

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 2068/MUM/2023 (A.Y: 2012-13)

Vanpool Consulting and Advisory Pvt., Ltd., 1501, Orient Height Rajaram Mohanrai Road Grant Road (E), Mumbai - 400004 PAN: AAACV2355C	v.	DCIT – CC – 1(2) Room No. 906, Ninth Floor Pratishtha Building, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri P.V. Desai
Department Represented by	:	Ms. Kavitha Kaushik
Date of conclusion of Hearing	:	24.01.2024
Date of Pronouncement	:	21.02.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income-Tax (Appeals)-47, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 05.04.2023 for the A.Y.2012-13.

2. Assessee has raised following grounds in its appeal: -

"1.1 The Ld. CIT(A) erred in law and on facts in upholding the re-opening of the assessment u/s 147 done by the AO in contravention of the provisions of law.

1.2 The Ld. CIT(A) erred in law and facts in not quashing the order u/s 144 r.w.s 147 passed by the AO in total contravention of the provisions of law.

1.3 The appellant prays that the illegal and unlawful order passed u/s 144 r.w.s 147 be quashed.

2.1 Without prejudice to the above:

The Ld. CIT(A) erred in law and on facts in upholding the unjustified and unwarranted addition of Rs 33,17,320/- made to the declared income in contravention of the provisions of law.

2.2 The Ld. CIT(A) failed to appreciate that the AO cannot make the additions to the declared income on vague and frivolous grounds without having any proof or evidence to substantiate his claim.

2.3 The Ld. CIT(A) failed to appreciate that additions to the declared income cannot be made on the basis of assumptions and presumptions particularly when assessments for the same year have been previously made u/s 143(3) and 143(3) r.w.s 153C and the declared income has been accepted by the AO.

2.4 The appellant prays that the unjustified and unwarranted addition to the assessed income of Rs 33,17,320/- made to the assessed income by wrongly invoking the provisions of section 144 and in total contravention of the provisions of law be deleted in toto."

3. At the time of hearing, Ld.AR of the assessee argued the issue only on technical and jurisdictional grounds. Accordingly, we shall deal only with jurisdictional issue.

4. Brief facts of the case are, the original assessment for the A.Y.2012-13 was completed under section 143(3) of Income-tax Act, 1961 (in short "Act") on 13.11.2014 assessing the total income at ₹.18,74,190/-. Further, the assessment was completed under section 143(3) r.w.s. 153C of the Act on 19.12.2017 assessing the total income of the assessee at ₹.18,74,190/-. Subsequently, Assessing Officer received information from the office of the DDIT(Inv.), Unit-7(3), Mumbai that Shri. Jitendra Salecha, Director of the assessee company had floated companies/concerns to provide accommodation entries in the form of purchase/sales, loans, LC, share premium and expenses for earning commission income without carrying out any real business activity. The assessee company is one of the company floated by Shri Jitendra Salecha for carrying out the aforesaid activities for commission income. Based on the above information, Assessing Officer observed that he had reason to believe that income chargeable to tax had escaped assessment due to failure on the part of the assessee to disclose true and full facts and hence Assessing Officer re-opened the assessment for A.Y.2012-13 under section 147 of the Act. Accordingly, he issued notice under section 148 of the Act dated 30.03.2019 and served on the assessee.

5. The assessee was issued several notices to comply the notice issued under section 148 of the Act. However, since there was no response from the assessee, the Assessing Officer has considered the return of income filed by the assessee in response to notice under section 153C of the Act and declared total income at ₹.13,55,038/-. Accordingly, he completed the assessment exparte under section 144 of the Act.

6. Aggrieved assessee, preferred appeal before the Ld. CIT(A) and raised the above said issue before him and filed the detailed written submissions, for the sake of clarity it is reproduced below: -

"Ground No 1-Re-opening of the assessment and passing of order u/s 144 r.ws.147:

The order date 30/12/2019 passed u/s 144 r.w.s. 147 is illegal and void abinitio. A notice u/s 148 was issued on 31/03/2019. In response to the said notice the appellant company was unable to file return of income online due to a technical hitch in the Income tax portal. This technical hitch was due to the fact that the earlier assessment proceedings u/s 147 for the same year were and which were time barred on 31/12/2017 were still show as "Open" and this was obviously due to fault on part of the AO. The appellant company had informed the AO regarding the inability to e-file the return and had filed physical copy of the return by uploading the same on the Income tax website. Please refer to response filed in the e-proceeding facility on the Income Tax portal of the appellant a copy of which is attached herewith. The appellant company also asked for reasons for re-opening of the assessment to enable it to raise objections to the re-opening of the assessment. It is very much clear from the assessment order that no such reasons were furnished to the appellant and the appellant was prevented from filing any objections to the re-opening of the assessment. It may be noted that the AO had passed order u/s 143(3) on 10/11/2014 and

again u/s 143(3) r.w.s. 153C on 19/12/2017. However, the assessment proceedings u/s 147 was shown as "Open" even though the same were time barred on 31/12/2017. Hence not only the assessment proceedings initiated on 31/03/2019 were invalid but the appellant company was also prevented from filing objections to the re-opening of the assessment. The guidelines issued by the Hon. Supreme Court and also the Hon. Bombay High Court were not followed by the AO and hence the order passed u/s 144 r.w.s 147 is illegal and void abinitio and requires to be quashed.

The AO had passed assessment u/s 143(3) of the I.T. Act, 1961 on 10/11/2014 after obtaining all the details/information and after examining the audited accounts of the appellant company. The income was assessed at Rs 18,74,191/- Again assessment u/s 143(3) r.w.s 153C was passed and again after thoroughly examining the details/information called for and also the audited accounts the income was again assessed at Rs 18,74,191/-. The copies of both these orders are attached herewith. There was absolutely no fresh material brought on record to justify the re-opening of the assessment other than some vague information that the appellant company was carrying on accommodation business. The AO has absolutely no proof or material evidence to prove that the appellant was carrying on accommodation business. Reliance was placed on some purported statements of one of the directors of the company to the effect that the company was carrying on accommodation business. The purported statements were recorded on 10/08/2017, 11/09/2017 and 12/09/2017. In means that these statements were already on record of the AO when he had passed the order u/s 143(3) r.w.s. 153C on 19/12/2017 and considered by the AO at the time of framing the assessment on 19/12/2017. Therefore, there was no fresh material on record of the AO at the time of re-opening of the assessment on 31/03/2019 te., after 15 months.

These purported statements were never furnished to the appellant company and appear to be given by one of the directors and not by all the directors of the company which is a separate legal entity and any statements given by any one of the directors cannot be used on the company. The re-opening of the assessment was beyond a period of four years and there was no fresh material on record of the AO. On this ground also the re-opening of the assessment requires to be quashed as the same is in total contravention of the provisions of law."

7. After considering the submissions of the assessee, Ld. CIT(A) dismissed the jurisdictional issue raised by the assessee with the following observations: -

"6.3 The information provided by DDIT(Inv), Unit-7(3), Mumbai was not available with the Assessing Officer while completing the earlier assessment, and the appellant has also not brought anything on record to prove that the information received by the Assessing Officer including the statement of Shri Jitendra Salecha, Director of the appellant company was available with the Assessing Officer while reopening of the appellant case.

6.4 Accordingly, after verifying the new/fresh tangible material available on record and after being satisfied of the income having escaped assessment and after recording the reasons for reopening', notice u/s 148 was issued. Therefore, it cannot be said by the appellant that no fresh material was brought on record by the AO to justify the reopening.

6.5 Further, the contention of the appellant that the AO had no proof or material/evidence to prove that the appellant was carrying accommodation business. In this regard, it is seen from the assessment record that the statement of Shri Jitendra Salecha, Director of the appellant was recorded on oath and it was admitted by him that he was in the business of providing accommodation entries.

6.6 Further, it is seen from the assessment order that neither did the DDIT nor the AO come to the conclusion, to confirming the statement of Shri Jitendra Salecha that the appellant company was into the business of accommodation entry, since no bills, vouchers, details of infrastructure was submitted/proved by the appellant company and even the other directors with whom the appellant had traded had failed to prove the genuineness of the purchase and sales transacted with the appellant.

6.7. Considering the above facts, the contention of the appellant in his submission that the AO had no proof or material for reopening of the case is not acceptable. Further, the contention of the appellant, made in his submission that the statement given at the time of search, explaining the nature of the appellant business, being accommodation entry provider was only given by one director and not by the other directors is also not acceptable. Once it was detected during the course of search that the appellant was

in the business of providing accommodation entry, and such findings had direct nexus with the statement given by the directors, then it was the responsibility of all the directors to prove the case otherwise, which they failed to do so and hence the contention of the appellant that the statement of one director does not have legal sanity is not tenable.

6.8 Further, the contention of the appellant that it could not file the return of income due to some technical hitch is also not acceptable. It is seen that the Assessing Officer has confirmed in the assessment order that the appellant had online submitted copy of return of income in response to notice u/s 153C of the ITA. Considering all the above facts, I find no force in the ground of appeal and the submission made. This ground raised by the appellant is therefore dismissed."

8. Aggrieved with the above order assessee is in appeal before us.

At the time of hearing, Ld.AR of the assessee brought to our notice relevant facts of the case and submitted as under: -

"1. The appellant company had filed return of income declaring income of Rs 13,55,040/- on 30/09/2012. The income was declared on the basis of audited Financial Statements and Tax Audit Report.

2. The return was selected for scrutiny assessment and order u/s 143(3) dated 10/11/2014 accepting the returned income after scrutiny of all the required details/information which were submitted during the course of the assessment proceedings.

3. Notice u/s 153C was issued on 17/01/2017 on the ground that the appellant had provided accommodation entries in the form of loans to Ess Gee Group. After examining all the details and information on record including seized material the Assessing Officer came to conclusion that the appellant company was carrying on genuine business of Finance and Leasing and trading in fabrics it had not carried out any accommodation business. Once again the returned income was accepted vide order u/s 143(3) r.w.s. 153C was passed on 19/12/2017.

4. Notice u/s 148 was issued on 30/03/2019 after a period of four years on the ground that one of the directors had admitted that he was carrying on accommodation entry business under statements on oath recorded on 10/08/2017, 11/09/2017 and

12/09/2017. The alleged statements on oath were never furnished to the appellant company. It is also not known if the statements were recorded during the course of any survey or search and seizure operations against the appellant company.

5. It may be noted that all the alleged statements on oath allegedly made by one of the directors were before the framing of order u/s 143(3) r.w.s. 153C on 19/12/2017 and the Assessing Officer had clearly ruled in the said order that the appellant company was carrying on genuine business activities after examining all the facts on record which obviously included the alleged statements on oath.

6. There is not an iota of evidence against the company that it was carrying on any accommodation business. The Assessing Officer has only relied upon alleged statements on oath by one of the directors. From the assessment order it appears that the person giving the alleged statements on oath have retracted the statements. No details were furnished to the appellant company.

7. The re-opening of assessment is purely based on change of opinion on the same facts on record and there is no valid or reasonable cause to re-open the assessment. Voluminous details and information was on record of the Assessing Officer as already admitted in the earlier two assessments and there is no fresh evidence or material whatsoever to justify re-opening of the assessment. There is only some vague information with the Assessing Officer at the time of issue of notice u/s 148. There is no failure on part of the appellant company to disclose fully and truly all material facts necessary for it's assessment, for the assessment year under consideration.

8. Reasons for re-opening of the assessment were not furnished. The appellant company was not given any opportunity to raise objections against the re-opening of the assessment. Statements on Oath and any other document or evidence justifying the re-opening of the assessment was furnished to the appellant company."

9. Further, he submitted that assessee was not able to upload the return of income in response to notice issued under section 148 of the Act. Assessee also filed e-filing response copy dated 12.12.2019 which is placed on record at Page No. 19 of the Paper Book which clearly

shows that the earlier return filed by the assessee in response to notice under section 153C of the Act was open, therefore, the portal was not accepting any fresh return of income. It is brought to our notice that assessee has filed the return of income by way of attachment to other submissions in e-portal. Therefore, the observations of the tax authorities that assessee has not filed any return of income in response to notice under section 148 of the Act is not correct. Further, he submitted that the reasons recorded for reopening the assessment was never forwarded to the assessee and only during the current proceedings before ITAT, Ld. DR forwarded the copy of the same. Further, he submitted that the whole issue raised by the Assessing Officer in this proceedings nothing but change of opinion considering the fact that the same income was subject to assessment under section 143(3) as well as reassessment under section 143 r.w.s. 153C of the Act. No new material brought on record by the Assessing Officer and also no material brought on record to show that there is failure on the part of the assessee considering the fact that the current assessment was reopened beyond four years. In this regard, he relied on the case of GKN Driveshafts (India) Ltd. v. ITO & Ors. [(2003) 259 ITR 19].

10. On the other hand, Ld. DR relied on the orders of the lower authorities.

11. Considered the rival submissions and material placed on record, we observe that the case of the assessee was earlier selected for assessment under section 143(3) and also reassessment under section 143 r.w.s. 153C of the Act. Therefore, same income was subjected to assessment as well as re-assessment proceedings earlier. The present re-assessment proceedings were initiated after receipt of certain information from the DDIT (Investigation), However, it is brought to our notice by the Ld. DR that the Assessing Officer has initiated the proceedings after recordings reasons for reopening of the assessment and also got it approved by the competent authority. However, it is also brought to our notice that the above said reasons for reopening of the assessment were never shared with the assessee. The same facts of supplying the reasons were also not recorded anywhere in the assessment order. Sharing of reasons of reopening and addressing the objections of the assessee are prerequisite for initiating of any re-assessment proceedings under the Income Tax Act. As held in the case of G.K. Shaft (supra) the Hon'ble Supreme Court held as under: -

3 *By the order under challenge, a Division Bench of the High Court at Delhi dismissed the writ petition filed by the appellant challenging the validity of notices issued under ss. 148 and 143(2) of the IT Act, 1961. The High Court took the view that the appellant could have taken all the objections in its reply to the notices and that, at that stage, the writ petition was premature. Accordingly, the writ petition was dismissed on 31st Jan., 2001. Aggrieved by that order, the appellant is in appeal before us.*

4. *Mr. M.L. Verma, learned senior counsel appearing for the appellant, submits that the impugned notices relate to seven assessment years; that during the pendency of these appeals in respect of two assessment years, viz., 1995-96 and 1996-97, assessment has been completed against which appeals have been filed. Notices relating to the other five assessment years, viz., 1992-93, 1993-94, 1994-95, 1997-98 and 1998-99, are now the subject-matter of these appeals.*

5. *We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under s. 148 of the IT Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.*

6. *Insofar as the appeals filed against the order of assessment before the CIT(A), we direct the appellate authority to dispose of the same, expeditiously.*

With the above observations, the civil appeals are dismissed."

12. For the current facts on record, we observe that Assessing Officer never shared the reasons for reopening of the assessment to the assessee and there is no record brought on record by the revenue that the same was shared with the assessee during the year after re-assessment proceedings. Since the issue raised by the assessee is

jurisdictional issue, failure on the part of the tax authorities on jurisdictional issue cannot be cured, in this case the assessee was never shared with the reasons for reopening until the re-assessment order was passed under section 147 of the Act. It is a right given by the law to the assessee to demand a copy of the reasons for reopening and raise an objection before initiating any proceedings under section 147 of the Act. accordingly, we are inclined to allow Ground No. 1 raised by the assessee and quash the assessment order dated 30.12.2019 as bad in law. Since we have addressed the jurisdictional issue raised in Ground No. 1, we are not inclined to adjudicate the other grounds raised by the assessee and these grounds are kept open at this stage. Accordingly, appeal filed by the assessee is partly allowed.

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

Order pronounced in the open court on 21st February, 2024.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER
Mumbai / Dated 21/02/2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum