

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 1837/Mum/2018
(Assessment Year: 2008-09)

M/s Om Developers
Office no.14, Mahavir Centre,
Sector No.17, Vashi,
Navi Mumbai 400 705

Vs.

DCIT-28(2),
Navi Mumbai

(Appellant)

(Respondent)

PAN No. AAAF09862A

Assessee by : Shri K. Gopal, Adv.
Revenue by : Shri Shambhu Yadav, DR

Date of hearing: 27.06.2023
Date of pronouncement : 18.09.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No.1837/Mum/2018 for A.Y. 2008-09 is filed by Om Developers (assessee/appellant) against the appellate order passed by the Commissioner of Income-tax (Appeals)-26, Mumbai [the learned CIT (A)] dated 20th December, 2017 wherein the appeal filed by the assessee against the assessment order passed under section 143 (3) of the Income-tax Act, 1961 (the Act) by the Dy. Commissioner of Income Tax -28 (2), Mumbai (the learned AO) dated 21st March, 2016 was dismissed.
02. Therefore, the assessee is aggrieved and has preferred this appeal before us. The following grounds of appeal have been raised: –

"1. The Ld. CIT(A) has erred in agreeing to A.O's holding that the appellant firm is in receipt of cash of Rs.



5,94,96,000/- from M/S Pathik Constructions and thereby has erred in confirming the action of A.O of taxing alleged undisclosed income of Rs. 5,94,96,000/- in the hands of the appellant.

2. The Ld. CIT(A) has also erred in confirming the action of A.O of not following the principle of natural justice and not granting the opportunity of cross examination to the appellant.

The Appellant craves leave to add, amend, supplement, alter and/or delete any of the above Grounds of Appeal."

03. Brief facts of the case shows that assessee is a partnership firm, who filed its return of income for A.Y. 2008-09 on 26th September, 2008 declaring total income of ₹6,316,295/-. The assessment under section 143 (3) of the Act was made on 16th December, 2010 determining the total income of the assessee at ₹7,106,560/-. Subsequently, the case of the assessee was reopened for the impugned assessment year by issue of notice u/s148 of the Act on 25 March 2015. In response to the above notice the assessee submitted as per letter dated 25th April, 2015 that the original return filed maybe treated as a return filed in response to notice. Thereafter, the respective notices under section 143 (2) of the Act was issued and served on the assessee.
04. The reopening was made because of the reason that information was received on 24th February, 2015 by a letter dated 23rd February, 2015 from the learned Assessing Officer, ward -3 , New Panvel , stating as under :-

"To

Dy. Commissioner of Income -tax

Cir 28(2),



Mumbai

Sir/ Madam,

Sub: Intimation for remedial action u/s 147 in the case of Om Developers on account of receipt of unaccounted income in cash in respect of land deals with M/s Pathik Construction in A.Y. 2008-09-reg

Please find enclosed herewith a folder in the case of Jai Ganesh Co- operative Housing Society in which assessment u/s 144 r.w.s. 147 of the Income- tax Act, 1961 was passed by this office on 24.03.2014.

2. In this connection a brief description of the case is as follows. A Search and seizure action u/s 132 of the Income-tax Act, 1961 was carried out on 18.02.2009 in the case of M/s Pathik Construction Group by the Investigation Wing Mumbai. M/s Pathik construction Group is engaged in the purchase and sale of land. During the course of the search and survey, some incriminating evidences were seized/impounded in which there is mention of land deal between M/s Pathik Constructions and M/s Jai Ganesh Co-operative Housing Society Ltd.

M/s Pathik Construction has purchased the said land which is situated at Plot No. 31, Sector 47, Dronagiri, Uran from the Jai Ganesh CHS for a consideration of Rs 5,94,96,000/- by tripartite agreement on 24.04.2007. In this transaction, Jai Ganesh CHS has received the consideration of Rs 5,94,96,000/- in cash as per the report given by the Jt. Commissioner of Income- tax (OSD), CC-39 Mumbai vide letter dated 02.02.2012 for necessary action against Jai Ganesh CHS On verification and

enquiries it was found that the assessee Jai Ganesh CHS was a non-filer. The society does not have PAN. Notice u/s 148 of the Income-tax Act, 1961 was issued on 04.02.2013. During the assessment proceedings it came to be known that the assessee society has 37 members who are project affected people. The agricultural land of those people were acquired by the CIDCO. In consideration, these people were provided 12.5 % size of their reparative plots from CIDCO. In order to get better returns, these people formed CHS in the name of Jai Ganesh Co-operative Housing Society.

Based on the information an order u/s 144 r.ws. 147 of the Income-tax Act, 1961 was passed on 24.03.2014 by this charge assessing an income of Ra 8,16,26,625/-IRs 5,94,96,000/- cash receipt Rs 2,21,30,625/ agreement value) against the Jai Ganesh CHS which resulted in demand raised to the tune of Rs 6,05.26,838/- However, this demand could not be recovered as the avid CHS in not in existence. On further enquiry it was found that the members of the CHS are all farmers and they are illiterate. They do not know much about the transaction While going through the sale of the agreement of the assessee society, it was noticed that the Jai Ganesh CHS has assigned all the right, title, interest and benefits to M/s Om Developers a partnership firm, through its partners 1) Mr. Pramod D. More and 2) Mr. Gajanan R. Kanade. In fact it was Om Developers who executed the whole transaction. Further on going through the sale agreement it is found that the sale consideration was to the tune of Rs 2,22,00,000/-. This amount was received by Om Developers on behalf of Jai Ganesh CHS It was OM Developers who executed the whole transaction in the name of the Jai Ganesh Cooperative Housing Society. Based on this finding a summon u/s 131 of the Income-tax



Act, 1961 was issued to one Sri Manohar Desai who is an office Assistant in Om Developers. In his Statement recorded u/s 131 of the income-tax Act, 1961, Shri Desai told that Om Developers has PAN AAFO9862A and is assessed at DCIT Cir 28(2), Mumbai. In view of the above discussion, it appears that the income is taxable in the case of OM Developers based on the information forwarded by the Jt. CIT(OSD) CC-39, Mumbai.

In view of the above discussion, it appears that the income is taxable in the case of OM Developers based on the information forwarded by the Jt. CIT (OSD) CC-39, Mumbai.

Your are requested to take necessary remedial action.

Thanking You,

Yours faithfully,

Sd/-
(SANJEEV KUMAR SHARMA)
Income Tax Officer, Ward-3,
Panvel, Dis-Raigad

05. Based on the above information the reason were recorded by the Id AO on 12/3/2015 as under :-

"Annexure

M/s OM DEVELOPERS

In this case, the assessee filed his ROI for the AY 2006-07 on 19/09/2000 declaring total income at Its. 63,16,3907. The regular assessment in this case was completed u/s 143(3) on 20.12.2010 there by determining the total income of assessee at Rs. 71,06,500/-.

Information was received from ITO ward 3, Panvel vide letter No. PIL/WD 3/2008/2014-15 dated 23.02.2015 that in the land deal between M/s Pathik Construction and M/s Jai Ganesh Co-operative Housing Society Ltd.. the society has received Rs.8,16,26,625/ out of which Rs.5,94,96,000/- as cash and Rs.2,21,30,625/- by Cheque through M/s. Om Developers. The Jai Ganesh CHS has assigned all the right, title, interest and benefits to M/s Om Developers a partnership firm, through its partners 1) Mr. Promd D. More and 2) Mr. Gajanan R. Kanade. In fact, it was Om Developers who executed the whole transaction. Further on going through the sale agreement it was found that the sale consideration was to the tune of Rs. 2,22,00,000/- This amount received by Om Developers on behalf of Jai Ganesh CHS. It was Om Developers who executed the whole transaction in the name Jai Ganesh CHS.

However, on perusal of the record of the assessee M/s. On Developers, it is seen that the assessee has shown Rs.2,24,88,685/- as sale from Jai Ganesh Society. The amount as required to be credited to the profit & loss account for the A.Y. 2003-09 was at Rs. 8,16,26,625/-.

Thus, I have reasons to believe that the income to the extent of Rs. 5,91,37,940/- chargeable to tax had escaped the assessment within the meaning of provisions of Section 147 of the Act. Hence, this is a fit case for reopening the assessment by issue of notice u/s 148 of the Act. Accordingly, if approved notice u/s 148 of the Act will be issued."

Sd/-
(Sudha Ramachandran)
Dy. Commissioner of Income Tax-28(2)

Mumbai.

06. The approval under section 151 was granted on 24/3/2015. Accordingly, under section 148 of the act was issued on 25/3/2015.

07. Fact shows that:-

- i. An agreement to sale was executed between the assessee and three individuals Mr. Sadanand G Mahatre, Mrs. Sunanda Mahatre and Mr Satyavrat G Mahatre on 29/5/2006 and measuring 650 m² of a plot allotted by CIDCO against the acquisition of land under 12.5% scheme at the Mathe, Naigaon, Panvel, Dist Raigad at the rate of ₹ 3000 per square meter. Accordingly and advance of ₹ 10 lakhs was also paid.
- ii. On 13/7/2006 according to the Maharashtra cooperative societies act 1960, a cooperative society was incorporated by the name of jai Ganesh Cooperative Housing Society Limited.
- iii. On 13/10/2016 and agreement was entered into between city and industrial development Corporation of Maharashtra Limited with the above cooperative societies where the society paid a sum of ₹ 69,375/- and obtain the license of the above land
- iv. On 15/10/2016 and agreement was entered into the above cooperative housing society and the assessee as an assignee with 37 persons who are stated to be the landowners/members whereby the above land was assigned by those members to the assessee for a consideration of ₹ 22,198,360. The assessee already paid the above sum to the society/members the entire agreed consideration as per clause (t) of the above agreement stating as under:-

“ t) the members had agreed to grant an assigned the said plot to be a sign the act order for a consideration of ₹ 22,198,360 (Rupees Two cores Twenty One lakhs Ninety Eight Thousands Three Hundred and sixty only) .



The assigning has already paid to the society and or its members the entire agreed consideration in like of the said agreement.”

- v. On 12/4/2007, the chairperson of the cooperative society got permission from the joint registrar cooperative society approving the proposal for the sale/transfer of the property of society to the highest bidder M/s Pathik constructions. Thus, the permission was granted to the society to sale/transfer of society’s property to the above entity.
 - vi. On 23/4/2007 and agreement of assignment cum sale entered into between the society, assessee as they assign or and Pathik construction as the assigning in this assignment of assignment cum sale agreement, the cooperative society were shown as the lessee, assessee as they assignor and Pathik construction as assignee. This was an agreement with a consideration of ₹ 222 lakhs to be paid to assignor by the assignee. The consideration was to be paid of ₹ 172 lakhs at the time of transfer of the above plot of land in the name of assignee and ₹ 50 lakhs was paid as an advance on the date of signing of this agreement
 - vii. on 24/4/2007 registered tripartite agreement was entered into between SIDCO , cooperative society and Pathik Construction
 - viii. On 16/1/2008, there was a further tripartite agreement between CIDCO, Pathik construction and Iconic Realtors.
08. A search under section 132 of the Act was conducted on 9th February, 2009 in case of Pathik construction group of assessee. The documents seized during the search included a sheet of paper with handwritten notes identified as page number 92. The above paper was seized from the business premises of Pathik constructions. The above seized paper shows that the Pathik construction has purchased



the said land which is situated at plot number 31, sector 47, Dronagiri from the cooperative society for a consideration of ₹ 59,496,000/- by way of a tripartite agreement on 24/4/2007. In this transaction, the cooperative society has received the consideration of ₹ 59,496,000 in cash. This was the report given by the joint Commissioner of income tax (OSD), Mumbai as per letter dated 2/2/2012 for necessary action against the cooperative society.

09. The assessee has disclosed the consideration of ₹ 2.2 crores received by it in its return of income. Therefore, the learned assessing officer issued a notice dated 12/2/2016 to the assessee stating that the cooperative society, assessee and Pathik construction enter into assignment cum Sale deed dated 23/4/2007. The above agreement shows that a purchase of land has been transacted through the assessee with regard to the cooperative society. The assessee has received payment in addition to Rs. 2.20 crores and further cash payment of ₹ 59,496,000/- for purchase of plot. As the assessee as an assignor for the whole transaction and also received the full payment of sale consideration, the above amount of ₹ 59,496,000 was required to be added as income of the assessee. Cash payment of ₹ 5.94 crores, which is reflected in the aforesaid seized material, has not been disclosed by the assessee in the original return or in the course of proceedings under section 147 of the Act. Therefore the learned AO was of the view that why the above amount should not be treated to have been received by the assessee. The assessee submitted detailed explanation for the same. However, the learned Assessing Officer made the addition as undisclosed income in the hands of assessee and determined the total income of ₹66,506,560 wherein the addition of ₹5.94 crores was made as per the assessment order passed under section 143 (3) read with section 147 of the Act dated 21st March, 2016.
010. The assessee challenged the same before the learned CIT (A). The assessee challenged the same only on the merits of the addition. The learned CIT (A) confirmed the addition as under: –

"6.1. Regarding issue (a), perusal of Information available on records shows that the said property stood assigned to the appellant, M/s Om Developers, by Jai Ganesh Co-op Society Ltd. for a sale consideration of Rs. 2,21,98,360/- as per 'agreement to transfer and assign executed on 15.10.2006. This fact has also been reiterated in the recitals for agreement of assignment-cum sale dated 23-04-2007 for plot No 31, Sector 47 admeasuring 5549.59 sq meters situated at Dronagiri Uran between M/s Jai Ganesh Co- op Society Ltd.(Lessee), M/s Om Developers(Assignor) and M/s Pathik Constructions (Assignee) as below.

7. Whereas the lessee JAY GANESH CO-OPERATIVE HOUSING SOCIETY LIMITED vide an Agreement dated 15th October 2006 assigned all its right, title, interest and benefits in respect of the said Plot no. 31 admeasuring 5549.59 sq. mtrs. of JAI GANESH CO-operative Housing Society Limited, at Sector-47, Dronagiri, Tal.Uran, Dist.Raigad to M/s. OM DEVELOPERS a Partnership firm, through its Partners 1) MR. PRAMOD D. MORE and 2) MR GAJANAND G. KANADE (hereinafter referred to as the ASSIGNOR) for proper consideration and had upon receipt of the Agreed consideration for the same, handed over possession of the plot to the Assignor.

6.2. It is abundantly clear from the above that the appellant was the effective owner of the said property as on the date of sale of the same to M/s Pathik Constructions on 23.04.2007. The property has also been shown by the appellant as part of its opening stock as on 01.04.2007 and the cheque receipts of Rs. 2,22,00,000/- on account of sale of the property has also been reflected



in its Profit and Loss account. The total sales consideration received including the cash component, therefore, has to be taxed in the hands of the appellant.

6.3. The appellant has submitted that the cheque as well as the cash component of Rs. 5,94,96,000/- has been taxed in the hands of Jai Ganesh Co-op Society Ltd. which has been confirmed by the CIT(A) against which further appeal was pending before the Hon'ble ITAT. The appellant has, therefore, contended that the cash component of Rs. 5.94,96,000/- in any case cannot be taxed in its hands as it would amount to double taxation of the same income. The appellant's contention is not tenable in view of the undisputed fact that the appellant was the owner of the property as on the date of sale of the said property to M/s Pathik Constructions on 23.04.2007. The fact of the cash component of sales consideration being taxed in the hands of Jai Ganesh Co-op Society Ltd. for whatever reason does not absolve the appellant of its rightful liability.

6.4. The appellant has also submitted that the addition had been made on the basis of sheet of paper seized under annexure O-2 at the premises of M/s Pathik Constructions during search which has been reproduced on page 3 of the assessment order. That it was clearly mentioned on the said paper that if at all, the amounts have been paid, the same have been paid to members of Jai Ganesh Society and that Jai Ganesh Society and Om Developers were just passing through intermediaries. That the appellant firm received the consideration of Rs. 2.22 crores as confirming party and in turn paid the same to members of the society. Hence, the sale consideration has been reflected as business income in the P/L a/c of the appellant firm for the year ended on 31.03.2008 and the payments to these members has been reflected in the

opening stock as on 01.04.2007. This contention of the appellant is also not tenable in view of the following:

I. The appellant was not a pass through intermediary or a confirming party to the sales made to M/s Pathik Constructions. The appellant was the assignor as it was the owner of the property being transferred as discussed in para 6.1 above.

ii. The appellant had already made payments for purchase of the property at the time of executing agreement to transfer and assign' entered into with Jai Ganesh Co-op Society Ltd. on 15.10.2006 for a consideration of Rs. 2,21,98,360/-. It is an absurd proposition that the appellant received the consideration of Rs. 2.22 crores as confirming party and in turn paid the same to members of the society when the said consideration has been received much later after 15.10.2016.

iii. The notings in the sheet of paper seized under annexure O-2 at the premises of M/s Pathik Constructions have to be interpreted considering the surrounding facts and circumstances of the case. The notings mention payment details in respect of Plot no.31, Sector-47, Dronagiri which is the property sold by the appellant to M/s Pathik Constructions. Though the appellant's name is not mentioned therein, the logical conclusion to be drawn is that the payments noted therein pertain to the appellant and more so as the cheque component of the payment matches with the consideration received shown by the appellant.



6.5. As regards the actual consideration received on account of sale of the aforementioned property to M/s Pathik Constructions, it would be relevant to consider the notings in the sheet of paper seized under annexure O-2 at the premises of M/s Pathik Constructions. For the sake of ease and clarity, the legible contents written on the sheet are being typed out below:

Annexure O-2

DCO File No-5550 Sqm

Plot No.31, sect-47, Dronagiri

Rate 14720/- sqm

Payment Details

Paid to Jai ganesh co-op.. members

a) Cheque 2,22,00,000/-

b) ca 5,94,96,000/-

Sold to(not legible) -Rate 25600/- sqmt

6.6. It is evident from the above notings that M/s Pathik Constructions had purchased the property from the appellant @ of Rs. 14,720/- per sq. mtr. which works out to Rs.8,16,96,000/- out of which Rs. 2,22,00,000/- was paid by cheque and Rs. 5,94,96,000/- was paid in cash. The working is very precise and the amounts mentioned are not estimated figures. This sheet was found during the course of search u/s 132 of the Act from the premises of M/s Pathik Constructions who was the buyer of the property sold by the appellant. It is therefore, to be construed that the notings in the seized sheet represent the true state of affairs of the transaction. Both the cheque and cash payments have been mentioned in the same sheet. The appellant has accounted for the cheque component in its books of account. The rules of evidence/appreciation of evidence as elaborated by the

various Courts stipulates that the evidentiary document has to be read consistently and a holistic view taken. It is also pertinent to mention here that M/s Pathik Constructions had claimed this amount of Rs.5,94,96,000/- paid in cash to be set off against its unaccounted cash receipts which has been allowed by the Hon'ble ITAT, Mumbai. This claim made by M/s Pathik Constructions is an admission of the fact that it had paid Rs.5,94,96,000/- in cash to the appellant though in response to notice issued u/s 133(6) issued by the AO it had confirmed only the cheque payment of Rs. 2,22,00,000/- and remained silent on the issue of cash payment of Rs.5,94,96,000/-. In any sale/purchase transaction, the consideration involved would be the same for both the seller and the buyer.

6.7. To sum up, in view of the discussions at paras 6.1 to 6.6 above, I am of the considered opinion that the cash component of Rs. 5,94,96,000/- of the sales consideration on account of sale of Plot No.31, sect-47, Dronagiri has to be taxed in the hands of the appellant. The addition made by the Assessing Officer is sustained. The appellant's ground of appeal on this issue is dismissed."

011. As the learned CIT (A) has confirmed the addition of ₹5.94 crore in the hands of the assessee, this appeal is filed before us.
012. At the time of hearing of the appeal the assessee has preferred an additional ground of appeal challenging the reopening of the assessment and various facets of reopening. The assessee submitted by all these grounds of appeal against the reopening are legal, jurisdictional, does not require any fresh investigation of facts, and therefore, may be admitted.



013. The Id DR vehemently opposed this additional grounds against reopening of assessment stating that same were not raised before CIT (A).
014. We find that challenge to reopening of reassessment can be made at any time during the appellate proceedings, as it is purely legal ground going to jurisdiction of reassessment. No further facts are required to be investigated, hence it is admitted.
015. The assessee also raised the issue before us that coordinate bench in ITA No. 1498 and 1499/Mum/2012 dated 13th February 2015 in case of society has categorically stated that the above sum has been received by the society and not by the assessee.
016. Before us, the learned authorized representative challenge the reopening of the assessment. He referred to the notice of reopening placed at page number 33 of the paper book wherein the notice issued under section 148 of the IT Act was placed. He further referred to page No. 31, wherein the original assessment order passed under section 143 (3) of the Act, dated 16th December 2010 is also placed. He referred to the reasons of reopening placed at page No. 37 to 38 of the Paper Book supplied by the learned assessing officer vide letter dated 12th March, 2015. He further referred to page No. 39 which is the form of recording of the reasons for initiating proceedings under section 148 of the Act and obtaining the approval of the Commissioner of income tax. In that form the approval is granted by the CIT (A)-28, Mumbai dated 24th March, 2015. He further referred to the provisions of section 147 of the Act and stated that the first proviso is attracted to the whole case. The reassessment is beyond the period of four years. He challenged the validity of reopening of assessment for the following reasons:-
- i. The reasons recorded by the learned assessing officer at page number 38 of the paper book does not show that there is any failure on part of the assessee to fully and truly disclose any material facts. If in the reasons



recorded if no such facts are mentioned, the reassessment notice issued by the learned assessing officer cannot be held to be valid.

- ii. It was further stated that letter dated 23rd February, 2015 to the Deputy Commissioner of income tax Circle-28 (2), Mumbai issued by the ITO, Ward-3, New panvel clearly shows that action is required to be taken not in the hands of the assessee. He extensively referred that what is the information available with the learned assessing officer. He submitted that necessary action was required to be taken in the hands of 'Jai Ganesh Cooperative Housing Society'. That society is a non-filer, as it did not have any Permanent Account Number. The notice was issued under section 148 of the Act on 4th February 2013. The above sum was also added in the hands of that society by an order under section 144 read with section 147 of the Act on 24 March 2014 wherein the total income of that entity was determined at ₹81,626,625. As the demand could not be recovered from the said cooperative housing society, as it was not in existence, the learned Assessing Officer noted that the members of the cooperative housing society are all farmers and they are illiterate. They do not know much about the transaction, while going through the sale of the agreement of the assessee society it was noted that the 'Jai Ganesh Cooperative Housing Society' has assigned all the rights, title, interest and benefits to the assessee partnership firm. Therefore, it was intimated that it was the assessee who executed the whole transaction. It was further noted that on going through the whole sale agreement it was found that the sale consideration was to the tune of Rs. 2.2 crores this amount was received by the assessee on behalf of 'Jai Ganesh Cooperative Housing Society'. The assessee



executed the whole transaction in the name of that cooperative society. Therefore, summon under section 131 of the Act was issued to Shri Manohar Desai, who is an office assistant in OM Developers. In view of this discussion, it appears that the income is taxable in the case of Om Developers based on the information received from by the joint Commissioner of income tax (OSD) Mumbai. Therefore, this letter is the basis of reopening of the assessment and therefore, the information received did not have any link with the income is kept in the hands of the assessee. He further stated by submitting the list of dates and events stating that there is no live link between the reasons recorded and escapement of income in the hands of the assessee.

- iii. He further challenged the reopening of the assessment is bad because of the satisfaction/approval granted by the Commissioner of income tax – 28 Mumbai holding that “yes I am satisfied that it is a fit case for issue of notice under section 148 of the Income Tax Act”. According to the learned authorized representative, this is not the good satisfaction and therefore, on this ground also the reopening of the assessment should be quashed.
- iv. On the merits of the addition he referred to the documents submitted at page number 101 and 106. He submitted that the above sum is not chargeable to tax in the hands of the assessee. He submitted that the addition has been made on the basis of the seat of paper seized as per annexure O – 2 at the premises of the other party during search which has been reproduced at page number 3 of the assessment order. The above paper clearly states that the amounts have been paid to the members of the cooperative society. As



the recipients are the members of the cooperative society and the payer is the person from whom the paper was seized i.e. Pathik constructions, assessee has nothing to do with the above transaction. The assessee firm has received the consideration of ₹ 222 Lacs as a confirming party and therefore the above sum has been included in the total income of the assessee. He further stated that the cash component and the cheque component of the world transaction has been taxed in the hands of the cooperative society. Even otherwise, it was stated that there is no information available on record that the assessee has received the above sum and therefore it cannot be taxed in the hands of the assessee.

017. The learned departmental representative vehemently submitted that that reopening is valid as reasons were recorded properly, there is a tangible material, approval granted is in order.
018. We have carefully considered the rival contention and perused the orders of the lower authorities. The facts are already been culled out hereinbefore. Succinctly, it shows that CIDCO as police agreement executed on 13/10/2006 least out of plot number 31 and measuring 5549.59 m² to a co-operative society consisting of 37 members in view of 12.5% scheme for project-affected persons. The agreement to transfer & between wherein the sale consideration was determined at ₹ 22,198,360 paid to individual members of the society is the members were the real onus of the plot of land. Thereafter the permission of CIDCO by agreement of assignment come sale was entered into between the society, assessee and other party Pathik constructions wherein the consideration of ₹ 222 lakhs was paid assessee has shown the above consideration for the year ended on 31/3/2008 as income. The cooperative society on behalf of its individual members entered into a tripartite agreement among itself, CIDCO and Pathik construction on 24/4/2007 for transfer of the



rights in the said leasehold land to Pathik construction. During search on Pathik construction on 18/2/2009 a loose paper was seized where the mention of cheque payment of ₹ 222 lakhs and cash payment of ₹ 59,496,000 was found. Based on that paper the AO inferred that above payment was made to the assessee and therefore it resulted into the addition. Accordingly reopening of the assessment took place and the addition was made. Assessee has challenged the reopening of the assessment. The reasons for reopening were triggered based on the letter dated 23/2/2015 from the income tax officer, Ward - 3, New Panvel wherein it was specifically mentioned that the cooperative society has received the consideration of ₹ 59,496,000 in cash as per the report of the joint Commissioner of income tax, Mumbai as per letter dated 2/2/2012 for necessary action against the cooperative society. The cooperative society was found and non-filer of the return of income. The assessment proceedings took place wherein it was found that assessee society has 37 members who are project affected people accordingly the assessment under section 144 read with section 147 of the income tax act was passed on 24/3/2014 in the hands of the cooperative society wherein the cash receipt of ₹ 59,496,000 along with a sum of ₹ 22,130,625 was added to the income of the society. As the above demand could not be recovered because of the cooperative society was not in existence. The members of the cooperative society were found to be farmers and illiterate who do not know much about the transaction. It was further noted that cooperative society has assigned all the rights, title, interest and benefits to the assessee. Therefore, it was noted that as the assessee has received the sale consideration of ₹ 222 lakhs the above sum of cash was also received by the assessee on behalf of the cooperative society as assessee executed the world transaction in the name of the cooperative society. Someone under section 131 of the act was issued to Mr. Manohar Desai, an office assistant of the assessee. From his statement the permanent account number of the assessee and assessment jurisdiction was found. Accordingly, it was communicated to the assessing officer of the



assessee stating that it appears that the income is taxable in the hands of the assessee. Accordingly recorded the reasons for reopening of the assessment stating that assessee has filed return of income on 19/9/2018 declaring a total income of ₹ 6,316,300/-. The regular assessment took place under section 143 (3) on 20/12/2010 where the total income of the assessee was assessed at ₹ 7,106,530. The reasons recorded also stated that assessee has shown ₹ 22,488,685/- as sale from the cooperative society, which was, credited to the profit and loss account however total sum of ₹ 81,626,625 should have been recorded as income and therefore ₹ 59,137,940/- chargeable to tax has escaped the assessment. The approval under section 151 was also obtained from the Commissioner of income tax – 28, Mumbai who granted approval stating that “yes, I am satisfied that it is a fit case for issue of notice under section 148 of the act” on 24/3/2015.

019. Meanwhile ITA number 542/Pun/2016 an ITA number 2921/PUN/2016 for assessment year 2008 – 09 in case of Jai Ganesh cooperative housing society Ltd and appeal of the learned AO were decided on 8/6/2022. The above appeal was heard in absence of the assessee and an ex parte order was passed. As per paragraph number 3 of that order where the assessee in cross appeal challenge the correctness of addition of cash component of ₹ 59,496,000, the coordinate bench held in paragraph number 4 as under:-

“4. We find no substance in revenue’s foregoing arguments supporting the impugned addition. This is for the precise reason that the alleged seized document itself rebut the presumption in assessee’s favour once it’s members only had received the payment who are separately assessable in their individual capacities. We further make it clear that the learned lower authorities have nowhere quoted any other cogent evidence since they have only gone by the above seized document. We accordingly accept the assessee soul substance in grievance as well as its cross appeal ITA number 2921/M/2016 in very terms.”

Accordingly, appeal of the assessee was allowed and appeal of the revenue was dismissed. Therefore by that order it has been



conclusively held by the coordinate bench that the above sum of ₹ 59,496,000/- is taxable in the hands of the members of the society. It was further held that from the seized documents only inference that can be drawn is that the members of the society has received the above payment. Therefore, now the issue has reached a finality so far as the order of the ITAT has categorically held that the amount of cash payment mentioned in that paper is chargeable to tax in the hands of the individual members of the society. Nothing has been shown to us that whether the revenue has accepted the order of the coordinate bench in the case of society or not.

020. Further, on the issue of reopening the original assessment under section 143 (3) was passed on 20/12/2010. Notice under section 148 of the income tax act was issued on 25/3/2015. Therefore, the reopening in the case of the assessee is initiated after four years from the end of the assessment year if any income chargeable to tax has escaped assessment for such assessment year by reason of failure on part of the assessee to disclose fully and truly all material facts necessary for assessment year for that assessment year. On perusal of the reasons recorded, we do not find that there is any allegation of failure on the part of the assessee to disclose full and true material facts. The learned authorized representative has supported his argument by placing reliance on the decision of the honourable Bombay High Court in case of German remedies limited versus Deputy Commissioner of Income Tax 287 ITR 494 (Bom) wherein in absence of any such allegation, the notice was set-aside. Therefore, respectfully following the decision of the honourable Bombay High Court, in absence of any allegation of such failure on part of the assessee, reopening of the assessment cannot be sustained. Further in the paragraph number 16 (2) the honourable Bombay High Court in case of Sea Sagar Construction Co V V.A. Nair, Income-tax Officer [2022] 141 taxmann.com 107 (Bombay) has also taken a view that

“Even for a moment we assume that the observations of the Tribunal could be stated to be a finding or a direction as contemplated by Section 150 of the Act, still in view of the proviso to Section 147 of the Act, the reopening cannot be stated to be valid. There is nothing in the reasons for reopening to indicate that there was any escapement of income due to failure on the part of the assessee to truly and fully disclose material fact. We would say that even in the reasons recorded, there is not even a finding that there was any such failure.”

Further honourable Bombay High Court in case of Godrej & Boyce Mfg. Co. Ltd. versus ACIT [2022] 140 taxmann.com 345 (Bombay) has also taken on identical view is under:-

7. Mr. Pinto relied upon a judgment of this Court in *Crompton Greaves Ltd. v. Asstt. CIT* [2015] 55 taxmann.com 59/229 Taxman 545 to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under sections 147 and 148 of the Act. We would certainly agree with Mr. Pinto but as held in *Crompton Greaves Ltd. (supra)*, this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled from the reasons in support of the notice seeking to reopen assessment, that will certainly not be fatal to the assumption of jurisdiction under sections 147 and 148 of the Act. The Court held "However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under sections 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to section 147 of the Act".

8. Having considered the reasons we are satisfied that even the reasons does not indicate there was failure to disclose truly and fully material facts. In fact there was nothing to indicate non-disclosure. Reasons itself rely on the balance-sheet and computation of income filed.

021. Further there is no mention of name of the assessee or any of the partners in the seized documents for receipt of impugned sum.
022. Even otherwise, intimation from ITO ward 3 New Panvel categorically stated that addition is made in the hands of society, but tax could not be recovered. For this reason, the sum cannot be taxed



in the hands of the assessee, without any material against the assessee.

023. In view of the above facts, applying the principles laid down by the honourable Bombay High Court in the above judicial precedents, we find that the reasons recorded for reopening of the assessment, in absence of any allegation on the part of the assessee to fully and truly disclosed material facts in the reasons recorded, are not sustainable.

024. Statement u/s 131 of Mr. Manohar Desai also do not state that cash is received by assessee. Letter of ITO ward 3 panel says that he has only stated PAN and Jurisdictional AO of the Assessee. This is evident in last para of the letter dated 23/02/2015.

025. Even otherwise on the merits the coordinate bench in case of the cooperative society has categorically held that income is chargeable to tax in the hands of the members of the society, therefore, we are not in a position to give any other finding with respect to the receipt of above sum and its addition in the hands of the assessee on the merits also.

026. Accordingly, reopening of the assessment in case of the assessee is quashed.

027. Appeal of the assessee is allowed.

Order pronounced in the open court on 18.09. 2023.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 18.09. 2023

Sudip Sarkar, Sr.PS/ Dragon

Copy of the Order forwarded to :

1. The Appellant



2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

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