

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

Before Shri Sanjay Garg, Judicial Member and Shri Rajesh Kumar, Accountant Member

ITA No.624/Kol/2020
Assessment Year: 2011-12

ITO, Ward-50(1), Kolkata.....Appellant

vs.

Sanat Singha Roy.....Respondent

Mahishpota, Post Office-Natagarh,

Kolkata-700113.

[PAN: ANIPS0738A]

Appearances by:

Shri Vijay Kumar, Addl. CIT, appeared on behalf of the appellant.

Shri Manish Tiwari, FCA, appeared on behalf of the Respondent.

Date of concluding the hearing : March 29, 2023

Date of pronouncing the order :April 03, 2023

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the Revenue against the order dated 28.02.2020 of the Commissioner of Income Tax (Appeals) – 15, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The brief facts of the case are that the Assessing Officer noted that the assessee being an agent/power of attorney on behalf of certain persons had received certain payment being consideration for sale of land and had paid that amount to the concerned vendors on whose behalf the assessee had done the transactions being their agent/power of attorney. Since there was mismatch of the amounts collected and amounts paid in relation to the said transactions in property, the Assessing Officer observed that the assessee had not disclosed as to how much amount actually he had received from the

authorized attorney of purchasers and further the vendors had stated that they have received higher amount than that was disclosed in the sale deed. He, therefore, observed that income of the assessee has escaped assessment. He, therefore, reopened the assessment and added the entire sale consideration as unexplained income of the assessee.

The Assessing Officer further examined the other transactions which were by certain other persons through assessee being real estate agent and finding discrepancies therein added the entire amounts of the transaction as unexplained income of the assessee.

3. The ld. CIT(A), however, held that the aforesaid transactions were not done by the assessee on his own part. That the assessee had acted only as an agent on behalf of one of the parties to the transactions. He, therefore, deleted the impugned additions made by the Assessing Officer. He however held that the assessee being a real estate commission agent might have incurred commission income on the aforesaid transaction done on behalf of other persons, therefore, he estimated the income of the assessee in relation to different transaction @2%.

4. Being aggrieved by the said action of the CIT(A), the Revenue has come in appeal before us with the following grounds:

“1. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in restricting the addition of Rs.90,00,000/-, made by Assessing Officer on account of payment made to Mukhopadhyay Brothers from undisclosed sources, to only @ 2% as commission received and gave relief of Rs.88,20,000/- to the assessee without considering the facts and circumstances of the case.

2. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in restricting the addition of Rs.37,24,000/-, made by

Assessing Officer on account of unaccounted and unexplained land, to only @ 2% as commission received and gave relief of Rs.36,49,520/- to the assessee without considering the facts and circumstances of the case.

3. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in restricting the addition of Rs.5,07,19,448/-, made by Assessing Officer on account of unexplained purchase transaction, to only @ 2% of total unexplained purchase as commission received and gave relief of Rs.4,85,73,604/- to the assessee without considering the facts and circumstances of the case.

4. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in restricting the addition of Rs.8,41,785/-, made by Assessing Officer on account of unexplained gross receipt of M/s. S.S. Enterprises, to only @ 2% as ad-hoc disallowance and gave relief of Rs.8,24,949/- to the assessee without considering the facts and circumstances of the case.

5. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in restricting the addition of Rs.3,71,000/-, made by Assessing Officer on account of disallowance on salary and other allowance payment, to only Rs.92,750/- and gave relief to the assessee of Rs. 2,78,250/- without considering the facts and circumstances of the case.

6. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in restricting the addition of Rs.62,00,000/-, made by Assessing Officer on account of unexplained advance from parties, to only @ 2% as commission received and gave relief of Rs.60,76,000/- to the assessee without considering the facts and circumstances of the case.

7. That the Department craves leave to add modify or alter any of the grounds of appeal and/or adduce additional evidence at the time of hearing of the case.”

5. The assessee however moved an application under Rule 27 of the Income Tax (Appellate Tribunal) Rules 1963, whereby, the assessee while supporting the order of the CIT(A) has hit at the very jurisdiction of the Assessing Officer to reopen the assessment.

6. The ld. AR of the assessee has submitted that the said legal issue was duly raised by the assessee not only during the assessment

proceedings before the Assessing Officer by raising an objection but also before the CIT(A), inter alia, pleading that there was no reason to believe for the Assessing Officer that the income of the assessee has escaped assessment, therefore, the reopening of the assessment by the Assessing Officer was bad in law. He has further submitted that though the Id. Assessing Officer rejected the aforesaid objection of the assessee, however, the Id. CIT(A) though deleted the addition made by the Assessing Officer on the said issue but proceeded to assess the income of the assessee on commission basis. The Id. CIT(A), however, rejected the ground of the assessee agitating the validity of the reopening of the assessee. The AR has further submitted that the aforesaid legal objection relating to the jurisdictional issue can be raised at any stage and even by way of additional ground or by way of an application. He has further submitted that even the said ground was duly raised before the lower authorities and there were no new facts required to be determined. The Ld. AR of the assessee has further submitted that the aforesaid application may be treated as cross-objection filed by the assessee. He has further submitted that as per the guidelines laid down by the Hon'ble Supreme Court in suo moto Writ Petition (C) No. 3 of 2020 dated 10.01.2022, the aforesaid legal ground has been raised within the limitation period for filing cross objection against the appeal of the Revenue. We note that the assessee vide his application dated 23.05.2022 has taken the following ground:

“1. That on facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the reassessment proceeding initiated by A.O u/s 147 and therefore the appellate order is liable to be quashed.”

7. It has been held time and again by the Hon'ble Supreme Court that the question of jurisdiction can be raised at any stage of

proceedings. The legal ground taken by the assessee through his application regarding the validity of the reopening of the assessment since hit at the very jurisdiction of the Assessing Officer to reopen the assessment and hence goes to the root of the case. This ground has been taken by the assessee since very beginning and there are no new facts to be determined. We further note that the aforesaid ground taken by the assessee is within limitation period as extended due to the covid pandemic by the Hon'ble Supreme Court in Suomoto Writ Petition (C) No. 3 of 2020 dated 10.01.2022.

The Hon'ble Karnataka High Court in the case of Union of India and Ors vs. Alisab decided on June 20, 2000 has held that the question of jurisdiction can be raised at any stage of the proceedings and can be gone into suo moto by the court even if it is not raised by either of the parties. In view of the legal position stated above, the aforesaid legal ground raised by the assessee is taken as cross objection and admitted for adjudication.

8. The Hon'ble Supreme Court in the case of Dr. Jagmittar Sain Bhagat & Ors vs Dir. Health Services, Haryana in Civil Appeal No.5476 of 2013 decided on July 11, 2013, while relying upon the decision of the Hon'ble Supreme Court in the case of Sushil Kumar Mehta v. Gobind Ram Bohra (1990) 1 SCC 193 and further placing reliance on the other decisions of the Hon'ble Supreme Court in the cases of Premier Automobiles Ltd. v. K.S. Wadke & Ors., (1976) 1 SCC 496; Kiran Singh v. Chaman Paswan, AIR 1954 SC 340; and Chandrika Misir & Anr. v. Bhaiyalal, AIR 1973 SC 2391 has observed that where a statute placed obligation and enforces the performance in specified manner, "performance cannot be forced in any other manner." Under the relevant provisions of section 147 & section 148 of

the Income Tax Act, for assuming jurisdiction to reopen an assessment by the Assessing Officer, there is a condition precedent that the Assessing Officer must have reasons to believe that the income of the assessee for that year has escaped assessment. It has been held time and again that such reasons to believe must have a material bearing on the question of escapement of income. It does not mean a purely subjective satisfaction of the assessing authority, such reason should be held in good faith and cannot merely be a pretence.

Furthermore, the reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of belief regarding escapement of income. The powers of Assessing Officer to reopen an assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. Such an action of the Assessing Officer regarding formation of belief of escapement of assessment and thereby in starting proceedings u/s 147 is open to challenge in a court of law. The entire law as to what would constitute "reason to believe" had summed up by Supreme Court in *Income Tax Officer v Lakhmani Mewaldas* (1976) 103 ITR 437. Reliance in this respect can also be

placed on the decision of the Hon'ble Punjab & Haryana High Court in the case of 'CIT vs Paramjit Kaur' (2008) 311 ITR 38 (P&H), wherein, making identical observations, the Hon'ble High Court held that in the absence of sufficient material to form satisfaction of the Assessing Officer that income of the assessee had escaped assessment, the issuance of notices u/s 148 of the Act was not valid. "Reasons to believe" is different from "reasons to suspect" or from "to have an opinion" [Indian Oil Corporation vs. ITO (1986) 58 CTR (SC) 83 : (1986) **159 ITR 956** (SC)].

9. Now, coming to the facts of the present case, the ld. counsel for the assessee has invited our attention to the copy of the reasons recorded which, for the sake of ready reference, are reproduced as under:

*OFFICE OF THE L.T.O. WD. (3)
Block-CS 2 & 3, Ulterapan Complex,
Maniktala Civic Centre,
Kolkala-700054*

*Sanat Singha Roy,
PAN: ANIPS0738A, A.Y.: 2011-12*

Reasons recorded for re-opening u/s. 147 of the Income Tax Act, 1961 (hereinafter called as 'Act')

As per Sale Deed No.2986/2011, Sanat Singha Roy, the assessee, received Rs.52,76,000/- (vide Pay Order No.314805 dt.15/3/2011 of Rs.27,00,000/- & Pay Order No.314812 dt. 16/3/2011 of Rs.25,76,000/-) from 8 different Pvt. Ltd. companies, all represented by one Shri Paras Mall Jain.

As per para 5.1.6 of above Deed, Shri Roy was appointed as Constituted Attorney on behalf of Vendors, Purna Chandra Mukhopadhyay, Gorachand Mukhopadhyay and Rabindranath Mukhopadhyay to sell Sali (agricultural) land of 87.21 decimal at R S Dag No.870, R S Khatian No.1098, Mouza - Nataqarh, J.L. No.15, P.S. Ghola within Ward No. 35 of Panihati Municipality, 24 Pgs.(N).

In the Annexure-2a to his letter dated 24/1/2013 addressed to ITO (I & CI)-

2/Kol., Shri Roy stated that he had received from Siddha Town during the period 1/4/2010 to 31/3/2011 Total Rs.74,23,750/-, of course, of different amounts on 18/3/2011 and deposited in IDBI Bank (Savings) A/c. No.0611040000104647 but he did not mention what amount he had received from Paras Mall Jain for the sale of the above said land Whereas the three Vendors claimed that each of them received Rs.30,00,000/- as sale consideration of the said land thereby the total sale consideration comes to Rs.90,00,000/received by the Vendors. Thus, the transaction value as per Deed dt. 16/3/2011 shown at Rs.52,76,000/- is quite contradictory.

Hence there is huge discrepancy as to the actual amounts received by Shri Sanat Singha Roy and the actual amounts paid by him to the three Vendors for the sale of the above said land. This gives rise to the reason to believe that income of Shri Sanat Singha Roy as escaped assessment for the asstt.year2011-12.

Accordingly, Notice u/s. 148 of the Act is issued for re-opening of assessment of Shri Sanat Singha Roy for the Asstt. Year: 2011-12.

GOUTAM NANDI
आयकर अधिकारी, वार्ड-51(3) कोलकाता
Income Tax Officer, Ward-51(3), Kol.
Code No: WBG-W-151(3)

10. A perusal of the above reasons to believe recorded by the Assessing Officer would show that in this case the Assessing Officer himself mentioned that the assessee Sanat Singha Roy was appointed as constituted attorney on behalf of the three vendors namely Purna Chandra Mukhopadhyay, Gorachand Mukhopadhyay and Rabindranath Mukhopadhyay. He received the sale consideration of land from eight different parties on behalf of the said vendors from the eight different companies of represented by one Shri Paras Mall Jain. The Assessing Officer has further noted as per the sale deed that the assessee had received a sum of Rs.52,76,000/- as sale consideration on behalf of the said vendors. On enquiry by the Assessing Officer, the aforesaid three vendors claimed that each of them received

Rs.30,00,000/- as sale consideration of the land. Therefore, the Assessing Officer held that the total sale consideration of the said land was Rs.90,00,000/-. Under the circumstances, the Assessing Officer doubted the source of the remaining amount as compared to the amount mentioned in the sale deed at Rs.52,76,000/-. Since it is apparent on record that the assessee was just a constituted attorney on behalf of vendors and whatever the assessee received from the purchasers of the land that was paid by the assessee to the vendors, under the circumstances, the source of the remaining amount can be asked only from purchasers and the additional income, if any, can be added in the hands of vendors only. The above facts had not given rise to any reasons to believe that the income of the assessee who acted as a attorney on behalf of vendors, in any manner, has escaped assessment. Moreover, there is no question of addition of entire amount of Rs.90,00,000/- received by the vendors at the hands of the assessee. The above reasons had not, in our view, constituted any reasonable reason to believe that the income of the assessee agent/power of attorney has escaped assessment. Neither the assessee was not purchaser of the land nor of the vendor of the land nor was a party to the transaction mentioned in the reasons recorded. Under the circumstances, it gives no reason to believe that the income of the assessee has escaped assessment in the aforesaid transaction. Our attention has also been invited to the relevant part of the order of the CIT(A) which, for the sake of convenience, is reproduced as under:

“5.3 Ground of appeal number 3 and 4 pertain to the additions made by A.O on the basis of reasons recorded by him.

It is observed from the reasons recorded that the appellant is a broker who is into the business of arranging land for buyers from sellers. I find from the recorded reasons that the appellant facilitated a sale of land between Purna Chandra Mukhopadhyay, Gorachand Mukhopadhyay

and Rabindranath Mukhopadhyay and said private limited companies represented by one Paras Mal Jain during the relevant assessment year. The appellant has acted as a constituted attorney or power of attorney holder on behalf of Mukhopadhyay brothers.

It is seen from clause 3.1 to 3.3 of the sale deed no. 2986/2011 placed in paper book pages 72 to 87 that (PB-72 to 87) that the appellant is representing the vendors namely Mukhopadhyay brothers as their constituted attorney holding a valid Power of Attorney.

It is further observed that Para 3.2 to 3.11 of the said sale deed contain names of eight private limited companies all of which were being represented by one Shri Paras Mal Jain as authorized signatories on behalf of purchasers. Therefore, it can be construed from above clauses is that the vendors of the land measuring 87.21 decimal were Purna Chandra Mukhopadhyay, Gora Chandra Mukhopadhyay, and Rabindra Nath Mukhopadhyay, and purchasers were the eight different companies.

The appellant was not the vendor, so the income/gain if any would accrue to the vendors and not to the appellant as the appellant was just a constituted attorney. I find from the recorded reason that the AO initiated reassessment proceedings to verify that the appellant has not mentioned what amount he received from Paras Mal Jain for the sale of the said land. I find from the agreement that Shri Paras Mal Jain was authorized signatory on behalf of all the eight purchaser companies and the payments were not to be made by Paras Mal Jain. Therefore, there cannot be any payment from Shri Paras Mal Jain to the appellant. Neither the sale deed mentions about any payment by Sri Paras Mal Jain to the appellant. I also find that it is not the case of AO also that actually any payment was made by Shri Paras Mal Jain to the Appellant. The reasons recorded are completely silent on this aspect.

Even in the final assessment order the AO has not made any addition on the ground that any payment was actually received by the appellant from ShriParas Mal Jain.

On further examination of recorded reasons and the sale deed, it is observed that the AO concluded that the three vendors Purna Chandra Mukhopadhyay, Gora Chandra Mukhopadhyay, and RabindraNath Mukhopadhyay, each of them received Rs.30 lacs as sale consideration of the said land thereby the total sale consideration comes to Rs.90,00,000/- by the vendors whereas the transaction value as per deed dated 16.03.2011 is shown at Rs.52,76,000/-.

I find that the observation of AO is based on incorrect appreciation and understanding of facts.

A perusal of Para 4.1 of the said sale deed where in the description of the said property has been given, it is seen that the vendors had 130 decimal land equivalent to 78kattahs and 10 chittak and 18 sq. feet land, out of which only 87.21 decimal land equivalent to 52 kattah 12 chittak and 9 sq. feet Sali Land (Agricultural land) was transferred by the vendors to the six companies. Thus, there cannot be any discrepancy of the transaction value of Rs.52.76 lakhs, as a consideration for sale of part land of 87.21 decimal.,

I find that the AO misunderstood the sale consideration Rs.90 lacs received by the vendors as consideration for the entire land of 130 decimal and not 87.21 decimal. Therefore, in my considered view this cannot lead to any addition of income of appellant being just a broker. I also find from the concluding part of the reasons recorded by the AO that he has observed that there is huge discrepancy as to the actual amount received by the appellant and the actual amounts paid by him to the three vendors for the sale of above land. Since, the area of the land as explained above were different the consideration amounts were also different and the appellant has only acted as constituted attorney of the vendors and therefore, no income can be said to have escaped assessment in the hands of the appellant. Thus the addition of Rs 90,00,000 and Rs.37,24,000/- made the hands of appellant is held to be bad in law. However I find that since the appellant has acted as a commission agent in the entire land deal he must have earned commission income and I am of the view that to meet the ends of justice, the appellant has received a commission of 2% of the transaction of Rs.1,27,24,000/- i.e. Rs. 2,54,480/-, which should be assessed in the hands of the appellant. Thus the appellant gets a relief of Rs.1,24,69,520/- (1,27,24,000/- minus Rs.2,54,480/-. The Grounds of Appeal No. 3 & 4 are partly allowed.”

11. A perusal of the above relevant part of the order of the CIT(A) would also reveal that the ld. CIT(A) held that the aforesaid reasons recorded by the Assessing Officer do not suggest that the income of the assessee has escaped assessment and that the assessee has only acted as constituted attorney of the vendors, therefore, no income can be said to have escaped assessment in the hands of the assessee. The ld. CIT(A), therefore, held the addition made by the Assessing Officer of Rs.90,00,000/- and since Rs.37,24,000/- made in the hands of the assessee and held the same as bad in law.

12. Since the reopening of the assessment itself stands quashed, the subsequent action of the CIT(A) in assessing the income of the assessee on other issues is not sustainable. The above facts also show that the proper analysis of the facts available before the Assessing Officer did not suggest that any income of the assessee has escaped assessment, therefore, the reopening of the assessment made by the Assessing Officer was bad in law, the same is, therefore, quashed.

13. Even otherwise, the ld. CIT(A) having deleted the additions on the basis of which reopening of the assessment initiated, proceeded to assess the income of the assessee on other issues estimating the same as commission income @ 2% on the transactions carried out by the assessee. This issue was not the basis of reasons to form belief by the Assessing officer of escapement of income of the assessee. In the case in hand since the ld. CIT(A) has held that the action of the Assessing Officer as bad in law in making the impugned additions on the basis of which reopening of the assessment was made and since the order of the Assessing Officer has merged with the order of the CIT(A) which, in fact, was the continuation of the reopened assessment. However, no notice of escapement of income was issued to the assessee in relation to commission income which the ld. CIT(A) proceeded to assess in the appeal against the reassessment order. The CIT(A), in our view, was not justified to suo moto proceed to assess the commission income of the assessee without issuance of notice and having deleted the additions on the issue on which the assessment was reopened by the Assessing Officer.

14. In the result, the cross-objection of the assessee is allowed and the reopening of the assessment is hereby quashed being bad in law and the consequential additions stand deleted.

So far as the appeal of the revenue is concerned, the same is dismissed on merits in view of the discussion made above and also on the ground of having accepted the assessee's legal ground on the validity of the reopening of the assessment.

Kolkata, the 3rd April, 2023.

Sd/-
[Rajesh Kumar]
Accountant Member

Sd/-
[Sanjay Garg]
Judicial Member

Dated: 03.04.2023.

RS

Copy of the order forwarded to:

1. ITO, Ward-50(1), Kolkata
2. Sanat Singha Roy
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches