

आयकर अपीलीय अधिकरण  
कोलकाता 'एसएमसी' पीठ, कोलकाता में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'SMC' BENCH, KOLKATA**

श्री राजेश कुमार, लेखा सदस्य

एवं

श्री संजय शर्मा, न्यायिक सदस्य

के समक्ष

Before

**SRI RAJESH KUMAR, ACCOUNTANT MEMBER**

&

**SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. Nos.: 103 & 104/KOL/2022**

**Assessment Years: 2012-13 & 2013-14**

***Mohan Kumar Roy.....Appellant***  
***[PAN: AEQPR 4761 P]***

***Vs.***

***ITO, Ward-29(1), Kolkata.....Respondent***

**Appearances by:**

***Assessee represented by – Sh. Miraj D. Shah, A/R.***

***Department represented by – Sh. Gautam Patra, Addl. CIT, D/R.***

Date of concluding the hearing : July 31<sup>st</sup>, 2023

Date of pronouncing the order : September 22<sup>nd</sup>, 2023

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

Both these appeals preferred by the assessee are against separate orders of Learned Commissioner of Income-tax (Appeals)-NFAC, Delhi [hereinafter referred to Ld. 'CIT(A)'] dated 10.01.2022 & 29.12.2021 for the Assessment Years (in short 'AY') 2012-13 & 2013-14, respectively.

**ITA No. 103/KOL/2022**

2. The assessee has challenged the order of Ld. CIT(A) on merit confirming the addition to the tune of Rs. 17,99,521/- as made by the Assessing Officer (in short ld. 'AO') u/s 68 of the Act in respect of loans. The assessee has also raised additional ground before the Bench in terms of Rule 11 of ITAT Rules, 1963 which is reproduced below:

*“a) For that the reopening u/s 148 of the IT Act 1961 was bad in law and hence the reopening and the assessment order be quashed.”*

3. Ld. Counsel for the assessee submitted that the issue raised in the additional ground is purely a legal issue challenging the legality of the assessment framed by the AO u/s 143(3) r.w.s. 147 of the Act dated 06.12.2019. Ld. A/R submitted that the issue raised is purely a legal issue which goes to the root of the matter and that the facts involved in the additional ground are available before the Tribunal and thus, no further verification of facts are required either before the AO or Ld. CIT(A). Ld. A/R therefore prayed that the issue raised in the additional ground may kindly be admitted for adjudication and in defence of his arguments, he relied on the decisions of Hon'ble Apex Court in *National Thermal Power Co. Ltd. Vs. CIT [1998] 229 ITR 383 (SC)* and *Jute Corporation of India Ltd. Vs. CIT [1991] 187 ITR 688 (SC)*.

4. Ld. D/R on the other hand, submitted that the issue was not raised either before the AO or the first appellate authority and therefore, the same kindly be dismissed.

5. After hearing the rival contentions and perusing the material on record, we find that the assessee has challenged the legality of the assessment framed u/s 143(3) r.w.s. 147 of the Act on the ground that the additions as envisaged in the reasons record u/s 148 of the Act were not made in the assessment framed and therefore the AO has no jurisdiction to make other additions in respect of loans from two parties amounting to Rs. 17,99,529/-. We note that the issue raised by the assessee is purely a legal issue involving no further verification of facts at the end of the authorities below. Therefore, we are inclined to admit the same for adjudication by following the ratio laid down by the Hon'ble Apex Court in the cases of *National Thermal Power Co. Ltd. (supra)* and *Jute Corporation of India Ltd. (supra)*. In the case of *National Thermal Power Co. Ltd. (supra)* Hon'ble Court has held as under:

*“Under section 254, the Tribunal may after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is, thus, expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. There is no reason why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.”*

5.1. In the case of *Jute Corporation of India Ltd. (supra)* also Hon'ble Court has held as under:

*“In the case of Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688, this court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.*

*The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal (vide, e.g., CIT v. Anand Prasad [1981] 128 ITR 388 (Delhi), CIT v. Karamchand Premchand P. Ltd. [1969] 74 ITR 254 (Guj) and CIT v. Cellulose Products of India Ltd. [1985] 151 ITR 499 (Guj) [FB]). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*

*The reframed question, therefore, is answered in the affirmative, i.e. the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the*

*proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits.”*

6. We also find merit in the submission of the assessee that the additional ground if not taken in the appeal memorandum or before the lower authorities the appellate authority has jurisdiction to entertain and alternatively be raised during the course of hearing which is in consonance with the ratio laid down by the Hon'ble Apex Court in the case of *CIT Vs. Mahalakshmi Textile Mills Ltd. [1967] 66 ITR 710 (SC)* wherein the Hon'ble Court has held as under:

*“There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal: If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him.”*

7. Accordingly, we admit the additional ground raised by the assessee for adjudication.

8. At the outset, Ld. Counsel for the assessee drew our attention to the assessment framed u/s 143(3) r.w.s. 147 of the Act dated 06.12.2019 and pointed out that there were two additions made in the said order. The first addition is in respect of loan taken from Sh. Subhas Biswas of Rs. 10 lakh which according to the AO remained unexplained. Consequently, the AO disallowed the interest of Rs. 79,521/- credited on the said loan resulting into gross addition on account of loan and interest thereon the to tune

of Rs. 10,79,521/-. Similarly, Rs. 7,20,000/- was added by the AO on account of loan taken from Smt. Sangeeta Roy. Ld. Counsel for the assessee drew our attention by referring to the reasons recorded a copy of which is placed at page no. 14 to 21 of the paperbook and pointed out that these two issues were not the subject matter of the reasons recorded u/s 148(2) of the Act. Ld. A/R prayed that the addition made by the AO in the order passed u/s 143(3) r.w.s. 147 of the Act are without the valid jurisdiction and therefore, the assessment framed may kindly be quashed. In support of his argument, Ld. A/R relied on the decision of Hon'ble Calcutta High Court in the case of *CIT Vs. M/S Infinity Infotech Parks Ltd ITAT No.60 of 2014 in GA No.1736 of 2014* besides relying on *Ranbaxy Laboratory Ltd. Vs CIT 336 ITR 136 (Del)* and *CIT Vs. Jet Airways Ltd 331 ITR 236 (Bom)*, which have been followed by the Coordinate Bench of the Tribunal in the case of *Shree Prakash Chhawchharia (HUF) Vs ITO Ward-36(2) ITA No.1622/Kol/2019 A.Y. 2011-12.*

9. Ld. D/R on the other hand, submitted that the issue raised by the assessee is a new issue which was not raised before the first appellate authority and therefore, he prayed that time may be allowed to file the reply in this case.

10. After hearing the rival contentions and perusing the material on record, we note that the case of the assessee has been re-opened u/s 147 of the Act by issuing notice u/s 148 of the Act dated 26.03.2019. We observe from the reasons recorded u/s 148(2) of the Act that the AO has re-opened the assessment on the ground that Rs. 6 Lakh has escaped assessment within the

meaning of Section 147 of the Act as the assessee has not disclosed the full and true particulars necessary for the assessment. The AO noted that Sh. Mohan Kumar Roy has purchased a property (a piece of land measuring 02 cottah 08 chittack, 41 sq.feet) for a consideration of Rs. 18 Lakh with two partners namely Mrs. Archana Roy and Mr. Mukesh Roy and the deed of conveyance was registered on 23.09.2011 in the office of ADSR Alipore, South 24 Parganas. According to the AO the assessee's share in the said investment is Rs. 6 lakh which has not shown as addition to his assets. For the sake of ready reference, the reasons are reproduced as under:

*“During the course of scrutiny proceedings, which were reopened u/s 147, for the AY 2013-14 of Smt Archana Roy (PAN- AUAPR9308J), (who is wife of the assessee Sri Mukesh Roy-another partner in project), it was revealed that the assessee Sri Mohan kumar Roy, in the financial year 2011-12 has purchased a property a piece and parcel of land measuring 02 cottah 08 chittack, 41 sq.feet. together with an old two storied building having municipal premises A-79 lake gardens, PS. Lake, Kolkata-700045 for a total purchase consideration of Rs. 18 lacs along with two other partners being Mrs. Archana Roy and Mr. Mukesh Roy (AKKPR3051N). The deed of conveyance was registered on 23/09/2011 in the office of ADSR Alipore, South 24 parganas.*

*As there are three parties involved the assessee share of payment comes to Rs. 6 lacs. The return filed by the assessee for the Asst. Year 2011-12 and 2012-13 was perused. It was found that the assessee has filed ITR 4 in the Asst. Year'2011-12 and 2012-13 and the assessee has not shown any addition to his assets to the tune of Rs 6 lacs.*

*On careful perusal, it was found that Mrs. Archana Roy (wife of assessee) has never filed any return but has managed to invest Rs. 600000/- with Mr. Mukesh Roy in the aforesaid property. Her case was later reopened u/s147. Thus the creditworthiness of Archana Roy is also not established.*

*On checking the records of e-filing portal it is found that the assessee has filed its return for AY 2012-13 on 25/07/2012. The return was perused and it was revealed that the assessee has not shown or mentioned any such transaction or income in the return filed.*

*From the details discussed above, it is evident that the assessee has done the above investment from the funds not declared in its books. This clearly depicts that assessee's income has escaped assessment and has not been offered for tax.*

*The out of books investment as discussed above is Rs. 600000/-. Based on these, I have reasons to believe the income chargeable to tax has escaped assessment to the tune of Rs.6,00,000/- within the meaning of section 147 of the Income Tax Act and the assessee has not disclosed full and truly all material facts necessary for her assessment.*

*The data available has been carefully perused by me and findings and h reasons to believe is based on facts and information received and it is not a case of change in opinion.*

*Accordingly, proposal is sent to Ld. JCIT, R-29, KOLKATA for his kind approval.”*

11. We note from the assessment order that the addition was not made in respect of Rs. 6 lakh which according to the AO was undisclosed in the assets of the assessee. However, the AO made the addition in respect of loans as discussed above of Rs. 17,92,521/-. In our opinion, the AO has no jurisdiction to make any other addition when the issues which were subject matter of the reasons recorded of Section 148(2) of the Act were not added in the assessment order. The case of the assessee is supported by the decision of Coordinate Bench in the case of *Shree Prakash Chhawchharia (HUF) Vs. ITO (supra)* wherein the Hon'ble Coordinate Bench has held that the AO has no jurisdiction to make the addition in respect of any other item which were not the subject matter of the reasons recorded when the issues which were

the subject matter of the reasons recorded u/s 148(2) of the Act were not added to the income of the assessee. We note that the Coordinate Bench has followed the decision of Hon'ble Calcutta High Court in the case of *CIT Vs. M/S Infinity Infotech Parks Ltd (supra)* on the same issue. The Coordinate Bench has also followed the decision of Hon'ble Bombay High Court in the case of *CIT Vs. Jet Airways (I) Ltd.* reported in [2011] 331 ITR 236 (Bombay) and *Ranbaxy Laboratories Ltd. Vs. CIT* [2011] 336 ITR 136 (Delhi).

12. Therefore, respectfully following the ratio laid down by the Hon'ble Courts we are hereby quash the assessment framed by the AO u/s 143(3) r.w.s. 147 of the Act and accordingly, the additional ground raised by the assessee is allowed.

13. Since we have allowed the legal issue in favour of the assessee the grounds raised on merits are not being adjudicated at this stage.

#### **ITA No. 104/KOL/2022**

14. Since the issue raised in the additional ground by the assessee is identical to the issue as decided by us in ITA No. 103/KOL/2022. Accordingly, the additional ground raised by the assessee is admitted for adjudication.

15. Ld. Counsel for the assessee at the outset submitted that the assessment in this case was framed u/s 143(3) of the Act accepting the returned income vide order dated 19.02.2016. Thereafter the case of the assessee was re-opened u/s 147 of the Act by issuing notice u/s 148 of the Act on the ground that income of the assessee to the tune of Rs. 19,11,049/- has escaped assessment

within the meaning of Section 147 of the Act as the assessee has not disclosed full and true facts necessary for the assessment of income. Ld. A/R also submitted that by referring to the reasons recorded a copy of which is placed at page 5 of the paper book that the assessee in the instant financial year has constructed a three-storied building consisting three flats on each floor on a piece of land measuring 02 cottah 08 chittack 41 sq.feet at A-79, Lake Gardens, Kolkata-700 045 and the total expense to the tune of Rs. 3,70,000/- for tenant evacuation and Rs. 55,05,646/- for construction of all these flats. The AO noted in the reasons recorded that these costs were borne by the assessee along with other two partners namely Mrs. Archana Roy and Mr. Mukesh Roy. The AO also noted that all these three partners got one flat each as their share on completion of the project and the value of each flat was found to be of Rs. 70,52,500/-. In the second para of the reasons recorded Ld. Counsel for the assessee pointed out that the AO has noted that the share of expense of the assessee comes to Rs. 19,58,549/- which has not been shown in the books of accounts of the assessee. On the contrary, Ld. Counsel for the assessee submitted that the assessee has shown Rs. 46,68,422/- under the head 'current assets', subtitled 'investment in A-79, Lake Gardens' which is much more than the amount stated by the AO to have not been disclosed. Ld. A/R submitted that there was total non-application of mind by the AO. Ld. A/R also referred to the original assessment framed a copy of which is placed at page 56 to 63 of the paper book and stated that the issue has been discussed by the AO during the course of assessment proceedings by calling upon to furnish the necessary details from the assessee

and a complete para has been devoted in the assessment order on the said issue. Ld. A/R submitted that since the issue has been examined by the AO in the assessment proceedings which culminated in framing of assessment u/s 143(3) of the Act dated 19.02.2016 and thereafter, the re-opening is merely on the issue which has been examined by the AO during the original assessment proceedings as stated herein above that too beyond a period of four years is not permissible under the Act in terms of the proviso to Section 147 of the Act. Ld. A/R submitted that the said proviso provides that the re-opening after a period of four years can only be made if the escapement of income has resulted from the non-disclosure of any material fact either in the return of income or in the assessment proceedings. Ld. A/R stated in the present case there has not been any non-disclosure of material fact on the part of the assessee. Therefore, the re-opening of assessment is bad in law. Ld. A/R in defence of his argument relied on the decision of *Ranglal Bagaria HUF Vs. ACIT* reported in [2016] 384 ITR 477 (Calcutta). A/R also relied on the decision of Hon'ble Apex Court in the case of *ACIT Vs. CEAT Ltd.* reported in [2022] 449 ITR 171 (SC). Ld. A/R pointed out that in the case before the Hon'ble Apex Court the issue was whether the notice issued after a period of four years after relevant assessment year where the assessment has been framed u/s 143(3) of the Act, proviso to Section 147 of the Act shall apply. In that case Hon'ble Apex Court has held that the AO has to first demonstrate the failure on the part of the petitioner failing which the re-opening is bad in law. Ld. A/R referred to the last para of the decision of the Hon'ble Apex Court wherein the Court has upheld the decision of the Hon'ble

High Court setting aside the re-opening notice issued u/s 148 of the Act. Ld. A/R therefore, prayed that in view of the latest decision of the Hon'ble Apex Court, the re-opening may be quashed

16. Ld. D/R on the other hand submitted that the issue has been raised for the first time by Ld. Counsel for the assessee and therefore, the same may kindly not be admitted and be dismissed.

17. After hearing the rival contentions and perusing the material on record, we find that undisputedly the case of the assessee has been re-opened u/s 147 of the Act by issuing notice u/s 148 of the Act on 26.03.2019 which is apparently after a period of four years from the end of relevant assessment year and therefore, the re-opening u/s 147 of the Act can only be made in terms of the first proviso to Section 147 of the Act. In the present case we note that the issue has been enquired into by the AO during the original assessment proceedings and in one para the AO has discussed the said issue in the assessment order passed u/s 143(3) of the Act dated 19.02.2016 meaning thereby that the issue which was the subject matter of the reasons recorded u/s 148 of the Act was examined in the original assessment proceedings which culminated in passing of assessment u/s 143(3) of the Act dated 19.02.2016. We note that the assessee has fully disclosed all the facts qua the said issue in the original assessment proceedings. Therefore, we do find that the reasons has been recorded by the AO without application of mind. We note that even the AO has recorded in the third para of the reasons that the assessee has not disclosed Rs. 19,58,548/- in the books of accounts whereas on the contrary we find in the balance sheet that the assessee has

disclosed Rs. 46,68,422/- as investment in A-79, Lake Gardens which also shows blatant non-application of mind on the part of the AO. Under these circumstances, we hold that there is no failure on the part of the assessee to disclose any material fact concerning the issues which were stated by the AO to have caused the escapement of income due to failure of the assessee truly and fully disclosure of the material fact. Accordingly, we quash the assessment framed by the AO by respectfully following the ratio laid down by the Hon'ble Apex Court in the case of *ACIT Vs. CEAT Ltd(supra)*.

18. In the result, both the appeals filed by the assessee are allowed.

***Kolkata, the 22<sup>nd</sup> September, 2023.***

*Sd/-*

[Sonjoy Sarma]  
Judicial Member

*Sd/-*

[Rajesh Kumar]  
Accountant Member

Dated: 22.09.2023

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

- 1. Mohan Kumar Roy, D/621, Lake Gardens, Kolkata-700 045.**
- 2. ITO, Ward-29(1), Kolkata.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

*//True copy //*

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata