

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.3300/Mum/2019

(निर्धारण वर्ष / Assessment Years: 2005-06)

Ravikumar Nath (HUF) 204/C-3, Veena Nagar, Mulund West-400080.	बनाम/ Vs.	ITO-29(3)(1) 305, C-10, Pratykshkar Bhavan, BKC, Bandra (E), Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGHR0075L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Ashwin Chhag
Revenue by:	Shri Ram Krishn Kedia

सुनवाई की तारीख / Date of Hearing: 30/05/2022

घोषणा की तारीख /Date of Pronouncement: 14/06/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-40, Mumbai dated 06.03.2019 for the assessment year 2005-06.

2. At the outset, the Ld. AR of the assessee brought to our notice that the assessment in this case has been re-opened after four (4) years but within six (6) years. However, the main grievance of the assessee is against the action of the AO having re-opened the assessment, not giving reasons recorded for reopening as mandated by the Hon'ble Supreme Court in G.KU Drive Shaft (2003) 259 ITR 19 (SC), as well as the Ld. CIT(A)'s actions of ignoring the legal issue raised before him that the notice u/s 148 of the Income Tax Act, 1961 (hereinafter "the Act") was issued without sanction of the competent authority u/s 151 of the Act. According to the Ld. AR despite this Tribunal directing the Department representative (DR) to produce the records of the case



ITA No.3300/Mum/2019

A.Y. 2005-06

Ravikumar Nath

vide order dated 24 Nov 2021, till date, the department for reasons best known to them has not produced it and therefore he wants us to draw adverse inference on this legal issue i.e. the action of AO to re-open the assessment after four (4) years was without sanction/approval of the competent authority before the issuance of notice u/s 148 of the Act as envisaged u/s 151 of the Act and consequently it is bad in law. Per contra, the Ld. DR fairly accepted the fact that despite their best efforts, the AO could not trace the file of the assessee, so they were not able to produce the file of the assessee as directed by us vide order dated 24 Nov 2021. Even though we queried as to whether the file can be produced by next hearing, the Ld. DR expressed his inability to produce the files. So in the absence of the file of assessee, we have to examine the legal issue raised by the assessee. In his rejoinder, the Ld. AR submitted that in the light of the department's omission to produce the file, the Tribunal may draw adverse inference against legal issue i.e. before re-opening the assessment, the AO failed to have taken the prior-approval as envisaged u/s 151 of the Act before issuance of notice u/s 148 of the Act.

4. We have heard both the parties and perused the record. We note that the assessee had filed the return of income on 22nd Sep, 2005 for AY 2005-06, and later the intimation was sent by the department u/s 143(1) of the Act. Later, a notice was issued u/s 148 of the Act by AO expressing his desire for reopening the assessment u/s 147 of the Act on 24.03.2011. It is noted that the assessee had been requesting the AO for '*reasons recorded*' for reopening the assessment and despite there



ITA No.3300/Mum/2019

A.Y. 2005-06

Ravikumar Nath

was clear binding direction of the Hon'ble Supreme Court in G.K.N. Drive Shaft case (supra), the AO gave a copy of it only during the First Appellate Proceedings before Ld CIT(A). And even though the assessee was raising the legal issue of non-approval u/s 151 of the Act, before the AO to have validly issued notice u/s 148 of the Act (since assessment was being admittedly re-opened after four (4) years), the assessee was not given the same. Further, we note from perusal of the impugned order of Ld. CIT(A) despite the assessee raising this legal issue of non-approval/sanction by the competent authority as envisaged u/s 151 of the Act before AO validly issued notice u/s 148 of the Act, the same was not adjudicated by the Ld. CIT(A). Before us also the assessee had been raising this legal issue and pleading about the omission of the AO to have issued the notice of re-opening u/s 148 of the Act without obtaining the approval of the competent authority u/s 151 of the Act. Taking note of this legal issue this Tribunal directed the DR to produce the file of assessee on 24 Nov 2021, however, till date the department has failed to produce the file and more than seven (7) months has elapsed, and even though we asked, the Ld. DR as to whether they could try to get it, he conceded that the AO tried his best to trace the file pursuant to our direction but they couldn't find it, so we have to draw adverse inference against the AO's action. In the light of the aforesaid discussion, we note that the issue pertains to AY 2005-06 and the AO after re-opening has made an addition of Rs 3,19,288/- by reopening the assessment on 24.03.2011 and even though the assessee had asked for the copy of the reasons recorded for re-opening the assessment, it was given to him only



ITA No.3300/Mum/2019

A.Y. 2005-06

Ravikumar Nath

during the first appellate stage which is in violation of the Hon'ble Supreme Court order in the case of G.K.N. Drive Shaft (supra) and more over, the assessee's ground of appeal raising the legal issue of AO not obtaining the approval u/s 151 of the Act before issuance of notice u/s 148 of the Act was not adjudicated by the Ld. CIT(A). And despite our directions the departments inability to produce the file of assessee, give us no other alternative but to draw adverse inference against AO for issuance of notice us/ 148 of the Act with-out prior-approval, which omission renders the notice of AO to re-open u/s 148 of the Act as invalid and bad in law, so, the consequential re-assessment order also is held to be invalid as held by Hon'ble Bombay High Court CIT Vs Suman Woman Chaudhary 321 ITR 495 (Bom). So the legal issue is held against the department on this issue and therefore we uphold the legal issue raised by the assessee and therefore we are inclined to quash the re-opening of the assessment carried out pursuant to the invalid notice issue u/s 148 of the Act dated 24.03.2011.

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

Order pronounced in the open court on this 14/06/2022.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 14/06/2022.
Vijay Pal Singh, (Sr. PS)



ITA No.3300/Mum/2019

A.Y. 2005-06

Ravikumar Nath

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**