

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

BEFORE SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.800/Mum/2020

(निर्धारण वर्ष / Assessment Year: 2013-14)

ACIT, Circle-3(3)(2) Room No. 628, 6 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	बनाम/ Vs.	M/s. Watermark Capital Ltd. (Previously Watermark Financial Consultants Ltd.) 1010, Maker Chambers- V, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACW3474H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Anand Kumar Tibrewal
Revenue by:	Shri Anil Gupta

सुनवाई की तारीख / Date of Hearing: 27/02/2023

घोषणा की तारीख / Date of Pronouncement: 10/04/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the Revenue against the order of the Ld. CIT(A)-08, Mumbai dated 20.11.2019 for AY. 2013-14.

2. At the outset, the Ld. AR brought to our notice that the assessee has not preferred an appeal/Cross objection against the impugned order of the Ld. CIT(A), since it has got relief on merits in respect of grounds raised by the revenue against the impugned order of the Ld. CIT(A). According to the Ld. AR, therefore, the assessee has preferred an application under Rule 27 of the Income Tax Tribunal Rule, 1963 wherein it has raised a legal issue challenging the jurisdiction of the DCIT Circle-3(3) to have issued notice dated 02.09.2014 u/s 143(2) of the Income Tax Act, 1961 (hereinafter "the rules"). And thereafter erred in framing the assessment u/s 143(3) of the Act on 30.03.2016,



ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.

without having jurisdiction to assess the assessee. According to the Ld. AR, the assessee company had filed its return of income for AY. 2013-14 on 30.09.2013 declaring total income at Nil, after set off of business loss of AY. 2007-08 to AY. 2009-10 at Rs.5,86,849/- and offered book profit u/s 115JB of the Act at Rs.1,09,467/- [*which facts have been acknowledged by AO in the first paragraph of assessment order*]. According to the assessee, its registered office is at Mumbai; and since it is a corporate assessee, registered at Mumbai and has returned less than Rs.30 Lakhs as its income, as per the CBDT instruction no. 01/2011 dated 30.01.2011, it ought to have been assessed by the jurisdictional/(territorial) ITO, Ward-3(3) and not the DCIT-3(3)(2) Mumbai. And it was brought to our notice that similar issue cropped up in assessee's own case for AY 2006-07 to AY 2010-11 (ITA. Nos. 4830/4831/4832/Mum/2016) wherein this Tribunal vide order dated 27.02.2023 has decided similar issue (*in that cases also the assessee had raised the legal issue through Rule 27 of the Rules by assailing the jurisdiction of the AO wherein the Tribunal has admitted the Rule 27 application as well as on the merits of the Rule 27 application*) and held as under: -

“16. Now, the question before us, is regarding admission of Rule 27 application filed by the assessee. After having gone through the decisions cited before us by both parties and after going through the order cited in favour of revenue as well as that of assessee, we find that the issue raised *albeit* through Rule 27 if found in favour of assessee goes to the root of the jurisdiction of the AO. Therefore, we are inclined to admit the grounds



ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.

raised by the assessee through application dated 21st Dec 2021 under Rule 27 of the Rules which even though is a general ground challenging the validity of the re-opening of the assessment by issuance of notice u/s 148 of the Act, we after hearing the assessee and the Revenue are inclined to frame the ground (except for appeal for AY 2009-10) as under:-

“That the Ld. CIT(A) erred, on facts and in law in dismissing the legal ground taken before him regarding the validity of the re-assessment proceedings initiated by the AO by issue of notice u/s 148 of the Act who, didn’t had the pecuniary jurisdiction as prescribed by CBDT instruction no. 01/2011 [F. No. 187/12/2010-IT (A-D)] dated 31.01.2011”.

17. We having admitted the legal issue, after hearing both the parties, we note that Ld. CIT(A) has given relief to the assessee on merits. The assessee has assailed the action of the AO (Deputy Commissioner) to have recorded reasons for re-open the assessment (except for AY 2009-10 in both assessee’s case) and consequent issue of notice u/s 148 of the Act, without authority of law and in contravention to that of CBDT instruction No. 01/2011 [F. No. 187/12/2010 – IT (A-D) Dated 31.01.2011. For effective adjudication and easy reference, the *ibid* instruction of CBDT is reproduced below: -

SECTION 119 OF THE INCOME-TAX ACT, 1961 - INCOME-TAX AUTHORITIES -
INSTRUCTIONS TO SUBORDINATE AUTHORITIES

INSTRUCTION NO. 1/2011 [F. NO. 187/12/2010-IT(A-1)], DATED 31-1-2011

References have been received by the Board from a large number of taxpayers, especially from mofussil areas, that the existing monetary limits for assigning cases to ITOs and DCS/ACS is causing hardship to the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The Board had considered the matter and is of the opinion that the existing limits need to be revised to remove the abovementioned hardship.



ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.

An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001, when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:-

	Income Declared (Mofussil areas)		Income Declared (Metro cities)	
	ITOS	ACs/DCs	ITOS	DCS/ACS
Corporate returns	Upto Rs. 20 lacs	Above Rs. 20 lacs	Upto Rs. 30 lacs	Above Rs. 30 lacs
Non-corporate returns	Upto Rs. 15 lacs	Above Rs. 15 lacs	Upto Rs. 20lacs	Above Rs 20 lacs

Metro charges for the purpose of above instructions shall be Ahmedabad, Bangalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011.

18. From a perusal of the aforesaid instruction of CBDT which is binding on Income Tax Authorities, it is clear that in respect of Corporate entities (Metro Cities), who are assessee's then if the returned income is less than Rs. 30 lacs, then the jurisdiction is vested with ITO's (Income Tax Officers), and if it is above Rs. 30 lacs, then it is with the Deputy Commissioner/Additional Commissioner (DC/AC); Hence, in the present cases we note that except for AY 2009-10, the returned income of both assessee's were below Rs. 30 Lakhs, so the jurisdiction of assessment lies with I.T.O who had territorial jurisdiction u/s 124 of the Act i.e. ITO- Ward 3(3). Admittedly in all these cases, the reasons have been recorded (for re-opening) as envisaged u/s 147 of the Act has been recorded by Deputy Commissioner-3(3) and consequent to which had issued the notice of re-opening u/s 148 of the Act, which as seen (supra) he didn't had power to do so. Since, the authority to assess such corporate entities were with the ITO viz ITO ward-3(3). For holding such a view, we rely on the ratio of the decision of the Hon'ble jurisdiction High Court in the case of Shri Ashok Devichand jain vs (supra) wherein similar issue



*ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.*

came up before the Hon'ble High Court and the Hon'ble High Court held in favour of assessee as under: -

“Petitioner is impugning a notice dated 30 March, 2019 issued under section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2012-13 and order passed on 18th November, 2019 rejecting Petitioner's objection to reopening on various grounds.

2. The primary ground that has been raised is that the Income Tax Officer who issued the notice under section 148 of the Act, had no jurisdiction to issue such notice. According to Petitioner as per instruction No. 1/2011 dated 31st January, 2011 issued by the Central Board of Direct Taxes, where income declared/returned by any Non-Corporate assessee is up to Rs. 20 lakhs, then the jurisdiction will be of ITO and where the income declared returned by a Non Corporate assessee is above Rs. 20 Lakhs, the jurisdiction will be of DC/AC.

3. Petitioner has filed return of income of about Rs. 64,34,663/- and therefore, the jurisdiction will be that of DC/AC and not ITO. Mr. Jain submitted that since notice under section 148 of the Act has been issued by ITO, and not by DC/AC that is by a person who did not have any jurisdiction over Petitioner, such notice was bad on the count of having been issued by an officer who had no authority in law to issue such notice.

4. We have considered the affidavit in reply of one Mr. Suresh G. Kamble, ITO who had issued the notice under section 148 of the Act. Said Mr. Kamble, ITO, Ward 12(3)(1), Mumbai admits that such a defective notice has been issued but according to him, PAN of Petitioner was lying with ITO Ward (12)(3)(1), Mumbai and it was not feasible to migrate the PAN having returned of income exceeding Rs. 30 lakhs to the charge of DCIT, Circle 12(3)(1). Mumbai, as the time available with the ITO 12(3)(1) was too short to migrate the PAN after obtaining administrative approval from the higher authorities by 31 March, 2019.



*ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.*

5. The notice under section 148 of the Act is jurisdictional notice and any inherent defect therein is not curable. In the facts of the case, notice having been issued by an officer who had no jurisdiction over the Petitioner, such notice in our view, has not been issued validly and is issued without authority in law.

6. In the circumstances, we have no hesitation in setting aside the notice dated 30th March, 2019.

7. Consequently the order dated 18th November, 2019 rejecting Petitioner's objection is also quashed and set aside.

19. In the present captioned appeals, it is undisputed that other than assessment for AY. 2009-10 (supra), in all other appeals, the assessee has filed return of income which is less than Rs.30 Lacs. As per the CBDT instruction No. 01/2011, in case of an assessee which is a corporate assessee, the pecuniary jurisdiction if it is below Rs.30 Lacs it lies before the Jurisdictional ITO; and if the return of income filed by a corporate assessee is above 30 Lacs it lies before the jurisdictional DCIT/ACIT. In these appeals for AY. 2006-07, AY, 2007-08 & AY 2008-09 and AY 2010-11 respectively for both assessee's (of the assessee's) admittedly the reasons have been recorded by the DCIT and not by ITO which is in direct contravention of the CBDT instruction No. 01/2011 conferring/allocating the pecuniary jurisdiction. It is settled position of law that the CBDT instruction is binding on all Income Tax Authorities. Therefore, the income tax authorities ought to have followed the CBDT instruction in letter & spirit and any contravention will be offending Article 14 of the Constitution of India which tantamount to arbitrary action of the authorities and also against the basic feature of the Constitution of India i.e. Rule of Law', which require all authorities of the Government to act in accordance to the law. The expression 'Rule of law' requires the Government to act in accordance to law and so, the AO had to act in accordance to law as prescribed by the CBDT in this case. And it should be borne in mind that where a power is given to do



*ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.*

a certain thing in a certain way, the thing must be done in that way or not at all. [Taylor Vs. Taylor (1875) LR 1ch.D-426 quoted and followed by Hon'ble Supreme Court in Rao Shiv Bahadur Singh Vs. State of Madhya Pradesh (AIR 1954 SC 322) and in a plethora of cases and recently in Zuari Cements Vs. ACIT (2015) 7 SCC 690. Therefore, as per the CBDT instruction (supra) in the present cases, only the territorial ITO had the jurisdiction to re-open the cases of the assessee (except AY 2009-10); and the DCIT by usurping this jurisdiction to re-open the assessment has wrongly assumed jurisdiction which he didn't enjoy. Therefore, the action of the DCIT in these cases to have recorded the reason for re-opening the assessment for AY. 2006-07, AY. 2007-08, AY. 2008-09 & AY. 2010-11 (in respective cases) and consequent issue of notice u/s 148 of the Act is bad in law, since the issuance of notice u/s 148 of the Act is a jurisdictional notice and this defect, goes to the root of re-opening itself; and is not a curable defect; therefore, ground raised in Rule 27 applications of assessee are allowed. And therefore, all the captioned appeals (except for AY 2009-10) of the revenue has been rendered academic. And therefore, the same stands dismissed. Viz ITA. No.4836/Mum/2016, ITA. No. 4827/Mum/2016, ITA. No. 4828/Mum/2016, ITA. No. 4833/Mum/2016, ITA. No. 4830/Mum/2016 & ITA. No. 4831/Mum/2016 are dismissed."

3. Respectfully following the ratio of order of the Tribunal in assessee's own case M/s. Watermark Financial Ltd. and sister concern M/s. Watermark System India Pvt. Ltd. (ITA. No.4836/4827/4828/4833/4834/Mum/2016), I am inclined to allow the grounds raised against the jurisdiction of the AO to have issued notice u/s 143(2) and to have framed assessment order u/s 143(3) of the Act. That is in this case, the DCIT CC-3(3)(2) Mumbai erred in usurping the jurisdiction



ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.

and issued notice u/s 143(2) of the Act and framed the assessment, because as taken note by me, the assessee corporate entity being registered at Mumbai had returned less than Rs.30 Lakhs as income and so the jurisdiction vested with ITO-3(3) as per CBDT instruction number 1/2011 (supra) and thus ITO-3(3) only had jurisdiction to assume jurisdiction as Assessing Officer of Assessee and could have issued the mandatory notice of Scrutiny u/s 143(2) of the Act and assess the assessee. And therefore, the notice issued instead by DCIT CC-3(3) u/s 143(2) and framing of assessment u/s 143(3) of the Act is held to be without jurisdiction. And therefore, the action of the AO is null in the eyes of law. Rule 27 application is allowed and the appeal of the revenue therefore becomes academic and so dismissed.

4. In the result, all the appeals of the revenue dismissed.

Order pronounced in the open court on this 10/04/2023.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 10/04/2023.
Vijay Pal Singh, (Sr. PS)



ITA No.800/Mum/2020
A.Y. 2013-14
M/s. Watermark Capital Ltd.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**