

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)

ITA No. 3712/MUM/2018
Assessment Year: 2012-13

M/s Pooja Hardware Pvt. Ltd.,
Flat No. A-102, Sai Darshan Bldg.
No. 10, Prem Nagar, Off. S.V. Road,
Borivali (W),
Mumbai-400092.
PAN NO. AAACP 2624 G
Appellant

Vs.

The Assistant Commissioner of
Income Tax-13(1)(1),
Aayakar Bhavan, M.K. Marg,
Mumbai-400020.

Respondent

Assessee by : Mr. Vipul Joshi &
Ms. Dinkle Hariya

Revenue by : Mr. H.M. Bhatt, Sr. DR

Date of Hearing : 15/02/2024
Date of pronouncement : 26/02/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 05.03.2018 passed by the Ld. Commissioner of Income-tax (Appeals) – 21, Mumbai [in short ‘the Ld. CIT(A)’] for assessment year 2012-13, raising following grounds:

“A) Reopening of assessment

- 1. The learned Commissioner of Income Tax (Appeals) - 21, Mumbai (CITA) erred on facts and in law in not dealing with the Additional Grounds 1 and whereby the appellant had*



challenged the reopening of assessment u/s. 147 of the Income-tax Act.

2. The appellant prays that the CIT(A) may be directed to deal with the grounds of reopening of assessment and as the said issue would go to the root of the matter, the order passed by the CIT(A) may be set aside.
3. Without prejudice to the above, the appellant prays that your honour hold that the reopening of assessment on the alleged ground that the donation given by the appellant to the School of Human Genetics & Population Health amounting to Rs. 1,00,00,000/- was bogus donation, is bad in law.

B) Principles of natural justice violated

4. The learned CIT(A) erred on facts and in law in holding that the principles of natural justice were not violated on the AO not giving the appellant an opportunity to cross examine the parties whose statements the AO was relying on.
5. As the principles of natural justice are violated, the appellant prays that your honour hold that the order is bad in law.

C) Disallowance deduction claimed u/s. 35(1)(ii) of Rs. 1,75,00,000/-

6. The learned CIT(A) erred in upholding the order of the AO holding that the donation of Rs. 1,00,00,000/- given to the School of Human Genetics & Population Health was paid back to the appellant after deducting a commission and hence the appellant was not entitled to deduction u/s. 35(1)(i) of Rs. 1,75,00,000/-
7. The appellant prays that your honour hold that the appellant is entitled to deduction u/s. 35(1)(ii) of Rs. 1,75,00,000/- with respect to donation given to the School of Human Genetics & Population Health of Rs. 1,00,00,000/--

D) Without prejudice, not allowing deduction u/s. 80G

8. Without prejudice to the above, the learned CIT(A) erred in holding that the appellant was not entitled to deduction u/s. 80G with respect to donation of Rs. 1,00,00,000/- given to the School of Human Genetics & Population Health.
9. If your honour is not inclined to allow deduction u/s. 35(1)(ii), the appellant prays that the AO may be directed to allow deduction u/s. 80G.

2. This appeal was earlier heard by the Income-tax Appellate Tribunal (In short the 'Tribunal') on 28.10.2019, wherein the appeal of the assessee was allowed. Subsequently, a Miscellaneous



Application filed by the Revenue seeking recall of the order of the Tribunal, was dismissed by the Tribunal vide order in MA No. 103/M/2022 dated 21.07.2022. Thereafter, the Tribunal, on a further miscellaneous application filed by the Revenue, recalled the order of the Tribunal in its order dated 27.06.2023, in MA No. 53/Mum/2023 arising out of MA No. 103/Mum/2022 observing as under:

“7. After considering the submissions of both the parties and on careful consideration of detailed submissions made by the Ld. AR objecting to the Miscellaneous Application filed by the revenue and we observe that in the normal circumstances "Miscellaneous Application" on "Miscellaneous Application" cannot be entertained as highlighted by the counsel appearing for the assessee. However, the issue raised by the revenue in the present Miscellaneous Application is on period of limitation and while passing the order in MA. No. 103/Mum/20222 this aspect of extension of limitation period to all the persons have 90 days was not considered and ay this is mistake apparent on record and the issue of extension of limitation period considered by the Hon'ble Supreme Court for overall justice. In order to achieve the same, the bench has overlooked the important aspect of achieving the same and not following the directions of Hon'ble Supreme Court is clearly mistake apparent on record and we deem it fit and proper to recall the order passed on 28.10.2019 and the Registry is directed to post the appeal for hearing in due course after issuing notice to both parties.”

2.1 In view of the above order of the Tribunal, the appeal is before us for adjudication.

3. Briefly stated facts of the case are that the return of income for assessment year under consideration was filed by the assessee on 07.09.2012 declaring total income at Rs.4,02,09,744/- . The return of income filed by the assessee was selected for scrutiny and total income was assessed u/s 143(3) of the Income-tax Act, 1961 (in



short 'the Act') on 30.03.2015 at Rs.38,33,350/-. Subsequently, on receipt of information from the Directorate of Income-tax (Investigation), Kolkata that assessee obtained receipt for bogus donation u/s 35(1)(ii) of the Act through entry operator/bogus billers and the assessee obtained benefit of bogus deduction of Rs.1,00,00,000/-, the Assessing Officer issued notice u/s 148 of the Act on 30.03.2016 and reopened the assessment. In response, the assessee submitted that return filed on 07.09.2012 might be treated as return filed in compliance to the notice u/s 148 of the Act. Thereafter, the Assessing Officer issued statutory notices and after taking into consideration submission of the assessee, disallowed the claim for deduction u/s 35(1)(ii) of the Act amounting to Rs.1,75,00,000/-.

4. On further appeal before the Ld. CIT(A), the assessee challenged validity of the reassessment as well as merit of the additions, however could not succeed. Aggrieved the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

5. As far as ground No. 1 relating to challenging reopening of the reassessment, we find that the Ld. CIT(A) rejected the contention of the assessee observing as under:

“6.3 Decision :

I have considered the facts of the case and submissions made by the appellant. It is seen from the facts available on record that the



assessee is engaged in the business of Hardware, Kitchen accessories and other related items as a wholesaler, distributor and importer. The assessee filed return of income on 07.09.20125 declaring total income of Rs 4,02,09,744/-. Subsequently, the case was re-opened on approval from higher authorities after receipt of information from the Investigation Wing, Kolkatta that the assessee is engaged in bogus donation of an amount of Rs 1,00,00,000/- with a notorious institute namely M/s School of Human Genetics & Population Health. After verification of the submissions on record and analysing the facts and circumstances of the cases, A.O. completed the reassessment by disallowing and adding Rs 1,75,00,000/- to the total income of the assessee in respect of bogus donation to the said institute u/s 35(1)(ii) of Income-tax Act, 1961. Aggrieved by the addition, the assessee contended against the addition of Rs 1,75,00,000/- made in respect of deduction claimed u/s 35(1)(ii) of Income-tax Act, 1961 by relying on the information received from Kolkata Directorate and the statements of the key persons of the institute SHG&PH, Kolkata citing various case laws.

The appellant stated that the reasons recorded are contrary to facts and without application of mind by the A.O. and hence cannot be sustained. The appellant has contended that the A.O. has recorded that the return of the appellant was accepted as per the provisions of Sec 143(1) but an assessment u/s 143(3) had taken place in the case of the appellant. As could be seen from record, the A.O. has recorded reasons for reopening and has satisfied himself that there is a reason to believe that income has escaped assessment. Sec 147 provides that the A.O. has to have reason to believe that any income chargeable to tax has escaped assessment. Reason to believe can be on the basis of information which comes to his possession or knowledge. This information is more than enough for any reasonable person to form a reason to believe that income has escaped assessment. The very fact that reasons are recorded and notice u/s. 148 is issued goes to show that the A.O. has applied his mind and satisfied himself about the reopening the case. The reasons recorded are not vague and scanty but precise and concrete. The Act envisages that the A.O. should only have to have reason to believe to reopen a case. He need not establish beyond doubt that there is escapement before issuing the notice. This can be done at the time of assessment but not at the time of issue of notice. Reliance is placed on: i)

- i) Rohilkhand Education Charitable Trust Vs CCIT Others 365 ITR 233(All.): It was held by Hon'ble High Court that A.O. should have relevant and credible material with him to form requisite reason to believe that income of assessee has escaped assessment. Material available on record has rational connection and relevant bearing on such formation of belief for issuing valid notices for re-assessment. Sufficiency or correctness of material was not to be considered at this stage.



- ii) *Sun Pharmaceutical Industries Ltd Vs DCIT 353 ITR 474 (Guj, where the Hon'ble High Court held the formation by belief that the A.O. is essentially within his subjective satisfaction-at the stage of issue of notice, only question is whether there was relevant material on which reasonable person could have formed requisite belief.*
- iii) *ACIT Vs Rajesh Jhaveri Stock Brokers Pvt Ltd: Hon'ble Apex Court held that Sec 147 authorises and permits the A.O. to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. So long as the ingredients of Sec 147 are fulfilled, A.O. is free to initiate proceedings u/s 147 and failure to take steps u/s 143(3) will not render the A.O. powerless to initiate reassessment proceedings even when intimation u/s 143(1) had been issued.*

In this case, the A.O. has ample reason to believe that income has escaped assessment and had rightly issued the notice u/s 148 to the appellant after recording reasons for reopening. Thus, it is concluded that the A.O. is well within jurisdiction and acted in accordance with the provisions of the Income-tax Act, 1961. This additional ground of appeal is therefore dismissed.”

5.1 However, before us, the Ld. counsel for the assessee challenged that the Assessing Officer has not disposed off the objection raised by the assessee against the reopening vide letter dated 15.09.2016, which being in violation of the principles laid down by the Hon'ble Supreme Court in the case of GKN Driveshaft (India) P ltd v. ITO [259 ITR 19], the reassessment proceeding are bed in law. The Ld. Counsel referred to said letter dated 15.09.2016, which is available on paper book page 62 to 64. The Ld. DR however submitted that no such objections were raised by the assessee before the Ld. Assessing Officer and for verification of the facts, the Ld. DR sought time for obtaining a report from the Assessing Officer. In the report filed before us through ld DR, the Assessing Officer has denied of availability of any such letter on the assessment record. Accordingly, the Ld. DR was asked to produce



said assessment record, but he submitted that record was not traceable readily. Therefore, the Ld. DR was given further opportunities on 14.12.2023, 10.01.2024 but on the last day of hearing i.e. 15.02.2024, the Ld. DR categorically admitted that assessment record was not available.

5.2 But, on perusal of the assessment order, we note that the Assessing Officer on page 3 of the assessment order has recorded the fact of acknowledgement of the letter dated 15.09.2016. This reference in the assessment order is a clear indication that letter dated 15/09/2016 was filed by the assessee. Since it is undisputed that objections were not disposed off by the AO, so only dispute remains is verification of contents of the letter dated 15/09/2016, but the DR has failed to deny or controvert the contents raised in the copy of letter dated 15.09.2016 submitted by the assessee, which is available on paper book page 62-64, where in the assessee objected reopening as under:

“Date: 15.09.2016

*The Dy Commi of I. Tax
Circle 13(1)(2)
R No. 218,
Aaykar Bhavan*

Dear sir,

*Ref: Your notice dated 08.09.2016 & Letter dated 20.05.2016- AY
2012-13*

We invite reference to your above notice & letter communicating to us the reasons recorded by you u/s 148 of the IT Act before issuing the notice.



The reasons recorded as communicated to us refer to the payments received by the following institutes

- 1. School of Human Genetics & Population Health (SHG&PH)*
- 2. Matrvani Institute of Experimental Research & Education (MIER&E)*
- 3. Herbicure Health Care Bio Herbal Research Foundation (HHNBRF)*

We are not concerned with the payments made to the institutes mentioned at 2 & 3 above. They have therefore no relevance in our case.

We made payments totaling to Rs. 1 cr in four installments to School of Human Genetics & Population Health in the year ended 31.03.2012.

We state that the reasons recorded by you as communicated to us in your above letter do not satisfy the requirements laid down u/s 147 & 148 of the | Tax Act. The reasons recorded by you refer to survey action carried out by the Kolkata I. Tax Directorate on the institutes mentioned above. It is stated by you that the key persons of the institute have accepted that they facilitated bogus donations in lieu of commission. And that only accommodation entries were made by that institute. Another point mentioned by you is that the above institute approached the settlement commission making certain admissions.

The reasons recorded by you, in so far as they are relevant to our case, are not specific and they are only vague. These reasons recorded do not state that in respect of the amounts Rs 1 cr paid by us, only accommodation entries were passed by the institute. You placed reliance only on the survey action taken by the Kollata I.Tax Directorate and the alleged acceptance made by the key persons of the institute that they made accommodation entries in respect o the amounts received by them. The material that came into your possession has no direct nexus with the belief entertained by you. Courts have held that for invoking section 147 of the | Tax Act, the material relied upon should be specific and has a bearing on the belief entertained by the ITO while recoding his reasons. In our case, in the reasons communicated to us by you, there is not even a passing reference that in respect of the amounts paid by us to the above institute, only accommodation entries were passed by the institute. You have initiated re-assessment proceedings in our case, only on the basis of information received by you from the Kolata I Tax Directorate and the alleged acceptance by the key persons of the institute that they made only accommodation entries. From the reasons communicated to us it is clear that the information has not been examined, before recording that income has escaped tax in



our case, to enable you to issue the notice u/s 148. Thus there is no material to show that an independently mind has been applied, in forming a belief resulting in the required reasons to believe as per the provisions of the section 147 & 148 of the I Tax act.

It is stated by you that the institute which received payments from us, approached the settlement commission admitting that they provided accommodation entries only. The fact that the institute approached the settlement commission, only shows that it had undisclosed income which was not shown in the income tax return filed earlier before the I Tax authorities. Again this does not show specifically that in respect of the amount of Rs. 1 cr paid by us only accommodation entries were passed by the institute.

On the above submissions made by us on the following decisions:

- Signature Hotel - 338 ITR 51(Del)
- Sarthak Security - 329 ITR 110 (Del)
- Ranee Singh - 330 ITR 417 (Del)
- Decision dated 29-10-2015 of Delhi ITAT in the case of Vardai Overseas Pvt Ltd vs. ITO Ward 8(3), New Delhi in ITA No. 187,188/Del/2010

We therefore state that the initiation of proceedings u/s 147 & 148 in our case are invalid.

We may state here that in the year ended 31.3.2012, we made payments totaling Rs 1 cr in four equal installments to the above institute before making the relevant payments and claiming deductions u/s 35(1)(ii), we ensured that the institute complied with the following requirements under the I Tax Act.

- a) Institute is registered under the Societies Registration Act on 26.04.1993
- b) It is an I Tax assessee assessed under PAN AABAS4570M
- c) It had applied for and was registered u/s 12A of the I Tax Act by the director of exemption (Kolkata) on 27.10.2004
- d) The approval u/s 80G(5)(VI) of the I Tax Act was granted by the director of the I Tax Kolkata
- e) The CBDT in its notification dated 28.01.2009, approved by the central govt for the purpose of clause (ii) of sub-section (i) of section 35 of the I. Tax Act 1961 from 2008-09 onwards
- f) The institute has been filing audited statements before the commissioner of I. Tax as required under the CBDT notification dated 28.01.2010.
- g) We made payments totalling to Rs. 1 cr by issuing crossed cheques and the relevant payments made by us appear as



- debits to our bank account no. 02460010462 with the Cosmos Cooperative Bank, Borivali West Branch Mumbai
- h) *The four cheques were duly realised by the institute as per the separate receipts issued by it.*

After receiving the payments totaling Rs. 1 cr and accounting for the same in its books of accounts, they cannot turn around and say that the relevant entire made by it are only accommodation entries.

We therefore submit that the alleged statement of the key person is to be put to strict proof and its veracity established.

To enable us to make a comprehensive and detailed submission, we request that the following may be furnished to us at your earliest:

- i. *A copy of the statement said to have been recorded from the key person of the institute accepting that they facilitated bogus donation in lieu of commission*
- ii. *The key person who made the above statement may be summoned by you u/s 131 of the I Tax Act on a date convenient to you and intimation given to us so that we can cross examine him with reference to the statement made by him before the Tax authorities*
- iii. *To issue summons u/s 131 of the 1 tax act to produce the books of account for the year ended 31.03.2012 including its bank accounts.*

Without prejudice to our above submissions, we enclose herewith the following:

- *Copy of request letter from the institute dated 05.01.2012*
- *PAN card copy of institute*
- *Copy of Official gazette containing the notification dated 28.01.2010*
- *CBDT notification dated 28.01.2009*
- *Renewal of recognition of the institute dated 17.06.2010*
- *Copy of 12A registration of the institute*
- *Copies of the receipts issued by the institutes for the donation received by them*
- *Copies of the bank statements depicting the payments made to the institute*

We have already submitted other details on 26.05.2016, as had been called for vide notice u/s 142(1) dated 17.05.2016

We have also attached the letter of authority for your record. We shall be glad to furnish any other details as may be required.”



5.3 In view of the above circumstances, we do not have any option other than to presume that the assessee filed objection for reopening, however same has not been disposed off by the Assessing Officer, which being in violation of principles laid down by the Hon'ble Supreme Court in GKN Driveshaft (India) P Ltd. (supra), the reassessment proceedings can't not be sustained.

5.4 We note that the Hon'ble Madras High Court in the case **Home Finders Housing Ltd. v. ITO [2018] 93 taxmann.com 371** has held that though the assessment order passed by the Assessing Officer, without meeting the objections, is not valid yet the entire proceedings are not vitiated because of this irregularity and the Hon'ble High Court remanded the matter back to the Assessing Officer for passing the assessment order after a speaking order on the objections raised. The Special Leave Petition filed by the assessee against the decision of the Hon'ble Madras High Court in the case of Home Finders Housing Ltd. (supra) has been dismissed by the Hon'ble Supreme Court as reported in (2018) 94 taxmann.com 84 (SC). Further, the Hon'ble Madras High Court in the case of **Kovalam Santhana Krishna Mohan v. ITO [2017] 88 taxmann.com 239** set aside the order of the Assessing Officer which was passed without disposing off the objections of the assessee against the reassessment and matter was remitted back to the Assessing Officer for fresh consideration. In the case of **Allana Cold Storage Ltd. v. ITO [2006] 287 ITR 1 (Bombay)**, the



Assessing Officer did not dispose off the objections of the assessee against reassessment notice, thus the Hon'ble Bombay High Court on writ petition filed by the assessee noticing that decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) had not been followed, set aside the order of the Assessing Officer directing the Assessing Officer to furnish reasons and dispose of objections first. Similarly, in the case of **IOT Infrastructure & Energy Services Ltd. v. Asstt. CIT [2010] 329 ITR 547**, the Hon'ble Bombay High Court remitted the matter back to the Assessing Officer as the Assessing Officer had not dealt with the objections filed by the Assessing to reopening of reassessment, in view of the decision of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) and directed to pass a fresh order on objections raised by the assessee to the proposed reassessment after furnishing an opportunity of being heard to the assessee. In the case of **Rajesh Poddar vs. ITO [2023] 152 taxmann.com 98 (Bombay)**, where the assessee had consistently requested the Assessing Officer to furnish reasons for reopening which were never provided to the assessee and in view of such failure on the part of the Assessing Officer to furnish reasons recorded for purpose of reopening assessment, the Hon'ble High Court set aside the assessment order and matter was remitted to the concerned officer under the faceless scheme for providing reasons recorded and then proceed in accordance with law. In the case of **Saroj Jalan v. Union of India [2022] 143 taxmann.com 33 (Calcutta)**, the Hon'ble



Calcutta High Court held that where the Assessing Officer passed the assessment order u/s 147 r.w.s. 144B of the Act on the basis of notice issued u/s 148 of the Act without considering and disposing off objections raised by the assessee company against said notice, the assessment order was set aside with the further direction to the Assessing Officer to dispose off objection raised by the assessee against reopening notice by passing a reasoned and speaking order and after giving an opportunity of hearing to the assessee. The Hon'ble Gujarat High Court in the case of **Pr. CIT-2, Vadodara v. Sagar Developers [2016] 72 taxmann.com 321 (Gujarat)** also held that where the Assessing Officer without disposing off the objection continued with reassessment proceedings and passed an order of reassessment, the reassessment order passed by the Assessing Officer was liable to be set aside with the direction to frame fresh assessment order after disposing off the objection of the assessee.

5.5 Respectfully, following the above precedents on the matter, the reassessment proceeding in the case is set-aside with the direction to the AO to pass a fresh assessment order after disposing off the objection of the assessee by way of a speaking order. The ground No. 1 of the appeal of the assessee is therefore allowed for statistical purpose.



6. Since we have already set-aside the reassessment proceedings, therefore, the other grounds raised on merit are not required to be adjudicated upon at this stage.

7. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open Court on 26/02/2024.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 26/02/2024
Rahul Sharma, Sr. P.S.

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,
(Assistant Registrar)
ITAT, Mumbai