

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

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA Nos.366 & 367/MUM/2022
Assessment Year: 2010-11**

Devakinandan Bagadia, 62-B, No.1, Jolly Makers Apt., Cuff Parade, Mumbai. PAN AAAPB 9847J	Vs.	Income Tax Officer 17(1)(1), Mumbai.
Appellant		Respondent

Assessee by : Shri Vijay Mehta.
Revenue by : Shri T Shankar (D.R.)

Date of Hearing : 16.06.2022.
Date of pronouncement : 15.07.2022.

O R D E R

PER AMARJIT SINGH, A.M.:

These two appals based on identical facts and similar issue are filed by the assesses are directed against the orders of Pr. Commissioner of Income Tax, Mumbai passed u/s.263 of the Income Tax Act, 1961 (in short 'the Act'). Since both these appeals based on similar facts and issue, therefore for the sake of convenience and brevity, we take ITA 366/Mum/2022 taken as a lead case and its finding will be applicable to ITA 367/Mum/2022 also.

ITA 366/Mum/2022

2. The assessee has raised the following grounds :

1. On the facts and in the circumstances of the case, the Ld. PCIT has erred in passing the order u/s. 263 of the Act which is illegal and bad in law.
2. On the facts and in the circumstances of the case, the Ld. PCIT has erred in assuming the jurisdiction u/s. 263 of the Act and holding that the assessment order passed by the A.O. u/s. 143(3) of the Act is erroneous in so far as it is prejudicial to the interest of the revenue.
3. On the facts and in the circumstances of the case, the Ld. PCIT has erred in holding that the assessee has received cash commission of Rs. 97,68,665/- and further holding that the A.O. has under assessed the above income.
4. The Ld. PCIT has erred in passing the impugned order without giving an effective opportunity of hearing and in violation of principles of natural justice.
5. The appellant craves leave to add to, amend, alter or delete the foregoing grounds of appeal.

3. The facts in brief are that the assessee filed Return of Income on 22.7.2010 declaring total income of Rs.16,73,371. The assessment u/s.143(3) r.w.s. 147 of the Act was completed on 29.12.2017 determining the total income at Rs.40,71,370 after making addition on account of cash receipt by way of brokerage of Rs.22,06,563 and expenses against the house property of Rs.1,91,432. Subsequently, the learned PCIT after perusal of the record observed that the assessee had received cash commission of Rs.97,68,665. However, the Assessing Officer had made addition u/s.68 amounting to Rs.22,06,563 only. Learned PCIT was of the view that the Assessing Officer had failed to enquire into the entire cash receipt from the purview of the provisions of section 68 of the Act. Therefore a show cause

notice u/s.263 of the Act dt.20.3.2021 was issued to the assessee. The ld. PCIT held that failure of the Assessing Officer to enquire into the genuineness of the entire commission transaction from the perspective of the provisions of section 68 has to be regarded as erroneous in so far as it is prejudicial to the interest of revenue within the meaning of section 263 of the Act. Accordingly, the assessment order dt.29.12.2017 passed u/s.143(3) r.w.s. 147 of the Act was set aside as per the provisions of Expln. 2 to section 263(1) of the Act to the Assessing Officer.

4. During the course of appellate proceedings before us, at the outset learned counsel contended that the assessment order passed u/s. 143(3) r.w.s. 147 of the Act dt.29.12.2017 against which the ld. PCIT has passed order u/s.263 of the Act dt.27.3.2021 has been quashed by the ITAT, Mumbai vide order ITA Nos.249 & 250/Mum/2020 dt.21.4.2022 (Devkinandan Bagadia Vs. I.T. Department, NFAC, Delhi), therefore order passed u/s.263 is invalid.

5. Learned Department Representative is fair enough to could not controvert this fact that order u/s.143(3) r.w.s. 147 dt.29.3.2017 was quashed by the above referred order of the ITAT.

6. Heard both the sides and perused the material on record. Without reiterating the fact, with the assistance of learned representatives, we have

gone through order of the ITAT, Mumbai vide ITA Nos.249 & 250/Mum/2020 dt.21.4.2022 (Devkinandan Bagadia Vs. I.T. Department, NFAC, Delhi) for the assessment years 2010-11 and 2011-12. Relevant part of the operating portion of the decision is reproduced as under :

“ 6. Under these issues the assessee has challenged the reopening in view of the provisions under section 147/148 of the Act. The AO issued the notice under section 148 of the Act dated 30.03.2017 and in pursuance of the said notice the assessee filed the return of income which he had filed earlier on 22.07.2010. The AO also filed the copy of reasons recorded which are hereby reproduced as under:

“..... Information has been received from the O/O. DOT - Central Circle - 4(1) Mumbai, that a search and seizure action was conducted in the Yashovardhan Birla Group on 7.1.2014. Birla Power Solution Ltd. (BPSL) is one of the entities of this group. It is found that Shri D. N. Bagadia, PAN AAAPB9847J has undertaken transactions with Birla Power Solutions Ltd in cash.

During the search and seizure action several incriminating documents were seized which proved that the company was involved in accepting cash loans/ICD's and payment of interest in cash & cheque both. Also, commission payment was made to several parties in cash & cheque both.

As per the information received, cash ICD's worth Rs. 211 lacs were arranged by Mr. Devkinandan Bagadia for BPSL. It is further intimated that the official portion of ICD's were obtained by BPSL through banking channel, however, interest payments were made in partly in cash and partly through banking channel.

As per the summary of broker wise details of interest paid, by BPSL to brokers, it is noticed that an amount of Rs. 73,26,499/- has been received by Mr. Devkinandan Bagadia from BPSL through banking channel. In addition, the cash component of interest paid by BPSL to Mr. Devkinandan Bagadia for the F. Y. 2009- 10 has been worked out at Rs. 97,68,665/-.

In view of the foregoing facts, I have reason to believe that income chargeable to tax in the form of interest in cash of at least of Rs. 97,68,665/- over and above the official portion of interest of Rs. 73,26,499/- on ICD's, has escaped assessment for A. Y. 2010-11 in the case of said assessee, within the meaning of section 147 of the Income Tax Act, 1961. Therefore, it is a fit case for issue of notice u/s. 148 of the Act.”

7. Subsequently, the assessee asked the necessary documents relied upon to form the reasons for the reopening of the assessment by virtue of letter dated 24.07.2017 lies at page 9 of the paper book. The AO disposed of the objection by virtue of order dated 13.11.2017 lies at page 12 of the paper book in which it was mentioned that necessary documents would be handed over to the assessee during the course of assessment proceedings. In brief the AO did not supply the documents before disposing the objections. Even before completion of assessment, nothing came into the notice that the said documents were given to the assessee. The assessee by virtue of letter dated 17.11.2017, lies at page

18 of the paper book, also requested to provide the necessary documents for the working but no documents were given. A letter dated 13.12.2017 lies at page 20 of the paper book also given to the AO for providing the necessary document but there is nothing on record with regard to providing the seized document, if any, to the assessee on record. Non providing the relied documents leads to this fact that the reopening is bad in law. In this regard the co-ordinate Bench of the Tribunal, Delhi in case of *Deepraj Hospital Pvt. Ltd. vs. ITO* in ITA No.41/Agra/2017 has decided the issue in which the Tribunal has given the following findings:

“ 22. Thus, in deference to "*Sabh Infrastructure Limited*" (supra), it is incumbent on the AO, while communicating the reasons for the reopening of the assessment, to provide the standard form, used for obtaining approval of the superior officers. Merely stating the reasons in a letter addressed by the AO, is not enough. Then, the reasons to believe escapement of income need to spell out all the reasons and grounds available with the AO for reopening the assessment. The reasons must also paraphrase any investigation report, which may form the basis of the reasons and any enquiry conducted by the AO thereon, as also the conclusions thereof. Further, and this is most relevant for the case at hand, where the reasons make a reference to any document, such document and/ or relevant portion thereof must be enclosed along with the reasons. The Hon'ble High Court has underlined that consideration of the assessee's objections to the reopening of assessment is not a mechanical ritual, but it is a quasi judicial function. It has been mandated that the order disposing of the objections should deal with each objection, giving proper reasons for the conclusion and no attempt should be made to improve or add to the reasons, as recorded and disclosed.

23. In the case of the present assessee, it remains undisputed that though the reasons recorded by the A O for belief of escapement of income contain reference to material forming the basis thereof, such material, despite written request by the assessee to the AO in this regard, was never supplied by the AO to the assessee. This is in direct contravention of the principle of natural justice, as reiterated in "*Sabh Infrastructure Limited*" (supra). As noted, in the present case, the alleged material was only supplied to the assessee in the remand proceedings, where too, the objections of the assessee were not met. The Id. CIT(A) also did not deal with these objections of the AO.

24. Therefore, the reasons recorded by the AO are found to be not in accordance with law. Accordingly, they are cancelled. Too, in view of "*Sabh Infrastructure Limited*" (supra), none of the other decisions cited by the Department are of any aid to it. Consequently, the reassessment proceedings, culminating in the order under appeal, are also not sustainable in the eye of law and they too are cancelled. Nothing further survives for adjudication."

8. The jurisdictional High Court in case of *Tata Capital Finance Services Ltd. vs. ACIT* dated 15.02.2022 is also of the view that when the necessary documents were not supplied to the assessee then the reopening is bad in law. Therefore, taking into account of all these facts and circumstances, we are of the opinion that the reopening is bad in law, hence the order in question is not liable to be sustained in the eyes of law. Hence, reopening is hereby ordered to be set aside. Accordingly, ground No.2, 3 & 4 are decided in favour of the assessee and against the Revenue.

ITA No.249/M/2022 (A.Y. 2011-12) 9. The facts of the case are quite similar to the facts of the case as narrated above while deciding the appeal bearing ITA No.248//M/2022, therefore, there is no need to repeat the same, however, the figure is different. Since the matter of controversy has already been

adjudicated while deciding the legal issue in case bearing ITA No.248//M/2022 above, therefore the finding given above while deciding ground Nos.2, 3 & 4 is quite applicable to the facts of the present case also as mutatis mutandis. Accordingly, this appeal is also decided in favour of the assessee and against the Revenue.

10. In the result, both the appeals of the assessee are allowed.”

Vide aforesaid order, the ITAT has held that reopening of assessment made in the case of the assessee was bad in law and the order passed by the Assessing Officer u/s.143(3) r.w.s. 147 of the Act for both the assessment years 2010-11 and 2011-12 were set aside/quashed. In the light of the above facts and circumstances, we consider that once the order u/s.143(3) r.w.s. 147 of the Act on the basis of which the ld. PCIT has passed order u/s.263 of the Act has been held as invalid, then there is no basis for validity of the order passed u/s.263 of the Act. Accordingly, the orders passed by the ld. PCIT u/s.263 of the Act for both the assessment years 2010-11 and 2011-12 are quashed and appeals of the assesses are allowed. Since the order passed u/s.263 are quashed therefore other grounds of appeals filed by the assessee are not required adjudication.

6. In the result, the appeals filed by the assesses are allowed.

Order pronounced in the open Court on 15th July, 2022.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai;

Dated: 15.07.2022.

* Reddy gp

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,

(Dy./Assistant Registrar)
ITAT, Mumbai