

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “C”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER**

**ITA No.497/M/2021
Assessment Year: 2009-10**

Jt. Commissioner of Income Tax (OSD), Cen. Circle-3(1), Room No.1924, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021	Vs.	M/s. Om Realty Private Limited, 205, Om Chambers, Om Kroner, 123, A.K. Marg, Kempscorner, Mumbai – 400 036 PAN: AAACO2564L
(Appellant)		(Respondent)

**CO No.150/M/2021
(Arising out of ITA No.497/M/2021)
Assessment Year: 2009-10**

M/s. Om Realty Private Limited, 205, Om Chambers, Om Kroner, 123, A.K. Marg, Kempscorner, Mumbai – 400 036 PAN: AAACO2564L	Vs.	Jt. Commissioner of Income Tax (OSD), Cen. Circle-3(1), Room No.1924, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Hari S. Raheja, A.R.
Revenue by : Shri C.T. Mathews, Sr. A.R.

Date of Hearing : 05 . 04 . 2022
Date of Pronouncement : 29 . 04 . 2022

ORDER

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid appeal and cross objections bearing common question of law and facts are being disposed of by way of composite order.

2. Appellant Jt. Commissioner of Income Tax (OSD) (hereinafter referred to as the Revenue) and the cross objector M/s. Om Realty Private Limited (hereinafter referred to as the assessee) by filing the present appeal and cross objections sought to set aside the impugned order dated 06.01.2021 passed by the Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the Ld. CIT(A)] on the grounds inter alia that:

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“1. Whether on the facts and circumstances of the case the Ld.CIT(A) was justified in law in deleting the addition of Rs.1,73,33,141/- on account of disallowance of unsecured loans u/s 68 of the Act as the assessee had never filed its return of income prior to this period and hence the year of origin of the unsecured loans cannot be verified.

2. The appellant craves to leave , to add, to amend and/or to alter any of the ground of appeal, if need be.

3. The appellant, therefore prays that on the ground stated above, the order of the Ld. CIT(A), therefore, prays that on the ground stated above, the order of the Ld.CIT(A)-51, Mumbai, may be set aside and that of the Assessing Officer restored.”

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“On the facts and in the circumstances of the case and in law the Commissioner of Income Tax (Appeals) 51, Mumbai CIT(A) erred in upholding the reopening of the assessment disregarding the fact that the information relied upon by the Assessing Officer did not relate to the year under appeal and hence the satisfaction recorded by the Assessing Officer was bad in law and hence the reopening ought to be quashed.

2. On the facts and in the circumstances of the case and in law CIT (A) erred in not accepting the objection of the appellant that the reassessment proceeding were bad-in-law as the reasons recorded were factually incorrect since no property was sold during the year under consideration as alleged by the Assessing Officer in his reasons recorded for reopening of Assessment.

3. On the facts and in the circumstances of the case and in law erred in holding that the reassessment order passed by Assessing Officer u/s 143(3) r.w.s. 147 was valid and that he was having jurisdiction over the case of appellant, and hence the issuance of notice u/s 148 & order passed u/s 143(3) r.w.s. 147 was valid.

4. On the facts and in the circumstances of the case and in law the CIT (Appeals) was not justified in confirming the validity of the reopening in absence of any addition made in respect of the reasons for which the assessment was reopened.”

3. Briefly stated facts necessary for adjudication of the controversy at hand are : on the basis of information received from office of investigation and criminal intelligence of Income Tax Department that “during the year under assessment assessee had entered into a transaction for sale of property of Rs.38,60,49,000/-” which fact is confirmed from the bank statement furnished by the assessee in response to the notice under section 133(6) of the Income Tax Act, 1961 (the Act). After recording the reasons Assessing Officer (AO) initiated the proceedings under section 147 & 148 of the Act. Assessee filed the return of income in response to the notice under section 148 of the Act, at nil. During the reopening proceedings the AO also noticed from the financial statement and bank statements of the assessee that the assessee has taken unsecured loan amounting to Rs.1,73,33,141/- as on 31.03.2009. After declining the contentions raised by the assessee the AO proceeded to make addition of Rs.1,73,33,141/- to the income of the assessee on account of unexplained cash receipt under section 68 of the Act and thereby framed the assessment at

Rs.1,73,33,141/- under section 143(3) read with section 147 of the Act.

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition on merits by partly allowing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) Revenue as well as assessee have come up before the Tribunal by way of filing appeal and cross objections respectively.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Before proceeding further, we would like to extract the reasons recorded by the AO before initiating the proceedings under section 147/148 of the Act, which are as under:

"An information have been forwarded by Addl. Director of Income tax (I & Cl) Unit-1, Mumbai vide letter No. Addl. DIT (I & Cl), Unit-1/F.Trans. 2015-16 dt. 17.03.2016 that M/s. Om Realty Pvt. Ltd. has entered into a financial transactions of sale of property aggregating to Rs.38,60,49,000/- during the F.Y. 2008-09 i.e. A.Y. 2009-10. It has been informed by the ADIT, Unit-1, Mumbai in the said letter that as per the documents registered with Joint Sub Registrar Andheri, the assessee has entered into a transaction for sale of property of Rs,38,60,40,000/-. It is also informed that the bank statement furnished by the assessee in response to notice u/s. 133(6) confirms the transactions of sale. On verification of records as well as ITD it reveals that assessee company has not filed return of income for A.Y. 2009-10. As such, it is apparent that income of the assessee from the alleged sales transactions for the A.Y. 2009-10 has escaped assessment."

7. From the reasons recorded it has come on record that “reopening has been initiated by the AO in order to inquire into the financial transactions of sale of property by the assessee to the tune of Rs.38,60,49,000/- allegedly during the year under consideration”, resulting in escapement of income to the extent of Rs.38,60,49,000/- as the assessee has not filed return of income for the said year.

8. However, during the appellate proceedings undisputed fact came on record that the property in question was sold by the assessee on 12.06.2009 i.e. in financial year 2009-10 relevant to A.Y. 2010-11. Another undisputed fact has also come on record that in the property in question assessee was having only share of 25% and the agreement price was Rs.3,25,00,000/-.

9. Bare perusal of the assessment order goes to prove that all of sudden AO without enquiring into this fact travelled beyond the reason recorded by initiating the assessment proceedings qua one another transactions of unsecured loan amounting to Rs.1,73,33,141/- as on 31.03.2009 and since assessee company has never filed any return of income prior to this period he has made addition thereof being unexplained cash receipt under section 68 of the Act.

10. Now in the given circumstances the sole question arises for determination in this case is :

“as to whether the AO can travel beyond the transaction recorded in the reasons recorded to initiate and make assessment under section 147 of the Act, particularly when after issuance of notice under section 148 of the Act he has accepted the contention of the assessee that income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment?”

11. Identical issue has already been decided by the Hon'ble Bombay High Court in case of Jet Airways (2011) 331 ITR 236 (Bom.) in favour of the assessee and against the Revenue by returning the following findings:

“20. Parliament, when, it enacted Explanation 3 to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd., [2008] 305 ITR 170 and of the Punjab and Haryana High Court in Vipin Khanna, [2002] 255 ITR 220 would, therefore, no longer hold the field. However, in so far as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh, [2008] 306 ITR 343, Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab and Haryana High Court in CIT v. Atlas Cycle Industries, [1989] 180 ITR 319. The decision in Atlas Cycle Industries, [1989] 180 ITR 319 held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or nonexistent. The decisions of the Punjab and Haryana High Court in Atlas Cycle Industries, [1989] 180 ITR 319 and of the Rajasthan High Court in Shri Ram Singh, [2008] 306 ITR 343 would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.

21. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148. Setting out the reasons, for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance (No. 2) Act of 2009. However, Explanation 3 does not

and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income (“such income”) which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147 and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147 as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income “and also” any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words “and also” are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion to Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words “and also” by the Rajasthan High Court in Shri Ram Singh, [2008] 306 ITR 343. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147 as they stood after the amendment of April 1, 1989, continue to hold the field.

22. In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall accordingly stand answered against the Revenue and in favour of the assessee. The appeal is accordingly dismissed. There shall be no order as to costs.”

12. In the instant case the AO categorically recorded reasons “that income to the extent of Rs.38,60,49,000/- escaped assessment pertaining to the year under consideration being the financial

transactions of sale of property. But during the assessment proceedings he being convinced that no such transaction escaped assessment the same being of subsequent years, no such income as recorded in the reasons has escaped assessment, but proceeded to make addition qua another transaction of unsecured loan amounting to Rs.1,73,33,141/-, admittedly not mentioned in the reasons recorded, qua which no notice was issued under section 148 of the Act, the addition made is not sustainable as the AO has no jurisdiction to travel beyond the issue raised in the notice under section 148 of the Act. When reasons recorded for initiation of reopening proceedings qua transaction of sale of properties ceased to survive, no addition qua any other transactions not recorded in the reasons recorded/noticed under section 148 of the Act is sustainable in the eyes of law.

13. In other words addition made by the AO is not sustainable being beyond his jurisdiction. So in view of the matter, cross objection raised by the assessee which is purely legal objections, are allowed. Since the AO has no jurisdiction to initiate the reopening of reassessment under section 143(3)/147 of the Act qua the transaction pertaining to unsecured loan, we do not feel it expedient to enter into the merits of this case. Consequently, cross objections filed by the assessee are allowed and appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 29th April 2022.

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 29.04.2022.

* 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.