

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.513/Mum./2021
(Assessment Year : 2010-11)

Bombay Real Estate Development Co. P. Ltd.
Norhirwan Mansion, Henry Road
Colaba, Mumbai 400 005 PAN – AAACB2092E

..... Appellant

v/s

Income Tax Officer
Ward-1(1)(3), Mumbai

..... Respondent

Assessee by : Shri K. Gopal a/w
Ms. Neha Paranjpe
Revenue by : Shri C.T. Mathews, Sr. A.R.

Date of Hearing – 07.04.2022

Date of Order – 14/06/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee against the impugned order dated 22/10/2019, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-2, Mumbai [*"learned CIT(A)"*], for the assessment year 2010 – 11.

2. The assessee, in the present appeal, has raised following grounds:-

"1. Being aggrieved by the Order of the Learned Commissioner of Income tax, Appeal 2 Mumbai the appellant prefers this appeal on the following amongst other grounds of appeal.

2. On the facts and in the circumstances of the case and in law, the Learned CIT (A) has erred is not allowing the deduction of Rs. 4180703/- in respect of income received from the fund houses net of tax while arriving at the income chargeable to tax u/s 115JB without considering that the income received from the fund houses is net of tax and is to be treated as exempt income as the tax on the same has been paid by the fund houses as representative assessee on behalf of the assessee.

3. Hence, the total income be reduced by Rs. 41,80,703/- and the income u/s 115JB be considered at Rs.6,67,74,763, only."

3. Apart from the above grounds of appeal, the assessee vide application dated 03/01/2022 sought admission of following additional grounds of appeal:

"1. The abovementioned appeal has been filed by the Appellant against the order dated 22.10.2019 passed by the Ld. Commissioner of Income Tax (Appeals). The said appeal is scheduled for the hearing on 04.01.2022.

2. The Appellant submits that it has raised the additional ground before the Hon'ble ITAT challenging the jurisdiction to issue a notice u/s 148(1) of the Act. The said ground is purely legal in nature and the same goes to the root of the matter. Thus, the Appellant prays before the Hon'ble ITAT to admit and adjudicate the same.

3. For the abovementioned well-established proposition of the law, the Appellant strongly relies upon the following judicial pronouncements and requests your honor to admit and adjudicate the said additional ground."

4. By way of additional grounds of appeal, the assessee seeks to challenge the jurisdiction of the Assessing Officer invoked under section 147 of the Act. As the issue raised by the assessee, by way of additional grounds of appeal, is purely legal issue which can be decided on the basis

of material available on record, we are of the view that same can be admitted for consideration and adjudication in view of the ratio laid down by Hon'ble Supreme Court in NTPC Ltd. V. CIT : 229 ITR 338.

5. The brief facts of the case for deciding the additional grounds of appeal, as emanating from the records are: The assessee is engaged in the business of real estate. For the year under consideration, assessee e-filed its return of income on 30/09/2010 declaring total loss of Rs. 33,85,526. The assessee is engaged in the activity of development of one ongoing project at Kandivali i.e. Evershine Millennium Paradise and has unsold flats in two projects known as Hillview Park and Viceroy Court, wherein no flat was sold during the year. Further, no construction activity during the year was undertaken as the entire area of Kandivali has been notified as private forest by the Government of Maharashtra, who have issued stop work notices and the matter is sub-judice before Hon'ble Supreme Court.

6. The return filed by the assessee was selected for scrutiny and notice under section 143 (2) of the Act was served on the assessee, which was replied and information as sought by the Assessing Officer was furnished by the assessee on various occasions. The Assessing Officer, after discussion and examination of details filed by the assessee, vide order dated 26/11/2012 passed under section 143(3) of the Act assessed the income of the assessee under section 115JB of the Act at Rs.

7,08,40,966, inter-alia, after making addition under section 14A read with Rule 8D, and disallowance of expenditure under section 40(a)(ia) of the Act.

7. The Assessing Officer vide notice dated 23/03/2015 issued under section 148 of the Act initiated the reassessment proceedings in the case of assessee. In response to the said notice, assessee submitted that the return of income filed earlier be treated as return filed in response to notice issued under section 148 of the Act and also requested for copy of reasons recorded for reopening the assessment. The Assessing Officer vide letter dated 04/01/2016 provided the copy of reasons recorded while reopening the assessment in the case of assessee. The Assessing Officer also issued notices under section 142(1) of the Act and directed the assessee to produce the documents in support of its claim. The said notices were responded by the assessee.

8. The Assessing Officer vide order dated 23/03/2016 passed under section 143(3) r.w.s. 147 of the Act computed the total income of the assessee under section 115 JB of the Act at Rs. 7,50,21,669. In further appeal, learned CIT(A) vide impugned order dated the 22/10/2019 partly allowed the appeal filed by the assessee on merits. Being aggrieved, assessee is in appeal before us.

9. During the course of hearing, the learned AR placed his submissions on the additional grounds of appeal challenging the legality of

reassessment proceedings in the present case. The learned AR submitted that impugned reassessment proceedings are based on the reappraisal of same set of facts which were already available on record at the time of original scrutiny assessment proceedings. The learned AR further submitted that there is no new or tangible information/material for initiating the reassessment proceedings in the present case and thus reopening of assessment is bad in law as the same is based upon the change of opinion of the Assessing Officer.

10. On the other hand, Shri C.T. Mathews, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities and supported the impugned reassessment proceedings.

11. We have considered the rival submissions and perused the material available on record. In the present case, the reassessment proceedings were initiated pursuant to notice issued by the Assessing Officer under section 148 of the Act just before the expiry of 4 years from the end of the relevant assessment year. The reasons recorded by the Assessing Officer, while reopening the assessment, reads as under:

"In this case, return of income has been filed for A.Y.2010-11 on 30.09.2010 declaring total loss at Rs.33,85,526/- The assessment was completed u/s. 143(3) of the LT Act, 1961, on 26.11,2012 assessing the total income at Rs.78,020/-.

On verification of the case records, it is seen from the clause 17(a) of Tax Audit Report, that during the year under consideration, the assessee company has debited Rs.12,710/- on account of loss on sale of asset, however, on perusal of the computation of Income it is seen that it had not added back in the income. Omission to do so

has resulted into under assessment of Rs. 12,710/- on the issue.

Further, the assessee company is engaged in the business of real estate. During the year under consideration, it is engaged in the activity of Development on ongoing project and it has also unsold flats in two projects. The stock of unsold flat as on 31/03/2010 is shown at Rs. 1,52,70,111/-. Since the assessee having stock of unsold flats, it should have offered the notional income from the said flats under the head income from house property.

In regard, in the recent judgment, the Delhi high court in the case of ("IT vs. MIs. Ansal Housing Finance & Leasing Co. Ltd. [213 Taxman 143 (Delhi)] the decision was in favour of the department.

It means the Hon'ble Delhi High Court has held that ALV of the Flats, built by the assessee engaged in the construction business, lying unsold, is assessable as Income from House Property.

In this case since the assessee has not offered the income from house property the ALV of said unsold Property is estimated at Rs. 12,97,960/- being 8.5% of cost of said Unsold flats of Rs.1,52,70,111/- as per the ratio laid down in the judgment of Omprkash & Co, 87 TTJ 183 (Mum) and Chem Mach P Ltd. (83 ITD 427 Mum).

Omission to do so has resulted into under assessment of Rs. 9,08,572/- on this issue.

Further, it was also observed from the record, that the assessee company had received dividend of Rs.3,97,85,797/- which was claimed as exempt. Also it has shown short term capital loss of Rs. 4972,979/-. No details of the said dividend and STCL are available on the record.

In view of the above, I have reason to believe that an amount of Rs.9,21,282/- for the A.Y.2010-11 has escaped assessment u/s 147 of the I.T. Act, 1961 for this year. Hence it is a fit case for issue of notice u/ s. 1'18 of the I.T. Act."

12. Thus, the Assessing Officer initiated the reassessment proceedings on the following 3 issues:

- (a) addition of loss on sale of assets of Rs. 12,710;
- (b) addition of notional income of Rs. 9,08,572 from unsold flats as income from house property; and

(c) *non-furnishing of details of dividend earned and short term capital loss incurred.*

13. At the outset, it is pertinent to note that neither in the reasons recorded for reopening the assessment nor during the proceedings before us, Revenue has pointed out as to what new or tangible material came to the knowledge of the Assessing Officer on the basis of which the impugned reassessment proceedings were initiated. From the perusal of reasons recorded for reopening the assessment, it is evident that the only basis available with the Assessing Officer for initiating the impugned reassessment proceedings was verification/observation of the case records i.e. the information which was already considered and examined during the course of original scrutiny assessment proceedings.

14. We find that even the factual narration in respect of the issues on which reassessment proceedings were initiated, in the present case, does not tally with the information as available on record and forming part of the paper book. In respect of the 1st issue, it is alleged by the Assessing Officer, in the reasons recorded for reopening the assessment, that assessee has debited Rs. 12,710 on account of loss on sale of asset. However, upon perusal of financials of the assessee, which are forming part of the paper book, it is amply evident that during the year under consideration, assessee did not undertake any transaction in respect of its fixed assets and rather profit was earned on sale of motor cars. There is also no variation in the inventories /stock of flats. Further, in respect of

second issue, in the reasons recorded for reopening the assessment, despite the assessment order passed under section 143(3) of the Act took note of the fact that matter is sub-judice before Hon'ble Supreme Court, the Assessing Officer vide impugned reassessment proceedings sought to levy tax on annual letting value of unsold property by treating the same as income from house property. In this regard it is relevant to note that Hon'ble Supreme Court vide order dated 05/05/2008 has stayed further construction and also prohibited creation of any third party rights on the property in the alleged forest land. At this stage, it is also pertinent to note that Hon'ble Delhi High Court's decision dated 31/10/2012 in Ansal Housing Finance and Leasing Co Ltd, reported in [2013] 213 Taxman 143 (Del), on which reliance has been placed by the Assessing Officer to support the aforesaid levy, was already available in public domain at the time of passing of the assessment order dated 26/11/2012 under section 143(3) of the Act. In respect of the other allegation in the reasons recorded for reopening the assessment that no details of dividend earned and short term capital loss incurred are available on record also appears to be another pretext to initiate reassessment proceedings in the present case, as during the original scrutiny assessment proceedings the Assessing Officer made disallowance of Rs. 34,59,553 under section 14A of the Act after perusing all the details filed by the assessee. Thus, upon perusal of all these aspects, we are of the considered view that the impugned reassessment proceedings were initiated only on the basis of

re-appreciation of facts already available on record without any new or tangible material coming into existence and also to conduct roving and fishing enquiry in the case of the assessee for the year under consideration.

15. For initiating the proceeding under section 147 of the Act, the Assessing Officer is required to have 'reason to believe' that income chargeable to tax has escaped assessment. In present case, reassessment proceedings are nothing but mere change of opinion by Assessing Officer with regards to material already available on record and considered during the course of original scrutiny assessment proceedings. That it is settled law that 'reason to believe' can never be the outcome of a change of opinion. It is essential that before any action is taken by the Assessing Officer he should substantiate his satisfaction. Thus, where the reasons recorded by the Assessing Officer disclose no more than mere change of opinion, the reassessment proceedings and assessment order pursuant thereto are liable to be quashed. Existence of a valid "reason to believe" is a *sine qua non* to exercise the jurisdiction under Section 147 of the Act. The expression 'reason to believe' imports the cumulative presence of following four elements viz. some tangible material or materials to establish that income has escaped assessment; nexus between such material and the belief of escapement of income from assessment as envisaged under Section 147; application of mind by the

Assessing Officer to such material; and an inference, based on reason drawn tentatively by the officer that income has escaped assessment.

16. The Hon'ble Jurisdictional High Court in the case of Asian Paints Ltd. v/s DCIT: [2009] 308 ITR 195 (Bom.), observed as under:

"10. It is further to be seen that the legislature has not conferred power on the AO to review its own order. Therefore, the power under s. 147 cannot be used to review the order. In the present case, though the AO has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the AO, nothing new has happened, therefore, no new material has come on record, no new information has been received; it is merely a fresh application of mind by the same AO to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator (supra) referred to above, has taken a clear view that reopening of assessment under s. 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under s. 148."

17. As is evident from the facts available on record, no new information was received by the Assessing Officer at the time of initiation of reassessment proceedings, and it was merely a fresh application of mind to the same set of facts as were available at the time of original scrutiny assessment proceedings. Thus, in view of the above, we are of the considered opinion that the reopening of assessment under section 147 of the Act, in the present case, is bad in law and therefore is set aside. Accordingly, the impugned order passed by the learned CIT(A), inter-alia, upholding the order passed under section 143(3) r.w.s. 147 of the Act is

set aside. As a result, additional grounds raised by the assessee challenging the jurisdiction of the Assessing Officer to initiate reassessment proceedings in the present case are allowed. As we have decided the issue on jurisdiction in favour of the assessee, grounds raised on merits need no separate adjudication in the present case.

18. In the result, appeal by the assessee is allowed.

Order pronounced in the open court on 14/06/2022

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 14/06/2022

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai