IN THE INCOME TAX APPELLATE TRIBUNAL
"C"BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENTAND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA Nos.1344 to 1350/Bang/2017
Assessment Years : 2006-07 to 2012-13

M/s. Rajarathnam's Jewels B-12, Devatha Plaza Residency Road Bangalore-560 025 **PAN NO :AABFR5632E**	**Vs.**	ACIT Circle-1(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri H. Anil Kumar, A.R.
Respondent by	**:**	Smt. R. Premi, D.R.

Date of Hearing	**:**	02.02.2021
Date of Pronouncement	**:**	18.02.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

All these appeals filed by the assessee are directed against the common order dated 30.3.2017 passed by Ld. CIT(A)-7, Bengaluru and they relate to the assessment years 2006-07 to 2012-13. All these appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. In the grounds of appeal, the assessee inter-alia has challenged the validity of re-opening of the assessment in all the years under consideration. Both the parties were heard on this legal issue only.

3. The facts that are necessary to adjudicate the above said legal issue are stated in brief. The assessee is carrying on jewellery business in Bengaluru. It deals in gold, silver and diamond jewelleries and also undertakes job work from its customers. The assessee also runs a savings scheme titled as Akshaya Gold scheme. The assessee was subjected to survey operation u/s 133A of the Income-tax Act,1961 ['the Act' for short] on 25.9.2012. During the course of survey, excess stock of gold titled by the AO as "un-reconciled gold" was noticed. It was claimed by the assessee that the gold and jewellery belonging to customers as well as family members weighing 17.319 kgs. were kept with it and the same was not included in its book stock. The assessee submitted that the above said gold weighing 17.319 kgs were taken from family members and customers as metal loan for physical stock purposes only, i.e., the value of gold was not considered as liability of the assessee firm. Since it does not belong to the assessee firm, the same was not included in its stock. The A.O. was of the view that the excess gold stock of 17.319 kgs. referred above has to be brought to tax in the hands of the assessee. Accordingly, he re-opened the assessment of assessment years 2006-07 to 2012-13 by issuing notices u/s 148 of the Act for the above said years. The assessee is challenging the validity of re-opening the assessment.

4. For adjudicating this issue, it is necessary to refer to the reasons for re-opening recorded by the A.O. We notice that the A.O. has recorded identical reasons for all the 7 years under consideration. For the sake of convenience, we extract below the reasons recorded by the A.O. for re-opening of the assessment of assessment year 2006-07:-

> *"The above case was selected for survey u/ s. 133A based on information that the assessee is holding huge quantities of stock of gold and silver ornaments in his business premises. A survey*

action u/s. 133A was conducted on 25/09/2012 in, this case with approval of Addl. CIT, Range-1.

During the course of survey, inventory of physical stock of the jewellery was taken in the presence of the partners of the firm with assistance of the firm's employees. The assessee also admitted that the entire stock of the firm has been kept in the same business premises and no stock belonging to any other customer is lying the same business premises. The Position of the. stock of gold jewellery on the day of survey was found as follows:

SI.No	*Particulars*	*Quantity*
	Gold & Jewellery belonging to customers as well as family members (out of this16.306 kgs belonging to family members only)	*17.319 kgs*
	Gold belonging to Gold Scheme subscribers	*2.090 kgs*
	Gold & Jewellery belonging to the firm	*32.711 kgs*
	Total	*52.121 Kgs*

During the course of recording the statements, the assessee stated that all the entries pertaining to sales & purchases are not up to date in the books. The assessee clearly stated that the gold and jewellery of 17.319 kgs brought in by the family members as well as customers are recorded in weight of the gold and not its value in rupees and hence such liabilities do not appear in the Balance sheet. Further the assessee stated that such liabilities of gold cannot be identified as jewellery pieces as they are being used in the business. Accordingly to the assessee, this liability is recognized and recorded in the books on the quantity basis only and the firm has the obligation of clearing the liability when the customers come for such

The assessee has maintained that stock of gold 17.319 kgs quantity-wise only & has not shown any value in rupees of such stock as liability of the firm towards the customers as well as family members in the Balance sheet. Furthermore no purchase cost for item of the above mentioned stock of 17.319 kgs of maintained to arrive at the closing stock value. ***As the above mentioned gold and jewellery stock belonging to has to accounted in the books of account as it is nothing but transfer of gold and jewellery by family members & customers to the assessee's firm. Also, the capital gains on the date conversion***

of stock into business should have been declared in the individual returns of the family members of the assessee.

Furthermore, it was found that the assessee is running a business of gold scheme under which customers pay monthly instalments of fixed amount for a fixed period and at the end of period the customer is given gold worth of assured amount under the scheme. This is nothing but sale of gold at the end of the period for which amounts are paid in monthly instalments. Hence, it is obligatory on the part of the assessee to maintain separate set of books of account in respect of each scheme and also arrive at profit in respect of each scheme and also arrive at profit in respect of each scheme and offer the same to tax.

But it was observed that the assessee is not maintaining any records showing (a) Name of Customer (b) Address of the customer (C) Date of Instalment received (d) Amount received. (d) Value of gold given at the end of the period, (e) Quantity of gold given to the customer and (e) Date of receipt of gold by Customer.

After examining all the available facts, ***I have a reason to believe that for every year there is escapement of income*** *from tax in the hands of the firm & it partners. Thus, in view of the above facts****, I am of the opinion that the value of un-reconciled gold stocks of 17.319 kgs has to be brought to tax by reopening the assessment u/s. 147 of the IT Act, in the case of assessee for the assessment year 2006-07."***

We notice that the AO has recorded very same reasons in AY 2007-08 to 2012-13.

5. A careful perusal of the reasons recorded by the AO would show that no where the assessing officer has alleged any escapement of income in any of the years. In fact, the assessing officer specifically mentions as under:-

> ***"I am of the opinion that the value of un-reconciled gold stocks of 17.319 kgs has to be brought to tax by reopening the assessment u/s. 147 of the IT Act, in the case of assessee for the assessment year 2006-07"***

From the above said reasoning, we notice that the assessing officer has only **formed an opinion** that the un-reconciled gold stock of Rs.17.319 kgs has to be brought to tax.

6. The provisions of sec. 147 of the Act, which governs reopening of assessment read as under:-

> **"147.** If the Assessing Officer **has reason to believe** that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, 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, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) ….."

A perusal of the above said provision would show that the first and foremost condition for invoking powers u/s 147 of the Act is that the AO should have **reason to believe** that any income chargeable to tax has escaped assessment for any assessment year.

7. "Reason to believe" consist of two words, viz., "reason" and "to believe". The word "reason" means cause or justification and the word "believe" means to accept as true or to have faith in it. Before the assessing officer has faith or accepts a fact to exist, there must be a justification for it. Belief may be subjective but reason is objective.- [Ganga Prasad Maheshwari v. CIT (1983)139 ITR 1043: (1981) 21 CTR 83 (All.)] The expression 'reason to believe' occurring in section 147 does not means a purely subjective satisfaction on the part of the ITO, the reasons for the belief must have a rational connection or relevant bearing to the formation of the belief.[ITO v.

Nawab Mir Barkat Ali Khan Bahadur (1974) 97 ITR 239 (SC)]. It is apt to refer to the following observations made by Hon'ble Supreme Court in the case of *CIT* v. *Kelvinator of India Ltd.*[2010] 187 Taxman 312 (SC) observed that,

> *"6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No. 549 dated 31st October, 1989, which reads as follows:*
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> > *7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.– A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the*

Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

8. Based on the above cited legal principles, we shall examine the facts available in this case. We notice that the AO is accepting the fact that the impugned un-reconciled stock of 17.319 kgs gold belong to family members. When he is accepting this fact that quality of being "un-reconciled stock" disappears. The AO's acceptance of the above fact is further fortified by the view taken by him, i.e., the AO has taken the view that the assessee should have taken the same in its books of accounts. Following observations made by the AO makes this point clear:-

"Furthermore no purchase cost for item of the above mentioned stock of 17.319 kgs of maintained to arrive at the closing stock value. ***As the above mentioned gold and jewellery stock belonging to has to accounted in the books of account as it is nothing but transfer of gold and jewellery by family members & customers to the assessee's firm. Also, the capital gains on the date conversion of stock into business should have been declared in the individual returns of the family members of the assessee."***

Hence, the AO has taken the view that the above said 17.319 kgs should be considered as having been transferred by the family members to the assessee firm and the capital gains arising on such transfer should have been declared in the individual returns by the family members. Based on this view, the AO has opined that the un-reconciled stock of 17.319 kgs gold & jewellery has to be brought to tax. It is pertinent to note that the AO as

recorded very same reasons in all the years under consideration.

9. In the instant case, the survey has taken place on 25.09.2012, wherein un-reconciled stock has been found. If at all the AO is not accepting the explanations given by the assessee with regard to the un-reconciled stock, then the cause of action shall arise in AY 2013-14, as the un-reconciled stock has been found during the financial year 2012-13. However, the AO has accepted that the un-reconciled gold belong to family members. However, he is of the opinion that the family members should have transferred the gold/jewellery to the assessee firm. It can at most be his opinion, which cannot be thrusted upon the assessee. It is well settled proposition of law that the taxing authorities cannot sit in the arm chair of the business man and direct them the way of conducting the business.

10. It is well settled proposition that the belief of the AO may be subjective, but the reason should be objective. In the instant case, we are of the view that both the "reason" as well as "belief" are subjective, i.e., the AO has completely failed to show that there was reason to believe that there was escapement of income. Merely because the AO has got different view with regard to the manner of accounting the gold received from the family members, it cannot be the basis for forming belief that there was escapement of income, when the method adopted by the assessee was not found fault with.

11. During the course of hearing, the Ld A.R submitted that the assessee has been following very same method since many years and the same has been accepted by the assessing officer. He invited our attention to pages 93 to 95 of the paper book, which contains a statement taken from one of the partners of the assessee

in the earlier survey operations conducted on 16.03.2001. In answer given to question no.5, the partner has reconciled the physical gold stock, after including gold of 17.319 kgs belonging to family members. It was not shown to us that the above said reconciliation of physical gold stock was not accepted by the revenue. This fact would show that the assessing officer is well aware of the fact that the gold belonging to family members were taken by the assessee as metal loan way back before 2001 itself. It also shows that the assessee is consistently following the practice of including the metal loan in its stock register as belonging to family members without showing the same as its own stock. We also notice that the assessee has been consistently not showing the value of gold as capital contribution/liability.

12. The Ld A.R also invited our attention to the assessment order passed for AY 2005-06 u/s 143(3) of the Act. The Ld A.R submitted that the assessee had entered into an agreement with family members titled as "Bilateral understanding for deposit of gold and diamond jewellery" before taking the gold as metal loan. He submitted that these agreements were entered into way back in 1998 itself and the assessee is holding the gold belonging to family members since that date. He submitted that the assessee has been paying "user fees" to two of the family members for taking their gold as metal loan. He submitted that the user fees so paid have been allowed as deduction by the AO in AY 2005-06.

13. The above said facts would show that the assessing officer is well aware of the fact of receipt of gold by the assessee as metal loan from its family members. This fact has been accepted in AY 2005-06 and in the earlier years. Hence, we are of the view that the AO does not have any reason to doubt the genuineness of explanations given by the assessee with regard to the un-reconciled

gold of 17.319 kgs of gold. In our view, the expression "un-reconciled" itself is a misnomer, since the revenue is aware of the receipt of gold from family members since 2001 itself, i.e., from the date of earlier survey operations.

14. Under these set of facts, we are of the view that the AO has re-opened the assessment on mere change of opinion, because it is the assessing officer who took a different view at the time of reopening of assessment, i.e., he has entertained an opinion that the family members should have transferred the gold to the assessee firm and then the assessee firm should have held the gold on its own account. There should not be any dispute that there is no material brought on record to support the above said view of the AO. Under these circumstances, we have no other option but to hold that the assessing officer does not have any reason to believe that there was escapement of income in any of the years under consideration.

15. The Ld D.R placed her reliance on the decision rendered by Hon'ble Karnataka High Court in the case of CIT vs. Rajatha Jewellers (2006)(153 Taxman 545). It was submitted that under identical set of facts, the Hon'ble Karnataka High Court has confirmed reopening of assessment. We have gone through the above said decision. We noticed that the case before Hon'ble High Court pertained to AY 1985-86. In the above said case, one of the partners had brought in 18.621 kgs of gold to the firm and it was kept as stock without passing entries in the books of account. The AO reopened the assessment on forming the belief that the above said stock should have been assessed as income of the firm. The Ld CIT(A) has recorded a finding that the value of above said gold was not credited to the concerned partner's capital account, but shown as due to a Sundry creditor, meaning thereby, the jewellery

formed part and parcel of book stock. The Hon'ble High Court also noticed that the assessee has shown the same as its stock in AY 1986-87 and subsequent years. Thus we notice that the fact that the Ld CIT(A) has given a finding that the gold formed part and parcel of assessee's stock. The facts prevailing in the present case are totally different. All along, the assessee has been showing that the impugned gold of 17.319 kgs belong to the family members only and not to the assessee firm. Further, the assessee has been paying user fees to some of the family members for using the gold. Hence we are of the view that the above said decision is not applicable to the facts of the present case.

16. In view of the foregoing discussions, we hold that the reopening of assessment of all the years under consideration is on account of "change of opinion" and hence the reopening is not valid. Accordingly we quash the orders passed by the tax authorities for all the years under consideration.

17. In its written submission, the Ld A.R has prayed for adjudicating the grounds on merits also. First of all, we have heard the parties only on the legal issue and not on merits. Hence we are unable to accede to the said request of Ld A.R. Secondly, we have held in the earlier paragraphs that the reopening of assessment of all the years under consideration is not valid and hence the impugned assessment orders would fail. Hence there is no necessity to adjudicate the grounds urged on merits.

18. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 18th Feb, 2021.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 18th Feb, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.