

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&**

SMT KAVITHA RAJAGOPAL, JUDICIAL MEMBER

**ITA No.2253/Mum/2022
(Assessment Year :2011-12)**

Income Tax Officer-Ward- 23(1)(1) Mumbai Room No.106, 1 st Floor Matru Mandir, Grant Road Tardeo, Mumbai – 400 007	Vs.	M/s. Champaklal Mathurbhai Mehta 17, Aradhana Society, Patkar, Blocks Turner Road Bandra, Mumbai – 400 050
PAN/GIR No.AEJPM6909D		
(Appellant)	..	(Respondent)

**CO No.130/Mum/2022
(Arising out of ITA No.2253/Mum/2022)
(Assessment Year :2011-12)**

M/s. Champaklal Mathurbhai Mehta 17, Aradhana Society, Patkar, Blocks Turner Road Bandra, Mumbai – 400 050	Vs.	Income Tax Officer-Ward- 23(1)(1) Mumbai Room No.106, 1 st Floor Matru Mandir, Grant Road Tardeo, Mumbai – 400 007
PAN/GIR No.AEJPM6909D		
(Appellant)	..	(Respondent)

Assessee by	Shri K. Shivaram
Revenue by	Ms. Sujata Iyengar
Date of Hearing	14/11/2022
Date of Pronouncement	25/ 11/2022

आदेश / ORDER**PER BENCH:**

This appeal in ITA No. 2253/Mum/2022 & CO No.130/Mum/2022 for A.Y.2011-12 arises out of the order by the Id. Commissioner of Income Tax (Appeals) National Faceless Appeal Centre (NFAC) in appeal No.CIT(A)-32, Mumbai/10647/2017-18 dated 27/07/2022 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28/12/2017 by the Id. Income Tax Officer – 23(1)(3), Mumbai (hereinafter referred to as Id. AO).

2. Let us take up the Revenue appeal First.

2.1. The Revenue has raised the following grounds of appeal:-

“1 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) had erred in holding that the AO has issued notice u/s 148 without bringing any tangible material on record without considering that assessee purchased property and source of investment in immovable property is unexplained recorded in the reason.

2 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) had erred in holding that the reason of reopening is based upon non filing return of income ignoring the fact mentioned in para 2 and 3 of the reason recorded.

3 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) had erred in not deciding the issues on the basis of finding of the assessing officer and without appreciating the fact that assessee failed to explain source of funds of Rs. 10,99,750 used for the purchase of the immovable property.

4 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) had erred in not deciding the issues on the basis of finding of assessing officer and without appreciating the fact that assessee failed to submit the supporting evidences to prove the long term capital gains of Rs. 1,67,06,394.

5 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) had erred in not deciding the issues on the basis of finding of the assessing officer and without appreciating the fact that assessee failed to explain source of funds of Rs. 1,00,000 invested in LIC.

6 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) had erred in not deciding the issues on the basis of finding of the assessing officer and without appreciating the fact that assessee failed to submit the proof of investment in respect of deduction claimed under chapter VI-A to the extent of Rs.81,406”.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is an individual and had filed his return of income for the A.Y.2011-12 on 21/07/2011. The Id. AO obtained information from ITS / AIR/ CIB available with the Income Tax Department that during the year under consideration, the assessee had purchased immovable property to the tune of Rs.2,13,61,851/-. The Id. AO had a mistaken opinion that assessee had not filed his return for A.Y.2011-12. Accordingly, since there was financial transaction carried out by the assessee and no return has been filed by the assessee, the Id. AO observed that income of the assessee had escaped assessment and sought to reopen the same by issuance of notice u/s.148 of the Act on 31/03/2017 after recording the reasons. The reasons recorded by the Id. AO are as under:-

Sir/Madam

Subject- Re-assessment proceedings in your case for A.Y. 2011-12-reg.

Ref: Your representative letter dated 24.11.2017

Please refer to the above.

Vide this office letter dated 28.09.2017, the reasons for re-opening was intimated as under-

"As per the ITS/AIR/CIB information available with the income tax department, during the year under consideration, the assessee had purchased immovable property for Rs. 2,13,61,851/- on 19.01.2011 i.e. during the F.Y. 2010-11.on verification of the ITD system it is seen that the assessee has not filed the return of income for A.Y. 2011-12

.....Income of Rs. 2,13,61,851/- chargeable to tax in the hands of the assessee has escaped assessment within the meaning of the provisions of section 147 (b) of the Act, for failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for A.Y. 2011-12.

Perhaps you failed to read the running dots after the first para and before the second para. For your better clarity, the para between these two paras is as under-

As the case was falling under the category of non-filers, NMS notice dated 25.07.2015 was sent to the assessee for filing the return of income and to explain the sources of the above financial transaction. In response to the notice, vide his AR's letter dated 03.08.2015, has stated that the assessee has filed his return on 21.07.2011. However, he has not given any explanation for the above financial transaction hence the source of the said investment in property remain unexplained.

Further your objection vide letter dated 25.10.2017 was reverted vide this office letter dated 27.10.2017 in which I never agreed to all the factual information submitted by the assessee. This office letter dated 27.10.2017 is self-explanatory in nature. There is no need to address the same again."

3.1. The re-assessment was framed by the Id. AO by making certain additions and ultimately the total income was determined at Rs.3,08,51,220/- as against the returned income of Rs.3,95,231/- vide order u/s.143(3)r.w.s. 147 of the Act dated 28/12/2017. The assessee challenged the validity of reopening u/s.147 of the Act before the Id. CIT(A) on the ground that the reopening was made based on incorrect assumption of fact as is evident from the reasons recorded. The Id. CIT(A) went through the reasons and quashed the re-assessment by observing as under:-

3. I have carefully considered the grounds of appeal, assessment order and submission of the appellant. This case was falling under the category of non filers. NMS letter dated 25.7.2015 was sent to the assessee in this regard. The appellant replied vide his letter dated 3.8.2015 filed on 4.8.2015 filed before ITO Wd 23(1)(3), Mumbai whereas he has informed that appellant has filed his income tax return for F.Y. 2010-11 onwards, The copy of acknowledgment of return is also to be stated to be filed before the A.O. It is observed that appellant has filed return of income in ITR-2 for AY. 2011-12 u/s 139(1) on 21.7.2011 in the office of ITO Ward 19(1)(3), Mumbai. However, Notice u/s 148 was issued by A.O on 31.3.2017. The AO has communicated following reasons for reopening to the appellant vide his letter dated 28.9.2017:-

3.1 As per the ITS/AIR/CIB information available with the Income tax department, during the year under consideration, the assessee had purchased immovable property for Rs. 2,13,61,851/- on 19.01.2011 ie during the F.Y. 2010-11. On verification of the ITD System it is seen that the assessee has not filed the return of income for A.Y. 2011-12.....

.....Income of Rs. 2,13,61,851/- chargeable to tax in the hands of the assessee has escaped assessment within the meaning of the provisions of section 147(b) of the Act, for failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for A.Y. 2011-12."

3.2 The appellant has objected to the reasons for reopening vide his letter dated 25.10.2017. He has submitted that there are no provision in ITR-2 to disclose relevant details in respect of purchase of property. He has also informed the AO that property has been purchased jointly with his wife Mrs. Sarojben C Mehta. No action has been taken in the case of wife of appellant after inquiry by the department. The AO disposed off the objections vide his letter dated 27.10.2017. The objections were disposed of summarily without dealing with the main issues raised by the appellant. The appellant again objected to the reopening vide his letter dated 24.11.2017 pointing out that the reply of the A.O dated 27.10.2017 does not addressed to the appellant. The AO again vide his letter dated 28.11.2017 informed that appellant has not given any explanations for the purchase of immovable property hence the investment in the said property remains unexplained. Ground of appeal no. 1 is relates to the appellant raised the issues that reopening by the AO is not valid. The arguments of the appellant in this regard are as under-

a. The AO has reopened the assessment under the belief that appellant has not filed ROI for A.Y. 2011-12 whereas the appellant vide his letter dated 03.08.2015 has informed the A.O that he has filed his ROI on 21.07.2011.

b. The appellant vide his letter dated 30.10.2018 has pointed out various judicial pronouncements as per which the reopening of assessment in this case is invalid as the same has been made without application of mind on the basis of reason to suspect and not on the basis of reason to believe without being any tangible material on record.

c. Reopening in this case has been made beyond 4 years without showing any failure on the part of appellant to make full and true disclosure.

5. I have gone through the facts of the case. In this case, the appellant has clearly pointed out that he has filed return of income for A.Y. 2011-12 within due date. Ignoring this facts, the AO has issued notice u/s 148 without bringing any tangible material on record. The AO has also fail to show any failure on the part of appellant to make full and true disposal for reopening beyond 4 year. In these circumstance, it is held that notice u/s 148 issued by the AO is without jurisdiction and is liable to be quashed.

Ground of appeal no. 1 is partly allowed so far as it is decided in favour of appellant that reopening in this case is not valid. Other issues pointed out by the appellant are not decided as relief is allowed to him on the main issue.

6. Since, relief is allowed to the appellant on the issue of reopening the other grounds of appeal are not being decided on merit.

7. Appeal is taken as allowed for statistical purpose.

3.2. Aggrieved, the Revenue is in appeal before us. From the perusal of the reasons recorded reproduced supra, we find that the reopening was made on the mistaken assumption that assessee had not filed his return of income for A.Y.2011-12. Factually, the return of income was already filed by the assessee on 21/07/2011. Moreover, there was a letter dated 25/07/2015 issued by the Id. AO to the assessee for A.Y.2010-11 calling for reasons for not filing income tax return for A.Y.2010-11. This letter is enclosed in page 13 of the paper book. In response to the said letter, the assessee's representative had vide letter dated 03/08/2015 had addressed to the Id. AO stating that assessee is a senior citizen aged about 83 years old and had filed his income tax returns from A.Y.2011-12 onwards and had enclosed the copy of ITR acknowledgement thereon. This letter is enclosed in page 14 of the paper book. We find that the Id. AO had referred to the aforesaid two letters in the reasons recorded stating the same as the reason to conclude that assessee had not filed return of income for A.Y.2011-12. This fact is evident from the reasons recorded reproduced supra. Factually, the notice dated 25/07/2015 was issued by the Id. AO for A.Y.2010-11 calling for income tax return from the assessee. The reply letter dated 03/08/2015 from the assessee to the Id. AO clearly states that assessee is a senior citizen aged about 83 years and had filed his income tax returns from A.Y.2011-12 onwards. The Id. AO goes by the incorrect assumption of fact that assessee had not filed his income tax return for A.Y.2011-12 that subsequently in the same reasons, he acknowledges the fact that assessee had filed his return of income on 21/07/2011. From the perusal of the entire reasons recorded by the Id. AO for reopening the assessment, we have absolutely no hesitation to hold that the entire reopening had been triggered by the Id. AO based on

complete incorrect assumption of fact that no return of income was filed by the assessee for the A.Y. 2011-12, wherein a financial transaction of purchase of property was made. The letter to assessee by the Id. AO calling for income tax return based on report received in the non-filers list was never issued by the Id. AO for A.Y. 2011-12 i.e. the year under consideration before us. Factually it was issued only for A.Y.2010-11 as stated supra. Hence, we hold that the reasons recorded for reopening has been made without application of mind by the Id. AO. Now the moot question that arises for our consideration is as to whether the reopening which is made based on incorrect assumption of fact and non-application of mind by the Id. AO could be held to be valid. This issue has been addressed by the Hon'ble Jurisdictional High Court in the case of Dhiren Anantrai Modi vs. Income Tax Officer in Writ Petition No.3224 of 2019 dated 15/12/2021. For the sake of convenience, the entire order is reproduced hereunder:-

"1. Petitioner is impugning notice dated 26th March, 2019 issued under [Section 148](#) of the Income Tax Act, 1961 (the Act) and the order dated 22nd October, 2019 disposing petitioner's objections to the re-opening.

2. Petitioner has challenged notice dated 26th March, 2019 on various grounds including non application of mind by the Assessing Officer while issuing notice.

3. We have considered the petition with documents annexed thereto, reply filed by respondent and also heard Mr. Gandhi and Mr. Pinto.

4. On bare perusal of the reasons it is quite evident that the reasons are based on totally erroneous and in correct facts and without non Perti Parab 2/4 420-WP-3224-2019.doc application of mind. In the reasons it is stated "The assessee is an individual and the Return of Income for A.Y. 2012-13 was filed on 24 th September, 2012 declaring total loss of Rs.4,21,11,382/- and the same was processed by the C.P.C.It is pertinent to mention here that in this case the assessee had filed return of income for the year under consideration but no assessment as stipulated under [Section 2\(40\)](#) of the Act was made and the return of income was only processed under [Section 143\(1\)](#) of the Act. In view of the above, provisions of clause (b) of explanation 2 to [section 147](#) are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment".

5. The fact is the return of income for A.Y. 2012-13 filed by petitioner on 24th September, 2012 has been assessed under [Section 143\(3\)](#) of the Act and the Assessment Order dated 31st March, 2015 has been passed. Therefore, the Assessing Officer has proceeded on erroneous factual basis that the return of income was only processed under [Section 143\(1\)](#) of the Act. That displays total non application of mind. In fact, petitioner's allegations that Respondent No.1 has sought to re-open the assessment on incorrect factual position that the return of income was only processed under [Section 143\(1\)](#) of the Act has not even been denied in the affidavit in reply which is filed by the same Assessing Officer. In paragraph no.2 of the affidavit in reply which is in response to paragraph no.1 and 2 of the Perti Parab 3/4 420-WP-3224-2019.doc petition, Respondent No.1 simply says that these are factual in nature and the notice under [Section 148](#) dated 26th March, 2019 and the order disposing the objections and the notice dated 22 nd October, 2019 are issued in pursuance of the objective of completing reassessment in accordance with the procedures laid down.

On this ground alone, the notice dated 26th March, 2019 has to be set aside.

6. Moreover, Mr. Gandhi submitted that despite repeated requests for copy of the sanction under [Section 151](#) of the Act, the same has not been provided. The averment to that effect in the petition has not even been denied in the affidavit in reply and respondent, in the affidavit in reply has not even bothered to annex the sanction obtained which gives us a feeling that the said Mr. Ramesh C. Meena who issued notice under [Section 148](#) of the Act containing errors of facts and who has filed affidavit in reply does not wish to produce the same. We have to, therefore draw adverse inference against respondent that if it is disclosed it may be prejudicial to the interest of Revenue.

7. One wonders whether the sanctioning authority under [Section 151](#) of the Act also would have even applied his mind because the reasons recorded as noted above itself displays non application of mind by the Assessing Officer. Therefore, either no sanction as contemplated under Perti Parab 4/4 420-WP-3224-2019.doc [Section 151](#) of the Act has been obtained or the same was granted mechanically without application of mind to the facts because if only the Assessing Officer had placed the entire file before the sanctioning authority he would have pointed out the error in the reasons for re-opening.

8. In the circumstances, petition is allowed in terms of prayer clause (a) which read as under :

(a) That this Hon'ble Court may be pleased to issue under [Article 226](#) of the Constitution of India an appropriate direction, order or a writ, including a writ in the nature of 'Certiorari", calling for the records of the case and, after satisfying itself as to the legality thereof, quash and set aside the Notice u/s 148 dated 26.03.2019, Ex. "H" herein, the order disposing objections dated 22.10.2019, Ex. "K" herein passed by the Respondent and also the Notice/summons dated 22.10.2019, Ex. "L" herein issued by the Respondent.

9. Petition disposed."

3.3. Similarly, the Hon'ble Delhi High Court in the case of Deepak Wadhwa vs. ACIT reported in 435 ITR 699 had also occasion to consider the similar issue wherein it was observed as under:-

5.2. As far as the other aspect is concerned, in our view, since the proof put in place by the petitioner-assessee with regard to the acknowledgment of return filed for the assessment year 2011-12 has not been disputed by the Revenue, as noticed above, the challenge to the impugned notice and the impugned order will have to be sustained.

61 Therefore, for the foregoing reasons, we are inclined to quash the impugned notice dated March 27, 2018 as also the impugned order dated September 28, 2018. It is ordered accordingly.

3.4. Similar view was taken by the Hon'ble Gujarat High Court in the case of Mumtaz Haji Mohamad Menon vs ITO reported in 408 ITR 268 wherein it was held as under:-

“In this context, we have noted that the reasons proceeded on two fundamental grounds. One, that the property in question was sold for a sum of Rs. 1,18,95,000; and two, that the assessee had not filed the return and that therefore his 1/3rd share out of the sale proceeds was not offered to tax. Both these factual grounds are totally incorrect as is now virtually admitted by the Revenue. It is undisputed that the assessee had actually filed the return of income for the said assessment year and also offered his share of income of the declared sale consideration to tax as capital gains. The Assessing Officer may have dispute with respect to computation of such capital gains, he cannot simply dispute the fact that the assessee did file the return. Importantly, even the second factual assertion of the Assessing Officer in the reasons recorded is totally incorrect. He has referred to said sum of Rs. 1,18,95,000 as a sale price of the property. The assessee had produced before the Assessing Officer, the sale deed in which, the sale consideration disclosed was Rs. 50 lakhs.

The Assessing Officer may be correct in pointing out that when the sale consideration as per the sale deed is Rs. 50 lakhs but the registering authority has valued the property on the date of sale at Rs. 1,18,95,000 for stamp duty calculation, section 50C of the Act would apply, of course, subject to the riders contained therein. However, this is not the cited reason for reopening the assessment. The reasons cited are that the assessee filed no return and that 1/3rd share of the assessee from the actual sale consideration of Rs. 1,18,95,000 therefore, was not brought to tax. These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually

incorrect, the Revenue simply cannot hope to salvage the impugned notice. Through the affidavit-in-reply a faint attempt has been made to entirely shift the centre of the reasons to a completely new theory, viz., the possible applicability of section 50C of the Act. The reasons recorded nowhere mentioned this possibility. Reasons recorded, in fact, ignored the fact that the sale consideration as per the sale deed was Rs. 50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gains. In the result, the impugned notice is quashed. The petition is disposed of.”

3.5. In view of the above, we do not find any infirmity in Id. CIT(A) quashing the re-assessment proceedings. Hence, the ground raised by the Revenue challenging the validity of quashing the re-assessment is dismissed. Since the entire re-assessment is quashed, there is no need to go into other grounds raised by the assessee on merits.

3.6. The other contentions raised by the assessee in his cross objections are also left open since the re-assessment has been quashed.

4. In the result, appeal of the Revenue is dismissed and Cross objection of the assessee is dismissed as infructuous.

Order pronounced on 25/ 11/2022 by way of proper mentioning in the notice board.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 25/11/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai