



IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.2574/Mum./20017
(Assessment Year : 2007-08)

Income Tax Officer
Ward-15(1)(2), Mumbai

..... Appellant

v/s

Shri Nikhil Vinod Aggarwal
2801, Glendale, Cliff Avenue
Hiranandani Garden, Powai
Mumbai 400 076 PAN – AAIPA3343E

..... Respondent

C.O. no.208/Mum./2017
(Arising out of ITA no.2574/Mum./20017)
(Assessment Year : 2007-08)

Shri Nikhil Vinod Aggarwal
2801, Glendale, Cliff Avenue
Hiranandani Garden, Powai
Mumbai 400 076 PAN – AAIPA3343E

..... Cross Objector
(Original Respondent)

v/s

Income Tax Officer
Ward-15(1)(2), Mumbai

..... Respondent
(Original Appellant)

Assessee by : Shri Snehal Shah
Revenue by : Shri Rajat Mittal

Date of Hearing – 27.09.2017

Date of Order – 13.10.2017

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the Department and the cross objection by the assessee respectively are against a common order dated 31st

January 2017, passed by the learned Commissioner (Appeals)–24, Mumbai, for the assessment year 2007–08.

2. Brief facts are, the assessee an individual filed his return of income for the impugned assessment year on 31st July 2007, declaring total income of ₹ 7,75,521. The return of income filed by the assessee was processed under section 143(1) of the Income-tax Act, 1961 (for short "*the Act*") by accepting the income returned. Subsequently, on the basis of information received from DIT (Inv.)–II, Mumbai, that the assessee has paid on–money amounting to ₹ 79,26,400 to M/s. Crescendo Associates, a concern of Hiranandani Group towards purchase of flats from them, the Assessing Officer re–opened the assessment under section 147 of the Act by issuing notice under section 148 of the Act on 30th March 2014. In response to the said notice, the assessee requested the Assessing Officer to treat the return of income filed originally as return of income in response to notice issued under section 148 of the Act. During the assessment proceedings, the Assessing Officer called upon the assessee to explain whether any on–money was paid to the concerned party. In this context, the Assessing Officer also asked for the names and addresses of persons through whom the assessee came in contact with Crescendo Associates for purchase of flat and the name and address of persons who facilitated the purchase of flat by negotiating the deal. As

alleged by the Assessing Officer, the assessee failed to furnish the details called for. He observed, in a search conducted in case of Hiranandani Group of builders and developers in March 2014, it was admitted by the directors of promoters of the said group that they have accepted on-money from buyers and various flats. The Assessing Officer observed, since, the assessee is one of the purchasers of flat in Hiranandani Garden, he has paid on-money of ₹ 79,26,400. Accordingly, he added back the amount to the income of the assessee.

3. The assessee challenged the assessment order before the first appellate authority both on the legal issue of validity of re-opening under section 147 as well as on the merits of the addition made.

4. The learned Commissioner (Appeals) while upholding the exercise of power under section 147 of the Act, however, deleted the addition made by the Assessing Officer while considering the issue on merits. The learned Commissioner (Appeals) observed, during the assessment proceedings, the assessee has furnished necessary details in support of his claim that no on-money was paid other than the declared sale consideration of ₹ 1,75,45,800. He found, though, the Assessing Officer in the assessment order has observed that the addition was made on the basis of information received from Investigation Wing of the Department, however, no such information

or adverse material indicating payment of on-money was either provided to the assessee or confronted to him. He observed, the Assessing Officer relied upon the statement recorded from the directors and promoters of Hiranandani Group for making the addition on account of on-money. However, he has neither provided copy of such statements to the assessee nor allowed cross-examination of the concerned person by the assessee. Thus, the learned Commissioner (Appeals) held that the Assessing Officer has no conclusive evidence to prove the fact that the assessee has paid on-money of ₹ 79,26,400 towards purchase of the flat. Accordingly, he deleted the addition.

5. Learned Departmental Representative submitted, in the course of assessment proceedings, the Assessing Officer had positive evidence before him indicating payment of on-money by the assessee towards purchase of flat. He submitted, the assessee did not furnish the required evidence called for by the Assessing Officer. Therefore, the addition made was justified.

6. Learned Authorised Representative while supporting the findings of the learned Commissioner (Appeals) on merits, argued on the legal ground raised in the cross objection challenging the validity of re-opening. The learned Authorised Representative submitted, prior to issuance of notice under section 148 of the Act, Assessing Officer has

not taken approval from the competent authority as prescribed under section 151 of the Act. Learned Authorised Representative submitted, as per the provision contained under section 151 sub-section (2) of the Act in case of the assessee sanction for issuance of notice under section 148 of the Act has to be given by either Jt. CIT or Addl. CIT. Whereas, as per the notice issued under section 148 of the Act, the Assessing Officer has obtained sanction of the CIT. In this context, he drew our attention to a copy of the said notice as placed at Page-6 of the paper book. Learned Authorised Representative submitted, in the course of assessment proceedings, the assessee has also objected to the initiation of proceedings under section 147 of the Act. However, the Assessing Officer has not disposed off assessee's objection independently before completion of assessment. Therefore, the assessment order is invalid.

7. As far as merits of the issue is concerned, the learned Authorised Representative submitted, in the course of assessment proceedings, the assessee has furnished all necessary and relevant details before the Assessing Officer with regard to purchase of flat. He submitted, the Assessing Officer has not provided adverse material / information indicating on-money payment made by the assessee. He submitted, statement of third parties though were relied upon, they were neither confronted to the assessee nor assessee was given opportunity to

cross-examine them. He submitted, even though the assessee has repeatedly requested the Assessing Officer to confront / provide copy of adverse materials in his possession, however, the Assessing Officer never provided them to the assessee and has arbitrarily made the addition. He, therefore submitted, the learned Commissioner (Appeals) was justified in deleting the addition.

8. We have heard rival contentions and perused the material available on record. As far as the legal issue raised by the assessee in the cross-objection challenging the validity of re-opening of assessment under section 147 of the Act is concerned, the submissions of the assessee is two-fold. Firstly, there is no sanction / approval by the competent authority before issuance of notice under section 148 of the Act and secondly, the objection of the assessee was not dealt with independently by the Assessing Officer before completion of assessment. As far as the second contention of the assessee is concerned, we find from record that the Assessing Officer issued notice under section 148 of the Act on 30th March 2014. The assessee complied to the said notice vide letter dated 10th April 2014, wherein the assessee also sought communication of the reasons recorded for re-opening the assessment. It is evident, in response to the assessee's request the Assessing Officer vide letter dated 14th August 2014, communicated the reasons for re-opening the assessment.

Thereafter, the assessment proceedings continued and only at the fag end when the assessment proceedings is going to be barred by limitation, the assessee on 20th March 2015 raised objection before the Assessing Officer against the initiation of proceedings under section 147 of the Act. In our view, the aforesaid approach of the assessee was with a motive to prevent the Assessing Officer from completing the assessment within the period of limitation. Had the assessee been serious to object to the initiation of proceedings under section 147 of the Act, he could have very well done so after communication of reasons for re-opening of assessment. The assessee having not raised any objection for initiation of proceedings within a reasonable time, the contention of the assessee that the Assessing Officer did not dispose off his objection independently before completion of assessment cannot be accepted. However, as far as the first contention of the assessee regarding lack of sanction / approval from competent authority for issuance of notice under section 148 of the Act is concerned, we find merit in the same. As could be seen from the notice dated 30th March 2014 issued under section 148 of the Act by the Assessing Officer, a copy of which is placed at Page-6 of the paper book, the Assessing Officer has categorically mentioned that the said notice was issued after obtaining satisfaction of the CIT-10, Mumbai. Keeping in view the aforesaid fact, it is imperative to know whether

such satisfaction / sanction / approval by the CIT satisfies the conditions of section 151 of the Act.

9. Section 151 provides for sanction of competent authority for issuance of notice under section 148 of the Act. As per sub-section (1) of section 151 of the Act, in a case, where assessment was earlier completed under section 143(3) or 147 of the Act, no notice under section 148 can be issued by the Assessing Officer below the rank of Joint CIT / Dy. CIT unless the Joint CIT records his satisfaction for issuance of notice under section 148 of the Act. Of-course, in a case where period of four years has expired from the relevant assessment year, such sanction / satisfaction has to be obtained from Principal Chief CIT or Chief CIT or Principal CIT or CIT. As per sub-section (2) of section 151 in a case which does not fall under sub-section (1) no notice shall be issued under section 148 of the Act after expiry of four years from the end of relevant assessment year by the Assessing Officer below the rank of Jt. CIT unless Joint CIT records his satisfaction / sanction for issuance of such notice. Admittedly, in the facts of the present case, sub-section (2) of section 151 is applicable as there is no assessment under section 143(3) or 147 of the Act earlier and the re-opening is after expiry of four years from the end of relevant assessment year. It is also to be noted that the authority issuing notice under section 148 is below the rank of Joint CIT.

Therefore, as per the provisions of the Act, sanction / approval of the Joint CIT was essential for issuance of notice under section 148 of the Act.

10. From the notice issued under section 148, it is evident that the Assessing Officer has obtained sanction of the CIT and not the Joint CIT. When this fact was pointed out to the learned Departmental Representative and a specific query was raised by the Bench, the learned Departmental Representative submitted that the approval of Joint CIT is not available on record and he further submitted that if such approval is available it will be furnished before the Bench. However, till date no such approval of Joint CIT has been brought on record by the learned Departmental Representative. Thus, it has to be presumed that no such approval of Joint CIT has been obtained by the Assessing Officer in terms of section 151(2) of the Act before issuance of notice under section 148 of the Act. When the provisions contained under the statute mandate a particular act to be done in a particular manner, it has to be done in that manner only. The Assessing Officer being bound by statutory provisions has to strictly comply with and act in accordance with the relevant statutory provisions. The argument of the Department that absence of approval from Joint CIT would not invalidate the assessment proceedings, since, the approval has been obtained from a higher authority is too specious an argument to be

accepted. Obtaining of sanction from a higher authority does not satisfy the statutory mandate. That being the case, we hold that in absence of sanction / approval from the authority prescribed under section 151(2) of the Act, issue of notice under section 148 is invalid. Consequently, the assessment order passed in pursuance thereto is also invalid. In support of our aforesaid conclusion, we may refer to the decision of the Hon'ble Delhi High Court in case of CIT v/s Soyuz Industrial Resources Ltd., [2015] 232 taxman 414.

11. Even otherwise also, the assessee has a strong case on merit as well. As evident from the facts on record, the Assessing Officer has made the addition on account of alleged on-money paid by the assessee towards purchase of flat relying upon the information obtained from the search operation carried out in the case of Hiranandani Group. Further, he has relied upon the statements recorded from the directors and promoters of Hiranandani Group in course of search. However, though, the assessee in the course of assessment proceedings, has repeatedly requested the Assessing Officer to provide the information / adverse material in his possession, neither such adverse material was provided to the assessee nor confronted to him. Further, the statement recorded from third parties which were relied upon by the Assessing Officer for making the addition were neither confronted to the assessee nor the assessee was

permitted to cross-examine the concerned persons. Neither in the assessment order the Assessing Officer has discussed in detail the nature of information / material available with him directly implicating the assessee for paying on-money for purchase of flat nor the learned Departmental Representative has brought on record any such material as may be available with the Assessing Officer. It is evident from the assessment order, the Assessing Officer without disclosing adverse material / information available with him to the assessee during the assessment proceedings, has simply called upon the assessee to furnish the name of persons who according to the Assessing Officer negotiated for purchase of flat between the assessee and the builder. Unless, the assessee is confronted with the adverse material in possession of the Assessing Officer, he cannot be expected to rebut them considering the fact that the from very beginning the assessee has consistently stated that he has not paid any on-money over and above the declared sale consideration. The learned Commissioner (Appeals) while deciding the issue has clearly brought out the aforesaid factual aspect in his order. We agree with the learned Commissioner (Appeals) that once the assessee has furnished the details of transactions relating to purchase of flat and has stated that he has not paid on-money over and above the declared sale consideration, burden shifts to the Assessing Officer to falsify

assessee's claim by bringing cogent evidence on record. Merely, referring to certain adverse material and statement of third parties, but, without confronting them to the assessee the Assessing Officer cannot make the addition. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals) in deleting the addition. Accordingly, we uphold the order of the learned Commissioner (Appeals) by dismissing the ground raised by the Revenue.

12. In the result, Revenue's appeal is dismissed and assessee's cross objection is allowed to the extent indicated above.

Order pronounced in the open Court on 13.10.2017

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 13.10.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai