

आयकर अपीलीय अधिकरण
मुंबई पीठ "एस एम सी", मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
आअसं. 3303/मुं/2019 (नि.व. 2007-08)
ITA NO.3303/MUM/2019 (A.Y.2007-08)
आअसं. 3304/मुं/2019 (नि.व.2008-09)
ITA NO.3304/MUM/2019 (A.Y.2008-09)

Bhiryani Dadlani Sales Agencies PVT. Ltd,
Shop Nos.10-11, Kenwood Apartment CHS Ltd.,
Dr.Ambedkar Road, Bandra (West),
Mumbai 400 050
PAN: AABCB 7448M

..... अपीलार्थी /Appellant

बनाम Vs.

ITO- Ward 12(1)(3)
Room No.145A, 1st Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Vimal Punmiya

प्रतिवादी द्वारा/Respondent by : Shri Sushil Kumar Mishra

सुनवाई की तिथि/ Date of hearing : 30/12/2020

घोषणा की तिथि/ Date of pronouncement : 25/03/2021

आदेश/ ORDER

These two appeals by the assessee are directed against the orders of Commissioner of Income Tax (Appeals) -20, Mumbai (in short 'the CIT(A)') for the assessment year 2007-8 and 2008-09, respectively. Both the impugned orders are of even date i.e. 25/02/2019. Since, the facts in both the impugned assessment years are similar and the grounds raised by the assessee in both the appeals are identical

(except for the amount of addition), these appeals are taken up together for adjudication and are decided by this common order.

2. Shri Vimal Punmiya appearing on behalf of the assessee submitted at the outset that these appeals are against ex-parte orders of the CIT(A), however, these appeals can be decided by the Tribunal without restoring to the First Appellate Authority. The Id. Authorized Representative of the assessee further submitted that the assessee has filed additional grounds of appeal challenging validity of reopening and the assessment order.

2.1. The Id. Authorized Representative of the assessee made four fold legal submissions challenging reopening under section 148 r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act'). The first objection of the Id. Authorized Representative of the assessee is that reassessment proceedings were initiated beyond the period of four years. The notice under section 148 of the Act dated 19/3/2014 was issued without obtaining proper sanction under section 151 of the Act. The notice under section 148 of the Act was issued after taking the approval of Additional CIT, whereas the section 151 mandates that for issuing notice under section 148 satisfaction of Principal Chief Commissioner, Chief Commissioner of Income Tax, Principal CIT or CIT is required. In support of this argument the Id. AR of the assessee placed reliance on following decisions:

- i. Chhugamal Rajpal vs. S.P. Chaliha & Ors., 179 ITR 603(SC);
- ii. Dhadda Exports v. ITO, 377 ITR 347 (Raj.);
- iii. Hindustan Lever Ltd. vs. R.B. Wadkar, 268 ITR 332 (Bom.);
- iv. East India Hotels Ltd. Vs. DCIT & ORS. 204 ITR 435 (Cal.)

2.2. The second objection of the assessee is that the assessment has been framed without issuing notice under section 143(2) of the Act. The Id. AR of the assessee placed reliance on following decisions to support his argument:

- i. ACIT vs. Hotel Blue Moon, 321 ITR 362 (SC);
- ii. ACIT v. Geno Pharmaceuticals Ltd, 214 Taxman 83 (Bom.);

- iii. Pr.CIT v. Silver Line, 383 ITR 455 (Del.);
- iv. Travancore Diagnostics (P.) Ltd., v. ACIT, 74 taxmann.com 239 (Kerala).

2.3. The third objection of the assessee is that the notice under section 148 has been issued by ITO, Ward 9(1)(2) and the assessment order has been passed by different Assessing Officer i.e. ITO, Ward 12(1)(3). The reasons for reopening assessment should have been recorded by the assessing officer having valid jurisdiction. In support of his third objection the Id. AR of the assessee relied on following decisions:

- i. CIT v. Anjum H. Ghaswala, 252 ITR 1 (SC);
- ii. CIT vs. Shree Rajasthan Syntex Ltd., 212 Taxman 275 (Raj.);
- iii. Hynoup Food and Oil Industries Ltd. vs. ACIT, 307 ITR 115 (Guj.);
- iv. Tata Sons Ltd. v. ACIT, 76 taxmann.com 126 (Mum.- Trib.)

The Id. Authorized Representative of the assessee submitted that the assessment is liable to be quashed on the legal grounds raised by the assessee as additional grounds of appeal.

2.4. The fourth and last legal objection by the assessee is regarding validity of reasons for reopening. During the course of hearing of appeal, no submissions were advanced by Id. Authorized Representative of the assessee on this ground. However, the Id. AR of the assessee in written submissions has assailed reasons for reopening primarily on following counts:

- The reasons recorded do not quantify the amount of escapement;
- The AO has recorded reasons based on tax evasion petition received from investigation wing without applying his mind.

To buttress these submissions reliance has been placed on the following decision:

- CIT vs. Insecticides (India) Ltd., 357 ITR 330 (Delhi)

3. The Id. Authorized Representative of the assessee submitted that without prejudice to the legal grounds raised, the assessee has also challenged addition on merits. Narrating the facts of the case the Id. Authorized Representative of the assessee submitted that the solitary issue raised in this appeal is against income from house property determined by the Assessing Officer. In response to notice under section 148 of the Act, the assessee filed return of income declaring its income as 'Nil'. The assessee company is not engaged in any business activity during the period relevant to the assessment year under appeal. The assessee is having shops i.e. Shop No.10 & 11 situated at Kenwood Apartment CHS Ltd., Dr. Ambedkar Road, Bandra (West) and these shops have not been actually let out during the relevant period. Therefore, the annual value would be Municipal Valuation of the property and not the market rent. The Id. Authorized Representative of the assessee referred to the provisions of section 23(1)(b) of the Act. The Id. Authorized Representative of the assessee submitted that the area of shop No.10 is 25 sq.mts.(256 sq. Fts.) and the area of shop No.11 is 22.7 sq.mts.(227 sq. Fts.). In support of his contention the Id. Authorized Representative of the assessee referred to a letter from Municipal Corporation, Mumbai dated 07/03/2015 (at page 17 of the paper book) giving the areas of the shop and the rental value. The Id. Authorised Representative submitted that in the first instance, the Assessing Officer while determining the rental value of the shops has wrongly taken the area of each shop as 800 sq. fts. Whereas, the actual area of the shops is far less. The Id.Authorized Representative of the assessee further contended that that fair rent of the shops has been fixed by the Municipal Corporation at Rs.204.80 and Rs.181.60, respectively. The Assessing officer ought to have adopted the fair rental value of the shops as determined by the Municipal Corporation instead of determining rent based on the report of Inspector. To support his submissions, the Id.Authorized Representative of the assessee placed reliance on the following decisions:

- (i) Shiela Kaushish vs. CIT, 7 Taxman 1(SC)

- (ii) M.V. Sonavala v. CIT, 42 taxman 123 (Bom.)
- (iii) Smitaben N. Ambani vs. CWT, 181 taxman 233 (Bom.)
- (iv) CIT vs. Tip Top Typography, 48 taxmann.com 191 (Bom.)

4. Per contra, Shri Sushil Kumar Mishra representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. Rebutting legal objections, the Id. Departmental Representative submitted that Section 151 of the Act was amended by the Finance Act, 2015. Since the appeal pertains to period prior to amendment by the Finance Act 2015, the un-amended provisions of the Act would apply. Prior to amendment, for reopening beyond the period of four years satisfaction of Joint Commissioner was required. In the present case satisfaction was recorded by Additional CIT.

The Id. Departmental Representative further submitted that the notice under section 148 of the Act was issued to the assessee on 19/03/2014. The was directed to file return in response to the said notice within 30 days from the date of service. The assessee responded to the said notice on 24/07/2014 i.e. after much delay from the date of service, hence, there was no question of issuing any notice under section 143(2) of the Act.

In response to the third legal objection of the assessee, the Id. Departmental Representative submitted that the notice under section 148 was issued to the assessee in March 2014 after recording reasons by the assessing officer having valid jurisdiction. Thereafter, there was major restructuring in the Department. The jurisdiction of the Assessing Officer was changed by the time assessment order was passed in March, 2015. Therefore, the notice was issued by a different assessing officer and the assessment order was passed by different officer. Both the assessing officers had valid jurisdiction over the assessee at relevant point of time, therefore, the legal objections raised by the assessee are without any merit.

4.1. On merits of the addition, the Id. Departmental Representative supporting the assessment order submitted that the issue may be restored to the Assessing Officer to re-examine area of the shops. The report of the Inspector on the base of which the Assessing Officer has framed the assessment order is not readily available, hence, it will be difficult to place the same on record now. The Id. Departmental Representative further pointed that the shops have been given to the daughter of Director of the assessee company.

5. Both sides heard, orders of authorities below examined and the judgments on which the Id. Authorized Representative of the assessee has placed reliance considered. The assessee is in appeal against ex-parte order of CIT(A). The Id. Authorized Representative of the assessee has stated at Bar, that the appeal may be heard by the Tribunal without restoring it to the First Appellate Authority. The assessee has raised legal grounds as additional grounds of appeal. Before proceeding to adjudicate grounds raised on merits, it would imperative to first adjudicate the legal grounds raised by the assessee.

6. The first legal objection raised by the assessee is that the notice issued under section 148 of the Act is defective as it has been issued without proper satisfaction of the authority specified under section 151 of the Act. A perusal of the notice at page - 3 of the Paper Book reveals that the notice has been issued after seeking necessary satisfaction of the Additional CIT. The provisions of section 151 of the Act as they are applicable at present mandates that no notice under section 148 of the Act shall be issued by the Assessing Officer after the expiry of period of four years from the end of the relevant assessment year unless the Principal CIT or CCIT or PCIT or CIT is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of the notice. The provisions of section 151 of the Act were amended by the Finance Act, 2015 w.e.f. 01/06/2015. The assessment under appeal is AY 2007-08 and the reassessment proceedings were initiated in 2014 i.e. prior to amendment by the

Finance Act 2015. The provisions of section 151 of the Act as they were applicable at relevant point of time, required that where an assessment u/s.147 of the Act has been made for relevant assessment year, no notice shall be issued u/s.148 by an Assessing Officer who is below the rank of Asst. Commissioner or Deputy Commissioner unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice. Section 2(28C) of the Act defines Joint Commissioner as under:

“Joint Commissioner’ means a person appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under sub-section (1) of section 117”

In the instant case since reopening proceedings were initiated prior to amendment by the Finance Act, 2015, satisfaction of Joint Commissioner was required for issuing notice under section 148 of the Act. The Assessing Officer has issued notice after the satisfaction was recorded by the Additional CIT. The Additional CIT has been included in the definition of Joint Commissioner, therefore, I see no infirmity in the notice issued under section 148 of the Act. The case laws on which the Id. AR of the assessee has placed reliance does not apply to the facts of the case. Consequently, the ground No.11 raised as additional grounds of appeal is dismissed.

7. The second legal objection of the assessee is that the reasons for reopening have been recorded by an Assessing Officer having no jurisdiction. A perusal of notice issued under section 148 of the Act shows that the same has been issued by ITO, Ward -9(1) (2) and the assessment order has been passed by ITO-Ward 12(1)(3). The Id. Departmental Representative has contended that there was substantial restructuring of the Department during year 2014, hence, the reasons recorded for reopening and the notice under section 148 was issued by the ITO, who was having jurisdiction over the assessee at that point of time. After restructuring, the assessment order was passed by ITO-12(1)(3) who was having jurisdiction over the assessee. Undisputedly, the reasons recorded for reopening, notice u/s 148 and the

assessment order can only be passed by the assessing officer having valid jurisdiction over the assessee. Reasons recorded for reopening or notice u/s148 of the Act or the assessment order passed by any assessing officer without jurisdiction is bad in law. I find that this legal objection has been raised by the assessee is without any cogent evidence. The assessee has failed to discharge its onus to substantiate that the Assessing Officer who has issued notice under section 148 of the Act or the one who has passed assessment order were not having jurisdiction over the assessee at relevant point of time. The assessee has made mere bald assertions without there being any substantive material on record. The case laws relied on by the Id. AR of the assessee are on different set of facts and hence, distinguishable. Ergo, additional ground No.12 of the appeal is rejected.

8. The third legal objection of the assessee is that the assessment is bad in law as no statutory notice under section 143(2) has been served on the assessee before making assessment. It is trait law that issuance of notice u/s 143(2) of the Act is mandatory before passing assessment order. The Hon'ble Apex Court in the case of Hotel Blue Moon (supra) has held that assessment framed without issuance of mandatory notice u/s. 143(2) of Act is bad in law. This position has been reiterated by the Hon'ble High Courts time and again. In the instant case notice under section 148 of the Act was issued to the assessee on 19/03/2014. The assessee was required to respond to said notice/file return of income in response to said notice within 30 days from the date of service. The Assessing Officer in assessment order has categorically mentioned that in response to the notice under section 148 of the Act issued and served on 19/03/2014, the assessee filed letter dated 24/07/2014 stating that the return filed on 31/10/2013 may be treated as return in response to the notice under section 148 of the Act. The said dates have not been disputed by the Id. AR of the assessee. Thus, it is evident from record that the assessee failed to comply with the notice u/s 148 of the Act within the time period specified. Once, the

assessee fails to comply with the conditions given in the notice, the assessee loses its right to object to service of notice under section 143(2) of the Act. Before seeking relief on legal grounds, it is incumbent upon the assessee to first comply with the conditions within the time frame prescribed under the notice. Thus, the decisions relied by the Id. AR of the assessee does not support the case of the assessee. Therefore, I see no merit in ground No.13 raised as additional grounds of appeal by the assessee. Consequently, the same is dismissed.

9. In ground No.14 of the additional grounds of appeal, the assessee has assailed reasons for reopening on the ground that '*the reasons are non reasons in the eyes of law*'. In the instant case, as is evident from the assessment order no assessment was made under section 143(3) as the return filed by the assessee was time barred, hence, invalid. Proceedings u/s 148 r.w.s. 147 of the Act were initiated on the bases of tangible material received by the Assessing Officer. The Assessing Officer has recorded his satisfaction for reopening the assessment explicitly mentioning the name of the firm to whom the assessee has given its premises for use. I find no merit in the submissions of Id. Authorised Representative of the Assessee on this legal ground. The case law on which reliance has been placed to support this argument does not apply to the facts of this case and hence, distinguishable. The ground No. 14 is dismissed being devoid of merit.

10. All the legal grounds raised by the assessee as additional grounds of appeal are without merit, hence, rejected. Now, I proceed to decide the appeal of assessee on merits of the addition. The assessee has raised as many as eight grounds of appeal assailing single addition of Rs.6,72,000/- under the head income from house property.

11. The assessee has two shops i.e. shop No.10 and shop No.11 at Kenwood Co-operative Housing Society Ltd., Dr. Ambedkar Road, Bandra (W), Mumbai. The said

shops were given to the daughter of the Director of the assessee company for her boutique. No rent was purportedly charged by the assessee for use of these shops. The contention of the assessee is that for the purpose of determining annual letting value under section 23(1)(a), Municipal value should be adopted. The assessee has filed a report from the office of Asst. Collector, Municipal Corporation giving the area of the shops as well as the rental value (at page 17 of the paper book). The relevant extract of the same is reproduced herein below:

| <i>Description</i> | <i>Rent(Rs.)</i> |
|--|------------------|
| <i>Ground floor at Rs.80/-per 10 M2</i> | |
| <i>Shop No.10, Area 25.60 M2</i> | <i>204.80</i> |
| <i>Loft Area 10.10 M2 at Rs.40/- per 10 M2</i> | <i>40.40</i> |
| <i>Shop No.11, Area 22.70 M2</i> | <i>181.60</i> |
| <i>Mezzanine Floor area 20.06 M2 at Rs.80/- per 10 M2 used as office</i> | <i>160.40</i> |

Total Rent Rs.11517.58; Total RV Rs. 110165 NPA

Residential RV Rs.79065 – NPA; Non Residential RV Rs.31100 - NPA

A perusal of the assessment order reveals that the Assessing Officer had deputed Inspector for conducting the enquiry. On the basis of report furnished by the Inspector, the Assessing Officer determined net annual value of the shops as Rs.6,72,000/- with an yearly increase of 5% to 10%. The area of each shop as per assessment order is 800 sq. ft. The area of shops mentioned in the assessment order and in the report of Municipal Corporation is at variance. During the course of hearing the Id. Departmental Representative was asked to produce said report. The Id. Departmental Representative expressed his inability to place the same on record.

In so far as the rental value of the property is concerned, I find that in the case of Park Paper Industries Pvt. Ltd. vs. ITO reported as 25 SOT 406, the Tribunal held that where the property has not been let out, Municipal value would be proper yardstick for determining annual value. The Tribunal after considering the decisions rendered in the case of M.V. Sonawala vs. CIT (supra), Shiela Kaushish vs. CIT (supra)

and the decision of Hon'ble Calcutta High Court in the case of Prabhavati Bansali 141 ITR 419 concluded as under:-

*“12. Learned counsel for the assessee relied on several other judicial pronouncements in support of his contention that the Municipal value should be the basis of determining the annual value. We are not making reference to those decisions, since, in our opinion the aforesaid pronouncement of Hon'ble Bombay High Court considers the decisions of Hon'ble Calcutta High Court which in turn has considered the law laid down by the Hon'ble Apex Court on the issue. It is clear from the aforesaid exposition of law that charge under section 22 is not on the market rent; but is on the annual value and in the case of property which is not let out, municipal value would be a proper yardstick for determining the annual value. Decision in the case of Mrs. Sheila Kaushish (supra) mentions standard rent under the Rent Control Act as one of the yardsticks. This does not mean that standard rent alone is to be considered. In the present case, we also notice that the Assessing Officer has not chosen to adopt the standard rent as per the Rent Control Act as yardstick for determining the annual value. We also find from the decision of Hon'ble Calcutta High Court in the case of Smt. Prabhavati Bansali (supra) that standard rent, if it does not exceed the Municipal Valuation alone can be adopted in place of Municipal Valuation. **For all the above reasons, we hold that the Municipal Valuation should be the basis of determining annual value in the present case. Action of the revenue authorities in adopting annual value on the basis of inquiries conducted regarding market rent in the vicinity of the property is not in accordance with law. The Assessing Officer is directed to accept the income from house property on the basis of Municipal Valuation.**”*

[Emphasised now]

12. Taking into consideration entire facts, I deem it appropriate to restore this issue back to the file of Assessing Officer with a direction to determine the exact area of the shops and thereafter, compute annual rental value in line with the decision of Tribunal rendered in the case of Park Paper P. Ltd. (supra). It is further made clear that any municipal taxes actually paid by the assessee qua the shops under question for the impugned assessment years are to be allowed as deduction. The ground No.1 to 8 of the appeal is allowed for statistical purpose, in the terms aforesaid.

13. In ground no.9 of appeal, the assessee has assailed levy of interest under section 234A, 234B & 234C of the Act. Charging of interest under aforesaid sections is mandatory and consequential hence, ground No.9 of the appeal is dismissed.

14. The ground no.10 of appeal is general in nature, hence, require no adjudication.

15. In the result, appeal of the assessee is partly allowed for statistical purpose.

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16. Both sides are unanimous in stating that the facts germane to the grounds raised in appeal are *pari materia* to AY 2007-08. Therefore, the findings given while adjudicating the appeal of the assessee for 2007-08 would *mutatis mutandis* apply to the grounds/additional grounds of appeal. Consequently, the appeal of assessee for assessment year 2008-09 is partly allowed for statistical purpose in similar terms.

17. To sum up, appeals of the assessee for assessment year 2007-08 and 2008-09 are partly allowed for statistical purposes.

Order pronounced in the open Court on Thursday, the 25th day of March, 2021

Sd./-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 25/03/2021
Vm, Sr. PS (O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai