IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1669/Mum./2024
(Assessment Year : 2009–10)

Johar Hasan Zojwalla
1st Floor, Rani Mansion, Murbad
Road, Kalyan (West) ……. Appellant
Mumbai-421301
PAN – AAAPZ5650K

v/s

ACIT, Circle-3
2nd Floor, Rani Mansion, Murbad
Road, Kalyan (West) ……. Respondent
Mumbai-421301

Assessee by :Shri Subodh Ratnaparkhi
Revenue by :Shri Ashish Kumar, Sr. AR

Date of Hearing –24/06/2024	Date of Order – 16/09/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 13/03/2024, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*],for the assessment year 2009-10.

2. In its appeal, the assessee has raised the following grounds: –

"1. The Hon. CIT(A) erred in upholding the re-opening of assessment u/s 147 of the I.T Tax Act 1961, by issue of the notice u/s 148 dt. 31.03.2016, not appreciating that such re-opening was on account of change of opinion in respect of same set of facts examined in the course of original assessment completed u/s 143(3) on 29.12.2011, which being not permissible by law, the re-opening be held to be invalid and bad-in-law.

2. The Hon. CIT(A) erred in upholding the re-opening of assessment u/s 147 of the I. Tax Act 1961, by issue of the notice u/s 148 dt. 31.03.2016, not appreciating that the original assessment was completed u/s 143(3) and four years had elapsed from the end of the assessment year and therefore, as per first proviso to section 147, without there being any omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, the reopening of assessment u/s 147 was invalid and bad-in-law.

3. The Hon. CIT(A) erred in upholding the addition of Rs. 29,76,508/- made by the ld. AO ws 56(2)(i) of the I.T. Act 1961, in respect of advance received by the appellant from M/s. Zojwalla Housing and Properties Private Limited, not appreciating that such advance was on account of a business transaction and therefore outside the ambit of the provisions of deemed dividend as contained in section 2(22)(e) of the I.T. Act 1961 and therefore addition u/s 56(2)(i) was not merited."

3. As the assessment in the present case was reopened by the Assessing Officer ("*AO*"), the validity of the assumption of jurisdiction under section 147 of the Act is the foundation aspect of this matter. Accordingly, we deem it appropriate to deal with the jurisdictional aspect first and if necessary, thereafter, to deal with the addition made by the AO on merits.

4. The brief facts of the case pertaining to the jurisdictional issue are:The assessee is an individual and is in the business of builders and developers. For the year under consideration, the assessee originally e-filed its return of income on 30/09/2009 declaring a total income of ₹ 36,55,460. The return filed by the assessee was selected for scrutiny and vide order dated 29/12/2011 passed under section 143(3) of the Act the assessee's total income was assessed at ₹ 48,81,660. Subsequently, on the basis that the assessee has received the unsecured loans from M/s Zojwalla Housing and

Properties Private Ltd to the tune of ₹ 29,80,340, wherein the assessee is a Director and has more than 10% voting share, proceedings under section 147 of the Act were initiated as the payment of ₹ 29,80,340 received by the assessee as an unsecured loan comes under the ambit of deemed dividend under section 2(22)(e) of the Act and the same has escaped assessment. Accordingly, notice under section 148 of the Act was issued on 31/03/2016. In response to the aforesaid notice, the assessee filed the copy of the return and tax audit report vide letter dated 09/08/2016 and requested that the same be treated as filed in response to the notice issued under section 148 of the Act. In response to the statutory notices issued under section 143(2) as well as section 142(1) of the Act, the assessee attended the proceedings and filed a copy of the bank account and names of the company/firm where the assessee is a Director/Partner. During the reassessment proceedings, the assessee was asked to show cause as to why the amount of ₹ 29,76,508 should not be added to the return income of the assessee as per the provisions of section 2(22)(e) of the Act. In response to the show cause notice, the assessee submitted that the amount received by the assessee fromM/s Zojwalla Housing and Properties Private Ltd in its proprietary business entity M/s Sab Reality towards the proposed sale of about 5000 ft^2 of commercial premises in the building project being developed by the proprietary concern. It was further submitted that the amount was received as a part consideration towards the sale of the said commercial premises. The assessee submitted that since the proprietary concern could not construct the premises due to the non-availability of construction premises, the entire amount was repaid toM/s ZojwallaHousing and Properties Private

Ltd. The AO vide order dated 26/12/2016 passed under section 143(3) read with section 147 of the Act disagreed with the submissions of the assessee and treated the amount of ₹ 29,76,508 as deemed dividend under section 2(22)(e) and added the same to the total income of the assessee under section 56(2)(i) of the Act.

5. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee on the challenge against the invocation of proceedings under section 147 of the Act andalso on addition made by the AO on merits. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that in the present case notice under section 148 of the Act was issued on 31/03/2016, i.e., after the expiry of 4 years from the end of the relevant assessment year, merely on the basis of the reappraisal of facts which were already available on record. The learned AR further submitted that the issue pertaining to the receipt of advances fromM/s Zojwalla Housing and Properties Private Ltd. was already examined during the scrutiny assessment proceedings under section 143(3) of the Act. Therefore, the impugned reassessment has been made on account of a change of opinion and there is also no failure on the part of the assessee to disclose fully and truly all material facts.

7. On the other hand, the learned Departmental Representative ("*learned DR*") vehemently relied upon the order passed by the lower authorities and submitted that the amount received from M/s Zojwalla Housing and Properties Private Ltd. was not disclosed by the assessee as its income,

therefore the provisions of section 147 of the Act were rightly invoked by the AO. It was further submitted that substantial payment was made by M/s Zojwalla Housing and Properties Private Ltd. when no work was commenced by the proprietary concern of the assessee, thus the payment was made for the appropriation of profits and not as a business transaction.

8. We have considered the submissions of both sides and perused the material available on record. In the present case, the assessee is a proprietor of M/s Sab Reality and is also a Director of M/s Zojwalla Housing and Properties Private Ltd. having more than 10% voting shares. For the year under consideration, the assessee originally e-filed his return of income on 30/09/2009 declaring a total income of ₹ 36,55,460 comprising income from salary, income from house property and income from other sources. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act along with the questionnaire were issued and served on the assessee. It is evident from the record that during the assessment proceedings, the assessee also filed its Audit Report in Form no. 3CB and 3CD and also furnished profit and loss account, and balance sheet along with the annexures. The AO vide order dated 29/12/2011 passed under section 143(3) of the Act assessed the total income of the assessee at ₹ 48,81,660 after making disallowance under section 80-IB(10) of the Act and on account of interest income. Subsequently, after the expiry of 4 years from the end of the relevant assessment year, the AO initiated reassessment proceedings under section 147 and issued notice under section 148 of the Act on 31/03/2016 to the

assessee.The reasons recorded by the AO, while reopening the assessment, are reproduced as follows: -

> *"In this case, the assessee is a proprietor of M/s. Sab reality. The assessee is also a director in Co. M/s. Zojwala Housing & Properties Pvt. Ltd. having more than 10% voting shares. On perusal of records, it is found that during A.Y. 2009-10, the assessee has received the unsecured loans from M/s Zojwalla Housing & Properties Pvt Ltd to the tune of Rs. 29,80,340/ The accumulated profit of M/s Zojwalla Housing & Properties Pvt Ltd as on 31.03.2009 is Rs. 85,47,660/, which is more than the loan taken by the assessee. The assessee, being substantial shareholders in the company and the company being a Pvt Ltd Company in which Public interest are not substantial. Hence, the payment as received by the assessee as unsecured loan comes under the ambit of deemed dividend u/s 2(22)(e).*
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> *In this case, the Scrutiny Assessment U/s 143(3) for A.Y.2009-10 was completed on 29.12.2011. On perusal of assessment records, it is found that the issue of deemed dividend was not considered/discussed during the course of Scrutiny Assessment,*
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> *Therefore, in view of the above, I have reason to believe that the amount of Rs. 29,80,340/- has escaped assessment for A.Y. 2009-10 due to failure on part of assessee to disclose fully and truly all material facts necessary for the assessment, within the meaning of the provisions of section 147 of the I.T. Act."*

9. Thus, the AO initiated the reassessment proceedings on the basis that since the assessee is a Director of M/s Zojwalla Housing and Properties Private Ltd. having more than 10% voting shares and has received the unsecured loans amounting to ₹ 29,80,340 fromM/s Zojwalla Housing and Properties Private Ltd., which is a private limited company in which public is not substantially interested and has accumulated profit of ₹ 85,47,660, therefore the payment received by the assessee falls within the ambit of deemed dividend under section 2(22)(e) of the Act. Thus, it was alleged that the amount of ₹ 29,80,340 has escaped assessment due to failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment.The AO further alleged that the issue of deemed dividend

was not considered/discussed during the scrutiny assessment proceedings under section 143(3) of the Act which was completed on 29/12/2011.

10. During the hearing, the learned AR placed on record the written submission dated 23/12/2011 filed before the AO in response to the query pertaining to the applicability of the provisions of section 2(22)(e) of the Act to the advances received by the assessee fromM/s Zojwalla Housing and Properties Private Ltd.From the perusal of the aforesaid written submission, we find that the assessee submitted that the amount was received as part consideration towards the sale of commercial premises which was acquired byM/s Zojwalla Housing and Properties Private Ltd. for the proposed corporate office at Kalyan. The assessee further submitted that the amount received was on account of a business transaction and therefore is outside the ambit of the provisions of deemed dividend as contained in section 2(22)(e) of the Act. However, vide assessment order passed under section 143(3) of the Act, the AO did not make any addition on the aforesaid issue. Thus, it can be reasonably presumed that the AO after due application of mind accepted the claim of the assessee. Therefore, we find no merits in the allegation of the Revenue, as stated in the aforenoted reasons recorded while reopening the assessment, that the issue of deemed dividend was not considered/discussed during the scrutiny assessment proceedings under section 143(3) of the Act. Further, we are of the considered view that the impugned reassessment proceeding is nothing but a change of opinion by the AO on the issue which was considered at the time of the scrutiny assessment.

11. Further, from the perusal of the aforenoted reasons recorded by the AO while reopening the assessment, it is pertinent to note that reopening is based only on perusal of the record and there is no reference to any new or tangible material which came to the knowledge of the AO for initiating the reassessment proceedings. The aforesaid conclusion is duly supported by the disclosure in the financial statement of the assessee, page 44 of the paper book, wherein the receipt of ₹ 29,80,339.94 from M/s Zojwalla Housing and Properties Private Ltd.has duly been disclosed by the assessee.

12. At this stage, it is also pertinent to note that the impugned reassessment proceedings were initiated on 31/03/2016, i.e. after the expiry of 4 years from the end of the relevant assessment year 2009-10. Further, as per the first proviso to section 147, no reassessment proceedings can be initiated after the expiry of 4 years from the end of the relevant assessment year unless the income chargeable to tax has escaped assessment for such assessment year, inter-alia, by reason of the failure on the part of the assessee to disclose truly and fully all material facts necessary for his assessment. From the facts available on record, it is evident that the Revenue has failed to justify the fulfilment of the aforenoted condition of failure on the part of the assessee to disclose truly and fully all material facts, as the details pertaining to the receipt of advances fromM/s Zojwalla Housing and Properties Private Ltd.were not only disclosed by the assessee in its financial statement but the written submission regarding the same were also made during the scrutiny assessment proceedings.

13. For initiating the proceeding under section 147 of the Act, the AO is required to have "*reason to believe*" that income chargeable to tax has escaped assessment. In the present case, reassessment proceedings are nothing but a mere change of opinion by the AO with regard to material already available on record and considered during the original scrutiny assessment proceedings. That it is settled law that "*reason to believe*" can never be the outcome of a change of opinion. It is essential that before any action is taken by the AO he should substantiate his satisfaction. Thus, where the reasons recorded by the AO disclose no more than a mere change of opinion, the reassessment proceedings and assessment order pursuant thereto are liable to be quashed.The existence of a valid "*reason to believe*" is a *sine qua non* to exercise the jurisdiction under Section 147 of the Act. The expression "*reason to believe*" imports the cumulative presence of the following four elements viz. some tangible material or materials to establish that income has escaped assessment; nexus between such material and the belief of escapement of income from assessment as envisaged under section 147; application of mind by the AO to such material; and an inference, based on reason drawn tentatively by the officer that income has escaped assessment.

14. The Hon'ble Jurisdictional High Court in the case of Asian Paints Ltd. v/s DCIT: [2009] 308 ITR 195 (Bom.), observed as under:

> *"10. It is further to be seen that the legislature has not conferred power on the AO to review its own order. Therefore, the power under s. 147 cannot be used to review the order. In the present case, though the AO has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the AO, nothing new has happened, therefore, no new material has come on record, no new information has been received; it is merely a fresh application*

of mind by the same AO to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator (supra) referred to above, has taken a clear view that reopening of assessment under s. 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under s. 148."

15. As is evident from the facts available on record, no new information was received by the AO at the time of initiation of reassessment proceedings, and it was merely a fresh application of mind to the same set of facts as were available at the time of original scrutiny assessment proceedings. Thus, in view of the above, we are of the considered opinion that the reopening of assessment under section 147 of the Act, in the present case, is bad in law and therefore is set aside. Accordingly, the impugned order passed by the learned CIT(A), inter-alia, upholding the order passed under section 143(3) read with section 147 of the Act is set aside. As we have quashed the reassessment proceedings for this short reason, we see no need to deal with other issues raised in the appeal on merits. Those aspects of the matter are, as of now, academic and infructuous.

16. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 16/09/2024

Sd/-	**Sd/-**
OM PRAKASH KANT	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 16/09/2024

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai