

आयकर अपीलीय अधिकरण "एक-सदस्य मामला" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.2758/PUN/2016

निर्धारण वर्ष / Assessment Year : 2008-09

Shri Bhagwan Chintu Mhatre,
House No. 777, Mulekhand,
Near Jari Mari Temple, Uran,
Raigad – 400702

PAN : BVIPM3733Q

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward – 3, Panvel

.....प्रत्यर्थी / Respondent

Assessee by : Shri Hari Krishan
Revenue by : Shri Achal Sharma

सुनवाई की तारीख / Date of Hearing : 20-06-2018

घोषणा की तारीख / Date of Pronouncement : 17-09-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-2, Thane dated 23-09-2016 for the assessment year 2008-09.

2. The brief facts of the case as emanating from records are : A search and seizure action u/s. 132 of the Income Tax Act, 1961 (hereinafter

referred to as “the Act”) was carried out in the case of Mr. Madan Kolambekar Group on 22-01-2009. He was engaged in the business of buying CIDCO plots for various entities of Jai Corp Group. During the course of search action incriminating evidences were gathered indicating payment of ‘On-Money’ by Jai Corp Group entities in respect of land deals made through Mr. Madan Kolambekar. A search action in the case of Jai Corp Group was also undertaken on 05-03-2009. The evidences collected during the search further reinforced payment of ‘on-money’ to the sellers of the plots. In one of the files allegedly seized during search from the premises of Jai Corp Group, name of assessee was mentioned against CIDCO File No. 1125 (Dronagiri) Sec. No. 48, Plot No. 11 admeasuring 500 sq. mtrs. The plot was transferred/sold to M/s. Iconic Realtors Ltd. vide tripartite agreement dated 07-01-2008. On the basis of information received from Investigation Wing, notice u/s. 148 was issued to the assessee on 30-03-2014. In response to the notice no return was filed by the assessee. The Assessing Officer passed the assessment order on 30-03-2015 u/s. 143(3) r.w.s. 147 making addition of Rs.23,40,000/- on account of ‘on-money’ received by the assessee in respect of CIDCO plot sold to M/s. Iconic Realtors Ltd.

Aggrieved by the assessment order dated 30-03-2015 the assessee filed appeal before the Commissioner of Income Tax (Appeals) challenging the validity of notice issued u/s. 148, as well as, on the merits of additions. One of the specific ground taken by the assessee before the Commissioner of Income Tax (Appeals) was that the action has been taken against the assessee consequent to the search, therefore, the Assessing Officer should have issued notice u/s. 153C and not u/s. 148. The Commissioner of Income Tax (Appeals) decided the issue against the assessee on the ground that the AR of assessee made statement that the grounds/additional

grounds relating to challenge to reopening are not pressed. The assessee is in second appeal before the Tribunal assailing the findings of Commissioner of Income Tax (Appeals) on following grounds :

“GR NO 1 The learned CIT APPEAL has erred in law and on facts by dismissing additional legal ground raised in this case that assessment proceeding was initiated on assessee consequent to search in another case and therefore, Assessing Officer was bound to issue notice under section 153C instead of u/s 147 and thereafter to assess undisclosed income under section 153A and thus no assessment or reassessment proceeding under section 147/148 and hence entire proceeding by AO and sustaining of same by CIT-A, is illegal, arbitrary and without any jurisdiction.

GR-2 Learned CIT-APP erred in law and on facts by sustaining assessment/reassessment u/s 148 r. w .s. 147 and also there was no reason to believe with AO in regard to escaped income of assessee.

GR-3 the Learned CIT-APP has erred in law on facts by not considering the ground that AO did not provided reason on record to assessee for escapement of income therefore reopening of assessment/s 148 was bad in law

GR-4) The Learned CIT-Appeal has erred in law and on facts for directing AO. to assess addition of RS 23,40,000/- as LTCG instead of business income, whereas no income was liable to any tax in the hands of assessee.

The appellant craves leave to add /alter any of the ground of appeal any time on or before the final hearing of appeal.”

3. Shri Hari Krishan appearing on behalf of the assessee submitted that during the proceedings before Commissioner of Income Tax (Appeals), the assessee filed detailed submissions vide letter dated 15-09-2016 raising objections against reopening of assessment u/s. 147 of the Act. In respect of the issue, i.e. the right course of action available to Assessing Officer was to invoke the provisions of section 153C or section 147 of the Act, the Commissioner of Income Tax (Appeals) has recorded that the grounds/additional grounds relating to challenge to the reopening of the assessee were not pressed by the ld. AR. The ld. AR asserted that, the AR representing the assessee before First Appellate Authority never made any such concession. The assessee had asked for copy of the ordersheets from

Commissioner of Income Tax (Appeals) and has paid requisite fee. However, the copy of ordersheets has not been provided to the assessee till date. The ld. AR referred to the request made before the Commissioner of Income Tax (Appeals) for obtaining the copy of ordersheets at pages 8 and 9 of the paper book. The ld. AR contended that there is no reason for giving concession before the Commissioner of Income Tax (Appeals) on this legal issue as the assessee has prima-facie strong case and had also filed written submissions on the issue of validity of proceedings u/s. 147 r.w.s. 148 of the Act.

3.1 The ld. AR further submitted that a perusal of reasons recorded for issuing notice u/s. 148 would show that the notice u/s. 148 has been issued on the basis of information received from Investigation Wing of the department after search operation in the case of M/s. Jai Corp Group/Mr. Madan Kolambekar. The requirement of section 147 is that the Assessing Officer should have "reason to believe" for reopening of assessment. In the present case a perusal of reasons clearly show that the Assessing Officer has not applied his mind and there is no prima-facie reason to believe by the Assessing Officer that the income has escaped assessment. The Assessing Officer merely on the basis of information received from Investigation Wing has invoked the provisions of section 148 of the Act. The Assessing Officer has not recorded his own satisfaction after examining the material in his possession that the income has escaped assessment. The ld. AR submitted that proceedings initiated u/s. 147 r.w.s. 148 under such circumstances are liable to be set aside. In support of his submissions the ld. AR placed reliance on the following decisions :

- i. Nu Power Renewables (P.) Ltd. Vs. Deputy Commissioner of Income Tax, 94 taxmann.com 29 (Bombay);

- ii. Principal Commissioner of Income Tax Vs. Meenakshi Overseas Pvt. Ltd., 395 ITR 677 (Del.).

3.2 On the merits of addition the ld. AR submitted that the assessee has sold the plot to M/s. Iconic Realtors Ltd. and not to M/s. Jai Corp Group/Mr. Madan Kolambekar. The addition made by the Assessing Officer is purely on the basis of surmises and conjectures. There is no evidence on record that the amount of Rs.23,40,000/- was received by the assessee as 'on-money' payment for sale of plot. The Assessing Officer made the addition of aforesaid amount under the head 'Income from other sources' and the Commissioner of Income Tax (Appeals) confirmed the addition by treating the amount received by the assessee as Long Term Capital Gain. The Commissioner of Income Tax (Appeals) in para 8.2 of the order has categorically observed, "*in the absence of these details, it is not possible, at the appellate stage, to verify whether the said cash amount was deposited in the bank account or not?*" The ld. AR referring to the bank statement at pages 11 to 16 submitted that the bank statements were furnished before the authorities below. There is no entry in the bank statement indicating that the assessee had ever received such amount. The authorities below have failed to establish that the amount of Rs.23,40,000/- was ever received by the assessee as 'on-money'.

3.3 The ld. AR further submitted that the assessee was not provided the reasons for reopening assessment and hence, the assessee lost opportunity to raise objections against the reasons for reopening. The ld. AR further submitted that the alleged incriminating documents indicating payment of on-money to the assessee were never confronted to the assessee. Thus, the assessment proceedings are vitiated as proper opportunity was not afforded to the assessee to rebut the alleged incriminating documents on

the basis of which additions were made in the hands of assessee. To support his contentions the ld. AR placed reliance on the decision of Hon'ble Bombay High Court in the case of H.R. Mehta Vs. Assistant Commissioner of Income Tax reported as 387 ITR 561.

4. On the other hand Shri Achal Sharma representing the Department vehemently defended the order of Commissioner of Income Tax (Appeals). The ld. DR submitted that the AR of assessee conceded before the Commissioner of Income Tax (Appeals) that he is not pressing grounds challenging reopening of assessment. After having made statement before the First Appellate Authority, the assessee cannot agitate the same ground before the Tribunal. The ld. DR submitted that the assessee never filed return of income at any stage. Neither the assessee filed return of income u/s. 139 nor any return was filed in response to the notice u/s. 148 of the Act. Further, the assessee never asked for the reasons for reopening. In the backdrop of these facts the Assessing Officer was constrained to proceed with the assessment on the basis of material available on record. The ld. DR submitted that during search in the case of Jai Corp Group incriminating documents were found which suggest that on-money was paid to the assessee and various other sellers of the CIDCO plots. M/s. Iconic Realtors Ltd. is part of Jai Corp Group and was instrumentally in purchasing the plot from assessee for Jai Corp Group. The ld. DR prayed for upholding the order of Commissioner of Income Tax (Appeals) and dismissing the appeal of assessee.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The ground Nos. 1 to 3 raised in the appeal are legal grounds challenging the jurisdiction of

Assessing Officer in invoking the provisions of section 147 r.w.s. 148 of the Act.

6. In ground No. 1 of the appeal the assessee has assailed the action of Assessing Officer in invoking the provisions of section 147 r.w.s. 148 instead of issuing notice u/s. 153C as the genesis of addition is the incriminating material found during search in the case of M/s. Jai Corp Group/Mr. Madan Kolambekar. A perusal of impugned order shows that this issue was raised before the Commissioner of Income Tax (Appeals), however, the Commissioner of Income Tax (Appeals) has observed that the ld. AR of assessee has made statement that the grounds/additional grounds qua challenge to reopening are not pressed. We find that the assessee has not furnished any affidavit or any other documentary evidences to substantiate that no such statement was made before the Commissioner of Income Tax (Appeals).

7. Be that as it may the grounds raised by the assessee are legal and goes to the root of ascertaining Assessing Officer's action in invoking provisions of section 148/147 of the Act. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax vs. BEHR India Ltd. reported as 389 ITR 419 has upheld the order of Tribunal in allowing the additional grounds in respect of issue not pressed before the Commissioner of Income Tax (Appeals), when the said issue raised was pure question of law. Thus, in the light of facts of present case and the decision rendered in the case of Commissioner of Income Tax Vs. BEHR India Ltd. (supra) we are of considered view that the assessee can agitate legal ground before the Tribunal even if the same was not pressed before the First Appellate Authority. Hence, we will take up ground No. 1 of the appeal for adjudication.

8. The contentions of the assessee is that since the alleged incriminating documents indicating payment of on-money was found during the course of search in the case of Jai Corp Group, the Assessing Officer should have issued notice u/s. 153C to the assessee. Invoking of jurisdiction u/s. 148 r.w.s. 147 is wrong recourse taken by the Assessing Officer. Before proceeding further it would be relevant to refer to Section 153C of the Act :

“153C. Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person by the Finance Act, 2015, w.e.f. 1-6-2015.”

A bare perusal of the provisions of section 153C would show that section starts with non-obstante clause to the exclusion of provisions contained in sections 139, 147, 148, 149, 151 and 153 of the Act. The provisions of Section 153C are invoked where during the course of search any money, bullion, jewellery or other valuable article or thing or documents belong to a person other than the person searched are seized. In the present case, we find that the documents on the basis of which notice u/s. 148 has been issued gives the information about payment of on-money to the sellers of CIDCO plot including the assessee. However, the said document is not of the nature which **‘belongs or belong to’** to the assessee. It is not emanating from the reasons recorded that document that indicates the payments of on-money **‘belongs to’** to the assessee. Here we would like to refer to the relevant extract of the reasons recorded for reopening by the Assessing Officer :

“In one file, the name of Shri Bhagwan Chintu Mhatre, Address At Mulekhand Tal : Uran Dist. Raigad is mentioned against CIDCO File No. 1125 (Dronagiri) Sec. No. 48, Plot No. 11, Area 500. But on enquiry with CIDCO about this plot by the Inv. Wing, Mumbai, it was found that name and

*address of second part of the original licensees is **Shri Bhagwan C. Mhatre** – the assessee. This plot was transferred/sold by this to M/s. Iconic Realtors Ltd. vide tripartite agreement dt. 07.01.2008. From these details which were received by JCIT (OSD), Mumbai Vide letter dt. 01.02.2012, which are received from the CIDCO, it can be seen that Dhakad Builders may be some broker involved in the plot deal, but beneficiary of the unaccounted cash of Rs.23,40,000/- paid on 19.12.2007 (A.Y. 2008-09) by Jai Corp Group entities/Madan Kolambekar in respect of the above plot deal is **Shri Bhagwan Chintu Mhatre.**”*

The expression ‘belongs or belong to’ used in Section 153C as it was applicable to the assessment year under appeal connotes different meaning from the expressions ‘relates to’ or ‘pertains to’ inserted by the Finance Act, 2015 to enlarge the scope of section 153C of the Act. A document / tripartite agreement found at the premises of search allegedly mentioning the name of vendors of CIDCO plot including the name of assessee does not suggest that the documents ‘belongs to’ to the vendor. Merely for the reason the documents seized carries the name of vendors does not lead to the conclusion that documents belong to vendors. Hence, we are of considered view that the Assessing Officer was right in not issuing notice u/s. 153C to the assessee. Since, during the course of search the document was seized indicating assessee’s name and there was indication of payment of on-money to the sellers of CIDCO plot, the document has attributes of tangible material, thus, providing handle to the Assessing Officer to invoke jurisdiction u/s. 148 r.w.s. 147 of the Act. Accordingly, notice u/s. 148 was issued to the assessee. We do not find any wrong in the action of Assessing Officer in issuing notice u/s. 148 of the Act. Thus, ground No. 1 raised in the appeal by the assessee is dismissed.

9. In ground No. 2 of the appeal the assessee has assailed that reasons for reopening recorded by the Assessing Officer does not reflect his ‘reason to believe’ that the income has escaped assessment. The Assessing Officer has recorded reasons for reopening in para 2 of the assessment order. A

perusal of same shows that the Assessing Officer has made repeated references to the search action u/s. 132 in the case of M/s. Jai Corp Group/Mr. Madan Kolambekar. The Assessing Officer has referred to the documents seized during search and the enquiry conducted by the investigation wing. In the entire reasons recorded for reopening there is not a single line which suggests Assessing Officer's satisfaction for reopening assessment. The Assessing Officer has issued notice u/s. 148 merely on the basis of information received from Investigation Wing. The Assessing Officer has not recorded his own independent satisfaction qua the incriminating material in his possession for initiating action u/s. 148 of the Act. The pre-requisite for invoking the provisions of sections 147/148 is that 'the Assessing Officer has reason to believe'. The reason to believe should be of Assessing Officer and not borrowed reasons from any other authority. The requirement of law is very specific in so far as satisfaction of Assessing Officer for reopening the assessment is concerned. The Assessing Officer after taking cognizance of tangible material has to apply his own mind, independent of the remarks/observations by the other authority of the Department. The Hon'ble Bombay High Court in the case of Nu Power Renewables (P.) Ltd. Vs. Deputy Commissioner of Income Tax (supra) wherein reopening of assessment was made by the Assessing Officer on the information received from DDIT held :

"6. Thus, prima facie, there has been no independent application of mind on the part of the Assessing Officer to the tangible material received from the Deputy Director of Investigation. The information received has to be examined in the context of the facts on record before coming to a view that income chargeable to tax has escaped assessment on account of failure to disclose fully and truly all relevant facts. In the absence of the above, it amounts to out sourcing of reasons to believe.

7. Therefore, it prima facie, it appears that the Assessing Officer has issued the impugned notice without himself coming to a reasonable belief that income chargeable to tax has escaped assessment. Thus, prima facie, the impugned notice is without jurisdiction."

Thus, in the facts of the case and after examining satisfaction recorded by Assessing Officer we are of considered view that the reasons recorded by the Assessing Officer for reopening the assessment fall short of legal requirements. The Assessing Officer's satisfaction and reason to believe for reopening the assessment under the provisions of section 147/148 of the Act are mere realignment of information received from Investigation Wing. Thus, we hold that the reasons recorded are bad in law and hence, the subsequent proceedings are vitiated. We find merit in ground No. 2 raised in the appeal by the assessee, accordingly, the same is allowed.

10. In ground No. 3 of the appeal the assessee has assailed that the reasons recorded for reopening were not provided to the assessee. Since, we have held that the reopening is bad in law for want of proper recording of satisfaction and the reason to believe by the Assessing Officer, the ground No. 3 raised in the appeal has become infructuous and the same is dismissed as such.

11. In ground No. 4 the assessee has assailed the addition of Rs.23,40,000/- on merits. A perusal of the assessment order shows that the Assessing Officer has made addition merely on presumptions. There is no document on record which shows with certainty that the assessee has received on-money in respect of sale of CIDCO plot to M/s. Iconic Realtors Ltd. The Assessing Officer in the assessment order has used the expression 'appears to have received unaccounted cash'. The additions cannot be sustained merely on suspicion without there being any corroborative evidence. During the course of search certain documents were seized from the premises of M/s. Jai Corp Group/Mr. Madan Kolambekar indicating expenditure on payment of on-money to the sellers

of CIDCO plots. The assessee had sold his plots to M/s. Iconic Realtors Ltd., no material has been placed on record by the Revenue connecting assessee to the M/s. Jai Corp Group/Mr. Madan Kolambekar. Thus, in view of the facts emanating from records, we are of considered view that the addition is liable to be deleted on merits as well. Accordingly, ground No. 4 raised in the appeal deserves to be allowed.

12. In the result, the appeal of assessee is partly allowed in the terms aforesaid.

Order pronounced on Monday, the 17th day of September, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 17th September, 2018

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Thane
4. The Pr. Commissioner of Income Tax-2, Thane
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "एक-सदस्य मामला" बेंच, पुणे / DR, ITAT, "SMC" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune