

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

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.60/Mum./2023
(Assessment Year : 2013-14)

Jowheri Jalaluddin Mullick
C/o Mr. Hari Raheja, Advocate
206, Neelkanth, 98, Marine Drive
Mumbai 400 002 PAN – BSTPM9666G

..... Appellant

v/s

Income Tax Officer
International Taxation
Ward-3(2)(1), Mumbai

.....Respondent

Assessee by : Shri Hari S. Raheja
Revenue by : Shri Soumendu Kumar Dash

Date of Hearing – 01/03/2023

Date of Order – 21/03/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 15/12/2022, passed under section 147 r/w section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions issued by the learned Dispute Resolution Panel-1 (*"learned DRP"*), for the assessment year 2013-14.

2. In this appeal, the assessee has raised the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the reopening is invalid and bad in law and needs to be quashed as the reasons recorded for

reopening of the assessment and issue of notice u/s 148 are that the assessee has not disclosed the sale of immovable property amounting to Rs. 2,65,45,504 which is incorrect as no immovable property of the value of Rs. 2,65,45,504/- has been sold by the appellant during the relevant assessment year.

2. On the facts and in the circumstances of the case and in law the appellant submits that neither the Assessing Officer nor the CIT granting approval has applied their mind to the reasons of reopening since the assessment has been reopened on the ground that the appellant has not offered any capital gains on the transaction of sale of property with sale consideration of Rs. 2,65,45,504/- and the assessment has been completed without making any addition based in the ground of reopening but by reworking the declared capital gain and disallowing the expenses as claimed in the return.

3. Without Prejudice to the above

On the facts and in the circumstances of the case and in law, the DRP was not justified in rejecting the Objections filed by the appellant holding the same to be time barred and refusing to condone the delay keeping in mind that the appellant had submitted the Objections to the draft order in Form no. 35A to the Assessing Officer online within time but the delay was on account of a mistake on the part of the appellant's representative which is a genuine and justified cause for the delay.

4. The appellant submits that the Hon. Tribunal looking at the justified cause for the delay of 4 days may kindly condone the same and direct the DRP to admit the Objections in Form no. 35A and adjudicate Rs. 1,24,42,549/- the same on merit.

5. Without Prejudice to the above

On the facts and in the circumstances of the case and in law, the Assessing Officer has erred in arbitrarily adopting the market value of the flat as on 1st April 1981 at Rs. 1,50,000/- without assigning any basis for the same.

5a. The appellant submits that the Assessing Officer has not given any justification nor has he relied upon any sale instance to adopt the market value of a 2471 sq. ft. flat situated in Churchgate in the heart of Mumbai City at Rs. 1,50,000/- (Rs. 61/- per sq. ft.) arbitrarily totally disregarding valuation report by a Govt. Registered Valuer adopting the rate @ Rs. 1,200/- per sq. ft. based on the rates as per the Ready Reckoner being Rs. 1,400/- per sq. ft. for a property in the same location.

6. The appellant submits that the Assessing Officer has blindly ignored the sale instances mentioned in the valuation report and adopted the fair market value of the flat as on 1st April 1981 at Rs. 1,50,000/- mechanically on the basis of the information from the DIT(I&C) that the appellant has sold a property for Rs. 2,65,45,504/- during the year without having applied his mind or making any verification or analyzing that the information if the information is correct as the same relates to the determination of the fair market value as on 1st April 1981, and disallowance of society charges.

7. *The appellant submits that the reopening of the assessment is bad in law and invalid as the final assessment has been made on totally different grounds and facts and not on the basis of the Rs. 1,24,42 reasons recorded for reopening.*

8. *Without Prejudice to the above*

*On the facts and in the circumstances of the case and in law, the Assessing Officer erred in calculating the indexed cost of the flat as on 1st April 1981 at Rs. 12,78,000/- as against Rs. 2,52,63,504/- (29,65,200*852/100) declared by the appellant.*

9. *On the facts and in the circumstances of the case and in law, the Assessing Officer erred in holding that the appellant is not entitled to the claim deduction of society contribution amounting to Rs. 25,60,000/-.*

10. *On the facts and in the circumstances of the case and in law, the Assessing Officer was not justified in assessing the long term capital gain in the hands of the appellant at Rs. 12,15,97,140/- as against the returned long term capital gain of Rs. 9,50,51,636/-.*

11. *On the facts and in the circumstances of the case and in law, the Assessing Officer erred in raising a demand of Rs. 1,24,42,549/- ignoring the fact that the same should be provisional as the matter of determination of the fair market value of the flat as on 1st April 1981 is with the DVO and his report is awaited.*

12. *The appellant craves leave to add to alter or vary the grounds of appeal at or before the hearing of the appeal."*

3. As the assessment in the present case was reopened by the Assessing Officer, therefore, the validity of assumption of jurisdictional under section 147 of the Act is the foundation aspect of this matter. Accordingly, we deem it appropriate to deal with the jurisdictional aspect first and if necessary thereafter, to deal with the addition made by the Assessing Officer on merits.

4. The brief facts of the case pertaining to the jurisdictional issue are: The assessee is an individual and is a non-resident. For the year under consideration, the assessee filed her return of income on 04/07/2013, declaring a total income of Rs.9,69,65,080. The return of income filed by the assessee was processed on 28/04/2014. Pursuant to the information received

from DIT (I&CI) that the assessee has sold a property amounting to Rs.2,65,45,504, during the year under consideration, proceedings under section 147 of the Act were initiated and notice under section 148 of the Act was issued on 27/03/2021. In response to the aforesaid notice, the assessee filed her return of income on 11/04/2021, declaring a total income of Rs. 9,69,65,080, i.e. equivalent to the income originally declared by the assessee. The assessee also raised objection against the initiation of proceedings under section 147 of the Act. The Assessing Officer vide order dated 03/02/2022, rejected the objections filed by the assessee and directed the assessee to comply with the notice issued under section 142(1) of the Act and furnish the details as required. Accordingly, vide draft assessment order dated 30/03/2022, passed under section 144C of the Act the Assessing Officer computed the additional long-term capital gains of Rs.2,65,20,504, and added the same to the total income of the assessee. Against the additions proposed by the Assessing Officer, the assessee filed detailed objections before the learned DRP. Vide directions dated 21/11/2022, issued under section 144C(5) of the Act, the learned DRP dismissed the objections filed by the assessee on the ground of delay and directed the Assessing Officer to pass the final order as per the draft proposed. In conformity, the Assessing Officer passed the impugned final assessment order dated 15/12/2022. Being aggrieved, the assessee is in appeal before us.

5. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that reopening of assessment is bad in law as no addition has been made on the basis of the reasons as recorded by the Assessing Officer

that the assessee has sold the property for a sale consideration of Rs.2,65,45,504 and capital gains on same has escaped assessment. Learned AR submitted that in the order disposing of objection as well as in the assessment order, the Assessing Officer instead reworked the capital gains already declared by the assessee and added the additional long-term capital gains of Rs.2,65,20,504. Thus, it was submitted that the reasons for reopening are very different from the actual assessment made by the Assessing Officer.

6. On the contrary, the learned Departmental Representative ("*learned DR*") vehemently relied upon the orders passed by the lower authorities and submitted that the reassessment was made on the basis of information received that property was sold by the assessee, though the amount of sale consideration and the capital gains may be different.

7. We have considered the rival submissions and perused the material available on record. In the present case, it is undisputed that for the year under consideration, the assessee has offered capital gains from the sale of property with sale consideration amounting to Rs.12,80,00,000. Accordingly, the assessee declared a total income of Rs.9,69,65,080, which comprise taxable long-term capital gains of Rs.9,50,51,636, and income from other sources of Rs.19,23,445. The Assessing Officer on the basis of information received from DIT (I&CI) vide letter dated 13/07/2018, that the assessee has sold property amounting to Rs.2,65,45,504, initiated proceedings under section 147 and issued notice dated 27/03/2021, under section 148 of the Act. The reasons recorded while reopening the assessment were provided to the assessee and the same reads as under:-

"1. *Brief details of the assessee: The assessee is an individual and NRI. The Assessee filed return of income F.Y. 2013-14 on 04.07.2013 declaring income of _ 9,69,65,080/-.*

1. *Brief details of Information collected/received: In this case, information was received from DIT(I&C) vide letter dated 13.07.2018 received on 18.07.2018 that the assessee has sold property amounting to 2,65,45,504/- during the year under consideration. The assessee has filed return of income on 04.07.2013 declaring income of 19,69,65,080/- in which the assessee derive income under the head capital gains amounting to 19,50,51,636/- and income from other sources amounting to 19,23,445/-.*

1. *Analysis of Information collected/received: On perusal of the return of income filed by the assessee, it is found that during F.Y. 2012-13 relevant to A.Y. 2013-14, the assessee has offered capital gains from sale of property with sale consideration amounting to 12.80,00,000/-. However, the assessee has not offered any capital gains on the transaction of sale of property with sale consideration of 2,65.45.504/. Thus, it is not proved that the assessee disclosed true and correct particulars of his income.*

1. *Enquiries made by the AO as sequel to information collected/received: On verification of the Return filed by the assessee, no such transaction of sale of property amounting to 2,65,45,504/- has not been offered to tax.*

1. *Findings of the AO: The capital gains earned by the assessee on the sale of property with sale consideration of L 2,65.45.504/- has not been offered to taxation in the return of income filed by the assessee.*

1. *Basis of forming reason to believe and details of escapement of income: In this case Since the assessee has not disclosed true and correct particulars of his income, I have reason to believe that income from capital gains from the sale of immovable property for 2.65,45,504/- has escaped assessment for A.Y. 2013-14.*

1. *Escapement of income chargeable to tax in relation to any assets (including financial interest in any entity): In this case the income from capital gains from sale of property amounting to 2.65.45,504/- was not offered to tax by the assessee and the total undisclosed income has escaped assessment in the case of the assessee.*

1. *Applicability of the provisions of section 147/151 to the facts of the case: Therefore, I have reason to believe that the taxability on capital gains remained to be verified which escaped assessment within the meaning of Explanation 2(b) of Sec 147 of the Income Tax Act. Therefore, it is a fit case for issue of notice u/s 148 r.w.s 147 of the I.T. Act for the A.Y-2013-14. Accordingly, approval of u/s. 151(1) of the I.T. Act, 1961 is required in the case, for issuing notice under section 148 of the IT. Act, 1961."*

8. From the perusal of aforesaid reasons, it is evident that the Assessing Officer was well aware and accepted that the assessee has offered capital

gains from the sale of property with sale consideration amounting to Rs.12,80,00,000. However, the Assessing Officer sought to tax the income from capital gains not offered for tax on the transaction of sale of property with sale consideration of Rs.2,65,45,504. From the paragraphs in the reasons with the headings "Enquiries made by the AO as a sequel to information collected/received" and "Findings of the AO", it is evident beyond doubt that the Assessing Officer considered the transaction of sale of property with sale consideration of Rs.2,65,45,504, as not being offered to tax by the assessee in her return of income, and capital gains from which, as per the Assessing Officer, has escaped assessment. However, while framing the assessment, instead of computing the long-term capital gains on the said property with the alleged sale consideration of Rs.2,65,45,504, the Assessing Officer recomputed the capital gains on the property sold by the assessee, during the year, for the sale consideration of Rs.12,80,00,000, on which the assessee had already offered to tax long-term capital gains amounting to Rs.9,50,51,636, in her return of income, as under:-

Accordingly, the long term Capital Gain is worked out as under.

<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>Cost of acquisition as on 01.04.1981</i>	<i>1,50,000</i>
<i>Indexed Cost of Acquisition (A)</i>	<i>1,50,000*852/100=12,78,000</i>
<i>Sale Consideration</i>	<i>12,80,00,000</i>
<i>Less: Society Transfer Fee</i>	<i>12,500</i>
<i>Professional Fee</i>	<i>1,12,360</i>
<i>Indexed Cost of Acquisition (As per "A" above)</i>	<i>12,78,000</i>
<i>Society contribution expenses (as discussed in para 6 above)</i>	<i>25,000</i>
<i>Long Term Capital Gain</i>	<i>12,65,72,140</i>

<i>Less: Exempt u/s 54EC</i>	<i>50,00,000</i>
<i>Net Long Term Capital Gain to be offered for taxation</i>	<i>12,15,72,140</i>

The assessee has shown Long Term Capital Gain of Rs.9,50,51,636/- in her Return of Income for AY 2013-14 while Long Term Capital Gain worked out as above is Rs. 12.15.72.140/- Hence, additional Long Term Capital Gain of Rs.2,65,20,504/- is detected which needs to be added in the total income of the assessee for AY 2013-14."

9. As per the learned DR, the reassessment proceedings were initiated on the basis of the information that the assessee has sold the property, which fact has also not been disputed by the assessee and the amount of sale consideration can differ. We however do not find merit in the aforesaid submission of the learned DR, as from the perusal of 2nd paragraph of the reasons for reopening the assessment we find that the Assessing Officer has taken due note of the capital gains offered by the assessee from sale of property with sale consideration amounting to Rs.12,80,00,000. However, the Assessing Officer sought to tax the capital gains on the transaction of sale of property with sale consideration of Rs.2,65,45,504, which as per the Assessing Officer was not offered to tax by the assessee. Therefore, the income which was initially alleged to have escaped assessment was not ultimately added by the Assessing Officer while passing the assessment order and rather the transaction already disclosed by the assessee was re-examined and the capital gains computed by the assessee was recalculated in the assessment order without issuing a fresh notice under section 148 of the Act. In this regard, it is relevant to note the following observations of the Hon'ble jurisdictional High Court in CIT vs Jet Airways India Ltd [2011] 321 ITR 236 (Bom.):

"16.Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

17. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147(1) and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament....."

10. Further, it is trite law that the reasons, as recorded for reopening the reassessment, are to be examined on a standalone basis to determine the validity of proceedings under section 147 of the Act. In this regard, it is relevant to note the following observation of Hon'ble Jurisdictional High Court in Hindustan Lever Ltd. vs R.B.Wadkar: [2004] 268 ITR 332 (Bom.):

"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. **It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should**

not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.” (emphasis supplied)

11. In view of the above discussion and respectfully following the decisions of the Hon’ble jurisdictional High Court cited supra, we hold that the reopening of assessment in the present case is unsustainable in law. The impugned reassessment proceedings are set aside for this short reason alone. As we have quashed the reassessment proceedings for this short reason, we see no need to deal with other issues raised in the appeal or on merits. Those aspects of the matter are, as of now, academic and infructuous.

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

Order pronounced in the open Court on 21/03/2023

Sd/-
M. BALAGANESH
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 21/03/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai