the interest income that was declared by the Tribunal, even though by mistake, to be not includible in the assessment of the assessed. It was further held that "it was not the intention of the legislature by amending section 34(1) in 1984 to enable the ITO to reopen final decision made against the revenue in

respect of question that directly arose for decision in earlier proceedings". The court further held, "if that were not the legal position it would result in placing an unrestricted power of review in the hands of the ITO to go beyond the finding given by a hierarchy of Tribunal and even those of the High Court and the Supreme Court with the changing moods".

13. In the case of Jagan Mohan Rao v. CIT [1970] ITR 75 the Hon"ble Supreme Court held that once proceedings u/s. 34 are validly initiated the jurisdiction of ITO is not restricted to the portion of income that escapes assessment. Once valid proceedings are started u/s. 34 (1) (b) the ITO not only had the jurisdiction but it was his duty to levy taxes on the entire income that has escaped assessment during that year. It was in this context that the Court held that when proceedings for re-assessment are initiated, the original assessment is set aside. At page 380 of the report the Hon"ble Supreme Court has held as under :

"Section 34 in terms states that once the Income Tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice u/s. 22 (2) and may proceed to assess or re-assess such income, profits or gains. It is, therefore, manifest that once assessment is re-opened by issuing a notice under sub-section (2) of Section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started u/s. 34(1) (b) the Income Tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year."

In our view the judgment is to be read as a whole and not in piecemeal. The reference to setting aside and starting fresh proceedings is for a definite purpose of bringing to tax the escaped income and not for purposes of reviewing the earlier decision of the superior authorities.

14. In the case of Sharda Trading Co. v. CIT [1984] 194 ITR 19: 17 Taxman 49 the Jurisdictional High Court of Delhi had to consider the issue as to whether by reopening of an assessment the original order is set aside and whether the Commissioner had the jurisdiction in such circumstances to invoke his powers u/s. 263. In this case it was held that merely by reopening an assessment or by issue of notice the entire assessment is not set aside. Once an assessment is validly reopened and the ITO proceeds to make re-assessment the initial order of assessment stands automatically cancelled. The order of re-assessment would take place of original order of assessment and till that is done the original order of assessment would still be operative. Referring to the decision of the Supreme Court in Jaganmohan Rao's case (supra). Lordship of the Delhi High Court held that the decision lays down that once an assessment is re-opened, the ITO will not only have the jurisdiction but will also be his duty to determine the tax liability of the assessed and for the said purpose, he will have necessarily to take into account not only the escaped income in respect of which a notice u/s. 148 read with Section 147 has been issued, but also the entire income that had

escaped assessment during that year. The court held that mere re-opening of assessment does not have the automatic effect of cancellation of original assessment. It is evidence from the decision of Delhi High Court quoted above that by merely re-opening an assessment the original assessment is not automatically cancelled. Thus when a notice u/s. 148 was issued on 20th March, 1978, the order passed by the Assessing Officer u/s. 143(3) was not automatically cancelled and accordingly the ITAT's order dated 15th April, 1981 was not a nullity as the original order passed by the Assessing Officer was still subsisting on the date of order (the reassessment having been made on 27th March, 1978). Thus the contention of the learned counsel for the assessee that the order of the ITAT is nullity is devoid of any substance.

15. Now coming to the next issue as to whether the CIT (A) had the jurisdiction to decide the issues that had already been decided by the final finding authority, i.e. the Income Tax Appellate Tribunal in an appeal against the re-assessment order. The decision of the Supreme Court in the case of Rao Thakur Narayan Singh (supra) is an authority for the proposition that in the re-assessment proceedings it is not open to the revenue to disturb the finding of the superior authority and the decision of the higher authorities would be binding upon the revenue authorities even in re-assessment proceedings.

16. Where proceedings for re-assessment are initiated in respect of income which escaped assessment, the assessing officer's jurisdiction under the section was confined to such income which has escaped tax and does not extend to revising, re-opening or re-considering the whole assessment. In proceedings u/s. 147 the assessee cannot re-agitate questions which had been decided in the original assessment nor can the assessing officer make a re-assessment inconsistent with the original assessment in respect of matters which are not the subject matters of proceedings u/s. 147 of the I. T. Act, 1961.

17. This view gets further support when we look at Section 152 of the Income Tax Act, 1961, which is reproduced hereunder :

"152(1) : In an assessment, or recomputation made u/s. 147, the tax shall be chargeable at the rate or rates at which it would have been charged had the income not escaped assessment.

(2) Where an assessment is re-opened u/s. 147, the assessee may, if he had impugned any part of the original assessment order for that year either u/s. 164, claim that the proceedings u/s. 147 shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made.

Provide that in so doing he shall not be entitled to reopen matters concluded by an order u/ss. 154, 155, 260, 262 or 163".

18. If contention of the assessed's counsel were to be accepted as correct, Section 152 could not have found a place in the statute book as it would in such circumstances be redundant. Section 152 gives an option to the assessed to contest the claim in re-assessment process case assessed not be impugned u/s. 246 to 248 or u/s. 264. In this case assessment had appealed to the first appellate authority u/s. 264 against the first assessment order and the addition of Rs. 73,425 had been impugned. Thus the option u/s. 152(2) of the Income Tax Act, 1961 was also not available to the assessed. The decisions quoted by the learned counsel for the assessed are not applicable to the facts of this case. The law laid down by the courts is that once proceedings for re-assessment are validly initiated it is open to the Assessing Officer to make re-assessment and which proceedings for re-opening only to the income for assessment of which proceedings for re-opening had been initiated. It is open to the Assessing Officer to reassess the income that had escaped assessment. Section 147 empowers the Assessing Officer to re-open the proceedings for a definite purpose of assessment/re-assessment of escaped income. Where statutory deduction is permissible to the assessed, the courts have taken the view that Assessing Officer would be duty bound to consider the same in re-assessment proceedings, even if such a deduction had not been considered or claimed in the original assessment. The principle is legally as well as logically sound as the Assessing Officer is empowered to assess/re-assess the income that has escaped assessment. If a deduction is permissible to the assessed which had not been claimed and allowed in the original assessment proceeding the income that had escaped assessment would be the income less the permissible deduction. In one of the authorities cited by the learned counsel for the assessed it had been held that it is open to the Assessing Officer to the CIT (A) to re-adjudicate upon the issues that had been decided by the Income Tax Appellate Tribunal in respect of the original assessment. In the case of *Kishan Gopal Prabhu Dayal* (supra) the Hon'ble High Court of Rajasthan has held that the issue regarding continuation of registration had not been gone into by the Assessing Officer in the original assessment proceedings and since status was to be decided in respect of re-assessment proceedings and since status was to be decided in respect of re-assessment, the ITO was directed to consider the issue of registration. It is evident from the facts stated above that the decision of the Hon'ble High Court of Rajasthan is not applicable to the facts of this case.

19. In the case of *Rangnath Bangur*, (supra) the Rajasthan High Court has held that it was open to the assessed to claim the deduction during re-assessment proceedings u/s. 34 of the Income Tax Act, 1922. This decision is also not applicable to the facts of this case.

20. The decision of the Income Tax Appellate Tribunal referred to by learned counsel for the assessed in cases of *Smt. Gulabbai M. Khinvasara* (supra) and *Liyaquat A. Rangoonwala* (supra) were also in different contents. The decision of the Bench of the Tribunal in the case of *Smt. Gulabbai M. Khinvasara* (supra) was with regard to the powers of Commissioner u/s. 264 whereas the

decision of Bombay Bench of the Tribunal in the case of Liyaquat A. Ragoonwala (supra) was with regard to the Power of the Assessing Officer in the matter of assessments reopened u/s. 146. Thus the decisions referred to be the learned counsel for the assessed are apparently inapplicable to the facts of this case. The decision of the Hon'ble Supreme Court in the case of Kundan Lal Srikishan (supra) is with regard to the provision of U.P. Sales Act, 1948. In this case the issue before the Supreme Court was, that in case where after original assessment, proceedings u/s. 21 of the U.P. Sales Act, 1948 are taken against the assessed and order u/s. 21 passed, period of limitation of three years mentioned u/s. 22 for application for rectification is to be calculated from the date of order u/s. 22 and not from the date of original assessment order. It was in this context that the Hon'ble Supreme Court held that the effect of re-opening of assessment is to vacate *pr set* aside the initial order of assessment and to substitute in its place the order made on re-assessment. This decision was in respect of the provision of U.P. Sales Act, 1948 and this decision is not applicable to the issue involved in this case under the provision of Income Tax Act, 1961.

21. On analysing the decision referred to above the principle of law that emerges is that [By mere issue of notice u/s 148 for re-opening of assessment the original assessment is not automatically canceled. It is not open to the Assessing Officer or to the CIT (A) to sit in judgment against the orders of the ITAT in re-assessment proceedings on the issues that had been finally decided by the Tribunal. When re-assessment is made by the assessing officer in the re-assessment proceedings. But it would not be open to the assessed to re-agitate the issues which had been the subject matter of appeal before the Appellate Authorities.]

22. Applying the above law to the facts of this case we are satisfied that the order passed by the Income Tax Appellate Tribunal on 15th April, 1981 when the proceedings for re-opening had been initiated on 20th March, 1978 was a valid order and not a nullity. That being so the addition of Rs. 73,425 confirmed by the ITAT in respect of original assessment order could neither be reconsidered by the Assessing Officer in re-assessment proceedings nor by the CIT (A) in an appeal against the said order. In this case the Assessing Officer had not reconsidered the addition of Rs. 73,425 during the re-assessment proceedings. But CIT (A) reviewed this addition of Rs. 73,425 made in the original assessment in an appeal against re-assessment order. In our view, the CIT (A) exceeded his jurisdiction by sitting in judgment against the order of the ITAT in respect of addition of Rs. 73,425 which had become final by its order dated 15th April, 1981. We accordingly set aside the order of the CIT (A) and restore that of the Assessing Officer. In the result, the appeal of the Revenue stands allowed.

23. In the Cross Objection filed by the assessed, levy of interest u/s. 139(8) and 217 is challenged. The issue is as to whether interest u/s. 139(8) and u/s. 217 can be charged in re-assessment proceedings. In *ITO v. Kishanlal Gadodia* [1988] 24 ITD 121 Jaipur Bench of the Tribunal (Third Member decision) has held

that the said interest cannot be charged in re-assessments. Since the issues relates to assts. year 1973-74, the amendment incorporated in the relevant provision of the Act are not applicable to this year. Interest u/s. 139(8) and u/s. 217 could be charged in regular assessment proceedings. Since re-assessment is not regular assessment. interest u/s. 139(8) and u/s. 217 is not chargeable .The levy of interest by the Assessing Officer in re-assessment proceedings under the aforementioned section is accordingly deleted. However, if any interest u/s. 139(8) or u/s. 217 was charged in the original assessment that shall stand.

24. In the result, cross objection is partly allowed.