

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

श्री संजय गर्ग, न्यायिक सदस्य
एवं
डॉ. मनीष बोरोड, लेखा सदस्य
के समक्ष

**Before
SRI SANJAY GARG, JUDICIAL MEMBER
&
DR. MANISH BORAD, ACCOUNTANT MEMBER**

**I.T.A. No.: 798/KOL/2023
Assessment Year: 2011-12**

***Artex Property Consultants (P) Ltd.....Appellant
[PAN: AALCA 0869 P]***

Vs.

ITO, Ward-4(3), Kolkata.....Respondent

Appearances:

Assessee represented by: Sh. Rajiva Kumar, A/R.

Department represented by: Sh. Umakanta Dhruvati, D/R.

Date of concluding the hearing : September 19th, 2023

Date of pronouncing the order : October 16th, 2023

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short 'AY') 2011-12 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the 'Act') by Id. Commissioner of Income Tax (Appeal)-NFAC, Delhi [in short Id. 'CIT(A)'] dated 23.05.2023 arising out of the Assessment

Order framed u/s 147 read with Section 143(3) of the Act dated 29.12.2018.

2. Registry has informed that the appeal is time barred by 9 days. Condonation application has been filed by the assessee. After perusing the same, we find force in the reasons mentioned therein and are satisfied that the assessee was prevented for reasonable cause in filing the instant appeal within statutory time limit. We, therefore, condone the delay and admit the appeal for adjudication.

3. The assessee is in appeal before this Tribunal raising the following grounds:

“1. That under the facts and circumstances of the case, the assessment made under section 147 of the Income Tax Act, 1961 is bad in law and need to be quashed.

2. That under the facts and circumstances of the case, the Ld. CIT(A) erred in confirming addition of a sum of ₹52,68,500/- made by the AO @1% of the share capital of ₹52,68,50,000/- raised by the assessee holding the same to be the commission income earned by the assessee by facilitating accommodation entry. The addition is unjustified and needs to be deleted.

3. The assessee craves leave to add, alter, amend or withdraw any ground or grounds of appeal before or at the time of hearing.”

4. The facts in brief are that are that the assessee is a private limited company engaged in real estate business. Loss of Rs. 11,093/- declared in the return of income for AY 2011-12 filed on 30.11.2012. Case selected for scrutiny and after carrying out detailed proceedings assessment u/s 143(3) of the Act was framed on 25.03.2014 assessing income at Rs. NIL. Thereafter based on information regarding deposit of unaccounted cash and layering

the same through several bank accounts of *Jama-Kharchi* companies, the assessee having received Rs. 81 Lakh during FY 2010-11 from one of such *Jama-Kharchi* concerns. Notice u/s 148 of the Act issued on 27.03.2018 after obtaining necessary approval. Thereafter re-assessment proceedings were carried out and so far as the issue for re-opening was concerned no addition was made for the amount of Rs. 81 Lakh received from M/s. Ashtavinayak Commodity Trade Pvt. Ltd. but income of Rs. 52,68,500/- estimated in the nature of commission at the rate of 1% of total share capital along with premium received during the year.

5. Aggrieved, the assessee preferred appeal before Id. CIT(A) but failed to succeed.

6. Aggrieved, the assessee is now in appeal before this Tribunal. Ld. Counsel for the assessee has stated that the re-assessment proceedings u/s 147 of the Act are bad in law and needs to be quashed as addition has not been made on the issue for which case was re-opened and therefore, if the AO does not assess the income for which the reasons were recorded u/s 147 of the Act then he cannot assess other income u/s 147 of the Act. Reliance placed on the judgment of Hon'ble Bombay High Court in the case of *CIT vs. Jet Airways (I) Ltd.* reported in *IT Appeal Nos. (L) 1526 of 2008 and 1714 of 2009* dated 12.04.2010.

7. On the other hand, Id. D/R vehemently argued supporting the orders of both the lower authorities.

8. We have heard rival contentions and perused the records placed before us. The assessee has raised legal ground stating that re-assessment proceedings are bad in law and deserves to be quashed. We notice that the assessee declared loss in the return of income which was subjected to scrutiny proceedings and the same were completed u/s 143(3) of the Act dated 25.03.2014. Perusal of the assessment order dated 25.03.2014 indicates that the assessee was asked for various information u/s 142(1) of the Act and details as called for were submitted and produced by the assessee. Further, the order also indicates that notices u/s 133(6) of the Act were issued to all the investors who have paid the share capital and share premium to the assessee company towards allotment of 2,50,125 equity shares. After examining all these details and making a disallowance u/s 14A of the Act income assessed at Rs. NIL.

9. We observe that thereafter based on the information received from DDIT (Inv.) it was found that the assessee is one of the beneficiaries of an alleged accommodation entry of Rs. 81 Lakh from M/s. Ashtavinayak Commodity Trade Pvt. Ltd. Based on this information re-assessment proceedings were carried out. However, ld. AO did not make any addition for the alleged accommodation entry received from M/s. Ashtavinayak Commodity Trade Pvt. Ltd. However, ld. AO made an addition for commission income at the rate of 1% of the total amount of share capital and share premium received during the year. The facts narrated above clearly indicates that ld. AO has not made any addition on the basis of the reasons for which the re-assessment proceedings were carried out and even though in the regular assessment proceedings complete details of

the amount received towards share capital and share premium received were examined by way of issuing notice u/s 133(6) of the Act and no addition has been made by the AO, examining very same details in the re-assessment proceedings and making addition towards commission income clearly tantamount to change of opinion. In the case of *Jet Airways (I) Ltd. (supra)* the Hon'ble Court has laid down the ratio as under:

“16. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

17. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147(1) and on the basis of the

precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh's case (supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147(1) as they stood after the amendment of 1-4-1989 continue to hold the field.

18. In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall, accordingly, stand answered against the revenue and in favour of the assessee. The appeal is, accordingly, dismissed. There shall be no order as to costs."

10. The above judgment of Hon'ble Jurisdictional High Court is squarely applicable on the facts of the instant case and since ld. AO did not make any addition for the reasons recorded and has made an addition for estimated commission income, such re-assessment proceedings become bad, illegal and deserves to be quashed. We, accordingly quash the re-assessment proceedings, set aside the order of ld. CIT(A) and allow ground no. 1 raised by the assessee on legal issue.

11. Ground no. 2 is raised on merits and the same is rendered infructuous as we have quashed the re-assessment proceedings.

12. Ground no. 3 is general in nature which needs no adjudication.

13. In the result, the appeal filed by the assessee is allowed.

Kolkata, the 16th October, 2023

Sd/-
[Sanjay Garg]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 16.10.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Artex Property Consultants (P) Ltd., Room No. 805, 8th Floor, 32, Ezra Street, Kolkata-700 001.**
- 2. ITO, Ward-4(3), Kolkata.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(D/R), Kolkata Benches, Kolkata.

// True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata