

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "G", MUMBAI**

**BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 1750/MUM/2018  
Assessment Year: 2009-2010**

**ITA No. 1751/MUM/2018  
Assessment Year: 2010-2011**

**ITA No. 1752/MUM/2018  
Assessment Year: 2011-2012**

**&**

**ITA No. 1753/MUM/2018  
Assessment Year: 2012-2013**

The DCIT, Cent. Cir.- 6(2), R. No. 1903, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai - 400021	<b>Vs.</b>	M/s Samira Gateways & Properties Pvt. Ltd., G, Shrikant Chambers, Sion Trombay Road, Next to R.K. Studios Chembur, Mumbai - 400071 PAN: AABCS1678L
<b>(Appellant)</b>		<b>(Respondent)</b>

Revenue by : Bharti Singh (DR)  
Assessee by : Aayush Goyal (CA)

Date of Hearing: 19/12/2019  
Date of Pronouncement: 30/12/2019

**ORDER**

**PER RAM LAL NEGI, JM**

These appeals have been filed by the revenue against the four orders dated 26.12.2017 passed by the Commissioner of Income Tax (Appeals)-54 (for short 'the CIT(A), Nasik, pertaining to the assessment years 2009-10, 2010-11, 2011-12 and 2012-13, whereby the Ld. CIT(A) has partly allowed the appeals filed by the assessee against the assessment orders passed u/s 143 (3) r.w.s 147 of the Income Tax Act, 1961 (for short the 'Act'). Since, these appeals pertain to the same assessee and the issues involved are identical, the same

were clubbed, heard together and are being disposed of by this common and consolidated order for the sake of convenience.

2. These appeals were earlier dismissed by the coordinate Bench vide common order dated 10.08.2018 on the ground that the tax effects in these cases are below prescribed limit for filing appeal before the Tribunal in terms of CBDT Circular No. 03/2018 dated 11.07.2018. Subsequently, vide order dated 07.06.2019, the coordinate Bench recalled the order dated 10.08.2018 aforesaid after hearing the parties on Miscellaneous Applications filed by the revenue, on the ground that the common issue raised by the revenue in the said appeals falls within the exception contemplated in clause 10(c) of the said Circular as in these cases the department has accepted the Revenue Audit Objections.

3. Since the facts of these cases are similar and the issues involved are identical, we take the facts of the appeal pertain to the assessment year 2009-10 as a lead case.

4. The brief facts emanating from the record and the pleadings of the parties are that the assessee company is engaged in the business of construction and development of real estate projects. On 21.03.2013, a search and seizure action u/s 132 of the Act was carried out by the department in the case of Samaria Group and the assessee was covered there under. Accordingly, the assessee filed its return of income for the assessment year 2009-10, declaring loss of Rs. 7,13,204/-. The AO passed assessment order u/s 143(3) r.w.s. 153 of the Act on 16.03.2015 determining total loss at Rs. 6,82,510/- Subsequently, the AO issued notice u/s 148 read with section 147 of the Act on 30.03.2016 on the ground that the assessee had undertaken development of property measuring 19 Acres in anticipation of receipt of requisite NOC for conversion of Agricultural land for non-agricultural purposes and claimed loss in contravention of the provisions of section 37(1) of the Act. The AO further pointed out that since the expenditure incurred on the said project was in contravention of law, the assessee has under assessed the income to the tune

of Rs. 6,82,510/- in AY 2009-10, Rs. 16,73,420/- in AY 2010-11 Rs. 48,63,200/- in AY 2011-12 and Rs. 15,61,640/- in AY 2012-13.

5. The assessee requested the AO to treat the return of income filed on 06.12.2014 as return of income in response to the notice u/s 148 of the Act. Thereafter, the AO issued notice u/s 142(1) of the Act and called for various details. The assessee contended that all the direct expenses incurred towards cost of land and construction expenses up to the plinth level have been debited to the work in progress and claimed as expenses in the profit and loss account, therefore do not form part of the loss return/assessed in the present case. It was further contended that since it has been following project completion method of accounting these expenses shall be claimed against the project receipt on completion of the said project. So far as the administrative and other expenses are concerned, the assessee contended that under no circumstances can it be concluded that the said expenses incurred prior to the approval to the project are in contravention of law. The AO rejecting the contention of the assessee disallowed the expenses incurred to the tune of Rs. 6,82,510/- and added the same to the income of the assessee. In the first appeal, the Ld.CIT (A) quashed the reassessment proceedings relying on the various judgments/decisions of the Hon'ble Supreme Court, High Courts and the ITAT. Against the said findings, the revenue is in appeal before the Tribunal.

6. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

1. *“Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing the assessment reopened and completed u/s 143 (3) r.w.s. 147?”*
2. *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) failed to appreciate that the decision of the apex court in the case of CIT vs. Sun Engineering Works (P) Ltd. reported in 198 ITR 297 was clearly applicable in present case?*
3. *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in not deciding the issue of addition of Rs. 6,82,510/- on merits?*

4. *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) failed to appreciate that the expenditure claimed by the assessee was in Contravention of provisions of Section 37(1) of the Income-Tax Act and thus not allowable?"*

7. The revenue has challenged the impugned order *inter alia* on the ground that the Ld. CIT(A) has erred in quashing the re-assessment proceedings initiated u/s 147 read with section 148 of the Act. The Ld. Departmental Representative (DR) relying on the assessment order passed by the AO submitted that since the findings of the AO are based on the judgment of the Hon'ble Karnataka High Court in the case of *CIT vs. Mamta Enterprises 266 ITR 356 (Kar)*, in which the Hon'ble Court has held that compounding of the offence cannot take away the rigor of the explanation 2 to section 37 (1) of the Act, the Ld. CIT (A) ought to have confirmed the action of the AO.

8. On the other hand, the Ld. counsel for the assessee relying on the order passed by the Ld. CIT (A) submitted that since the AO had erred in issuing notice u/s 148 r.w.s. 147 of the Act, ignoring that there was no fresh tangible material available with the AO to form a belief that a part of the income of the assessee has escaped assessment, the Ld. CIT (A) has rightly quashed the reopening proceedings. The Ld. counsel invited our attention to the contents of notice issued u/s 148 of the Act to demonstrate that the AO has not pointed out any tangible material on the basis of which it was concluded that the income of the assessee has escaped assessment. Relying on the decision of the Hon'ble Bombay High Court in the case of *Bombay Stock Exchange Ltd. (89 CHH 118)* submitted that since the action of AO was contrary to the ratio laid down by the Hon'ble Bombay High Court, the Ld. CIT (A) has rightly quashed the reassessment proceedings. The Ld. counsel further pointed out that the findings of the Ld. CIT (A) are based on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Kalvinator India Ltd. 320 ITR 561 (SC)* in which the Hon'ble Court has held that for reopening assessment the AO should have tangible material. The Ld. counsel further pointed out that the AO issued notice u/s 148 on the basis of the material already available on record. Since, the

assessee was following project completion method it had not shown any sales and the expenditure incurred was credited to the work in progress. The only administrative expenses, sales and marketing and depreciation expenses were claimed in the P & L account and a loss of Rs. 6,82,510/- was claimed. During assessment proceedings u/s 143(3) of the Act, the assessing officer made disallowance of Rs. 30,690/- on account of short deduction/late payment of TDS after verification of the details and explanations furnished by the assessee. The reopening of assessment further amounts to mere change of opinion which is not permissible as per the settled law.

9. We have heard the rival submissions of the parties and perused the material on record in the light of the rival contentions of the parties. As pointed out by the Ld. counsel for the assessee, the AO has power to reopen, if he has reason to believe that the income of the assessee has escaped assessment. As per the settled law, in order to reopen the assessment the AO should have tangible material to form the belief that the income of the assessee has escaped assessment. Further, as submitted by the Ld. counsel, the AO has not pointed out any tangible material on the basis of which, he formed the belief that the income of the assessee has escaped. The reasons recorded for reopening are as under:-

*“In the instant case, a search & seizure operation u/s 132 was carried out in the case of Samira Group on 21.03.2010. Accordingly, the assessment for the A.Y. 2009-10 to 2012-13 was completed u/s 143 (3) r.w.s. 153A determining loss of income in all the above said assessment years. It was seen from the case records that the assessee has undertaken development of property measuring 19 Acres of land approx, at the assessee company started excavation work and in some cases, say about in respect of 5 villas, even construction work up to the plinth area was completed in anticipation of a receipt of requisite NOC for conversion of the Agricultural Land. On account of the uncertainty in obtaining the requisite approval of the concerned authority for conversion of the land, the work on the project had to be stalled till the issue got resolved and construction activity came to a stand – still.*

*As per the provision u/s 37 (1)-any expenditure not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purpose of business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". Further, as per the Explanation u/s 37 (1) – expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*

*The assessee company had incurred expenditure on Administration & other Expenses, Selling & Distribution Expenses and Depreciation and claimed los from A.Y. 2012-13. Expenditure incurred on the said project without obtaining the proper permission from Government Authority was in contravention of law and not allowable as per the I T provision stated above. This resulted into under assessment of income to the tune of Rs. 6,82,510/- in A.Y. 2009-10, Rs. 16,73,420/- in A.Y. 2010-11, Rs. 48,63,200/- in A.Y. 2011-12 and Rs. 15,61,640/- in A.Y. 2012-13 thereby leading to short levy of tax (notional) of Rs. 2,31,985/- in A.Y. 2009-10, Rs. 5,68,795/- in A.Y. 2010-11, Rs. 16,15,433/- in A.Y. 2011-12 and Rs. 5,006,674/- in A.Y. 2012-13. The total notional loss comes to Rs. 29,22,887/-.*

*In view of the above facts, I have reason to believe that certain income Chargeable to tax has escaped of assessment for A.Y. 2009-10."*

10. We notice that the AO has not pointed out any tangible material on the basis of which he came to the conclusion that the income of the assessee has escaped assessment. It is clear from the record that during the assessment proceedings u/s 143 (3) read with section 153A of the Act, the assessee had produced the entire record before the AO. As pointed out by the Ld. counsel, the AO had disallowed Rs. 30,690/- out of the total claim made by the assessee during the assessment proceedings, which further implies that the AO has duly verified the genuineness of the expenses, therefore, reopening on the basis of

the same issue amounts to mere change of opinion of the AO on the basis of the material already available on the record. The Ld. CIT (A) has set aside the proceedings u/s 147 read with section 148 of the Act, by following the ratio laid down by the Hon'ble Supreme Court, various High Courts and the decisions of the ITAT. The concluding para of the order passed by the Ld.CIT (A) reads as under:-

*“5.9 In the instant case the said claim of expenses was allowed by the assessing officer while completing the assessment u/s 143 (3) read with section 153A of the Act pursuant to search conducted u/s 132 of the Act. During the course of these assessment proceedings, the copies of the audited annual accounts were duly furnished which implies that the relevant information and the details were available with the AO. Therefore, reopening the assessment on the basis of the details which were already in possession of the AO, which must also have been examined at the time of search, merely leads to the conclusion that the assessment was reopened on the basis of change of opinion and not on the basis of any tangible material. The assessing officer is totally silent about the information which he received or the source of the information. In view of the judgments cited above of the hon'ble apex court, the jurisdictional High Court and the jurisdictional ITAT, the reopening proceedings initiated by the assessing officer cannot be justified. The assessment proceedings initiated and completed u/s 147 of the Act cannot be held to be valid and are quashed. This ground of appeal of the assessee is allowed.”*

11. We have carefully gone through the order passed by the Ld. CIT (A). The Ld. CIT (A) has based his findings on the judgment of the Hon'ble Supreme Court, High courts and the ITAT. In the case of *CIT vs. Kelvinator India Ltd.* (supra), the Hon'ble Supreme Court has held that the AO has no power to review but he has the power the reassess however, the reassessment has to be based on fulfillment of certain pre-condition, the AO cannot review its findings under the garb of reopening of the assessment. After the amendment w.e.f. 01.04.1989, the AO has power to reopen the assessment provided there is tangible material to come to the conclusion that there is escapement of income

from the assessment. Similarly, in the case of *Rallis India Ltd.* (supra), the Hon'ble Bombay High Court has held that mere change of opinion would not justify the AO in seeking a recourse to the powers u/s 147 r.w.s. 148 of the Act and in order to exercise the jurisdiction under the said sections there must be tangible material before the AO to prove that the income chargeable to tax has escaped assessment. In the case of *CIT vs. Amitabh Bachchan* (supra), the AO issued notice u/s 148 of the Act to reopen the assessment on the ground that the claim for expenses (which was withdrawn) had to be assessed as "unexplained expenditure" u/s 69 of the Act. The CIT (A) & Tribunal struck down the reassessment order on the ground that the material on the basis of which the assessment was sought to be reopened was already available at the time of the original proceeding and there was no new material with the AO to reopen the assessment. On further appeal by the department, the Hon'ble Bombay High Court dismissed the department's appeal and confirmed the findings of the Tribunal. In the present case also the material was available with the AO at the time of original assessment.

12. In our considered view, the findings of the Ld.CIT (A) are based on the ratio laid down by the Hon'ble Supreme Court and the Bombay High Court in the cases discussed above. Since, there was no tangible material with the AO, the Ld. CIT (A) has rightly set aside/quash the proceedings u/s 147 r.w.s. 148 of the Act initiated by the AO. Hence, we do not find any infirmity in the decision of the Ld. CIT (A) to interfere with the same. We therefore dismiss the revenue's appeal and uphold the findings of the Ld. CIT (A).

13. The facts and the issues involved in the appeals pertaining to AY 2010-11, 2011-12 and 2012-13 are identical to the facts of the appeal pertaining to the AY 2009-10 except the amount of addition made by the AO in reassessment order. In all the cases, the CIT (A) has set aside the proceedings u/s 147 read with section 148 of the Act on the ground that the action of the AO is not sustainable in the law.

14. Since, we have upheld the findings of the Ld.CIT (A) in the assessee's appeal pertaining to the AY 2009-10 and since there is no material change in the facts of the cases pertaining to the AY 2010-11, 2011-12 and 2012-13, consistent with our findings in the said case, we dismiss the revenue's appeal for the AYs 2010-11, 2011-12 and 2012-13 for the same reasons.

In the result, appeals filed by the revenue for assessment years 2009-10, 2010-11, 2011-12 and 2012-13 are dismissed.

Order pronounced in the open court on 30<sup>th</sup> December, 2019.

Sd/-  
(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 30/12/2019

Sd/-  
(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
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आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai