

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.2769/Mum/2023
(Assessment Year :2011-12)**

Mr. Bhagwan Laxman Rokde Rohidas Wada Near Joker Cinema Kalyan (W) Maharashtra-421301	Vs.	ITO-3(1) 2 nd Floor, Rani Mansion Murbad Road Kalyan - 421 301
PAN/GIR No.AFOPR0976D		
(Appellant)	..	(Respondent)

Assessee by	Shri Jigar Mehta
Revenue by	Shri Ashok Kumar Ambastha
Date of Hearing	08/01/2024
Date of Pronouncement	29/01/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 14/06/2023 passed by NFAC Delhi for the quantum of assessment passed u/s. 143(3) r.w.s. 147 for the A.Y.2011-12.

2. In various grounds of appeal, assessee has challenged-

➤ *Firstly*, validity of reopening u/s.147 r.w.s.148;

- *Secondly*, addition of Rs.4,07,20,000/- as income from business by treating sale consideration in respect of property owned by the firm which was given for the development; and
- *Lastly*, addition on account of deposits made in the bank account for sum aggregating to Rs.49,85,200/-

3. The brief facts qua the legal issue raised before us are that, assessee is an individual which according to ld. AO he has not filed his return of income for the year under consideration. As per the information, AO found that as per the Non Filers Monitoring System (NMS), assessee has entered into transaction of sale of property pertaining to F.Y.2010-11 relevant to A.Y.2011-12, which was not disclosed. The 'reasons recorded' by the ld.AO are as under:-

01. The assessee Shri Bhagwan Laxman Rokde is an individual running a proprietary concern in the name and style M/s Onkar Developers. As per Non Filers Monitoring System (NMS) available in this office, the assessee has entered in to transactions of sale of immovable property valued at Rs 30,00,000/- or more during the Financial Year 2010-11 relevant to AY 2011-12. However, the assessee has failed to file return of income for AY 2017-12

02. In order to verify the transaction of sale of immovable property reported under Non Filers Monitoring System (NMS), an Individual Transactions Statement available in the ITD system has been verified. On verification of Individual Transactions Statement, it is found that the assessee has entered into transaction of sale of immovable property valued at Rs 4,07,20,000/- on 5/10/2010 duly registered in the office of Sub Registrar, Kalyan -2. Thus the transaction of sale of property

was pertaining to financial year 2010-11 relevant to AY 2011-12 However, the assessee has failed to offer any capital gains or income on the aforesaid transaction of sale of immovable property.

03. As per provision of section 139(1) of the Income Tax Act, 1961, the assessee was required to file return of income for AY 2011-12 on or before 31/07/2011, however, the assessee has failed to deliver the return. Moreover, the assessee has failed to comply with notices issued by this office under Non Filers Monitoring System from time to time. Therefore the transactions of sale of immovable property remained unexplained. In view of the above, I have reason to believe that the income of more than Rs.1,00,000/- for the A.Y. 2011-12 has escaped assessment within the meaning of Explanation 2 to the provision to Section 147 of the Income Tax Act, 1961.

4. In this case more than four year has been elapsed from the end of the assessment year under consideration. Hence necessary sanction to issue notice under section 148 of the Income Tax Act 1961 may kindly be accorded as per provisions of section 151 of the Income Tax Act 1961.

4. Accordingly, notice u/s.148 was issued on 26/03/2018. Before the ld.AO assessee filed objection from the reasons recorded wherein he has categorically submitted that assessee is neither sold any property nor has purchased any immovable property during this year. The specific objection of the assessee reads as under:-

“I am in receipt of the copy of reasons recorded on 28.02.2018 for the purpose of reopening assessment in my case. The copy of said reasons have been provided to me on 3rd Dec, 2018. The said reasons are summarized as under:

Your Honour has observed that I have entered into transaction of sale of immovable property amounting to Rs. 4,07,20,000/- on 05.10.2010 duly registered in the office of Sub Registrar, Kalyan-2 as per the Individual Transaction Statement available with your good office. It is further observed by Your Honour that because of the above transaction I was required to file my return of income u/s. 139(1) of the Act. Therefore Your Honour has opened that my income to the tune of Rs.4,07,20,000/- has escaped assessment.

In regard to the said reasons, I raise the following objections:

1. At the outset, Your Honour's attention is invited to the fact for the year under consideration, I have neither sold any property nor have purchased any Immovable property. In so far as the transaction of sale reported in ITS is concerned, it may be noted that the said transaction pertains to transfer of development rights by M/s. Sai Developers, a firm wherein I am a partner. The copy of the said sale agreement registered on 05.10.2010 is attached herewith marked as Annexure 'A' for your kind perusal. Thus, it may be appreciated that the reasons recorded by Your Honour are Itself not related to me and are Incorrect for the reason that I have not entered into any transaction of sale/purchase of Immovable property. Thus, the very reason on which the edifice of reopening is based itself collapses and the reopening falls.

2. Your Honour may note that I am a small businessman engaged in the business of trading into footware in the name and style of Rahul Footware and small civil contract in the name and style M/S. Omkar Developers. My income did not exceed the maximum amount which is chargeable to tax. Accordingly, Your Honour may appreciate that I was not required to file the

return of income for the year under consideration as per section 139(1) of the Act. Thus, as I was not required to furnish a return of income u/s. 139(1), there was no failure on my part and accordingly, invocation of explanation 2 to section 147 is completely unwarranted.

3. Your Honour has proceeded with the reopening on the erroneous premise that I had sold property during the year under consideration and further a mere suspicion that my income has escaped assessment in excess of Rs.1,00,000/- which is contrary to the facts of my case. Thus, the basis of reopening seems to be mere reasons to suspect" against the mandate of the section which is "reasons to believe". Further, it may be noted that it is a well settled principle that mere information recorded In 26AS/ ITS details without any independent verification by itself cannot be a reason for reopening of the assessment.

5. The ld. AO disposed of the assessee's objection vide order dated 13/12/2018 rejecting assessee's objection. The relevant extract for rejecting the objection of the assessee was as under:-

3. I have gone through the objections of the assess and considered me pudictal prommuncements relied upon by the assessee. I found the objectionof the asse inuruable The attesare has mainly emphasized on the fact that the sale of properes transaction is carried out by the partnership Firm M/s Sal Developer, where the is a partner and he has not carried out any sale of property transactio wa ha believe it formed on the basis of certain premise/circumstancial backgromalef the case that are discussed in details in the following para

4. The basis of reasons to believe in this case was formed with the following basis

1. It is seen from the ITS records that assessee is one of the two parties to immovable property transaction for Rs 4,07,20,000/ which was registered with the SRO vide registration No 10110/2010 on 25 10 2010 But there was no mention of PAN of M/s Sai Developers in the said registered document, thus not reported in the ITS

ii. On further verification from the Return Receipt Register maintained with the Systems (which includes physical returns entered into the systems), no return of income was filed by any entity namely M/s Sai Developers for A.Y.2011-12.

iii. Given the background that there is no mention of PAN and return of income filed in the name M/s Sai Developers. It could not ascertained, whether Sai Developers is a name given to the joint venture or Association of persons Just a appellation for co-ownership In such cases the co-owner/conventurer is Individually liable to Tax

iv. There also cannot be an excuse that PAN was not allotted at the time of registration of sale document, as they could have filed a belated return also. But till the date of re opening not a single return of income is found to have been filed by the so claimed Firm M/s Sai Developer

v. This transaction pertains to sale of property. When the sale of property transaction is not disclosed, the transaction of purchase of the property is also not disclosed. When both purchase & sale transaction of property is not disclosed in the so claimed Firm Sai Developer by way of filing of return of income, the existence of the so called firm is not known to the department and therefore, was not considered for re-opening of assessment for escapement of income

vi. As per ITS data, the information about cash deposits amounting to Rs 14,50,000/ Axis Bank and Rs. 10,50,000/- in Kalyan Janata Sahakari Bank, was available with the department and the assessee had sold immovable property during the year for Rs. 4,07,20,000/

vii. The assessee has failed to comply with the notices issued under Non-filer Monitoring System.

Thus, there is a reason to believe, that the assessee, in his individual capacity has carried out the sale of immovable property transaction and has not filed his return of income for the year under consideration.

6. Thereafter, the ld. AO held that assessee instead of explaining the transaction in respect of sale of property, cash deposits and other deposits appearing in the bank account has not given any proper explanation and has been stating that he has not carried out any such transaction. Thereafter, he has proceeded to treat the sale consideration of Rs.4,07,20,000/- as 'income from business and profession' after observing as under:-

"03. Now coming back to the main issues, as per available Information the assessee has sold a land situated at Village Gouripada Tal. Kalyan, Distt, Thane for a consideration of Rs. 4,07,20,000/ as per the registered document dated 20/10/2010 regd. Vide Regn No.10110/2010 on 25/10/2010

3.1. The assessee though claims to have carried out the transaction in the partnership firm M/s Sai Developers, has not produced any documentary evidence to establish that transaction has been duly disclosed and offered to tax in the said partnership firm Sai Developers

3.2 The assessee also did not submit any documentary evidence to state as to how the said land was purchased and what was the purchase consideration. He also did not state who received how much of share from the said sale of land. In the absence of any documentary evidence from the assessee.

3.3 From the perusal of the document, it is seen that the assessee Bhagwan Rokade (Sai Developer) has purchased land from Mr. Shankar Govind Mhatre vide Regn 1857/2008 and vide Regn 1856/2008. Thus, the copy of the documents Regn 1857/2008 and vide Regn 1056/2008, were obtained from the Sub-registrar but the same are turned out to be different Flat purchase agreements not related to this transaction. Both the documents are placed on record.

3.4 Further, there is reference of M/s Sai Developer towards purchase of land in 2000 but as per assessee, the partnership deed was made on 22/02/2010. This suggests that was provided wrong information in the present sale deed under consideration. Therefore, in the absence of any documentary evidence from assessee, the cost of acquisition/purchase of the land could not ascertain. Hence, the entire purchase transaction is attributed to the assessee.

3.5. It is pertinent to mention here that the Hon'ble Supreme Court of India in the case of Malabar Fisheries Co. Vs Commissioner of Income Tax (1979) 120 ITR 49 (SC) has held that the firm itself does not have any right on the assets held by the partnership firm and it is the partners who have the interest on the asset jointly. The relevant para is reproduced below

"a partnership firm under the Indian Partnership Act, 1932, is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest

04 In view of the above discussion, it is clear that the assessee, in his individual capacity, has carried out transaction of sale of immovable property and not discloses the said transaction. Therefore keeping in view the fact that the sale of property

transaction has not been disclosed and not offered to tax in the alleged partnership firm and in view the fact that the assessee did not provide any information in regard to purchase of land and sharing of sale proceeds of the land. I treat it to be an "Adventure in the nature of Trade bring to tax the entire sale consideration of Rs. 4,07,20,000/-as income from Business Profession: Penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961, is initiated separately for concealing the particulars of income."

7. Apart from. that he also made addition of Rs.49,85,200/- on account of receipts appearing in the bank account of assessee which has been treated as 'undisclosed income'.

8. Ld. CIT (A) after incorporating the relevant finding of the ld. AO as well as the entire written submissions, by and large he has confirmed the reasoning of the ld. AO in so far as issue of validity of reopening u/s.147 and held that he does not find any advertence in the reopening of the case by the ld. AO and confirmed the additions made by them.

9. We have heard both the parties on the issue of validity of reopening and also relevant observation and the finding of the ld. AO and ld. CIT (A) in rejecting assessee's ground for validity of reopening u/s.147/148. Admittedly, assessee had not filed return of income for A.Y.2011-12. However, the reopening has been done based on information of individual transaction statement wherein it was informed that the assessee had entered into transaction of sale of immovable property valued at Rs. 4,07,20,000/- on 5/10/2010 and assessee has failed to offer any capital gains or income on the aforesaid transaction of the sale of

property. Further, assessee was required to file the return of income u/s.139(1) for A.Y.2011-12 on or before 31/07/2011 which assessee has failed to file and also has failed to comply with the notices issued by this office in NMS system and therefore, he has reason to believe the transaction of immovable property remained unexplained.

10. At the first instance, after receiving reasons recorded assessee has categorically stated and objected that;

- *firstly*, he has neither sold any property nor has purchased any immovable property;
- *secondly*, he also explained that the transaction of sale proceeds pertains to transfer of development rights by M/s. Sai Developers which is a partnership firm wherein assessee is a partner;
- *thirdly*, the assessee has also filed the copy of sale agreement dated 05/10/2010 before the ld. AO wherein the agreement was with M/s. Om Shree Sai Developers. Assessee was one of the 4 partners in M/s. Sai Developers;
- *lastly*, assessee had further explained that he was a small business man engaged in the business of trading footwear and civil contractor in the name and style of M/S. Omkar Developers and his income did not exceeded the maximum amount which is chargeable to tax and therefore, he was not required to file the return of income.

11. The ld. AO despite taking note of the fact of the sale deed which was between the two partnership firms and not by the assessee in his individual capacity nor anything pertain to the assessee in his individual capacity qua the said transaction, he still proceeded to entertain his 'reason to believe'. Even the partnership deed and the PAN of M/s. Sai Developers were also filed during the course of assessment proceedings, which AO has ignored. Now, whether the firm has disclosed the said transaction or not, and instead of proceeding against the firm, the ld. AO proceeded to make assessment by issuing notice u/s.148, and also made the addition in the hands of the assessee for the entire value of transaction. Once, assessee has brought these facts on record, then ld. AO could not have proceeded to tax the above transaction in the hands of the assessee, because the agreement and transaction was not with the assessee, albeit between two partnership firm. In fact, ld. AO should have issued notice u/s.148 to the partnership firm, M/s. Sai Developers. He has simply gone by ITS records, i.e., information from the individual transaction statement and that there is no return of income filed by the name of Sai Developers. Therefore, he presumed that all the transactions belong to assessee. Once the sale deed or the agreement is between the two partnership firms, then how the transaction can be viewed in the individual hands by the ld. AO, is beyond comprehension. Even the reasoning given by the ld. AO as incorporated above is not based on rationale reasoning either on facts or in law. Thus, reasons recorded by the ld. AO based on certain information that

assessee has entered into transaction of immovable property itself is incorrect and based on such incorrect assumption of facts, notice u/s.148 cannot be issued nor the same amount can be taxed in the hands of the assessee. At least when assessee has raised this objection and has filed all the documents like partnership deed, PAN of the partnership firm and more specifically the developer's agreement entered between two different parties namely M/s. Om Shree Sai Developers and M/s. Sai Developers. When all these documents were filed before him then how the assessment can be made u/s.148 in the hands of the assessee. Accordingly, the reasons recorded itself in the case of the assessee do not give jurisdiction to the ld. AO to make any assessment or issue notice u/s.148 and accordingly, same is quashed. Accordingly, the entire proceedings u/s.148 is held to be invalid. Consequently, the assessment order is quashed.

12. In the result, appeal of the assessee is allowed.

Order pronounced on 29th Jan, 2024.

Sd/-
(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai; Dated 29/01/2024
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

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//

(Asstt. Registrar)
ITAT, Mumbai