

IN THE INCOME TAX APPELLATE TRIBUNAL

"SMC" BENCH, MUMBAI

BEFORE SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER AND

SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 5765/Mum./2018
(Assessment Year : 2009-10)

Mrs. Chetna Dilip Doshi
C/o Amish Traders
66, Radha Krishna Chawal
21-B, Khadilkar Road, Mumbai 400 004
PAN - AEDPD4376H

..... Appellant

v/s

Income Tax Officer
Ward-19(1)(3), Mumbai

..... Respondent

Assessee by : Shri Rahul Hakani
Revenue by : Shri Chandra Vijay, CIT-DR

Date of Hearing - 16.02.2022

Date of Order - 8/4/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee against the order dated 08 August 2018 passed by the Commissioner of Income Tax (Appeals) - 54, Mumbai ("CIT (A)") under section 250 of the Income Tax Act, 1961 ("the Act") for the assessment year 2009 - 10.

2. In its appeal, the assessee has raised following grounds:

1. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the action of Income Tax*

Officer in reopening the assessment under section 147 of the Act vide notice under section 148 dated 29/03/2016, served on 16/12/2016.

2. The learned CIT(A) erred in confirming the action of Income Tax Officer under section 148 and proceeding for assessment/s 142(1) without disposing of appellants objection for reopening the assessment vide application dated 20/12/2016.

3. The learned CIT(A) erred in confirming the action of Income Tax officer in addition of Rs.14,00,000/- on accounts of unexplained investment without considering facts of the case.

4. The learned CIT(A) failed to appreciate that not providing opportunity to the appellant for cross examination of the party on whose statement is relied 1)4 assessing officer. Amounts violation of natural justice.

5. The learned CIT(A) failed to see that agreement for Rs. 22,75,500/- does not exist on the record. On the assessing officer as same was not provided to the appellant; despite of asking the same.

3. The brief facts of the case for deciding the present appeal as emanating from the record are: The assessee is an individual and has filed the return of income on 23.07.2009 declaring total income of Rs. 2,16,526. On 25 October 2008 (during the relevant assessment year), the assessee along with her husband purchased flat from Saraswati Devi Ramji Lal trust as "Owner" and Sashwat Construwell Pvt Ltd. as "Developer" for a total consideration of Rs. 41,00,000. The return filed by the assessee was selected for scrutiny and notice under section 142 (1) of the Act was issued, inter-alia, asking for detail of premises owned by the assessee, which was duly replied by the assessee. The Assessing Officer ("the AO") passed order dated 29 August 2011 under section 143 (3) of the Act, after considering the response of the assessee to notices issued under section

142(1), without making any addition to the returned income of the assessee.

4. The AO vide notice dated 29 March 2016 issued under section 148 of the Act proposed to initiate reassessment proceedings. The reasons provided by the AO for reopening the assessment under section 147 of the Act reads as under:

"The assessee has filed return of income for the year under consideration on 23.07.2009 declaring total income at Rs. 2,16,530. The same has been processed u/s 143(1) of the Act.

2. As per this office record, vide copy of agreement dated 25.10.2008, the assessee has purchased a flat no.C-201 in the project Bhoomi Sarasawati from Sashwat Construwel Pvt. Ltd. whose agreement value is Rs.22,75,500. A search and seizure action was conducted by the DDIT(Inv.), Unit-3(4), Mumbai, on 05.10.2015, on M/s. Ekta and Bhoomi Group which resulted into collection of evidence that the assessee has also paid Rs.14,00,000, in cash for acquiring the said flat as extra consideration over and above the agreement value of Rs.22,75,500. The fact of receipt of extra consideration in cash has also been duly admitted by the Director of M/s. Bhoomi Group, Shri Akshay Doshi in his statement recorded u/s 131 dated 28.12.2015, and 04.01.2016. The extra consideration received in cash has also not been accounted for in the books of M/s. Bhoomi Group.

3. In view of the above, the Assessing Officer has reason to believe that extra consideration of Rs.14,00,000, paid by the assessee in cash for purchasing the said flat is nothing but income generated by the assessee out of sources not disclosed to the Income Tax Department. Therefore, the Assessing Officer has reason to believe that income chargeable to tax to the tune of Rs.14,00,000, or any other income which comes to the notice of the Assessing Officer during the course of re-assessment proceedings, has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. Thus, the assessee has failed to disclose fully and truly his particulars of income in the return of income. Accordingly, the case is proposed to be re-opened for the A.Y. 2009-10.

4. *Notice u/s 148 of the Income Tax Act, 1961 is to be issued after obtaining the approval of the Pr. Commissioner of Income Tax-19, Mumbai."*

5. Assessee vide letter dated 20 December 2016 objected to the initiation of reassessment proceedings and submitted that the information relied upon by the AO for initiating the reassessment proceedings is incorrect as the assessee had purchased the flat vide agreement dated 25 October 2018 for a total consideration of Rs. 41,00,000 instead of Rs. 22,75,500 as alleged by the AO. The assessee further submitted that the entire consideration of Rs. 41,00,000 was paid by the assessee by way of cheque (loan to an extent of Rs. 30,00,000 was availed by the assessee from Kotak Mahindra Bank and balance of Rs. 11,00,000 was paid through cheque). The assessee denied to have made a payment of Rs. 14,00,000 in cash as extra consideration for purchasing the flat. The assessee also sought the copy of agreement dated 25 October 2008 as relied upon by the assessing officer in its reasons for initiating the reassessment proceedings. The assessee also requested for statement recorded of Mr Akshay Doshi. The assessee vide another submission dated 23 December 2016 also requested the AO for grant of opportunity to cross examine the party on whose statement reliance is placed for initiating the impugned reassessment proceedings.

6. The AO vide assessment order dated 29 December 2016 passed under section 143 (3) read with section 147 of the Act in addition to the basis mentioned in the reasons for reopening the assessment also observed

that the market value of the flat as determined by a stamp duty valuation authority is much more than the documented payment of Rs. 41,00,000 and thus the same circumstantially corroborate that extra consideration over and above the agreement value of Rs. 41,00,000 would have been paid by the assessee. Accordingly, the AO made an addition of Rs. 14,00,000 under section 69 of the Act as unexplained investment.

7. The CIT (A) vide impugned order dated 8 August 2018 dismissed the appeal filed by the assessee. Being aggrieved, the assessee is in appeal before us.

8. During the course of hearing, Shri Rahul Hakani, learned Authorised Representative ("*learned A.R.*") submitted that the AO by not disposing of assessee's objection against initiation of reassessment proceedings has not followed the procedure laid down by Hon'ble Supreme Court in GKN Driveshaft (India) Ltd. v. ITO: 259 ITR 19. The learned AR further submitted that the initiation of reassessment proceedings as well as addition made by the AO is completely based on presumption and incorrect facts. The learned AR also submitted that the AO failed to provide opportunity to cross examine the person on the basis of whose statement proceeding under section 147 of the Act has been initiated in the present case.

9. On the other hand, Shri Chandra Vijay, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

10. We have heard the rival submissions and perused the material available on record. In the present case, the assessee alongwith her husband purchased the flat vide sale agreement dated 25 October 2008 for a total consideration of Rs. 41,00,000, copy of which forms part of the paperbook filed by the assessee from pages 14-49. Further it is evident from the record that during the course of assessment proceedings under section 143(3) of the Act, the assessee provided the details as sought by the AO vide notice issued under section 143(2) of the Act, inter-alia, regarding the property owned by the assessee. After considering the details filed by the assessee, the AO vide order dated 29 August 2011 passed under section 143(3) of the Act accepted the return filed by the assessee. Subsequently, the AO initiated the reassessment proceedings under section 147 of the Act by placing reliance upon the statement of Director of M/s Bhoomi Group, Mr Akshay Doshi recorded under section 131 of the Act. In the reasons recorded for reopening the assessment, the AO alleged that vide agreement dated 25 October 2008 assessee has purchased a flat whose agreement value is Rs.22,75,500. Further, in the statement of Mr Akshay Doshi recorded under section 131 of the Act, copy of which was provided to the assessee, it was alleged that flat was purchased by the assessee vide agreement dated 25 October 2008 having agreement value of Rs.22,75,500 and cash component of Rs.14,00,000. However, despite request by the assessee, copy of agreement dated 25 October 2008, as referred in the reasons for reopening the assessment, was not provided to the assessee. The CIT(A), dismissed the appeal filed by the assessee, inter-

alia, holding that the agreement value mentioned by the AO at Rs.22,75,500 is not a crucial piece of evidence and does not in any way vitiate the reopening proceedings. The CIT(A) further by referring to the statement of Mr Akshay Doshi recorded under section 131 of the Act held that the crucial information is the information of on money of Rs.14,00,000 paid by the assessee. Thus, on one hand, part of the statement of Mr Akshay Doshi recorded under section 131 of the Act was relied upon in support of initiation of reassessment proceedings to allege that the assessee has paid cash of Rs.14,00,000 for purchase of the flat. However, the other part of the aforesaid statement wherein it was alleged that assessee entered into agreement on 25 October 2008 having agreement value of Rs.22,75,500 was treated as not a crucial piece of evidence. Thus, from the aforesaid facts, it is evident that the statement recorded under section 131 of the Act is relied upon by the Revenue only partially, to suit its convenience. The Revenue has neither provided to the assessee nor brought on record agreement alleged to have value of Rs.22,75,500. On the contrary, from the copy of agreement dated 25 October 2008 forming part of the paperbook, it is clear beyond doubt that agreement value was Rs.41,00,000 instead of Rs.22,75,500 as alleged by the AO. From the above, it is thus evident that there was no independent application of mind by the AO on the information received. Accordingly, we are of the view that the basis for initiating reassessment proceedings i.e. statement recorded under section 131 of the Act, is contrary to the facts on record and such a statement cannot be relied upon to initiate the reassessment proceedings.

Therefore, in the present case, reassessment on the basis of wrong facts cannot be upheld.

11. Further, the AO vide order dated 29 December 2016 passed under section 143(3) r/w section 147 of the Act, in order to support the addition of Rs.14,00,000 under section 69 of the Act, inter-alia, observed as under:

"As per copy of agreement, market value of above flat as determined by the stamp duty valuation authority is Rs. 60,35,423/-. However, the assessee has made documented payment of Rs. 41,00,000 which is far less than the market value of the flat. This fact also goes on to circumstantially corroborate that extra consideration over and above the agreement value of Rs. 41,00,000 would have been paid."

It is well established that the reasons recorded by the AO cannot be further be substituted or added or deleted. Hon'ble Jurisdictional High Court in the case of Hindustan Lever Ltd v/s R.B.Wadkar: 268 ITR 332 observed as under:

"It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."

Thus, we are of the view that the reference to market value of the flat as determined by stamp duty valuation authority also cannot justify initiation of reassessment proceedings under section 147 of the Act, as the

validity of reassessment has to be tested only on the basis of reasons recorded by the Assessing Officer before issuing notice under section 148 of the Act and those reasons cannot be further improved.

12. Further, in the present case, the AO has also not granted opportunity to the assessee to cross examine the person on the basis of whose statement proceedings under section 147 of the Act were initiated. We find that in Shri Abhishek Dhanotia v/s ITO: ITA No.655/Ind./2018, wherein reassessment was also initiated on the basis of similar search proceedings carried out on 5 October 2015 on M/s Ekta and Bhoomi Group and the statement of the Director of M/s Bhoomi Group was recorded on 28 December 2015 under section 131 of the Act, the Co-ordinate Bench of Tribunal, observed as under:

"12. Now coming to the second objection of the assessee that the assessee was not provided cross examination. It is not in dispute that the information was gathered at the premises of the 3rd party addition is based upon the statement of the 3rd party. This fact is not rebutted by the revenue, therefore, in my considered view the assessee ought to have been provided opportunity of cross examination. The Assessing Officer purely based his finding on the statement made by third party and data recovered from third party. In my view not providing opportunity of cross examination is ex-facie contrary to the principles of natural justice, therefore, on this ground also assessment so framed is against settled principles of law. In view of the above, I hereby quash the assessment order being contrary to judicial pronouncements. The AO is directed to delete the impugned addition."

13. Thus in view of the above, as the AO, in the present case, has failed to provide opportunity of cross examination to the assessee, which is contrary to the principle of natural justice, on this basis also assessment framed under section 143(3) r/w 147 of the Act is liable to be set-aside.

14. As is evident from the record, the assessee filed detailed submissions dated 20 December 2016 and 23 December 2016 objecting to the initiation of reassessment proceedings under section 147 of the Act. The learned AR submitted that the AO has not passed any order disposing of assessee's objections against initiation of reassessment proceedings and thus violated the procedure as laid down by the Hon'ble Supreme Court in GKN Driveshaft India Ltd (supra). We find that this ground has been raised for the first time by the assessee in the present appeal and therefore the lower authorities had no occasion to deal with the same. Be that as it may, since we have held that the reassessment proceedings initiated under section 147 of the Act is contrary to the settled position of law and also based upon incorrect facts, finding on this ground becomes academic in nature in the present case.

15. In view of the above, the order passed by the CIT(A) is set aside and AO is directed to delete the addition of Rs.14,00,000 made under section 69 of the Act.

16. In the result, appeal by the assessee is allowed in terms of our aforesaid findings.

Order pronounced in the open court on 08/04/2022

Sd/-
GAGAN GOYAL
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 08/04/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai