IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI
BEFORE SHRI O.P. KANT, ACCOUNTANT, MEMBER AND
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER
ITA No. 258/Mum/2019 (A.Y. 2010-11)

M/s Surajkumar & Sons
302,-C, Shivshakti CHS Ltd.,
Kashinath Dhuru Marg, Agar Bazar,
Prabhadevi, Mumbai-400025.
PAN: AAQFS4464G ..... Appellant

Vs.

ITO – 21(3)(4),
206, Piramal Chambers,
Parel, Lalbaug, Mumbai-400012 ..... Respondent

Appellant by	:	Sh. Dalpat Shah, AR
Respondent by	:	Sh. Kishor Dhule- CIT-DR
Date of hearing	:	24/04/2023
Date of pronouncement	:	20/07/2023

ORDER

PER KAVITHA RAJAGOPAL, J.M:

This appeal has been filed by the assessee challenging the order of the Ld. Commissioner of Income Tax (Appeals) -33, Mumbai [hereinafter referred to as ('Ld. CIT(A)') passed under section 250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') pertaining to the Assessment Year (AY) 2010-11. The assessee has challenged the assessment order passed under section 147 of the

Act and has also challenged the disallowance of Rs. 4,79,89,606/- towards the cost of improvement and the consequential index cost thereof. The assessee has also challenged the order of Ld. CIT(A) in holding Rs. 6,50,00,000/- paid to the Bank for the purpose of collateral securities on the ground that the same should have been allowed as cost while computing the capital gains raising from the sale of property or according to the assessee was to be excluded from the sale proceeds as the said amount was not received by the assessee and was thus diverted by overriding title.

2. Brief facts of the case are that the assessee is a partnership firm and has not filed its return of income during the impugned year for the reasons that it did not have taxable income. The assessee's case was re-opened after duly recording the reasons for re-opening under section 147 of the Act vide notice under section 148 dated 31.03.2017 and notice under section 142(1) dated 13.06.2017 were issued and served on the assessee.

3. The assessee raised the objections to the reasons for re-opening vide letter dated 13.09.2017 stating that it had not received any notice under section 148 and that the re-opening was time barred. The assessee has also raised objection that it had not purchased any property during the year under consideration and the reasons for re-opening was hence bad-in-law. The Ld. AO dealt with the objections raised by the assessee and passed the assessment order dated 27.12.2017 under section 143(3) of the Act determining total income at Rs. 10,03,53,900/- as being the Long Term Capital Gain (LTCG) on sale of property.

4. The assessee was in appeal before the Ld. CIT(A) challenging the impugned assessment order passed by the AO. The Ld. CIT(A) then upheld the order of Ld. AO.

5. Further aggrieved, the assessee is in appeal before us challenging the order of Ld. CIT(A).

6. Ground No.1 raised by the assessee challenged the assessment order passed under section 147 of the Act as being bad-in-law and barred by limitation.

7. It is observed that the AO has re-opened the assessment in the case of assessee for the reason that as per the individual transactions statement of the assessee, the assessee is said to have purchased a property amounting to Rs. 10,50,00,000/- for which the source was undisclosed and since prima facie it is observed that income has escaped assessment due to the failure on the part of the assessee in disclosing fully and truly all material facts necessary for its assessment. The reasons for re-opening has been extracted here-in-under for ease of reference:

> ***"Reasons recorded for issue of notice u/s 148(2) of the IT Act, 1961.***
>
> *1. The assessee has not filed Return of Income for A.Y. 2010-11.*
>
> *2. On perusal of the Individual Transaction Statement of the assessee, it is seen that during the year under consideration the assessee has purchased a property amounting to Rs. 10.50,00,000/- sources of the same remain undisclosed.*
>
> *3. In view of the above, I am satisfied and also I have reason to believe that income more than Rs 1,00,000/- has escaped assessment due to the failure on part of the assessee in disclosing fully and truly all material facts necessary for its assessment. Accordingly, the case of the assessee required to be reopened u/s*

147 of the I.T. Act, in order to frame assessment in its proper perspective and to bring to tax appropriate income of the assessee including under stated income, as discussed above. It is therefore, necessary to reopen the case u/s 147 of the Act.

Issue Notice u/s 148 of the I.T. Act."

8. The Ld. AR for the assessee contended that notice under section 148 dated 13.09.2017 was not issued to the assessee as alleged by the lower authorities and that the assessee was in knowledge of the re-assessment proceedings only through notice issued under section 142(1) of the Act which was emailed to the Chartered Accountant of the assessee after 31.03.2017. The Ld. AR also contended that the reasons recorded for re-opening was for purchase of immovable property and that there was no such purchase made by the assessee during the year under consideration. The ld. AR further contended that the lower authorities has failed to establish the fact that the said notice under section 148 was delivered to the assessee through Speed Post on or before 31.03.2017 thereby holding the assessment order to be invalid and bad-in-law.

9. The ld. AR relied upon these decisions of the Hon'ble Apex Court in the case of CIT Vs. Major Tikka Khushwant Singh 80 Taxman 88 (SC), R.K. Upadhyaya Vs. Sanabhai Patel 166 ITR 163 (SC) and Kanubhai M. Patel (HUF) vs. Hiren Bhatt 202 Taxman 99 (Guj) for the preposition that notice under section 148 of the Act was barred by limitation.

10. On the other hand, the Ld. DR controverted the said facts and stated that the assessee in its Paper Book had filed the copy of notice under section 148 dated 31.03.2017 and the same was duly signed by the Ld. AO. The Ld. DR further stated that the copy of reasons recorded for re-opening was also filed by the

assessee which was presumably issued before the date of notice under section 148 of the Act. The Ld. DR further contended that even otherwise there was time period provided under section 149 of the Act holding the assessment order to be valid. The Ld. DR relied on the decision of the Tribunal in Ambica Steels Ltd. v/s DCIT (2009) 118 ITO 116 (Del)

11. The Ld. DR on the issue of the reasons for re-opening contended that the AO had merely mistaken the sale of property to be purchase of property which apparently was a mistake curable under section 292B of the Act. The ld. AR brought our attention to the fact that being a partnership firm the assessee was under obligation to file its return of income even otherwise. The Ld. DR relied on the order of the lower authorities.

12. We have heard the rival submissions and perused the material available on record. The assessee has contended that it had not received notice under section 148 of the Act as alleged by the AO that the same was served through Speed Post on 31.03.2017. It is evident that the assessee vide its letter dated 13.09.2017 had filed its objection to the re-opening stating that it had not received notice under section 148 of the Act and that the reason for re-opening is said to be bad-in-law and time barred. It is also evident that the assessee had received the reasons recorded for re-opening dated 27.03.2017 prior to notice under section 148 of the Act whereas the assessee had filed its objection only on 13.09.2017 alleging that it had not received notice under section 148 of the Act.

13. We do not find any other communication from the assessee to the Ld. AO stating that it had not received the notice since the reasons for re-opening was

served. It is also evident that the AO had again dispatched copy of the said notice vide letter dated 13.09.2017 subsequent to the assessee's letter dated 13.09/2017. Apart from the bare allegation, the assessee has not furnished any details substantiating its allegation that the notice was not received when there were other options of seeking RTI from the Department to prove the service of notice. Hence, we find that the assessee has not substantiated enough to prove the fact that notice under section 148 was not served to the assessee. On identical facts the Tribunal in the case referred by the ld. DR has held in Ambica Steels Ltd. (supra) that when the requirement of service of notice u/s 148 of the Act was duly complied with by the Ld. AO and when the assessee has no grievance on this the same will not vitiate the reassessment proceedings. With regard to the contention that the reasons recorded for re-opening was wrong as the assessee did not make any purchase during the year under consideration, we find that there was merit in the submission of the Ld. DR in stating that it was merely a mistake on the part of the Ld. AO to have specified purchase instead of the sale transaction, nevertheless the fact that the assessee has made transaction of Rs. 10,50,00,000/- during the year under consideration and has not filed its return of income during the year under consideration according to us, is a sufficient reason for re-opening the assessment of the assessee. The assessee cannot taken advantage of the error committed by the AO in the reasons for re-opening when there are genuine reasons where it is evident that income has escaped assessment. We are of the considered opinion that this ground of appeal raised by the assessee does not hold merit and the same is dismissed.

14. The assessee has challenged the computation of the capital gain on sale of property at Rs. 10,03,53,900/- for which the assessee has claimed deduction for cost of improvement & alleged that the diverted amount at source by overriding title never reached the assessee and further had claimed indexed cost and cost of transfer.

15. It is observed from the facts that the assessee being a partnership firm was formed by 5 partners namely Tina Tejraj Gowani, Minoo Tejraj gowani, Sandeep Agarwal, Premkanta Agarwal and Sudha Agarwal in which Tina Gowani & Minoo Gowani had by way of capital introduced Flat no. 1207, 1208 on 12th Floor & 1304 on 13th Floor of Eldorado Building at Prabhadevi, Mumbai as capital to the firm. The assessee contended that these flats were made a one unit and various renovation works was carried out to fetch a good price of the said property. Subsequently Tina Gowani & Minoo Gowani resigned from the assessee firm and the remaining partners continued to be partners in the firm. It is also observed that firm was maintaining credit facility with BOI, Mahalaxami branch for which the assessee firm was one of generator of the above mentioned properties were mortgaged with BOI. Due to losses incurred by the firm the account of the assessee's firm become NPA on 30.06.09 and on negotiations with the bank, the partners decided to sell the property for better price themselves and to pay the outstanding dues from the sale consideration. The property was then sold for Rs. 10,50,00,000/- which is as per the index-II where the market price was only Rs. 4,76,16,434/-. During the assessment proceedings the assessee was asked to submit details of expenses incurred on construction/renovation/repair of any along with documentary evidences for calculating LTCG. The AO had also sought

for the deed of retirement of partners from the Assessee's firm. The assessee has claimed the total expenses at the time of assessment proceedings as tabulated below:

Sr. No.	Expenses incurred in F.Y.	Amount (in Rs.)	Payment ostensibly made to
1.	2001-02	27,04,0111	RPS Infrastructure
2.	2002-03	3,81,113	Not Submitted
3.	2009-10	4,48,04,482	M/s Suraj Infrastructure Pvt. Ltd.
4.	2009-10	6,50,00,000	Cost of Bank Guarantee

16. The Ld. AO had rejected this said claim on the ground that the assessee has failed to substantiate the said expenditure by way of any supporting documentary evidence by way of copy of bills raised by the contractor, material purchased etc. The assessee has also claimed deduction under the head cost of bank guarantee amounting to Rs. 6,50,00,000/- which was the bank outstanding dues at the time of sale. The AO rejected the said contention of the assessee and allowed the indexation cost of Rs. 46,46,101/- & computed the LTCG.

17. Aggrieved assessee was in appeal before the Ld. CIT(A) who upheld the order of the Ld. AO on the ground that the assessee has failed to substantiate its claim by cogent evidence.

18. Further the aggrieved assessee is in appeal before us.

19. The Ld. Representative for the assessee contended that properties that were sold were given as collateral securities for loans to Bank of India by the assessee firm and that the assessee undertook to sell the properties with view to fetch better sale consideration and that the sale proceeds of Rs. 6.50 crore was

directly paid to the bank. The Ld. AR further contended that the assessee firm did not receive any of the sale consideration and the same is evident from the sale deed enclosed in the paper book. The Ld. AR also contended that there was no profit in the said sale. The ld. AR further stated that SARFAESI Act was invoked on the assessee by way of which the bank had taken symbolic possession. The Ld. AR then contended that the bank had overriding title to the said flat by way of provision of SARFAESI Act and that Rs 6,50,00,000/- was diversion of funds by such overriding title and that the same should not be taxed in the hands of the assessee. The Ld. AR made a submission that cost of improvement computed by the assessee was partly allowed by the Ld. AO which include the cost of acquisition, stamp duty and registration fee and also the cost of acquisition of garage. The Ld. AR also stated that the lower authorities have failed to consider the banks statements in which payments for improvement of property was made, and since the said expenses were made beyond six years the assessee had not maintained bills for the same. Ld. AR also contended that the of cost of addition was substantiated by the balance sheet furnished by the assessee. Ld. AR further stated that the assessee has incurred major expenses amounting to ₹4.49 crore for conversion of 3 flats into one pent house for which the assessee has also deducted TDS u/s 194C of the Act and same was overlooked by the lower authorities. The Ld. AR relied on the various decisions in support of its claim.

20. The Ld. DR on the other hand controverted the said facts and stated that the assessee has failed to furnished any details of works contract, purchases of raw materials and other evidences in support of its claim. The Ld. DR further stated that this was not the case of transfer of interest and merely loan

transaction of sister concerns and same cannot be categorized as expenditure incurred for the sale of property. The Ld. DR relied on the decision of the Co-ordinate Bench in the case of Perfect Thread Mills Ltd. Vs DCIT [2020] 113 taxmann.com 384 (Mumbai- Trib) wherein on identical fact the Tribunal has decided the said issue in favour of the revenue. The Ld. DR relied on the orders of lower authorities.

21. We have heard the rival submission and perused the materials available the record. It is observed that the assessee out of the total sale consideration has paid to Rs. 6.50 crore to Bank of India to clear the loan availed by the assessee firm wherein the said properties were given as collateral securities. It is also evident that the said loan account was termed NPA by the bank thereby invoking the provision of SARFAESI Act. The assessee has negotiated with the bank to directly sell the properties in order to fetch better sale consideration on the undertaking that the assessee will clear dues to the bank to directly out of the sell proceeds. It is observed that the purchasers had made payment to the bank out of part amount of the sale consideration for the purpose of release of the mortgage created by the assessee firm through its partners. The assessee contends that the bank had overriding title of the properties and the payment made to the bank was clear diversion of fund by such overriding title. For this proposition we would like to place our reliance on the decision of the Tribunal in the case of Perfect Thread Mills Ltd. (Supra) wherein on identical facts it was held that the payment of loan availed in the banks by invoking the SARFAESI Act was not diversion of sale proceeds by overriding title and was merely an application of the sale proceeds towards discharge of outstanding of loan liability of the sale assessee. In the

tribunal further held that assessee was not entitled to claim deduction of such payment for the purpose of computing capital gain as per the provision of section 48 of the Act. The relevant extracts of said decision as cited here under for ease of reference:

> *"Section 13 of the SARFAESI Act, cannot come to the rescue of the assessee. At the time of entering into mortgage agreement assessee was well aware of the consequences of non-payment of loan amount which, inter alia, included procedure of recovery of and sale of mortgage asset by the secured creditor. It is not something new or some unforeseen event which assessee was not aware of. Having complete knowledge of the consequences of default in repayment of loan, assessee still chose to enter into such an arrangement. So it is an action of the assessee, which has created the instant obligation on itself. Insofar as the argument of the assessee that the instant obligation was not voluntary and was mandated by the SARFAESI Act, the same is quite misplaced inasmuch as it is only the voluntary act of the assessee of entering into mortgage loan arrangement with KMBL and the subsequent default in repayment which has triggered sub-section (13) of section 13 of the SARFAESI Act restriction on the assessee to transfer the mortgaged/secured asset by way of sale, lease or otherwise without the prior consent of KMBL. Alternatively, SARFAESI merely provides a recovery mechanism and nothing else. The SARFAESI Act cannot be interpreted to mean that it has created right of 'diversion of income by overriding title. While interpreting the law, due regard must be given to the intent and purpose of the law. The purpose of SARFAESI Act, and which clearly emerges from the phraseology of section 13 of SARFAESI Act, is to effectuate and expedite the recovery of secured interest of the secured creditor and certainly not, so far as the present case is concerned, to reduce or to impair the provisions of the Act in determination of tax liability of the assessee.*

In view of the above reasoning, it is held that in the present case there was no diversion of sale proceeds by overriding title, but on the contrary, there is only a mere application of the sale proceeds realised on sale of plots towards the discharge of outstanding loan liability of the assessee. The assessee cannot claim any part of such application as deduction for the purpose of computing capital gain in terms of section 48 of the Act."

21. From the above observations we are of the considered view that the contention raised by the assessee in the present facts of the case does not hold merit where it is not a case of diversion of sale proceed but is merely application of the sale proceeds for repayment of the loan availed. We would also like to place our reliance on the decision of the Hon'ble Jurisdictional Bombay High Court in the case of Roshanbabu Mohhomad Hussein Merchant Vs CIT [2005] 144 Taxman 720 (Bombay) relied upon by the CIT(A) wherein it was held that the assessee was not entitled to deduction u/s 48(i) of the Act for repayment of the mortgage debt which was incurred subsequent to the acquisition of the property and not for the purpose of acquisition. Even in this case the assessee has not established the fact that the loan availed in the Bank of India was for the purpose of acquiring said properties because from the facts of the case it is evident that the assessee firm has mortgage the said properties as collateral securities subsequent to the acquisition of the said properties and hence this is not the case of the diversion of fund by the overriding title. Therefore, ground no. 3 raised by the assessee does not hold merit and is hence dismissed.

22. As far as the claim of the assessee pertaining to the cost of improvement amounting to ₹ 4.49 Crore, the lower authorities have denied the said claim on the ground that the assessee has not furnished any documentary evidences in the

support of its claim by way of supporting bills etc. It is also the same in the case of claim of repair and renovation amounting to ₹ 27,04,011 and 3,81,113/- claimed by the assessee. Though the assessee contends that the assessee has not maintained bills as the said work was carried out more than 6 years back but alleges that the said expenditure reflected in the balance sheets filed by the assessee and also TDS towards said expenditure were deducted by the assessee u/s 194C of the Act. The assessee has also contended that the huge expenditure incurred by it for renovating the said properties during conversion of three flats to a pent house the assessee has failed to substantiate this by furnishing the bills of the work done. Though the Lower Authorities had allowed ₹46,46,101/- as indexed cost the assessee had challenged the disallowance for the remaining claim. It is also pertinent to point out that said renovation cost of Rs. 4.49 crore was paid by the assessee to its sister concerns M/s Suraj Infrastructure Pvt. Ltd. The said expenditure was incurred in FY 2009-10. The assessee has not justified why it had not maintained the bills which was expended during the impugned year. Though not of much relevance, it also creates a doubt as to the source of the said expenses when the assessee firm was unable to repay its debts availed in BOI and having incurred such a huge expenses for renovation of the flats in order to sell it for a better price. As it may be, we deem it fit to remand this issue to the file of the Ld. AO for the limited purpose of verifying the expenses claimed by the assessee and the assessee is directed to furnish all the documentary evidences pertaining to the expenses incurred in support of its claim. Hence this issue is remanded back to the Ld. AO for factual verification.

In the result ground no. 2 raised by the assessee is partly allowed for statistical purpose.

In the result appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 20 day of July, 2023.

Sd/-	Sd/-
(O.P. KANT)	(KAVITHA RAJAGOPAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai,
दिनांक/Dated: 20/07/2023
Aniket Rajut (Stenographer)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy. /Asstt. Registrar)
ITAT, Mumbai