

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI SANJAUY GARG, JUDICIAL MEMBER

ITA no.4391 & 4392/Mum./2015
(Assessment Year: 2010-11& 2011-12)

Oasis Reality,
3rd Floor, Commerz International Business Appellant
Park, Oberoi Garden City Goregoan (E)
Mumbai 400 063
PAN-AAAA01735B

v/s

ACIT CEN CIR 4(2)
4th Floor, Aayakar Bhavan Respondent
M.K Road,
Mumbai 400 020

ITA no.4613 & 4614/Mum./2015
(Assessment Year : 2010-11 & 2011-12)

DCIT CEN CIR 4(2) CEN RG 4
R. No. 411, 4th Floor, Appellant
Aayakar Bhavan, M.K Road
Mumbai 400 020

v/s

Oasis Reality, Respondent
3rd Floor, Commerz International Busine
Park, Oberoi Garden City Goregoan (E)
Mumbai 400 063
PAN-AAAA01735B

Assessee by : Shri U.C. Bothra
Revenueby : Shri P.R. Ghosh
Ms. Arju Garodia

Date of Hearing – 13.02.2017

Date of Order – 22.02.2017

ORDER

PER: BENCH

These are cross-appeals by the assessee and revenue emanating out of respective orders of Ld. CIT-A for assessment year 2010-11 and 2011-12. Since some of the issues are common and the appeals were heard together these are being consolidated and disposed of by this common order.

2. The grounds of appeal in the respective appeals read as under:

Assessee Appeal-A.Y-2010-11

1. THAT the Ld. Commissioner of Income tax (Appeals) has erred as well as under the facts of the case in not considering the facts while deciding the matter relating to challenging the proceedings initiated u/s. 148 of the Income tax Act. 1961.

2. THAT the Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in confirming the assumption of jurisdiction by the Assessing Officer u/s. 148 in as much as he fails to appreciate that

a) There was no income which had escaped assessment;

b) Merely on the basis of deposition of Mr. Sudhakar Shetty during the course of survey proceedings u/s. 133A at the premises of M/s. Skylark Buildcon Private Limited, it could not be said that the income chargeable to tax in the case of the appellant has escaped assessment:

c) The impounded material during the course of survey proceedings did not have any discrepancies, pertaining to the appellant:

d) There was no admission of undisclosed income in the letter dated 30/01/2012 filed by Mr. Sudhakar Shetty.

3. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not considering the evidence filed in connection with purchases made from alleged hawala dealers.

4. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not holding that there is violation of principles of natural justice by the Assessing Officer in not providing any documentary evidence and/or giving any opportunity of cross examination to your Appellant in connection with additions made on account of alleged Hawala purchases.

5. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not considering

the fact that in earlier assessments/appellate proceedings. closing work-in- progress have already been decided in appeal.

6. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not providing the copy of remand report filed by the Assessing Officer during the course of Appellate proceedings and deciding the matter which is against the principles of natural justice.

7. THAT your appellant crave to add, alter, amend or delete any of the - grounds at the time of hearing of appeal.

Grounds of appeal in revenue's appeal: -A.Y-2010-11

1. "Whether, on the facts and circumstances of the case and in law, Ld. the CIT(A), was justified in directing the AO not to reduce Rs. 1,33,04,808/- from closing Work-in-progress (WIP) of project under construction, whereas the AO reduced the WIP as the assessee's purchases could not be proved genuine."

2. Whether, on the facts and circumstances of the case and in law, Ld the CIT(A), was justified in directing the AO not to reduce Rs. 5,85,49,730/- from closing Work-in-progress (WIP) of project under construction because the same had already been reduced from the closing WIP of N/s. Skylark Build whereas the closing WIP of N/s. Skylark Build was transferred to N/s. Oasis Realty on the book value in the A.Y. 2010-11."

3. "Whether, on the facts and circumstances of the case and in law, Ld the CIT(A), was justified in directing the AO not to reduce Rs. 5,85,49,730/- from closing Work-in-progress (WIP) of project under construction, whereas such action will reduce the profitability of the assessee as it helped in reducing the profitability of N/s. Skylark Build."

4. "The appellant craves to leave, to add, to amend and / or to alter any of the grounds of appeal, if need be."

The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-52, Mumbai, may be set aside and that of the Assessing Officer restored.

Assessment year 2011-12

Grounds of appeal in assessee appeal;

1. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not considering the evidence filed in connection with purchases made from alleged hawala dealers.

2. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not holding that there is violation of principles of natural justice by the Assessing Officer in not providing any documentary evidence and/or giving any

opportunity of cross examination to your Appellant in connection with additions made on account of alleged Hawala purchases.

3. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not considering the fact that in earlier assessments/appellate proceedings, closing work-in-progress have already been decided in appeal.

4. THAT the Ld. Commissioner of Income tax (Appeals) has erred in law as well as under the circumstances of the case in not providing the copy of remand report filed by the Assessing Officer during the course of Appellate proceedings and deciding the matter which is against the principles of natural justice.

5. THAT your appellant crave to add, alter, amend or delete any of the grounds at the time of hearing of appeal.

Grounds of appeal in revenue's appeal:-

1. Whether, on the facts and circumstances of the case and in law, Ld the CIT(A), was justified in directing the AO not to reduce Rs. 2,98,09,029/- from closing Work-in-progress (WIP) of project under construction, whereas the AO reduced the WIP as the assessee's purchases could not be proved genuine."

2. "The appellant craves to leave, to add, to amend and / or to alter any of the grounds of appeal, if need be."

The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-52, Mumbai, may be set aside and that of the Assessing Officer restored.

3. The Assessee has also raised following additional grounds

(i) Additional ground for assessment year 2010-11.

"That on the facts and circumstances of the case and the provisions of law, the assessment order passed under section 143(3) is against the statutory provisions of the Act and as such the assessment being bad in law deserves to be quashed."

(ii). Additional ground for assessment year 2011-12.

"THAT on the facts and circumstances of the case and the provisions of law, the Assessment order passed under section 143(3) of the Income tax Act, 1961 and confirmed by the Commissioner of Income tax (Appeals) is bad in law and deserved to be quashed."

The above additional ground is a based on law point and can be decided on the basis of contents of the order passed by the Assessing Officer as the Assessing Officer has assumed jurisdiction under the wrong provisions of the Act and which goes to root cause of the matter and requires consideration.

4. We have carefully read the grounds and heard both the counsel on the issue of addition ground. We find that additional ground raised relates to the validity of reopening and issue of notices u/s 143(2).

Grounds relating to reopening were also taken before the Ld. CIT-A.

However, before us Ld. Counsel of the assessee has assailed the reopening & issue of notices u/s 143 (2) on some new aspects which were not before the Ld. CIT-A. Since the issues raised relate to the legal issues, on the anvil of honourable Apex Court decision in the case of NTPC Ltd. 229 ITR 383 we admit the additional ground.

5. At the outset the Ld. Counsel of the assessee submitted that the reopening for assessment year 2010-11 and issue of notice under section 143(2) for 2011-12 has been done after search has been conducted. He further submitted that on the basis of materials found during search and survey the action as aforesaid has been taken. He submitted that once search has been conducted it was incumbent upon the revenue to take action and issue notice under section 153 C of the income tax act. Referring to the provisions of chapter-XIV relating to the procedure for assessment in the case of search and seizure, Ld. Counsel stated that once search and seizure activity has taken place assessment or reassessment can only take place after issue of notice as per the provisions contained in this chapter. For this proposition Ld. Counsel referred to case law from honourable Patna High Court in the case of HARSH Kochhar 287 LTR 63 and decision of ITAT Delhi bench in the case of ITA number 2430/D el/2015 Rajat Shubhra Chatterjee vs ACIT as per order dated 28/5/2016.

6. The Ld. Counsel for the assessee further submitted that action of revenue is based upon a survey statement of Shri Sudhakar M Shelly director of M/s Skylark Buildcon Pvt. Ltd., Wherein there has been no mention of the assessee. Hence he submitted that the reopening in the hands of the assessee or the notice to assessee is totally bad in law. Further more Ld. Counsel submitted that Shri. Shetty has given the statement in his individual capacity. He further submitted that Shri. Shetty had no locus stand to give any statement on behalf of the assessee. Hence any statement by him cannot be taken as reason to believe that any income has escaped assessment.

7. As regards the merits of the case Ld. Counsel submitted that the same is also now covered in favour of the assessee. He submitted that the additions relate to alleged bogus Hawala purchases. He submitted that now in view of several case laws this issue was also in favour of the assessee.

8. In light of above submissions of the Ld. Counsel of the assessee both the counsel fairly agreed that the issue relating to reopening and issue of notice now being canvassed by the assessee was not before the Ld. CIT-A. Hence both the counsel fairly agreed that this issue may be remitted to the file of the Ld. CIT-A.

9. As regards the merits of the issue, both the counsel agreed that the issue as to merits may also be remitted for a denovo consideration.

10. On the conspectus of aforesaid discussion, we are of the considered opinion that the issues relating to reopening, issue of notice and the merits of the case in these cases may be remitted to the file of Ld. CIT-A to consider the same afresh. Accordingly, the issues are restored to the file of the Ld. CIT-A. Needless to add assessee should be granted adequate opportunity of being heard.

In the result these appeals are allowed for statistical purposes.

Order pronounced in the Open Court on 22.02.2017

Sd/-

**SANJAY GARG
JUDICIAL MEMBER**

Sd/-

**SHAMIM YAHIYA
ACCOUNTANT MEMBER**

MUMBAI, DATED: 22.02.2017

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.*

Nishant Verma
Sr. Private Secretary

By Order

(Dy./Asstt.Registrar)
ITAT, Mumbai