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

BEFORE SHRI PRASHANT MAHARISHI, AM

ITA No. 1798/Mum/2020
(Assessment Year 2008-09)

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| Arvind Mohanlal Jain<br>Flat No.304,<br>D-wing, Vishwanath Nagar,<br>Gandhi Chowk,<br>Kulgaon, Badlapur (E)<br>Mumbai-421 503<br>(Appellant) | Vs. | CIT(A)-3<br>Room No-30,<br>B-Wing, Asher IT Park,<br>Wagle Industrial Estate,<br>Thane 400 604<br>(Respondent) |

PAN No. AARPJ2456J

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| Assessee by | : | Shri Piyush Chhajed, AR |
| Revenue by | : | Shri Ujjawal Chavan, SR AR |

Date of hearing: 20.09.2022
Date of pronouncement : 15.12.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by assessee against Appellate order passed by the Commissioner of Income-tax (Appeals)-3, Thane, [ The Ld CIT (A)] dated 17th February, 2020 for A.Y. 2008-09 raising following grounds of appeal:-

*"1. Legal*

*Reopening of assessment under section 148 of the Act is unjustified:*

*The honorable CIT(A)-3 Thane, failed to appreciate that the Income Tax Officer of Ward 2(1), kalian (hereinafter referred to as "Ld. CIT(A) A.O.") erred in reopening the assessment without recording proper and valid reasons. Hence, the notice dated 27/03/2015 issued under section 148 of the Act as well as the Assessment order dated 30/03/2016 passed under section 143(3) pursuant to the said notice is bad in law and void ab initio. The Appellant therefore prays that the Assessment order passed under Section 143(2) may be quashed.*

*Reopening of the assessment is unjustified:*

*The honorable CIT(A)-3 Thane, failed to appreciate that the Ld. A.O. erred in reopening the assessment of the Appellant without having any new tangible material to show that the any income chargeable to tax has escaped assessment. Thus, the reopening of the assessment and subsequent assessment order passed under section 143(3) of the Act is not at all justified and the same may be quashed and set aside.*

*The Ld. A.O. erred in passing the assessment order dated 30/03/2016 u/s 143(3) of the Act whereas the order should have been passed u/s 143(3) r.w.s. 147 of the Act. Further the Ld. CIT(A) A.O. also failed to issue notice u/s 143(2) of the Act which is the pre-requisite and hence the assessment order passed under section 143(3) of the Act is not at all justified and the same may be quashed and set aside.*

*Both, the honorable CIT9(A)-3 Thane as well as the Ld. A.O. failed to appreciate the fact that the signature on the communication dated 23/02/2016 in the matter of reason for reopening of Assessments for A.Y. 2008-09 do not belong to me nor the then Authorized representative CA Nihar Mehta. Hence, the said reasons for reopening the assessment were not communicated to me within a reasonable period of time.*

*2. The honorable CIT(A)-3 Thane failed to appreciate that the Ld. CIT(A) A.O. erred in passing the assessment order dated 30/03/2016 under Section 143(3) of the Income Tax Act determining total income of the Appellant at Rs. 31,58,480/- as against returned income of Rs. 1,58,483/- by making various additions and disallowances without appreciating the facts and circumstances of the case. The Appellant strongly objects to the addition and disallowances made in the assessment order.*

*3. Addition on account of Unexplained Cash Deposit- Rs. 30,00,000/-*

*i. The honorable CIT(A)-3 Thane failed to appreciate that the Ld. A.O. erred in making an addition of Rs.30,00,000/- being the unaccounted cash deposited in bank account.*

*ii. Both, the honorable CIT(A)-3 Thane and the Ld. A.O. failed to appreciate the fact that the Appellant is an estate*

*agent acting on behalf of the Kalpataru Group and the said amount was received from the said group for purchase of plot on their behalf and hence explained the source of the fund.*

*iii. Both the honorable CIT(A)-3 Thane and the Ld. A.O. also failed to appreciate the fact that the said amount utilized for the payment to Mr. Chandrakant Dedhia, who subsequently refunded money directly to Kalpataru Group as the deal was not materialized.*

*4. The ld. Assessing Officer erred in levying interest under section 234A, 234B, 234C and initiating penalty proceedings under Section 271(1)(c) of the Act without appreciating the fact that the appellant denies his liability to the same."*

02. The brief fact of the case shows that assessee is an individual engaged in the business of real estate broker. He filed his return of income on 2nd September, 2008 at ₹1,58,483/-. Such return was accepted as it is. Subsequently, information was received from Income Tax Officer, Ward 17(1)(3), Mumbai as per letter dated 25th March, 2015, regarding cash deposit of ₹30 lacs in his account and immediately same was advanced to one Shri Chandrakant Dedhia. Therefore, notice under Section 148 of the Income-tax Act, 1961 (the Act) was issued on 27th March, 2015. Necessary notices were issued in response to which assessee reiterated by letter dated 23rd February, 2016, return filed under Section 139(1) of the Income-tax Act, 1961 (the Act). The assessee was asked to explain the deposit of ₹30 lacs in cash in his bank account. Assessee submitted that he is an individual engaged as real estate broker for many years in proprietary concern of M/s Vaishnavi Enterprises. During the year assessee has pitched for a plot of land at Karjat, admeasuring 250 acres on behalf of Kalpataru Group through Mr. Chandrakant Dedhia. Mr. Chandrakant Dedhia is also a real estate broker representing land owners. In order to vacate the land, Assessee entered into a Memorandum of Understanding (MoU) dated 26th August, 2007 and supplementary MoU dated 4th September, 2007 with Mr. Chandrakant Dedhia and others. The claim of the assessee is that he received an advance of ₹30 lacs in cash from Kalpataru Group [purchaser] as a token money to carry out the process of acquiring land in their name. Assessee deposited that cash in his bank account on 4th September, 2007. Further Assessee issued a cross cherub on 5th September, 2007 in favour of Mr. Chandrakant Dedhia. However, as the deal was cancelled, the advance was returned by

Mr. Chandrakant Dedhia to Kalpataru Group. The learned Assessing Officer questioned about the source of the above cash deposit and complete address of the person from whom it is received. The learned Assessing Officer also asked the assessee to produce the parties. Assessee failed to produce documentary evidences as well as the parties. Assessee also failed to show the evidences that he was authorized by Kalpataru Group for purchase of the above land. The agreement of land also nowhere referred to the name of Kalpataru Group. The assessee in the end produced a confirmation letter from one Shri Vikram S. Jain stating that he has advanced cash of ₹30 lacs and ultimately, assessee returned the same money to him as the deal got cancelled. The learned Assessing Officer asked the assessee to produce Mr. Vikram S. Jain. Assessee failed to do so and therefore, learned Assessing Officer made an addition of ₹30 lacs in the hands of the assessee and determined the total income at ₹31,58,480/- by order dated 30th March, 2016 passed under Section 143(3) of the Act.

03. Assessee aggrieved with the assessment order preferred the appeal before the learned CIT (A). Assessee challenged the reopening of the assessee as well as the addition on merits. On the issue of reopening, the learned Assessing Officer was asked to submit the remand report. On the merits also the claim of the assessee was adjudicated. Ld CIT [A] upheld the reopening of assessment. On the merits, he confirmed the addition of ₹30 lacs, therefore, assessee aggrieved and is in appeal before us.

04. The learned Authorized Representative first challenged the reopening of the assessment stating that

a. Approval granted by Joint. Commissioner of Income Tax, Range-2, Kalyan, is without application of mind. For this proposition, he submitted the copy of form of recording of the reasons for reopening as well as the approval of Joint. Commissioner of Income Tax on the same form. He submitted that against column no.12, the Joint Commissioner of Income Tax has merely stated 'yes I am satisfied'. According to him recording of such satisfaction is not proper and the issue deserves to be decided on this ground itself quashing the reopening of assessment. For this proposition, he relied on the decision of the Hon'ble Supreme Court in case of CIT Vs. S. GoyankaLime & Chemical Ltd. [2016] 237 Taxman 378 (SC), wherein the Special Leave Petition (SLP) against the decision of the Hon'ble Madras High Court reported in

56 taxmann.com 390 was dismissed. He further submitted that Hon'ble Madras High Court has held that where the Joint Commissioner recorded the satisfaction in a mechanical manner and without application of mind to accord sanction to issue notice under Section 148 of the Act of reopening of assessment is invalid. He further referred to the decision of the Hon'ble Bombay High Court in CIT Vs. Aquatic Remedies Pvt. Ltd. in Income Tax Appeal No. 904 of 2016 dated 25th July, 2018, wherein the decision of the co-ordinate Bench dated 25th March, 2015 for A.Y. 2004-05 was upheld, he referred to Para nos. 5,6, 10 and 11 of that decision. He further refereed to the decision of Hon'ble Bombay High Court in case of Kalpana Shantilal Haria vs. ACIT in writ petition no. 3063 of 2017 dated 22nd December, 2017, wherein on identical facts for non application of mind the reopening was quashed. He submitted that decision of the jurisdictional High Court binds the Tribunal. He further referred to several other judicial precedents as mentioned in his cash law compilation paper book containing 150 pages.

b. He further referred to reasons recorded by the learned Assessing Officer placed at page no.2 of the Paper Book. He submitted that the impugned assessment year is 2008-09, which is being reopened under Section 147 of the Act beyond the period of four years from the end of the assessment year. He submitted that in such case reopening can be done only if there is a failure on the part of the assessee to fully and truly disclose all particulars of income. He submitted that there is no mention in the reasons recorded that there is failure on the part of the assessee to fully and truly disclose the facts of the income of the assessee.

c. He further submitted that no notice under Section 143(2) of the Act was served on the assessee. For this proposition, he submitted a letter dated 23rd November, 2021 of the Income Tax Officer, which is a reply in response to an application made by the assessee on 8th November, 2021 under the Right to Information Act. He submitted that in that reply a letter dated 23rd February, 2015 is stated to be a notice issued under Section 143(2) of the Act. He referred to acknowledgement of receipt of the notice but stated that it is neither that assessee and nor his authorized representative, therefore no notice under Section

143(2) of the Act is served on assessee. He submitted that in absence of the same the assessment cannot be upheld.

d. He further challenged that the learned Assessing Officer has completed the assessment without providing a copy of the reasons recorded even after specially requested by the assessee during the assessment proceedings. He submitted that failure of the learned Assessing Officer to provide the copy of the reasons rendered, render reassessment order invalid. For this proposition, he referred to the decision of the Hon'ble Supreme Court in case of Gkn Driveshafts (India) Ltd. He submitted that assessee submitted a letter dated 25th January, 2016, wherein such request was made. Therefore, he submitted that the reopening of the assessment deserves to be quashed on this grounds

e. On the merits of the case, he submitted that the cash was given to the assessee by one Shri Vikram S. Jain of ₹30 lacs on 3rd August, 2007 as a token money towards the land dealing. He submitted that confirmation of Shri Vikram S. Jain was provided to learned Assessing Officer on 11th March, 2016, and therefore, the assessee has given the source of the funds. He further referred to the MoU and supplementary MoU placed at Page Nos. 15 to 43 of the Paper Book. Accordingly, he submitted that the addition deserves to be deleted.

05. The learned Departmental Representative vehemently supported the orders of the lower authorities.

i. On the issue of reopening of the assessment and consequent approval it was submitted that there is no infirmity in the approval recorded by the Joint. Commissioner of Income Tax. He submitted that he has perused the reasons recorded which clearly shows that assessee has deposited ₹30 lacs in his bank account of Vaishnavi Enterprises with Ambernath Jaihind co-operative Urban Bank on 4th September, 2007 and immediately issued the cheque of the same amount to Shri Mr. Chandrakant Dedhia. This information was received from ITO, Ward 17(1)(3), Mumbai. The assessee was asked to furnish the evidences with respect to the cash deposit and substantiate genuineness of such loan. Assessee failed to do so and therefore, the learned Assessing Officer recorded the reasons for reopening of the

assessment. He submitted that on perusal of this reasons the learned JCIT after perusing the column no. 1 to 10 of the proforma recorded his satisfaction at point no. 12 stating that 'yes I am satisfied'. He submitted that when there is no fallacy in the reason, column no. 1 to 10 are perfectly recorded, the learned JCIT then satisfied on verification of the same as recorded his satisfaction. There is nothing to show that there is non-application of mind. He further stated that the law does not provide recording of satisfaction only in a particular manner. He also submitted that as there is a complete application of mind shown by the Jt. Commissioner of Income Tax, there is no evidence with the learned Authorized Representative who is alleging non-application of mind. He submitted that the learned Authorized Representative inferring non-application of mind only on the basis of recording of satisfaction in a particular manner based on judicial precedents.

ii. He further submitted that reasons of reopening has been given to the assessee by letter dated 23rd February, 2016 which is placed at page no. 4 of the Paper Book filed by the assessee. He further submitted that despite assessee not furnishing the return of income in response to notice under Section 148 of the Act, the reasons were provided to the assessee and therefore, the argument of the learned Authorized Representative is incorrect.

iii. He further submitted that notice under Section 143(2) of the Act was already issued to the assessee on 23rd February, 2016 which has been replied by the learned Assessing Officer at serial no.2 of the RTI reply dated 23rd November, 2021. He therefore submitted that there is no reason that the learned Authorized Representative to claim that notice under Section 143(2) of the Act is not issued to the assessee.

iv. On the merits of the case, he submitted that assessee has not been able to produce any evidence either before the learned Assessing Officer or before the learned CIT (A) or before the co-ordinate Bench that sum of ₹30 lacs is not required to be added in the hands of the assessee. He submitted that assessee is not able to produce even the single person to corroborate the fact stated before the learned Assessing Officer. With respect to the confirmation of Shri Vikram S. Jain, he submitted that such confirmation did not contain any permanent account number or the source of fund available with Shri

Vikram S. Jain. Assessee also failed to produce Shri Vikram S. Jain before the learned Assessing Officer.

06. The learned Authorized Representative further submitted that the reason recorded by the learned Assessing Officer does not show any escapement of income. He submitted that merely because cash is deposited in a bank account it does not show that there is an escapement of income. For this proposition, he relied on the decision of co-ordinate Bench reported at 53 tamann.com 360. He further relied on the SMC decision in ITA No.676/Ahd/2016 of Smt. Mariyam Ismail Rajwani dated 9th August, 2016. He further relied upon the decision of the SMC Bench in case of Gurpal Singh vs. ITO dated 27th May, 2016. Accordingly, he submitted that reasons recorded by the learned Assessing Officer are not at all sustainable in law.

07. The learned Departmental Representative read out the reasons once again and stated that there is no information available in the return of income of the assessee. Further, the assessee was questioned before recording of the reasons which was replied to and therefore, there is a failure on the part of the assessee to disclose the source of cash deposited and therefore, no fault can be found with the reasons recorded.

08. We have carefully considered the rival contention and perused the orders of the lower authorities. The main challenged vociferously made by the learned authorized representative is with respect to the reopening of the assessment. Several arguments were raised. Several judicial precedents were relied upon. We have considered all of them in making the decision.

09. The first objection of the learned authorised representative is that the notice issued u/s 143 (2) is not issued to the assessee. Same has been replied in reference to the right to information queries raised by learned AO on 23/11/2021, the learned AO has attached the copy of the notice issued Under Section 143 (2) dated 23/2/2016, which has been received by some person. The identical signature is also available in the notice issued u/s 148 of the act. Both the signatures are almost similar. The learned it authorised representative could not show us any reason or indication that the notices received by the person u/s 148 of the act dated 23/2/2016 (which is not challenged is not received by the assessee) and that the signature of 11 on notice issued u/s 143 (2) dated 23/2/2016 is of different person. Further, the notice u/s 148 was issued on 23/2/2016 and the notice u/s 143 (2) was also issued on 23/2/2016, which are at the same address, i.e., Shri Arvind

Mohanlal Jain, 217, Shardha Sagar Complex, Station Road, badlapur East, District Thane – 421503, one notice is accepted by assessee as received, and 2nd notice on the same date at the same address was stated to be not received. Further the letter dated 25 January 2016 submitted by the assessee before the income tax Officer in response to notice u/s 148 of the act is Under the signature of one Mr. Nihar Mehta, the signature of the same person is also available in notice u/s 143 (2) of the act. Therefore the argument of the learned authorised representative that the notice u/s 143 (2) of the act was not received by the assessee and who has received the notice is neither the authorised representative of the assessee as well as any staff of the assessee.

010. Since 2nd objection of the learned authorised representative is with respect to the manner of recording the approval by the joint Commissioner of income tax, range – 2, Kalyan, who has mentioned his satisfaction as "yes, I am satisfied." The learned it authorised representative has challenged it stating that it is a non application of mind, in proper manner of recording of satisfaction, therefore, the reopening should be quashed. On careful consideration of the fact we find that the form for recording of the reasons for initiating proceedings u/s 147 and for obtaining the approval of the higher authority, the learned assessing officer has correctly mentioned the name and address of the assessee as well as the quantum of income which has escaped assessment. Further, also, the date of filing of the return of income. However when we look at serial number 7 of the particular form where the question is 'whether the provisions of Section 147 (a) or Section 147 (b) or both are applicable' the answer provided by the learned assessing officer is 'yes'. This was recorded on 26/03/2015. Thus the issue is squarely covered by the decision of Honourable Jurisdictional high court in case of *Smt. Kalpana Shantilal Haria* v. *Asstt. CIT* [Writ Petition (L) No. 3063 of 2017, dated 22-12-2017] where in it has been held as under :-

> "5. Our attention is invited to the sanction given by the Joint Commissioner of Income Tax on the application by the Assessing Officer seeking his approval in the prescribed form. The prescribed form filled by the Assessing Officer indicated that the notice has been issued under Section 143(b) of the Act. The Joint Commissioner of Income Tax has while granting the sanction has recorded the word "satisfied".

6. The grievance of the petitioner is that there is no proper sanction in view of non application of mind by the Joint Commissioner of Income Tax. The Assessing Officer has invoked a provision of law to sustain the impugned notice which is admittedly not in the statute and the Joint Commissioner has yet approved it.

7. Mr. Chanderpal, learned Counsel appearing for the Revenue tendered a copy of the letter dated 19th December, 2017 issued to the petitioner wherein the Assessing Officer has stated that the words "147(b)" were inadvertently filled in the prescribed form, instead of Section 147 of the Act while obtaining the sanction from the Joint Commissioner of Income Tax. It is further submitted on behalf of the Revenue that the same is a curable defect under section 292B of the Act. Therefore, the impugned notice cannot be held to be bad for mere incorrect mentioning of section on account of the mistake.

8. There can be no dispute with regard to the application of Section 292B of the Act to sustain a notice from being declared invalid merely on the ground of mistake in the notice. However, the issue here is not with regard to the mistake / error committed by the Assessing Officer while taking a sanction from the Joint Commissioner of Income Tax but whether there was due application of mind by the Joint Commissioner of Income Tax while giving the necessary sanction for issuing the impugned notice. It is a settled principle of law that sanction granted by the higher Authority for issuing of a reopening notice has to be on due application of mind. It cannot be an mechanical approval without examining the proposal sent by the Assessing Officer. Prima facie, it appears to us that if the Joint Commissioner of Income Tax would have applied his mind to the application made by the Assessing Officer, then the very first thing which would arise is the basis of the notice, as the provision of law on which it is based is no longer in the statute. Non pointing out the mistake / error by the Joint Commissioner of Income Tax

on the part of the Assessing Officer is prima facie evidence of non application of mind on the part of the sanctioning authority while granting the sanction."

011. When the ld AO fails to mention right section applicable and ld Sanctioning authority put its sanction on such a document, there cannot be more evidence of non application of mind. Thus assessee succeeds on this point.

012. Other arguments on reopening of assessments, we are not impressed with.

013. In the result, we quash the reassessment initiation. Assessment order is quashed on improper sanction of reopening. Appeal of assessee is allowed on this issue.

014. In the result appeal of assessee is allowed.

Order pronounced in the open court on 15.12.2022.

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 15.12.2022
*Sudip Sarkar, Sr.PS/Dragon*
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.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai