

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

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI RAHUL CHAUDHARY, JM

**ITA No. 30/Mum/2023**  
(Assessment Year: 2012-13)

Rajat Commercial Enterprises Pvt.  
Ltd.  
A-401, Pearl Arcade,  
Off J P Road,  
Dawood Baug Lane,  
Andheri (W), Mumbai-400 058

Vs.

The Dy. Commissioner of  
Income Tax,  
Circle 11(1)(1)  
Room No. 204,  
Aaykar Bhavan  
M.K. road,  
Mumbai-400 020  
**(Respondent)**

**(Appellant)**

**PAN No. AABCR5631E**

**Assessee by** : Shri Ashok Bansal, AR  
**Revenue by** : Smt. Mahita Nair, DR

**Date of hearing:** 09.01.2024  
**Date of pronouncement :** 21.03.2024

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. This appeal is filed by Rajat Commercial Private Limited in ITA No. 30/Mum/2023, for A.Y. 2012-13, against the appellate order passed by the National Faceless Appeal Centre, Delhi [the learned CIT (A)] dated 25<sup>th</sup> November, 2022, wherein the appeal filed by the assessee against the assessment order passed under Section 143(3) read with section 147 of the Income-tax Act, 1961 (the Act) dated 26<sup>th</sup> December, 2017, passed by the Dy. Commissioner of Income Tax, Central Circle 1(1), Mumbai, (the learned Assessing Officer) was dismissed.
02. Therefore, the assessee is in appeal. Assessee has raised following grounds of appeal:-

"**GROUND OF APPEAL**"

1. *The Id.CIT(A) erred in confirming validity of the jurisdiction assumed by the AO u/s 147 of the Act.*

*1.i. In doing so, the Id.CIT(A) relied on some judgments referred to in the order under appeal without establishing how ratio decidendi of the said decisions are applicable to the facts of the appellant.*

2. *The Id.CIT(A) erred in dismissing the ground of appeal of the appellant challenging the legality of the assessment order as the same was passed without issue of valid notice u/s 143(2) of the Act.*

*2.1. In doing so, the Id. CIT(A) did not appreciate that the appellant has not challenged the validity of notice issued u/s 143(2) of the Act on the ground that it was not issued within the time limit but has challenged the same on the ground that the said notice authorised the AO to scrutinize the return originally filed on 29.09.2012 & not the return filed in response to notice u/s 148 of the Act on 10.04.2017.*

3. *The Id.CIT(A) erred in confirming the addition made u/s 68 of the Act of Rs. 25374801/- in respect of gain on sale of shares of Nouveau Global Ventures Ltd. (NGVL) as non-genuine long-term capital gain which was claimed by the appellant as exempt u/s 10(38) of the Act.*

*3.1. In doing so, the Id.CIT(A) did not appreciate that the initial onus which lay on the appellant to prove genuineness of long-term capital gain in shares of NGVL was duly discharged & the onus shifted to AO to bring on record some material to*

*dislodge the evidence placed on record by the appellant which he miserably failed to do so.*

*3.ii. Further in doing so, the Id.CIT(A) erred in relying on decision of the Kolkata High Court referred to in the order under appeal in preference to binding decision of the jurisdictional high court relied upon by the appellant.*

*3.iii. In any event, the Id.CIT(A) did not appreciate that if the buyer & seller are same persons as contended in the order under appeal, then there cannot be any sham transaction between them leading to tax evasion.*

*Your appellant, therefore, submits that the order under appeal be quashed and in alternative the addition so made be deleted.*

*Your appellant craves leave to add to, delete, amend or alter all or any of the grounds of appeal at or before the date of hearing”*

03. It is to be noted that assessee has been admitted for corporate Insolvency Resolution Process and National Company Law Tribunal has passed an order dated 12<sup>th</sup> September, 2023, admitting the Insolvency Petition under Section 7 of the code appointing Miss Mona Vora as Interim Resolution Professional. Additional ground filed , which we deal with later on , is also verified by the Insolvency Resolution Professional.
04. Brief facts of the case shows that assessee is engaged in the business of investment in shares and securities filed his return of income for A.Y. 2011-12 on 29<sup>th</sup> September, 2012, at a loss of ₹2,73,37,520/-. This return was processed on 14<sup>th</sup> February, 2013, under Section 143(1) of the Act.



05. Subsequently, the reasons were recorded for the reopening of the assessment on the basis of the information that assessee is one of the beneficiaries in case of bogus accommodation entries. It was found that the trading value of shares in two of the companies engaged into by the assessee is ₹6.59 crores. The learned Assessing Officer examined the transaction and found that there is tangible information. Notice under Section 148 of the Income-tax Act, 1961 (the Act) was issued on 26<sup>th</sup> September, 2016. Assessee reiterated original return of income. The copies of the reasons were provided to the assessee, which was objected to and such objections were disposed off. Notice under Section 143(2) and 142(1) of the Act was issued to show cause that why accommodation entries of long term capital gain in penny stock amounting to ₹6,59,02,083/- should not be added to the total income under Section 68 of the Act. The assessee submitted its reply which was considered and thereafter, the learned Assessing Officer found that assessee has purchased shares of Nouveau Global Ventures Ltd. of 3,95,000 shares which were acquired in 1996-99 at a total cost of ₹92,36,115/- which were sold on 17 and 18<sup>th</sup> January, 2012, for ₹3,46,10,951/-, resulting into long term capital gain of ₹2,53,74,801/-. The learned Assessing Officer verified the data of assessee and found that it has sold 62,64,191 shares of Nouveau Global Ventures Ltd. to Mr. Krishan Raghunath Prasad Khadaria on 18<sup>th</sup> January, 2012 and 30,85,809/- shares to Ms. Asha Krishan Khadaria on 17<sup>th</sup> January, 2012. The learned Assessing Officer held that Mr. Krishan Raghunath Prasad Khadaria was identified as entry operator by DIT Investigation Kolkata and Ms. Asha Krishan Khadaria and family member of Mr. Krishan Raghunath Prasad Khadaria. Therefore, purchases were made by the entry operator and his family. He further noted both these parties are also the directors of Nouveau Global Ventures Ltd. Thus, from the assessee the shares were purchased by the directors of Nouveau Global Ventures Ltd. Mr. Krishan Raghunath Prasad Khadaria who is also director of the assessee. Thus, the transactions was from the assessee company and above shares were sold by directors of these company in the independent name of

directors and his family members of Nouveau Global Ventures Ltd., wherein also the same persons are directors. Thus, the learned Assessing Officer held that Mr. Krishan Raghunath Prasad Khadaria has provided exit to the assessee at huge profit. Thus, the learned Assessing Officer held that the long term capital gain claimed by the assessee on transfer of script of Nouveau Global Ventures Ltd. amounting to ₹2,53,74,801/- is brought to tax under Section 68 of the Act. Accordingly, he passed an assessment order under Section 143(3) read with section 147 of the Act on 26<sup>th</sup> December, 2017, at total income of ₹2,53,74,801/-.

06. The assessee preferred the appeal before the learned CIT (A). The claim of the assessee is that the long term capital gain earned on sale of investigation of Nouveau Global Ventures Ltd. is supported by the balance sheet of the assessee company, wherein the above shares were partly acquired in the year ended on 31<sup>st</sup> March, 2006 and further, copy of allotment letters for allotment of shares on 22<sup>nd</sup> September, 2009. The assessee submitted the bank statement evidencing the payment for allotment of the above share. The assessee also stated that after acquisition of the above 9,35,000 equity shares of ₹10 each, same were sub divided on 11<sup>th</sup> May, 2011. The Demat account of assessee with progressive share broker private limited was also submitted. As assessee also submitted the copy of contract notes on sale of the above share, transfer of the above shares from the Demat Account of the assessee supported with the brokers ledger account and bank statement for payment receive. Therefore, it was submitted that there is nothing unusual in the transaction by which it can be said to be unexplained. The assessee also challenged the reopening of the assessment. The ground of reopening was dismissed by the learned CIT (A) holding that the reasons recorded by the learned Assessing Officer are on application of mind and the reopening in absence of any assessment is valid. The assessee also challenged that no notice under Section 143(2) of the Act was issued to the assessee on 7<sup>th</sup> November, 2017, selecting the return of income filed originally on 20<sup>th</sup> September, 2012, for scrutiny

and such notices is barred by limitation. It was further stated that the learned Assessing Officer did not issue any notice under Section 143(2) of the Act in response to the return of income filed on 10<sup>th</sup> April, 2017 and in absence of such notice the assessment is invalid. The learned CIT (A) held that the notice under Section 148 of the Act was issued on 26<sup>th</sup> September, 2016, which was responded by the assessee by filing letter dated 10<sup>th</sup> April, 2017, reiterating the original return filed on 29<sup>th</sup> September, 2012, under Section 139 of the Act. Therefore, assessee filed its return of income on 10<sup>th</sup> April, 2017 and notice under Section 143(2) of the Act was issued on 7<sup>th</sup> November, 2017, which is then prescribed time limit of 6 months from the end of the financial year in which the return was furnished. Therefore, this ground of appeal was also dismissed. With respect to the addition of ₹2,53,74,801/-, the learned CIT (A) examine the reasons given by the learned Assessing Officer and following the decision of the Hon'ble Kolkata HC in case of Swati Bajaj [2022] 139 taxmann.com 352/288 Taxman 403/446 ITR 56 (Cal.), confirmed the addition. Accordingly, the appeal of the assessee was dismissed.

07. Therefore, assessee is in appeal before us. At the time of hearing, the assessee raised an additional ground of appeal stating that notice issued under Section 148 of the Act is invalid notice, as it was issued by the Income Tax Officer, who was not having jurisdiction as the return filed disclosed a loss of ₹2,73,37,520/-, for which the jurisdiction lies with the Dy. Commissioner of Income Tax. Thus, the issue of notice by non jurisdictional officer has rendered the order under appeal as null and void, therefore, bad in law.
08. The assessee submitted that the above ground of appeal is partly legal, does not require any further investigation of facts and it can be raised at any time, therefore, same may be admitted.
09. The learned Authorized Representative submitted the same facts as submitted in the application for admission of additional ground.



010. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer and submitted that the notice is issued by the learned Assessing Officer for the reason that assessee has disclosed nil income in the return of income. The learned Departmental Representative referred to return of income originally filed where the total income is ₹ nil. It was further stated that the speculation loss has been earned by the assessee is carried forward. Therefore, the return deserves to be treated at ₹ nil only. Thus, it was stated that there is no infirmity and hence, additional ground cannot be admitted. The learned Departmental Representative also submitted that according to the Provisions of Section 124 of the Act, the jurisdiction of the learned Assessing Officer cannot be questioned now. If the assessee wanted to challenge the jurisdiction it should have been done within 1 month of the issue of notice. Therefore, the additional ground should not be admitted.
011. The learned Authorized Representative referred to the decision of the Hon'ble Bombay High Court in Writ Petition No. 3489 of 2019, in case of Ashok Devi Chand Jain dated 8<sup>th</sup> March, 2022. He referred to paragraph no. 5 that the notice under Section 148 of the Act is a jurisdictional notice.
012. We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that assessee has raised a jurisdictional issue of issue of notice by a non-jurisdictional officer. Such ground goes to the root of the matter and therefore, same deserves to be admitted.
013. On the merits of the additional ground, the learned Authorized Representative submitted that assessee filed return of income disclosing a loss of ₹2,73,37,520/-, for which the jurisdiction lies with the Dy. Commissioner of Income Tax, whereas the notice is issued under Section 148 of the Act by the Income Tax Officer, ward 11(1)(1), Mumbai, placed at page no.23 of the paper book. It was further stated that the reasons for reopening of the assessment on

22<sup>nd</sup> August, 2017, have been recorded by Dy. Commissioner of Income Tax, 11(1)(1), Mumbai, on 26<sup>th</sup> September, 2016, the notice was issued by the ITO. He referred to the notice issued under Section 142(1) of the Act by the Dy. Commissioner of Income Tax, 11(1)(1), Mumbai. Therefore, the notice under Section 147 of the Act which was issued by the ITO should have also been issued by the Dy. Commissioner of Income Tax. He submitted that instruction no.1 of 2011, dated 31<sup>st</sup> January, 2011, clearly held that notice in case of corporate returns income declared upto ₹30 lacs is to be issued by ITO and above ₹ 30 lacs should be issued by Dy. Commissioner of Income Tax. Thus, in case of the assessee jurisdiction lies with the Asst. Commissioner or Dy. Commissioner of Income Tax and not with the learned Assessing Officer and hence, such notice issued by the ITO is without jurisdiction. Therefore, the assessment order is invalid.

014. The learned Departmental Representative vehemently contested that in the present case, the income disclosed by the assessee is ₹ nil and assessee has carried forward the losses of ₹2,73,37,520/- and therefore, the jurisdiction correctly lies with the learned Assessing Officer. She further referred to the return of income wherein in the return of income filed itself but assessee has given the jurisdiction of ITO Ward 8(3)(3), Mumbai. Therefore, now the assessee cannot question that notice under Section 148 of the Act is issued by learned Assessing Officer incorrectly, but should have been issued by the Dy. Commissioner of Income Tax.
015. As the learned Authorized Representative has placed reliance on the decision of the Hon'ble Bombay High Court in case of Ashok Devi Chand Jain, the learned Departmental Representative submitted that in that case in the Writ Petition itself the assessee has challenged the jurisdiction of the learned Assessing Officer.
016. We have carefully considered the rival contentions in the present case, the assessee has filed return of income on 29<sup>th</sup> September, 2012, wherein the current year loss of ₹2,73,37,520/-, was returned. It is also an admitted fact that notice under Section 148 of the Act on

26<sup>th</sup> September, 2016 was issued by Income Tax Officer, 11(1)(1), Mumbai. This notice is now challenged on the ground that as the return of income filed by the assessee is more than ₹ 30 lacs and as assessee is resident of Mumbai, the jurisdiction of the assessee lies with Asst. Commissioner of Income Tax or Dy. Commissioner of Income Tax and not with the Income Tax Officer. The instruction no.1 of 2011, dated 31<sup>st</sup> January, 2011, also clearly provided that assessee being a corporate resident of metro city, having filed return of income at a loss of ₹2.73 crores, will have a jurisdiction of the Dy. Commissioner or Asst. Commissioner of Income Tax only. The Hon'ble Bombay High Court in case of Ashok Devi Chand Jain [2023] 151 taxmann.com 70 (Bombay) , vide order dated 8<sup>th</sup> March, 2022, considering the above instruction has categorically held that the notice issued in that case by the ITO, where the income of the assessee was ₹64.34 lacs is correctly without jurisdiction. The Hon'ble High Court also held that notice under Section 148 of the Act is jurisdictional notice and any defect therein is not curable. The Hon'ble High Court quashed the order passed in that case holding as under :-

*"1. Petitioner is impugning a notice dated 30th March, 2019 issued under section 148 of the Income-tax Act, 1961 (the Act) for A.Y. 2012-13 and order passed on 18th November, 2019 rejecting Petitioner's objection to reopening on various grounds.*

*2. The primary ground that has been raised is that the Income-tax Officer who issued the notice under section 148 of the Act, had no jurisdiction to issue such notice. According to Petitioner as per instruction No. 1/2011 dated 31st January, 2011 issued by the Central Board of Direct Taxes, where income declared/returned by any Non-Corporate assessee is up to Rs. 20 lakhs, then the jurisdiction will be of ITO and where the income declared returned by a Non Corporate assessee is above Rs. 20 lakhs, the jurisdiction will be of DC/AC.*

*3. Petitioner has filed return of income of about Rs. 64,34,663/-and therefore, the jurisdiction will be that of DC/AC and not ITO. Mr. Jain submitted that since notice under section 148 of the Act has been issued by ITO, and not by DC/AC that is by a person who did not have any jurisdiction over Petitioner, such notice was bad on the*



count of having been issued by an officer who had no authority in law to issue such notice.

**4.** We have considered the affidavit in reply of one Mr. Suresh G. Kamble, ITO who had issued the notice under section 148 of the Act. Said Mr. Kamble, ITO, Ward 12(3)(1), Mumbai admits that such a defective notice has been issued but according to him, PAN of Petitioner was lying with ITO Ward (12)(3)(1), Mumbai and it was not feasible to migrate the PAN having returned of income exceeding Rs. 30 lakhs to the charge of DCIT, Circle 12(3)(1), Mumbai, as the time available with the ITO 12(3)(1) was too short to migrate the PAN after obtaining administrative approval from the higher authorities by 31st March, 2019.

**5.** The notice under section 148 of the Act is jurisdictional notice and any inherent defect therein is not curable. In the facts of the case, notice having been issued by an officer who had no jurisdiction over the Petitioner, such notice in our view, has not been issued validly and is issued without authority in law.

**6.** In the circumstances, we have no hesitation in setting aside the notice dated 30th March, 2019.

**7.** Consequently the order dated 18th November, 2019 rejecting Petitioner's objection is also quashed and set aside."

017. INSTRUCTION NO. 1/2011 [F. NO. 187/12/2010-IT(A-I)], DATED 31-1-2011 provides as under :-

INSTRUCTION NO. 1/2011 [F. NO. 187/12/2010-IT(A-I)], DATED 31-1-2011

References have been received by the Board from a large number of taxpayers, especially from mofussil areas, that the existing monetary limits for assigning cases to ITOs and DCs/ACs is causing hardship to the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The Board had considered the matter and is of the opinion that the existing limits need to be revised to remove the abovementioned hardship.

An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001,



when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:

	<i>Income Declared (Mofussil areas)</i>		<i>Income Declared (Metro cities)</i>	
	<i>ITOs</i>	<i>ACs/DCs</i>	<i>ITOs</i>	<i>DCs/ACs</i>
Corporate returns	Upto Rs. 20 lacs	Above Rs. 20 lacs	Upto Rs. 30 lacs	Above Rs. 30 lacs
Non-corporate returns	Upto Rs. 15 lacs	Above Rs. 15 lacs	Upto Rs. 20 lacs	Above Rs. 20 lacs

Metro charges for the purpose of above instructions shall be Ahmedabad, Bangalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011."

018. As the facts of that case squarely applies to the case before us, respectfully following the decision of the Hon'ble Bombay High Court in case of Ashok Devi Chand Jain (supra), we also quash the order passed by the learned Assessing Officer. Accordingly, the additional ground raised by the assessee is allowed.

019. In the result, the appeal filed by the assessee is allowed on additional ground and other grounds of appeal are left open.

Order pronounced in the open court on 21.03.2024.

Sd/-  
(RAHUL CHAUDHARY)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.03.2024

*Sudip Sarkar, Sr.PS*

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//

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai