

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 666 & 667/Srt/2023 (AY: 2011-12 & 2012-13)

(Physical hearing)

Om Sai Stone Limited, 6/2060/2061-A Off No. 107, Vedant Building, Bhojbhai Ni Sheri, Mahidharpura, Surat-395003. PAN No. AAFCS 2403 R	Vs.	I.T.O., Ward-2(1)(4), Aaykar Bhavan, Majura Gate, Surat.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri P M Jagasheth, CA
Department represented by	Shri Vinod Kumar, Sr. DR
Date of institution of appeals	03/10/2023
Date of hearing	18/12/2023
Date of pronouncement	27/12/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. These two appeals by the assessee are directed against the separate orders of National Faceless Appeal Centre, Delhi (NFAC)/Commissioner of Income Tax (Appeals), (in short, the Id. CIT(A)) both dated 12/05/2023 for the Assessment Year (AY) 2011-12 and 2012-13 respectively. In both these appeals, the assessee has raised similar grounds of appeal. Certain facts in both these years are common, therefore, with the consent of parties both these appeals were clubbed, heard together and are being decided by this consolidated order to avoid the conflicting decision. For appreciation of facts, the appeal for the A.Y.

2011-12 in ITA No. 666/Srt/2023 is treated as a "lead case". In this appeal, the assessee has raised following grounds of appeal:

- "1. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of Income Tax (Appeals), has erred in confirming the action of assessing officer in re-opening the assessment u/s 147 of the Act and issuing notice u/s 148 of the Income Tax Act, 1961.*
- 2. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of Income Tax (Appeals), has erred in confirming the action of assessing officer in making addition of Rs. 2,13,85,461/- on the account of estimation of 1 percentage commission income on alleged accommodation entries to the tune of Rs. 2,13,85,41,461/-.*
- 3. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of Income Tax (Appeals), has not offered adequate opportunities to hear the case and passed ex parte order and hence the case may please be set aside and restored back to the CIT(A) or AO.*
- 4. It is therefore prayed that the above addition may please be deleted as learned members of the Tribunal may deem it proper.*
- 5. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of the hearing of the appeal."*

2. Perusal of record shows that impugned order was passed by Id CIT(A) on 12.05.2023 and the present appeal is filed on 03.10.2023, thus there is delay of 84 days in filing appeal before this Tribunal. The assessee has filed application for condonation of delay of 84 days in filing appeal. The application of assessee is supported by affidavit of Director of assessee company. The learned Authorised Representative (Id. AR) of the assessee submits that the order of Id. CIT(A) was passed on 12/05/2023 and that appeal should have been filed on or before 11/07/2023 from the date of communication. The Principal Officer of the assessee company could not take necessary steps for filing appeal as the assessee is not having any

business activity and the office is remained closed. Since the office remains closed, the Principal Officer has not checked their e-mail as it became non-operational. When the Principal Officer has checked the e-mail and found that the order has been uploaded on the ITBA Portal and immediately took step for filing appeal before the Tribunal. The Id. AR of the assessee submits that the delay in filing appeal is neither intentional nor deliberate. The assessee is not going to be benefited in filing appeal belatedly. The Id. AR of the assessee submits that the delay is not an inordinate delay. The assessee has good case on merit and is likely to succeed if the assessee is allowed to contest their case on merit.

3. On the other hand, the learned Senior Departmental Representative (Id. Sr. DR) for the revenue submits that the assessee has not disclosed a reasonable and plausible explanation for not filing appeal within the period of limitation. The cause of delay is not a reasonable one. The assessee should explain the reasons of condonation of delay with plausible and reasonable explanation. To support his view, the Id. Sr.DR for the revenue relied on the decision of Hon'ble Apex Court Civil Appeal No.7696 of 2021 in the case of Majji Sannemma @ Sanyasirao Vs Reddy Sridevi & Ors.
4. We have considered the submissions of both the parties and perused the contents of application for condonation of delay. The main contention of Id. AR of assessee is that the delay is neither intentional nor deliberate

for the reasons that there is no business activity in assessee company, therefore, they have not checked their e-mail and that as soon as they checked the e-mail, realised that the order has been passed by the Id. CIT(A) and that immediately filed appeal before the Tribunal. The Director of assessee Ankush Kalke has filed his affidavit to substantiate such contention. Considering the fact that there is no inordinate delay and the assessee has fairly accepted that the order was communicated only when they open their e-mail on 03/10/2023. We further find that the assessee is not going to be benefitted by filing appeal belatedly. Considering the fact that when the technical consideration and cause of substantial justice kept against each other, the cause of substantial justice must be prevailed. So far as objection of Id. Sr. DR for the revenue is concerned and reliance placed on decision of Hon'ble Supreme Court in Civil Appeal No.7696 of 2021 in the case of Majji Sannemma @ Sanyasirao Vs Reddy Sridevi & Ors., with utmost regard to the said decision, we find that facts of the present appeal are at variance. With utmost regard the ratio of the said decision, we find that in that case, the High Court has not observed that there was any sufficient cause explaining the huge delay of 1011 days. However, in the present appeal, the assessee categorically pleaded that as there are no business activities the email was non-operative and has shown sufficient and reasonable cause for filing appeal belatedly. Thus, considering the facts and

circumstances of the case, we condoned the delay in filing appeal and admit for adjudication. Now adverting to the merit of the case.

5. At the outset of hearing, the Id. AR of the assessee submits that he is not pressing ground No. 3 of appeal which relates to passing of ex parte order by Id. CIT(A) as the Id. CIT(A) also discussed the merit of the case while confirming the order of Assessing Officer. The Id. Sr. DR for revenue has raised no objection if the Bench may permit to not to press ground No. 3. Considering the contention of Id. AR of the assessee, ground No. 3 of the appeal is dismissed as not pressed.
6. Ground No. 1 of the appeal relates to validity of reopening under Section 147 of the Income Tax Act, 1961 (in short, the Act) and issuance of notice under Section 148 of the Act. The Id. AR of the assessee submits that the case of assessee was reopened on the basis of information received from ADIT (Inv.)-1, Surat. As per reasons recorded, information was received that the assessee was having bank account with Indusind Bank, Opera House Branch, Mumbai in which there was total credit of Rs. 5.44 crores. On the basis of such information, enquiry was conducted and statement of Director of assessee was recorded. In the statement, the Director of assessee stated that they are in the trading of diamond business and also received brokerage on sale of diamond. No detail was furnished by him. The Assessing Officer further recorded that Inspector conducted verification which reveals that no business activity was carried out by the

assessee. The Assessing Officer further recorded that such bank account was not disclosed in the return of income which shows that the assessee has not disclosed the credit entry to the extent of Rs. 5.44 crores in its books of account. The Assessing Officer further recorded that the share capital of assessee was increased to the extent of Rs. 41.00 lacs. The assessee received share capital from four entities which were managed by Pravin Kumar Jain, who was Hawala entry operator and has provided bogus entries. On the basis of such reasons recorded, the Assessing Officer was of the view that the income of assessee chargeable to tax has escaped assessment. The Assessing Officer issued notice under Section 148 of the Act on 24/03/2018. The Id. AR of the assessee submits that the reasons recorded itself was not correct. The assessee filed objection against reopening vide objection dated 11/10/2018. In the objection, the assessee stated that in the reasons recorded, it is noted that the assessee has not disclosed the bank account in its return of income. The assessee stated that such fact is recorded without properly verifying the return of income that the assessee has not shown Indusind bank account in his return of income. Such fact is not true. The assessee has accounted for all the transactions in the account of Indusind bank in its books of account and shown in the return of income, thus, it is apparent and factual mistake in the reasons recorded for reopening. On factual incorrect basis, notice under Section 148 of the Act cannot be

sustained. To support such view, the assessee relied upon the decision of Hon'ble Jurisdictional High Court in Sagar Enterprises Vs ACIT (2202) 257 ITR 335 (Guj).

7. On other issue of share capital, the assessee also denied such reasoning regarding bogus entry. The assessee submitted that the share issued to Aditi Exports and Vrajendra Thakkar are incorrect. The assessee also demanded satisfactory note issued by Pr.CIT. The Id. AR of the assessee further submits that the Assessing Officer without disposing of the objection of assessee, proceeded for reassessment. The Assessing Officer recorded that objection of assessee dated 11/10/2018 was disposed off vide speaking order on 12/10/2018. No such order disposing off objection was ever received or served upon the assessee. Thus, the action of Assessing officer without disposing of objection of assessee is *void ab initio*. The Assessing Officer made no addition with respect to share capital, however, the Assessing officer made addition of 1.00% of total sale and purchase of assessee aggregating of total sale and purchase of Rs. 213 crores @ 1.00 % thereby made addition of Rs. 2.13 crores. The Id. CIT(A) confirmed the action of Assessing Officer by taking a view that the Assessing Officer has established that the assessee was providing accommodation entry on commission basis. On validity of reopening, the Id. CIT(A) simply held that the Assessing Officer made reopening on the basis of credible information.

8. The Id. AR of the assessee submits that neither the reasons recorded was correct nor the objection of assessee was disposed off by the Assessing Officer. The Id. AR of the assessee submits that he has already filed audit report at the time of filing of original return of income. The details of bank account was duly reflected in audit report. The details of which are clearly visible in the column of 'cash and balances' wherein cash in hand, various branches of bank with name of bank is duly reflected. The Assessing Officer made addition of 1.0 % of sale and purchase without discussing the reply filed by assessee and the objection raised before the Assessing Officer. To support such view that the objection was not disposed off, the assessee relied upon the decision of Hon'ble Apex Court in GKN Driveshaft's (India) Ltd. Vs ITO (2002) 125 Taxman 963/259 ITR 19 (SC). The Id AR for the assessee submits that Hon'ble Bombay High Court decision in Prashant S. Joshi Vs ITO (2010) 189 Taxman 1 (Bombay) held that only reason recording for reopening are only reasons which can be considered for formation of belief and that reasons cannot be allowed to grow age and ingenuity by devising new grounds. No additional reasons subsequent to issuance of notice under Section 148 of the Act could be looked into for the purpose of determining validity of proceedings under Section 147 of the Act. To support such view, the Id. AR of the assessee relied upon the decision of Hon'ble Delhi High Court in the case of CIT Vs Living Media India Ltd. (2013) 35 taxmann.com 105

(Delhi), decision of this Tribunal (SMC) in Mukhtar Ramzan Shaikh Vs ITO in ITA No. 628 and 629/Srt/2023 order dated 12/12/2023.

9. On the merit of addition, the Id. AR of the assessee submitted that he has already accounted all the income in his return of income. The reopening was made from four years from the end of the relevant assessment year and there is no reference that the income of assessee has escaped from assessment on failure on the part of assessee.
10. On the other hand, the Id. Sr. DR for the revenue supported the orders of lower authorities. On the objection of assessee that the reasons recorded are not valid, the Id. Sr. DR. for the revenue submits that the sufficiency of reasons is not to be looked at the recording of reasons. Prima facie information for making belief that income has escaped assessment is sufficient for recording reasons and issued notice under Section 148 of the Act. To support such view, the Id. Sr. DR for the revenue relied upon the decision of Hon'ble Gujarat High Court in the case of Pushpak Bullion (P) Ltd. (2017) 85 taxmann.com 84 (Guj). The Id. Sr. DR for the revenue submits that the objection of assessee was duly considered by Assessing officer and was disposed off in speaking order. The case of assessee was reopened on two issues i.e. non-disclosure of bank account with Indusind bank and receipt of share capital. No addition in this year on account of share capital was made as the money was received in some other financial year. So far as first/

primary reasons recoded, with regard to non-disclosure of bank account with Indusind Bank, the Assessing Officer considered such transaction and made addition of commission income. The assessing officer made a addition on very reasonable basis. On various case laws, the Id. Sr. DR for the revenue submits that the ratio of all such decisions are not applicable as the facts in all cases are at variance.

11. At the time of hearing, the parties were making allegation/counter allegation about non-disposal of objection by Assessing Officer, therefore, we directed the Id. Sr. DR for the revenue to bring/call the assessment record to ascertain such fact.
12. We have considered the submissions of both the parties and perused the record and the orders of the lower authorities carefully. We have also deliberated upon the case laws relied upon by both the parties. We find that basically the case of assessee was reopened on two issues (i) that the assessee has not disclosed bank account with Indusind Bank and (ii) receipt of share application from entry provider. Admittedly, no addition on account of share capital is made in the impugned assessment year, so we are not giving any finding on such issue.
13. So far as reopening of first issue is with regard to non-disclosure of bank account with Indusind bank is concerned, we find that the assessee in its financial disclosure disclosing all the ban account including the impugned bank account. Details of which are available on page No. 22

of the paper book, which consists of bank details of Bank of India, Surat and Mumbai Branch, Indusind Bank, Ing Vasya bank and two bank account with UTI Bank. We further find that such details were duly furnished by assessee while filing objection before the Assessing Officer on 11/10/2018. In the objection, the assessee clearly mentioned that the reasons recorded are not true and is recorded without verifying the return of assessee. The reason for reopening of assessment itself shows that the case of the assessee opened on the basis of information received from Asst. Director of Income Tax (Inv.), Unit-I, Surat that the assessee has maintained bank account in Indusind Bank and in same total credit entry of Rs.5.44 Cr. was found. Further it mentioned that on verification of return of income revealed that the assessee has not disclosed this bank account in return of income. We find the Assessing Officer has even without verifying return of the assessee concluded that the assessee has not shown Indusind bank in return of income and such fact is not true. The assessee has accounted for the entries in Indusind bank in its books of account and shown in return of income and hence there is an apparent mistake in reasons recorded for reopening of assessment.

14. We further find that the assessee again vide their reply filed on 21/11/2018 furnished books of account, copy of audit report and bank statement of Indusind Bank and contended that the balance of bank is

tallied with schedule of cash and cheque balance shown in the audit report. The Assessing Officer instead of verifying the fact, has proceeded for making addition.

15. The Hon'ble Jurisdictional High Court in Sagar Enterprises Vs ACIT (supra) while considering the contention of the petitioner (assessee in that case) on sufficiency of reasons recorded held that on going through the entire reasons recorded by the revenue, it was apparent that the factor of non-filing of the return for the assessment year 1991-92 had overbearingly weighed with the Assessing Officer for arriving at the satisfaction about the failure on the part of the assessee and escapement of assessment of income. On the basis of the same, even for the sake of argument, if the contention raised by the Assessing Officer was taken into consideration, the settled legal position would be that in such circumstances, it would not be possible to say with certainty as to which factor would have weighed with the officer concerned and once it was shown that an irrelevant fact had been taken into consideration, to what extent the decision was vitiated would be difficult to say. On that count alone, the petition required to be accepted.

16. In view of the aforesaid factual and legal position, the reasons recorded by the Assessing Officer was not factually correct, therefore, the initiation of action under section 147 is not valid. Thus, the reasons

recorded are nothing but result of change of opinion. Hence, reopening is held as bad in law and the action thereon is *void ab initio*.

17. So far as objection of Id AR for the assessee that objections of the assessee was disposed off, is concerned, we called the assessment records and find that the assessing officer disposed the objection in a detailed and speaking order, which is available on record. We further find that said order was sent/ posted by way of speed post as postal receipt No. EG 491425927 IN is mentioned on first page of the order itself. Though, the postal receipt is not available on record of assessment. So we do not find any merit in such objection of Id AR for the assessee in this regard.
18. However, on merit, we find that the assessing officer for making addition considered the total transaction in all bank accounts of assessee on debit entry as well as credit entry and estimated 1.00% income on total transaction of Rs. 213.85 Crore, which can never be the basis for determining the income of assessee even on estimation basis. Mere bank entry is not sufficient for determining the income of assessee. Thus, even the additions were made without any valid base, which we direct to delete. Thus, the assessee also succeeded on merit. In the result, grounds of appeal raised by the assessee are allowed.
19. In the result, this appeal of assessee is allowed. Assessment record be return forthwith with acknowledgement.

ITA No. 667/Srt/2023 for A.Y. 2012-13

In this appeal, the assessee has raised following grounds of appeal:

- “1. *On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of Income Tax (Appeals), has erred in confirming the action of assessing officer in making addition of Rs. 49,50,000/- on the account of credits of shares capital and share premium treated as alleged unaccounted income introduced u/s 68 of the Act.*
2. *On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of Income Tax (Appeals), has erred in confirming the action of the Assessing Officer in making addition of Rs. 1,34,528/- on the account of disallowance of foreign travel expenses.*
3. *Appellant craves leave to add, alter or delete any ground(s) either before or in the course of the hearing of the appeal.”*

20. In this appeal, there is also a delay of 84 days in filing appeal. The Id.

AR of the assessee has also raised similar submissions for condonation of delay as raised for condoning of delay in ITA No. 666/Srt/2023 for the A.Y. 2011-12. Considering the fact that we condoned the delay of 84 days in the appeal for A.Y. 2011-12, therefore, similar delay of 84 in filing appeal is also condoned with similar observation. Now adverting to the merits of the case.

21. At the outset of hearing, the Id. AR of the assessee submits that the Assessing Officer while passing the assessment order under Section 143(3) of the Act on 31/03/2015, made various additions including of share capital and share premium of Rs. 2.49 crores, addition on account of disallowance of foreign travel expenses, exchange difference and disallowance under Section 43B of the Act.

22. On appeal before the Id. CIT(A), though the assessee has granted substantial relief on addition under Section 68 and set aside the other issues to the file of Assessing Officer either allowing partly or subject to verification. The Id. AR of the assessee submits that he fairly concedes that the Id. CIT(A) granted relief to the assessee without calling any remand report from the Assessing Officer, therefore, addition under Section 68 of the Act may also be restored back to the file of Assessing Officer to adjudicate the issue afresh by giving opportunity to the assessee alongwith other additions restored/set aside to Assessing Officer.
23. On the other hand, the Id. Sr. DR for the revenue submits that he has no objection if all the grounds of appeal wherein the assessee has not received any received may be restored to the Assessing Officer.
24. We have considered the submissions of both the parties and perused the orders of the lower authorities carefully. Considering the fact that both the parties have agreed that all the issues wherein the assessee has not received relief may be restored back to the file of Assessing Officer, we find merit in the contention of Id. AR of the assessee that while granting partial relief to the assessee on addition under Section 68 of the Act, no opportunity was given to the Assessing Officer before granting substantial relief to the assessee, therefore, we deem it appropriate to restore the addition under Section 68 of the Act to the file

of Assessing Officer to decide the issue afresh in accordance with law. Needless to direct that before passing the order, the assessee may be given fair and reasonable opportunity to the assessee. The assessee is also directed to be more vigilant in future and not to cause delay and seek adjournment without any valid reason and to furnish all the details and his submissions and evidences on various grounds of appeal raised by him, as soon as possible, if so desired without any further delay. In the result, the grounds of appeal raised by the assessee are allowed for statistical purposes.

25. In the result, the grounds of appeal raised by the assessee are allowed for statistical purpose.

26. In the result, appeal for A.Y. 2011-12 is allowed and appeal for A.Y. 2012-13 is allowed for statistical purposes.

Order pronounced in the open court on 27th December, 2023.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 27/12/2023

**Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat