

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI PROMOD KUMAR (VICE PRESIDENT) AND
MS. SUCHITRA KAMBLE (JUDICIAL MEMBER)**

**ITA No. 5107/MUM/2011
Assessment Year: 2002-03**

Ramchandra Dashrath & Co.
F-108, APMC Fruit Market, Sector-
19, Turbhe, Navi Mumbai-400705.

PAN No. AAFFR 7250 L

Appellant

Vs. Dy. Commissioner of Income Tax-
22(3),
Mumbai.

Respondent

Assessee by : Ms. Aasifa Khan, AR
Revenue by : Mr. Sunil Kumar Jha, CIT-DR

Date of Hearing : 11/01/2022
Date of pronouncement : 20/01/2022

ORDER

PER MS. SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 29.03.2011 passed by the Ld. CIT(A)-33, Mumbai for the assessment year 2002-03. The grounds of appeal are as under:

"1) On the facts circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [CIT(A)] erred in upholding the validity of the order passed u/s. 143(3) read with section 147 of the Income Tax Act, 1961.

2) On the facts circumstances of the case and in law, the CIT(A) failed to appreciate that the appellant did not receive any notice u/s. 148 of the Act

and the objection in this regard from the appellant remained undisposed of by the ld. AO.

3) On the facts circumstances of the case and in law, the reopening of assessment u/s. 147 of the Act was illegal, invalid and contrary to the law.

4) On the facts circumstances of the case and in law, the CIT(A) failed to appreciate that in re-opening, there was no belief of the assessing officer re-opening the assessment as is evident from a conjoint reading of the recorded reasons and, disposal of the objections to reopening and the assessment order.

5) On the facts circumstances of the case and in law, the AO failed to appreciate that the order is barred by limitation since:

i) On the time barring date the objection to the reasons recorded was only disposed of;

ii) No order was received by the appellant much after the time barring date as evidenced by our letter dated 8.1.2010

iii) No evidence of issuance of the order before the time barring date has been produced by the ld. AO to support that order was made prior to time barring date.

iv) On the facts circumstances of the case and in law, the CIT(A) failed to appreciate that the impugned assessment period is covered in the Block Assessment order passed u/s. 158BD in the case of the Appellant, wherein all the material has been considered.

7) On the facts circumstances of the case and in law, the CIT(A) failed to appreciate that the AO had disposed the objections raised against the reopening of the assessment on the last day of the time barring period.

8) On the facts circumstances of the case and in law, the CIT(A) failed to appreciate that the assessment was having been made in violation of principal of natural justice is liable to be declared as null & void.

9) *On the facts circumstances of the case and in law, the CIT(A) erred in confirming 23,58,427/- out of Rs. 46,56,323/- as unexplained cash credit ignoring the detailed submission of the appellant wherein beside other it was highlighted that excess of cash receipt over cash payment is closing cash balance and not unexplained cash credit.*

10) *On the facts circumstances of the case and in law, the CIT(A) erred in treating the difference between sundry debtors and sundry creditors as income of the appellant.*

11) *On the facts circumstances of the case and in law, the CIT(A) failed to appreciate that the undisclosed trading operation to which some of the debtors and creditors represent has already been considered in the block assessment order passed u/s. 158BD and hence no separate addition can be made in regular assessment for the same issue*

12) *On the facts circumstances of the case and in law, the CIT(A) erred in calculating the excess cash over receipts, over few days as unexplained investment ignoring the submission of the appellant that the opening cash balance has not been considered in the calculation and hence such calculation is erroneous.*

13) *The Appellant craves leave to add amend and or delete any of the above grounds of appeal."*

2. The assessee is a partnership firm engaged as fruit merchant and commission agent for fruits in the APMC market. The assessee is also engaged in trading activities which were not reflected in the financial statement and in the income tax records. Return declaring total income of ₹21,578/- was filed on 12.012.2002. Notices u/s 143(2) and 142(1) were issued and served on the assessee. Subsequently, questionnaire was sent to the assessee on 04.10.2014. Search action was carried out u/s 132 of the Act in the name of Ramchandra Dashrath & Co. of 2002-03 wherein it was discovered that the assessee-firm

i.e. M/s Ramchandra Dashrath & Co. is also operating from the same premises as that of the search person. The original assessment order was passed u/s 143(3) on 22.09.2005 determining the total income of ₹1,62,60,859/- by the ACIT, Central Circle-36, Mumbai who was not the Assessing Officer of the assessee's firm (the said objection was taken by the assessee at the relevant time but was not decided by the Revenue authorities).

3. Being aggrieved by the said assessment order, the assessee-firm filed a appeal before the Ld. CIT(A). The Ld. CIT(A) vide order dated 19.05.2008 annulled the said assessment order as the same was passed by ACIT, Central Circle-36, Mumbai who did not have jurisdiction. The Assessing Officer gave effect to the order of the Ld. CIT(A) on 02.07.2008. Thereafter, notice u/s 148 dated 25.03.2009 issued by Dy. CIT-22(3), Mumbai who was the Assessing Officer of the assessee. The reasons recorded for reopening of the assessment as stated in the assessment order passed u/s 143(3) r.w.s. 147 dated 31.12.2009 are as under :

"In this case assessment u/s.143(3) has been completed on 22.09.2005 by ACIT Central Circle-36. The CIT(A) has annulled the assessment on the ground that the same was passed without jurisdiction, in view of the fact that no order for centralization was passed in this case. While completing the assessment, a sum of ₹1,62,60,859/- was determined as income for A.Y. 2002-03. In the appellate proceedings the quantification of the income has not been held to be erroneous. In view of these facts, income to the extent of Rs.1,62,60,859/- is required to be assessed for A. Y. 2002-03 and to that extent income has escaped assessment within the meaning of Sec. 147 because the assessee has filed return for a sum of Rs.21,578/- only which is substantially lesser than the income that was determined in the order u/s. 143(3) passed."

4. The assessment order was passed on 30.12.2009 thereby making addition of ₹46,56,323/- as unexplained cash credits of ₹87,46,462/- towards difference between balance in sundry creditors and sundry debtors,

₹22,96,896/- towards unexplained investments and ₹5,44,600/- towards income from business operation. Thus the Assessing Officer assessed the total income at ₹1,64,44,860/-.

5. Being aggrieved by the assessment order dated 30.12.2009, the assessee filed appeal before the Ld. CIT(A). The Ld. CIT(A) partly allowed the appeal of the assessee.

6. The Ld. AR submitted that Ground No. 2 is not pressed. The Ld. AR further submitted that it is clear from the reasons that the Assessing Officer reopened the assessment only on the ground that although the scrutiny assessment u/s 143(3) was annulled by the Ld. CIT(A), however, the quantification of the income is not held to be erroneous. The Ld. AR further submitted that once order which is annulled the same becomes non-est and no longer a valid order. The Assessing Officer for reopening the assessment cannot rely on the order which is non-est. The annulment of assessment done u/s 143(3) by the authorities itself cannot be a ground for reopening. The Ld. AR relied upon the following decisions :

1. *ITO v. Deepa Restaurant & Bar (P.) Ltd. [2014] 42 taxmann.com 542 (Mum)*
2. *M/s Sang Fastners Pvt. Ltd. v. ACIT [ITA No. 6871/M/2008 & 5639/M/2010 dated 08.05.2013 (AY 2000-01)]*
3. *Babulal Nath v. ACIT [2002] 82 ITD 691, Mum*
4. *R.K. Nagpal v/s. ACIT (2006] 10 SOT 57, Nagpur (URO)*
5. *CIT vs. M/s. Rameshwar Prasad Sharma, Contractor [D.B. ITANo.642/2011 (Raj.) dated 04/09/2017]*
6. *Smt. Anchi Devi v/s. CIT [ITA No.208 of 2007 (P&H) dated 28/03/2008]*
7. *CIT v/s. Air Craft Radio Corporation (292 ITR 64, P&H)*
8. *Manoo Lal Kedarnath v. UOI (114 ITR 884, AIL.)*

9. *CIT v/s. Rao Thakur Naravan Singh (56 ITR 234, SC)*
10. *DIT (IT)-1, v/s. Atom story export [2018] 95 taxmann.com 257, Bom*
11. *DIT (IT)-1, v/s. Atom story export [2018] 95 taxmann.com 260, SC(SLP dismissed)*

6.1 The Ld. AR further submitted that the reasons recorded for reopening are not based on any search conducted at assessee's premises as there was no search in assessee's case. The Ld. AR further submitted that the reasons recorded are not at all inconsonance with the additions made by the Assessing Officer vide order dated 30.12.2009. Therefore, the Ld. AR submitted that on the threshold itself the assessment itself is a bad in law and *void ab initio*.

7. The Ld. DR submitted that the Assessing Officer has rightly reopened after giving the cogent reasons for reopening and therefore, the question of annulment of earlier assessment does not come in the way of reopening. The Ld. DR relied upon the assessment order u/s 147 r.w.s. 143(3) as well as the order of the Ld. CIT(A).

8. We have heard both the parties and perused all relevant material available on record. It is pertinent to note that the reasons recorded by the Assessing Officer while reopening the assessment is for the issue related to a sum of ₹1,62,60,859/- for which the reasons are lacking the very basis of reopening and simply it is showing that the said sum was that of determination as income for assessment year 2002-03 and the said income is escaped from the regular assessment. While dealing with the issue of earlier order dated 22.09.2005 u/s 143(3), the same was not passed by the jurisdictional Assessing Officer of the assessee and therefore, the same was rightly annulled by the Ld. CIT(A). This itself does not debar the Assessing Officer to take further action for taking up the issue contested by the Revenue

in hand. Therefore, reopening cannot be quashed on the issue of annulment of assessment. Thus this argument of Ld. AR is dismissed.

8.1 As regards the material aspect of reasons recorded by the Assessing Officer while reopening, there was no iota of evidence or any cogent material reported in the reasoning given by the Assessing Officer u/s 148 r.w.s. 147 as to what basis the income has escaped and the necessity of reopening the assessment is required. On this issue, the assessee's contentions are accepted as no cogent reason was given while reopening. Section 147 has given a proper mechanism while reopening the cases by giving a convincing reason so that the assessee can present its case before the Revenue authorities in a clear manner and there is no room for escapement to the assessee when the tax issues are contested. Thus the reopening on this issue is not as per the procedural aspect prescribed by the Income Tax Act. The assessment itself become bad in law and therefore does not survive. The appeal of the assessee is allowed on the legal issue and therefore there is no need to comment on the merit of the case.

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

Order pronounced in the open Court on 20/01/2022.

Sd/-

**(PRAMOD KUMAR)
VICE PRESIDENT**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Mumbai;

Dated: 20/01/2022

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant

2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Sr. Private Secretary)
ITAT, Mumbai