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

BEFORE MS PADMAVATHY S, AM &
SHRI RAHUL CHAUDHARY, JM

I.T.A. No. 4302/Mum/2023
(Assessment Year: 2010-11)

I.T.A. No. 4303/Mum/2023
(Assessment Year: 2011-12)

Ramprakash Mathuradas Dhingra Dhingra House, Khativali Village, Mumbai Nashik Highway, Post Vasind, Taluka-Shahapur, Thane-421604. **PAN : ABVPD4267A**	Vs.	**ITO Ward-2(3),** 2nd Floor, Mohan Plaza, Wayale Nagar, Khandakpada, Kalyan (W)-421301.
Appellant)	:	**Respondent**)

Appellant/Assessee by	:	Dr. Dainiel, AR
Revenue/Respondent by	:	Shri Joginder Singh, Sr. DR.
Date of Hearing	:	18.07.2024
Date of Pronouncement	:	21.08.2024

O R D E R

Per Padmavathy S, AM:

These two appeals by the assessee are against the orders of the Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre, Delhi [for short 'the CIT(A)] both dated 16.10.2023 for the Assessment Year (AY) 2010-11 & 2011-12. The concise grounds of appeal filed by the assessee for both the AYs are as below:

"1. The learned CIT (A) erred in confirming the order passed by the Assessing officer u/s. 147 of the Income Tax Act, 1961 which is bad in law and void- ab-initio.

2A. The learned CIT (A) erred in confirming the additions made by the Assessing officer u/s. 68 of the Income Tax Act, 1961.

2B. The learned CIT (A) erred in holding that the additions made u/s. 68 of the Income Tax Act, 1961 is wrong as it should have been made u/s. 69A of the Income Tax Act, 1961.

3. The learned CIT (A) erred in confirming the Assessment order passed by the Assessing officer without application of mind and adding therein the receipts of other family members who are independent assessees.

4. The learned CIT (A) erred in confirming the additions from mere entries in the books of accounts of third party without any corroborative evidence regarding the payment to the Appellant and without even allowing the cross examination of third party which is bad in law.

5. The learned CIT (A) erred in stating therein that cross examination is not necessary and it will not vitiate the proceedings.

6. The learned CIT (A) erred in holding that the agricultural land is treated as Capital Asset u/s. 2(14) of the Income Tax Act, 1961 which is factually incorrect and without following the provisions of section 251 of the Income Tax Act, 1961.

7. Appellant prays that the additions made by the learned Assessing officer be cancelled or in the alternate the additions be deleted."

2. The assessee is an individual filed the return of income for AY 2010-11 on 31.01.2011 declaring a total income of Rs. 1,81,400/-. The assessee filed the return of income for AY 2011-12 on 31.10.2012 declaring a total income of Rs. 2,80,271/-. The Assessing Officer (AO) received information from DDIT (Inv.), Thane that the assessee vide agreement dated 02.02.2010 and 04.02.2010 has sold land for a consideration of Rs. 2,52,40,620/- to M/s Swastik Group, Thane. The AO further noticed that vide agreement dated 20.05.2010 the assessee has sold land for a consideration of Rs. 1,79,05,220/- to same group. On verification

from AST System it was noticed that in the returns of income filed for AY 2010-11 and 2011-12 the assessee has not disclosed the capital gain on sale of land. Accordingly, the AO issued a notice under section 148 dated 31.03.2016, re-opening the assessments of the assessee for AY 2010-11 and dated 29.03.2016 for AY 2011-12. The AO held that from the materials found during the search action carried out in the case of M/s Swastik Group it was noted that certain cash transaction have been entered into with various members of Dhingra family pertaining to sale of land at village-Khativali. The AO further held that the cash payments have not been recorded in the sale agreement and therefore proceeded to treat a sum of Rs 1,38,56,120/- for AY 2010-11 and a sum of Rs. 1,10,20,720/- for AY 2011-12 as unexplained cash receipts in the hands of the assessee as per section 68 of the Act. Aggrieved, the assessee preferred further appeal before the CIT(A). Before the CIT(A), the assessee raised the legal contention against the re-opening under section 147 of the Act. With regard to the contentions of the assessee on merit, the CIT(A) called for a remand report from the AO. After considering the remand report, the CIT(A) confirmed the additions made by the AO both on the legal contentions and also on merit.

3. With regard to the legal submissions that re-opening is bad-in-law, the ld. AR submitted that the AO has simply borrowed the satisfaction from the information received from DDIT (Inv.) and that there was no independent application of mind on the part of the AO to come to his own conclusions that there has really been escapement of any income. The ld. AR further submitted that the assessee has in the computation of income has mentioned the sale of agricultural land and the same is shown as being exempt. The ld. AR drew our attention to the reasons recorded for re-opening wherein it is stated that the assessee has not disclosed the capital gain arising on sale of land whereas the AO

finally made the addition under section 68 of the Act as unexplained receipt. Therefore, the ld. AR argued that the AO did not make any addition on the reasons recorded but made additions for reason other than what is stated in the reasons recorded. On merits, the ld. AR submitted that the AO has made the additions based on the alleged cash receipt without bringing anything on record to state that the assessee has indeed received any cash payments. The ld. AR further submitted that the assessee does not maintain any books of account and therefore, no addition can be made under section 68 of the Act without any corroborative evidence to the contrary.

4. The ld. DR on the other hand relied on the order of the lower authorities.

5. We heard the parties and perused the material on record. There was a search operation in the case of M/s Swastik Group of Virar on 31.07.2014. The AO held that certain incriminating materials were seized during the course of search wherein there are entries pertaining to cash transactions with various members of Dhingra family. The AO further held that in the sale agreements entered into by the assessee towards sale of land to M/s Swastik Group the cash payments have not been considered and therefore, the AO treated a sum of Rs. 1,38,56,120/- for AY 2010-11 and a sum of Rs. 1,10,20,720/- for AY 2011-12 as unexplained cash receipts under section 68 of the Act. The main contention of the assessee is that the addition towards alleged cash receipts by the assessee is made without any basis by simply placing reliance on the report from DDIT (Inv.). It is also contended that since the assessment is opened beyond four year period, the AO could not have made the addition without bringing any corroborative evidence on record. In this regard, it is relevant to look at the provisions of section 147 of the Act.

Income escaping assessment.

*[5] **147.** If the [6][Assessing] Officer [7][has reason to believe [8]] that any income chargeable to tax has escaped assessment [8] for any assessment year, he may, subject to the provisions of sections 148 to 153 , assess or reassess [8] such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

***Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure [9] on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts [9] necessary for his assessment, for that assessment year:*

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6. Though section 147 of the Act authorizes an assessing officer to reassess income chargeable to tax if he has reason to believe that the income for any assessment year has escaped assessment, the proviso to the aforesaid section, curtails the powers to initiate reassessment proceedings beyond the period of 4 years from the end of the relevant assessment year, where the assessment has been completed under section 143(3) of the Act unless the income has escaped assessment by reason of the failure of the assesses to disclose fully and truly all material facts necessary for assessment. In other words where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the proviso to Section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary. The Courts have been consistently holding that where there was no failure on the part of the assessee to truly disclose all material facts and it was only a question of drawing an inference from the facts, reopening of

assessment beyond the four years period is invalid. Therefore when a period of four years has lapsed from the end of the relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact.

7. In the background of this settled legal position, we will now examine the assessee's case in hand. In assessee's case, it is an undisputed fact that the reopening of assessment for both AY 2010-11 and 2011-12 have been done beyond 4 years and therefore the proviso to section 148 is applicable in assessee's case whereby there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. From the perusal of the return of income filed by the assessee (page 1 to 7 of PB for AY 2010-11) we notice that the assessee has declared certain agricultural income and also in the note to the computation of income the assessee has declared that there has been a sale of agricultural land during the year under consideration treating the same as exempt since the agricultural land is not a capital asset within the meaning of section 2(14) of the Act. However this fact has not been considered by the AO and in the reasons recorded the AO has stated that the assessee has not disclosed the "Capital Gain" on the said transaction.

8. Further in the reasons recorded as furnished to the assessee dated 10.01.2017 (page 14 & 15 of PB for AY 2010-11), the AO has recorded that the land in Survey number 339 is sold for a consideration of Rs.73,35,400 consisting of Rs.45,00,000 lakhs of cheque payment and Rs.28,35,000 cash payment and that the entire amount has escaped assessment. This according to the AO is based on the information received from DDIT(Inv) and it is relevant to mention that

the land having the said Survey number is not in the name of the assessee. We also notice that in the Remand Report called for by the CIT(A), the AO has relied on certain documents seized during search in the case M/s Swastik Group. However on perusal of the remand report (page 167 to 174) we notice that in the alleged incriminating documents based on which the AO made an addition of Rs.1,38,56,120 does not contain anything specifically against the assessee except for the list with name and survey numbers mentioning purchase amounts as cash and cheque (page 187 & 188 of PB). The statement recorded (page 176 to 181 of PB) and other document (page 182 to 185 of PB) does not contain anything to substantiate that the assessee has received consideration in cash. Therefore there is merit in the submission that the AO has not brought anything to prove that the assessee has received the alleged cash consideration and has simply relied on a statement found during the course of search. In view of these discussions and facts that are unique to this case we are of the considered view that the addition made by the assessing officer, without properly appreciating the facts already disclosed by the assessee and without bringing any material evidence to substantiate the receipt of cash consideration by the assessee, the addition made by the AO is not sustainable. Accordingly we direct the AO to delete the additions made for AY 2010-11.

9. The facts for AY 2011-12 are identical to that of AY 2010-11 and therefore our decision as given above for AY 2010-11 is mutatis mutandis applicable for AY 2011-12 also. According we hold that the addition made for AY 2011-12 be deleted. It is ordered accordingly

10. The ld AR during the course of hearing also presented arguments regarding the sanction by the Principal Commissioner of Income Tax instead of

Joint / Additional CIT and also that the reopening is done to assessee income from "capital gains" whereas the final addition is made under section 68 which is not correct. We have already allowed the appeal on the ground that reopening beyond 4 years without considering that the assessee has declared the sale transaction in the return and that there is no independent enquiry / evidence to substantiate alleged cash receipts by the assessee. Therefore the other arguments of the ld AR have become academic and left open.

11. In the result, the appeals of the assessee for AY 2010-11 and AY 2011-12 are allowed.

Order pronounced in the open court on 21 -08-2024.

Sd/-	***Sd/-***
(RAHUL CHAUDHARY)	**(MS. PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai