

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.1065/M/2020
Assessment Year: 2012-13**

M/s. Vananchal Properties Ltd., 2054, Building No.20, Vanrai Colony, Off Western Express Highway, Goregaon (E), Mumbai, Maharashtra- 400 063 PAN: AABCV 7969F	Vs.	ITO (3)(4), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Jain Dixit, A.R.
Revenue by : Shri S.N. Kabra, D.R.

Date of Hearing : 13.10.2021
Date of Pronouncement : 05.01.2022

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 27.11.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13.

2. The assessee has raised the following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in upholding the reopening of completed assessment made by the Ld. AO by issuing notice u/s. 148 of the IT Act 1961 and the reasons assigned for doing so are wrong and contrary to the provision of the Income Tax Act and rules made there under.

2. On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in upholding the addition of Rs.87,91,502/- made by the Ld. AO by invoking provisions of section 2(22)(e) of the Act and the reasons assigned for doing so are wrong and contrary to the provision of the Income Tax Act and rules made there under"
3. The issue raised in ground No.1 is against the order of Ld. CIT(A) upholding the reopening of assessment as made by the AO under section 147 read with section 148 of the Act.
4. The facts in brief are that the assessment in this case was framed under section 143(3) of the Act vide order dated 17.03.2015. Thereafter, the case of the assessee was reopened under section 147 of the Act by issuing notice under section 148 of the Act on 29.03.2017. Finally, the assessment was framed under section 143(3) read with section 147 of the Act vide order dated 21.12.2017 by making an addition of Rs.87,91,502/- in respect of deemed dividend under section 2(22)(e) to the income of the assessee.
5. In the appellate proceedings, the assessee challenged the order of AO on jurisdictional issue that reopening has been done under section 147 of the Act in contravention to various provisions of the Act in absence of any tangible materials, however, the same was dismissed by the Ld. CIT(A) by holding that the assessee has requested the AO to provide the reasons recorded under section 148(2) of the Act which were duly provided vide letter dated 12.06.2017. The Ld. CIT(A) further noted that in response thereto the assessee filed objections for reopening vide letter dated nil received by the office of the AO on 28.06.2017. The Ld. CIT(A) came to a conclusion that the reopening has been validly done as the reasons were properly

recorded and a belief was formed that income has escaped the assessment and thus the order of the AO on the legal issue was upheld by the Ld. CIT(A) by dismissing the appeal of the assessee.

6. The Ld. A.R. vehemently submitted before us that the reopening of assessment under section 147 of the Act has been invalidly made by the AO without being there any tangible and new material for reopening the assessment. The Ld. A.R. drew our attention to the reasons recorded under section 148(2) of the Act which are reproduced at page No.2 of the assessment order and stated that on the very first line the AO has stated that on verification of the assessment records and therefore the AO on the basis of the records which were available during the original assessment proceedings were re-appreciated and reviewed and the reopening has been made on the basis of old material which were before the AO in the original assessment proceedings. The Ld. A.R. therefore prayed before us that this is not permissible under the Act to review the assessment order on the basis of same material which were there in the original assessment proceedings as same is not permissible under the Act. The Ld. A.R. therefore prayed that the order of Ld. CIT(A) may kindly be reversed and the reopening may kindly be quashed as without any tangible materials. The Ld. A.R. in defense of his argument relied on the decision of Hon'ble Apex court in the case of CIT Vs Kelvinatpor India Ltd. (2010) 320 ITR 561 (SC).

7. The Ld. D.R., on the other hand, relied heavily on the order of Ld. CIT(A) by submitting that the AO has recorded reasons on the basis of material before him and after recording the reasons

reopened the assessment. Therefore, the order of Ld. CIT(A) upholding the reopening of assessment was very much correct and as per the provisions of the Act. The Ld. A.R. therefore prayed that the appeal of the assessee on the jurisdictional issue deserved to be dismissed.

8. We have heard the rival submissions and perused the material on record. The undisputed facts are that the case of the assessee has been reopened under section 147 of the Act read with section 148 of the Act by recording reasons on the basis of the material available on the assessment folder at the time of original assessment as is clear from the reasons recorded. For the sake of ready reference the reasons recorded are reproduced below:

"On verification of the case records, it is seen that the assessee company has received unsecured loan and advance from M/s. Vananchal Infrastructure Put Ltd. (M/s. VIP Ltd) during the year ending March, 2012. M/s. VIPL is a sister concern in which the public is not substantially interested and the assessee company is holding more than 10% of the voting power. As M/s. VIPL is possessing accumulated profits of Rs.87,91,502/-, the loans and advances received by the assessee company to the extent of Rs.87,91,502/- should have been treated as receipt of dividend under section 2(22)(e) of the IT. Act, 1961.

Further, it is seen that there is nothing on record to indicate that the order u/s. 143(3) has deliberated on the issue of deemed dividend, making it very clear that the AO has not formed any opinion about the issue of deemed dividend.

It may also be mentioned that the record very clearly reflects that the AO has not show-caused the assessee on this issue and omission to disclose material facts during the course of assessment proceedings confers jurisdiction on the AO to re-open the assessment.

In view of the above, I have reason to believe that income of Rs.87,91,502/- has escaped assessment within the meaning of section 147 of the I. T. Act."

9. It is apparent from the above that the very beginning of the first line the AO has started with the words that upon verification of the case records it is seen that assessee has received loans and advances from Vananchal Infrastructure Pvt. Ltd. during the year ended 31.03.2012 and thereafter in the

second para it was mentioned that there was no deliberation on this issue in the assessment framed under section 143(3) of the Act and thus the AO has not formed any opinion about the deemed dividend and finally the AO noted that he has reason to believe that income of Rs.87,91,502/- has escaped assessment within the meaning of section 147 of the Act. In our view, this is nothing but the reopening of assessment on the basis of material which was available before the AO in the original assessment proceedings as there was no tangible material before the AO and therefore this is a patent case of review of the earlier assessment framed on the basis of same materials which is not permissible under the Act. The case of the assessee finds support from the decision of CIT Vs Kelvinatpor India Ltd. (supra) wherein it has been held that the re-opening can be made on the basis of tangible materials before the AO and not otherwise. Therefore, we are inclined to set aside the order of Ld. CIT(A) and the reopening of assessment is quashed as being invalid and contrary to law.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 05.01.2022.

Sd/-
(Amarjit Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 05.01.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai

The DR Concerned Bench
//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.