

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

**BEFORE JUSTICE (RETD.) SHRI C.V. BHADANG, PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No. 2617/Mum/2023
Assessment Year : 2011-12

Income Tax Officer, Ward-7(2)(1), Room No. 126-H, Aayakar Bhavan, Maharshi Karve Road, Mumbai.	vs.	Magnetic Properties Exim Pvt. Ltd., 477, Babyloan Building, Adenwala Road, Matunga, Mumbai. PAN : AAGCM8999K
(Appellant)		(Respondent)

For Assessee :	Shri Neelkanth Khandelwal
For Revenue :	Shri R.R. Makwana, Sr.DR

Date of Hearing :	05-12-2024
Date of Pronouncement :	11-12-2024

ORDER

PER B.R. BASKARAN, A.M :

The Revenue has filed this appeal challenging the order dated 02-06-2023 passed by the Ld.CIT(A)-NFAC, Delhi and it relates to the Assessment Year (AY.) 2011-12. The Revenue is aggrieved by the decision of the Ld.CIT(A) in deleting the addition made by the AO u/s 68 of the Income Tax Act, 1961 ('the Act').

2. The assessee has also moved a petition under Rule 27 of the Appellate Tribunal Rules, raising a legal contention on the validity of reopening of assessment.

3. We heard the parties on the legal issue. The Ld.AR invited our attention to the reasons recorded by the AO, which reads as under:-

“Reasons for reopening assessment u/s. 147 of the I.T. Act, 1961

In this case, the information has been received from the office of the DGIT(Inv), Mumbai, providing a list of cases involving bogus transaction between Hawala entities and beneficiaries. On the basis of list provided by the DGIT(Inv), Mumbai and it is found that one of the beneficiary in the instant case M/s. Magnetic Properties Private Limited (PAN: AAGCM8999K). The following details were provided by the Investigation Wing in which the assessee company was termed as the beneficiary, in respect of bogus purchases made by the company through the following entities which are as under.

S.No.	Name of the Hawala Entity as per list	PAN	Amount (Rs.)
1	M/s. Casper Enterprises Pvt. Ltd.	AAAC07955M	50,00,000
2	M/s. Casper Enterprises Pvt. Ltd.	AAAC07955M	50,00,000
3	M/s. Duke Business Pvt Ltd. (JKP Trading)	AABCJ6245N	1,05,00,000
		TOTAL	2,05,00,000

In view of the above, I have reason to believe that an amount of Rs. 2,05,00,000/- chargeable to tax has escaped assessment for A.Y. 2011-12, by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the said assessment year. Hence, I am convinced and satisfied that this is a fit case to re-open the assessment u/s. 147 by issue of notice u/s. 148 for A.Y. 2011-12.

*Sd/-
(P. MESHRAM)
Income Tax Officer-5(2)(3), Mumbai”*

4. The Ld.AR submitted that the AO has reopened the assessment on the basis of information received from the Investigation Wing that the assessee is a beneficiary by way of bogus purchases made from two companies mentioned above. The aggregate sum of purchases was mentioned by the AO as Rs.2,05,00,000/- in the reasons recorded by him. The Ld.AR submitted that the assessee has not purchased anything from the above said two companies and hence the reason for reopening recorded

by the AO is baseless. He submitted that the assessee had availed loans from the above said two companies. This fact would show that the AO was not sure about the nature of income that has actually escaped the assessment. Relying upon the decision rendered by the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd vs. R B Wadkar, ACIT (268 ITR 332) (Bom), the Ld.AR submitted that the reasons, once recorded by the AO, cannot be amended subsequently. Accordingly, he submitted that the impugned assessment has been framed by the AO without proper reasoning and hence, the same is liable to quashed. He further submitted that the AO did not make any addition towards alleged bogus purchases, but made the addition u/s.68 of the Act. By placing reliance on the decision rendered by the Hon'ble Bombay High Court in the case of Jet Airways (I) Ltd (2011)(331 ITR 236) (Bom), the Ld.AR submitted that the AO cannot make any new addition, which was not part of the reasons recorded for reopening of assessment, unless he makes any of the additions mentioned in the reasons. He submitted that the AO did not make any addition on account of alleged bogus purchases and hence, he could not have made addition u/s.68 of the Act in the reopened assessment. Accordingly, he contended that the reopening of assessment is not valid and hence, the addition made by the AO u/s.68 of the Act is liable to be deleted.

5. The Ld.DR, on the contrary, submitted that the AO has reopened the assessment after recording proper reasons on the basis of information received from the Investigation Wing. He submitted that the case of the Department is that assessee has availed accommodation entries. The fact remains that the assessee has taken loans from the entities providing accommodation entries. Accordingly, he submitted that the reopening is valid.

6. We heard rival contentions and perused the record. It is settled position of law that the reopening of an assessment can be made by the AO only after recording reasons for reopening of assessment. The reasons so recorded are sacrosanct and hence, it cannot be changed later. The legal position in this regard has been explained by the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd (supra) as under:-

“The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.”

7. In the instant case, the AO has recorded reasons mentioning alleged bogus purchases, but the fact would remain that the assessee has not made any such purchases. We notice that the AO has made following observations in the assessment order:-

“10. The submissions made by the assessee as mentioned above have been carefully perused. However, do not fully agree with the above submissions /contentions made by the assessee for the following reasons:

a) The onus was on the assessee to establish the genuineness of the transaction. Mere putting forth the explanation that it has made payments through bank and furnishing confirmation for the same does not prove the genuineness of the transactions and purpose.

b) Mere fact that the assessee had received payment by cheque from these parties does not make the loan transaction as genuine unless and until that recipient of the payment confirms that the payments was towards the purpose for which it was made. This fact can be further understood from the examples

- i. “A” claims to have made payment of Rs. 5 lacs to “B” towards donation whereas “B” treats the amount as share capital and allots shares also. In such case, though “A” claims payments was towards donation whereas “B” treats as share capital. Therefore the payment through cheque does not ipso facto prove the genuineness of the transaction unless and until both the parties confirms the transaction in full.

ii. “A” makes payment of Rs. 5 lacs to “B” towards purchases whereas “B” treats the same as loans in books of accounts. Therefore the payment through cheque does not ipso facto prove the genuineness of the transaction unless and until both the parties confirms the transaction in full.

c) A cheque payment only proves that a payment has been made to this party but in absence of any contractual agreement the where purpose vested does not prove.

d) Further, the name of this party appears among the persons who have given bogus accommodation entry.

e) It only proves that assessee made accommodation entry in his books. To regularise these loans the assessee produced only confirmation to give colour of a genuine transaction.

*f) Therefore, the **source of investment** by the alleged parties remained unexplained.*

*g) Hence, I hold that the assessee made accommodation entry in the books of accounts but **very basis of investment** therein remained unexplained.*

*In view of the above, total investment of Rs.2,05,00,000/- made by the alleged parties remained unexplained and therefore the same is treated as assessee income from unexplained sources credited in the books, are added **u/s 68 r.w.s. 56 of the IT Act.***”

8. It can be noticed that the AO is making addition u/s 68 r.w.s. 56 of the Act. Under the Act, unexplained investments will be covered by sec.69 of the Act and cash credits will be covered by sec.68 of the Act. Section 56 relates to the 'Income from other sources' including certain receipts deemed as income. The addition towards alleged bogus purchases is made u/s.28 of the Act. Thus, the AO could invoke any of the above said provisions depending the exact nature of income that has escaped the assessment. The discussions made by the AO in the assessment order would show that he himself was not clear with regard to the nature of alleged accommodation entry availed by the assessee from the operator named Shri Pravin Kumar Jain or exact nature of income that has escaped the assessment. It can be noticed that the AO has used the expressions “source of investment” and “very basis of investment therein remained unexplained”, which shows that he AO was under the impression that the assessee has given some money. On the contrary, the Ld.AR submitted that the assessee has taken loans from the companies belonging to Shri Pravin Kumar Jain, which again proves that the AO has reopened the assessment without knowledge of exact nature of income alleged to have escaped the assessment at the time of recording reasons as well as at the time of completion of assessment. As noticed earlier, the provisions of sec. 147 of the Act makes it mandatory that the AO should be clear about the

alleged escapement of income while recording reasons for reopening of assessment. Hence, the reopening has to be invalid on these reasons.

9. We noticed earlier that the AO had reopened the assessment on the reasoning that the assessee has availed accommodation entries in the form of bogus purchases. However, while completing the assessment, the AO assessed the income u/s.68 r.w.s 56 of the Act. Thus, the AO did not make any addition in respect of the issue for which the reopening was done. We noticed earlier that the Ld.AR contended that the AO shall be entitled to make addition on any other issues not mentioned in the reasons for reopening of assessment, only if he makes addition on any one of the issues mentioned in the reasons for reopening. We notice the above said contention of the assessee is supported by the decision rendered by the Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (I) Ltd (331 ITR 236)(Bom). In the above said case, the Hon'ble Bombay High Court held as under:-

*"11. The rival submissions which have been urged on behalf of the Revenue and the assessee can be dealt with, both as a matter of first principle, interpreting the section as it stands and on the basis of prece-
dents on the subject. Interpreting the provision as it stands and without adding (sic) deducting from the words used by Parliament, it is clear that upon (sic) formation of a reason to believe u/s 147 and following the issuance of a notice u/s 148, the Assessing Officer has the power assess or reassess the income which he has reason to believe had escap(sic) assessment and also any other income chargeable to tax. The words and also" cannot be ignored. The interpretation which the Court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word "and". The words "and" as well as "also" have been used together and in conjunction.*

The Shorter Oxford dictionary defines the expression "also" to mean further, in addition, besides, too". The word has been treated as being relative and conjunctive. Evidently, therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe u/s 147 and the issuance of a notice u/s 148(2) must assess or reassess: (i). "such income"; and also (ii) (sic) other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words "such income" refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice u/s 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of Section 147 with effect from 1 April 1989 clearly stipulated that the Assessing Officer has to assessee (sic) reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax came which came to his notice during the proceedings. In the absence of the assessment or reassessment the former, he cannot independently assess the latter."

Hence, on this ground also, the addition made by the AO is liable to be deleted. Accordingly, we are of the view that the reopening of the assessment is bad in law and accordingly, the addition made by the AO cannot be sustained.

10. We notice that the Ld.CIT(A) has deleted the addition on merits. Since we have held that the reopening of assessment is bad in law and the impugned addition is liable to be deleted on the basis of legal issues discussed above, we do not find it necessary to address the grounds urged

by the Revenue on merits. Accordingly, we uphold the final decision rendered by the Ld.CIT(A) for the reasons discussed above.

11. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 11-12-2024

Sd/-

(JUSTICE (RETD.) C.V. BHADANG)
PRESIDENT

Mumbai,

Date: 11-12-2024

TNMM

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "D" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai