

आयकर अपीलीय अधिकरण “ए” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, CHENNAI

माननीय श्री एबी टी. वर्की, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON’BLE SHRI ABY T. VARKEY, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

1. आयकर अपील सं. ITA No.288/Chny/2024
(निर्धारण वर्ष / Assessment Year: 2017-18)

ITO Corporate Ward-1(1) Chennai.	बनाम/ Vs.	M/s. Ambattur Constructions Pvt. Ltd. 86E-2, Industrial Estate, Ambattur, Chennai-600 058.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AAACA-7390-N		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

2. Cross Objection No.47/Chny/2024
(In ITA No.288/Chny/2024)
(निर्धारण वर्ष / Assessment Year: 2017-18)

M/s. Ambattur Constructions Pvt. Ltd. (Merged with Ambattur Infra India Pvt. Ltd.) 86E-2, Industrial Estate, Ambattur, Chennai-600 058.	बनाम/ Vs.	ITO Corporate Ward-1(1), Chennai.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AAACA-7390-N		
(Cross-Objector)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Assessee by	:	Shri T. Banusekar (Advocate) - Ld. AR
प्रत्यर्थीकी ओरसे/ Revenue by	:	Smt. D. Babitha (JCIT) - Ld. Sr. DR

सुनवाईकी तारीख/ Date of Hearing	:	23-01-2025
घोषणाकी तारीख / Date of Pronouncement	:	25-03-2025

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid appeal by revenue for Assessment Year (AY) 2017-18 arises out of an order passed by learned Commissioner of Income Tax

(Appeals), National Faceless Appeal Centre (NFAC), Delhi [CIT(A)] on 10-11-2023 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 147 r.w.s.144B of the Act on 26-03-2022.

1.2 The grounds raised by the Revenue read as under:-

1. The order of the learned CIT(A) is contrary to law, facts and circumstances of the case.
2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in holding that the reopening was bad as the AO had reopened the case despite not accepting the audit objection, when the very fact that the AO has initiated remedial action to the audit objection with the prior approval of the Pr. CIT-1, Chennai goes to prove that the Assessing Officer has accepted the Audit objection on merits?
3. The Ld. CIT(A) while deciding the appeal of the assessee, erred in not considering the merits of the case and held the reopening itself to be bad as the same was due to change in opinion of the AO.
4. The Ld. CIT(A), while discussing the applicability of Sec 28(ii) to the income which has escaped assessment, erred in not considering taxing the escaped income under the provisions of Sec 68/56 of the IT Act.

1.3 The assessee has filed cross-objection against the appeal of the revenue. The registry has noted delay of 66 days in assessee's cross-objection, the condonation of which has been sought by Ld. AR on the strength of an affidavit of the director of the assessee-company. Considering the period of delay, the delay is condoned. The regular grounds as well as additional ground as taken in the cross-objection read as under: -

1. For that the assessment order passed u/s.147 r.w.s.144B is bad in law.
2. For that the assessment was completed without complying with the statutory requirements of law.
3. For that the approval and the satisfaction recorded by the Additional Commissioner of Income Tax for reopening the assessment is without application of mind.

1.4 From the revenue's grounds, it is quite evident that Ld. CIT(A) has quashed the assessment order on the ground that reopening was bad-in-law. Aggrieved, the revenue is in further appeal before us. The assessee,

in its cross-objections, supports the impugned order and further challenges the reopening on additional grounds.

1.5 The Ld. AR advanced arguments and relied on various case laws. The Ld. Sr. DR also advanced arguments and supported the assessment order. Having heard rival submissions and upon perusal of case records, our adjudication would be as under.

Assessment Proceedings

2.1 The assessee being resident company filed regular return of income admitting income of Rs.7.82 Lacs. The same was taken up for limited scrutiny and an assessment was framed u/s 143(3) on 27-09-2019 accepting the returned income.

2.2 Subsequently, the case was reopened and a notice u/s 148 was issued within 3 years i.e., on 22-03-2021. The assessee admitted the same income. The reasons for reopening were communicated to the assessee. The assessee preferred objection against the same which was rejected by Ld. AO on 21-12-2021.

2.3 The case was reopened on the observation that as per Note No-2 Reserve & Surplus (notes to financial statement), an amount of Rs.651.85 Lacs was directly added as return of capital in addition to profit from continuing operation with the surplus account. Since the same was not exempt income, the same was required to be routed through Profit & Loss Account and offered to tax. The same was required to be added back to the total income u/s 68 of the Act. Thus, the reopening was undertaken to add the impugned credits u/s 68 of the Act.

2.4 The assessee contended that there was no fresh tangible material for reopening the case of the assessee and the same was merely on the

basis of information which was already available on record. However, the same was rejected by Ld. AO.

2.5 On merits, Ld. AO held that the assessee was a partner in M/s Yuga Developers from which it retired during the year and received amount of Rs.651.85 Lacs in addition to share of profit. The said amount, in terms of provisions of Sec. 28(ii), would be taxable as income of the assessee. Accordingly, the same was added as business income u/s 28(ii) and the assessment was finalized. Pertinently, the assessment was reopened to make addition u/s 68 but ultimately Ld. AO has made no such addition and he has ended up making addition u/s 28(ii).

Appellate Proceedings

3.1 The assessee assailed the legality of reopening and also assailed impugned addition on merits by way of elaborate written submissions which have already been extracted in the impugned order.

3.2 The Ld. CIT(A), in para-8, noted that the case was reopened on the basis of audit objection without there being any fresh tangible material. Upon perusal of Audit Memo dated 21-10-2020, Ld. AO mentioned that the observation memo was beyond the scope of assessment and the observation made in the audit memo was to be dropped. The Ld. AO disagreed with the audit objection but despite disagreeing with the audit objection, Ld. AO reopened the case on the basis of same very material which was available at the time of original assessment proceedings. No fresh material was there on record and reasons related to the same set of facts / material that was available at the time of original assessment proceeding. The Ld. AO, after due consideration of the same, had accepted the returned income in regular assessment. Therefore, the legal ground was allowed.

3.3 On merits, Ld. CIT(A) concurred that the provisions of Sec.28(ii) would not apply in assessee's case. The assessee's case would fall under fifth proviso to Sec. 28(ii) which was inserted by Finance Act, 2018 w.e.f. 01-04-2019. Therefore, the impugned receipts would be capital receipt and accordingly, the addition was deleted. Aggrieved, the revenue is in further appeal before us. The assessee has raised further legal ground which have not been dealt with by Ld. CIT(A) in the impugned order.

Our findings and Adjudication

4. From the facts, it clearly emerges that reopening exercise has been undertaken by Ld. AO on the basis of same material that was available before Ld. AO during the course of regular assessment proceedings. The reopening has been done at the behest of audit objection. The Ld. AO disagreed with the audit objection but still reopened the case of the assessee. Clearly the satisfaction is nothing but a borrowed satisfaction which is impermissible in law to reopen the case of the assessee. It is settled position of law that the formation of belief of escapement of income to reopen the case of the assessee is necessarily to be that of Assessing Officer and nobody else. Only and only if Ld. AO is satisfied that certain income escaped assessment, the case could be reopened. After perusal of reasons recorded by Ld. AO to reopen the case of the assessee, it could very well be seen that formation of belief of escapement of income is on same set of material and financial documents which were already available before Ld. AO during the course of original assessment proceedings. The reasons do not indicate any event as to the receipt of any fresh tangible material coming to the possession of Ld. AO subsequent to culmination of original assessment

proceedings. The formation of belief is on the same set of material as available during assessment proceedings u/s 143(3). This being the case, reopening would be nothing but mere change of opinion on existing material which is impermissible as per the decision of Hon'ble Apex Court in **Kelvinator of India Ltd. (187 Taxman 312)**. It was held therein that the review of order is impermissible. The Hon'ble Court, inter-alia, held that Assessing Officer has power to reopen provided there is "tangible material" to come to the conclusion that there is escapement of income. There can be no review of an assessment in the guise of reopening and that a bare review without any tangible material would amount to abuse of the power. In this case, the Ld. AO reached the belief of escapement of income on going through the return of income filed by the assessee after the return was accepted u/s 143(1). The Hon'ble Court held that it was nothing but a review of the earlier proceedings and an abuse of power by AO. The less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued u/s 143(1) cannot be permitted. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the AO subsequent to the issue of the intimation which reflects an arbitrary exercise of the power conferred under section 147. The ratio of cited decision would squarely apply to the facts of present case. The decision of Hon'ble High Court of Madras in **Cognizant Technology Solutions India P. Ltd. (143 Taxmann.com 351)** is also on the same lines. Considering the ratio of this decision, the adjudication of Ld. CIT(A) on legal grounds could not be faulted with. We order so. We would hold that the impugned order is liable to be quashed since Ld. AO did not have valid jurisdiction to reopen the case of the assessee.

5. We also find that pertinently the assessment was reopened to make addition u/s 68 but ultimately Ld. AO has made no such addition and he has ended up making addition u/s 28(ii). In such a case, the ratio of decision of Hon'ble Bombay High Court in the case of **CIT vs. Jet Airways (I) Ltd. (195 Taxman 117)** would also apply. In this decision, it was held by Hon'ble Court that Explanation-3 could not override the necessity of fulfilling the conditions set out in the substantive part of Sec.147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open for him to independently assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee. This decision has been followed by Hon'ble Delhi High Court in the case of **Ranbaxy Laboratories Ltd. (12 Taxmann.com 74)**. Respectfully following the same, we would hold that the impugned additions are not sustainable on this score only. The corresponding grounds raised by the assessee in the cross-objection succeeds.

6. In view of our adjudication as above, the other legal grounds as urged by Ld. AR as well as adjudication on merits has been rendered mere academic in nature.

7. The revenue's appeal stands dismissed. The assessee's cross-objections stand partly allowed.

Order pronounced on 25th March, 2025

Sd/-
(ABY T. VARKEY)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated : 25-03-2025
DS

आदेश की प्रतिलिपि ँ ग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी/Assessee
2. प्रत्यर्थी/Revenue
3. आयकरआयुक्त/CIT Madurai/Chennai.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF