IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1239 OF 2014

The Commissioner of Income Tax .. Appellant

v/s.

M/s. A.A. Estate Pvt. Ltd. .. Respondent

Mr. Ashok Kotangle a/w Padma Divakar for the appellant
Mr. R.S. Padvekar i/b Dave & Padvekar Associates for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.
DATED : 9th JANUARY, 2017.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 5th February, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. The Revenue urges following questions of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in law in setting aside the notice u/s 148 holding the re-assessment proceeding invalid?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting addition of Rs.1,70,94,000/-?"

3. <u>Regarding question (i) :-</u>

(a) Consequent to search action on 30th November, 2007, the Assessment Order for the subject assessment year was completed on 24th December, 2009 under Section 143(3) r/w Section 153A of the Act. The above order determined the total income at Rs.7.77 crores.

(b) On 22nd September, 2010, the Assessing Officer issued a notice under Section 148 of the Act seeking to reopen the assessment for Assessment Year 2008-09. The reasons recorded for issue of reopening notice notice was information received from the Income Tax Department at Nashik. This was consequent to a search on the third party namely M/s. Ashoka Buildcom Ltd. and documents found therein coupled with the statement made by its Manager. The reasons as recorded read as under :-

> *"The assessee had shown profit from RNA Azzure project for the A.Y. 2008-09 specifying the sale proceeds of Rs.31,47,62,391/-. This included the following sum, which were shown at the agreement value increased by some other charges :*

Asha Ashok Katariya	*Rs.89,44,030*
Satish D. Parakh	*Rs.89,39,030*
Satish D. Parakh HUF	*Rs.87,38,650*

"However, the information received from DDIT (Inv)-II Nashik establishes that M/s. A.A. Estate Pvt. Ltd. has received Rs.4,27,35,000/- on aggregate from above mentioned persons. The difference, i.e. Rs.1,61,13,290/- was paid in cash and is, therefore, prima facie unaccounted in the books of account. Therefore, there is suppression of income to that extent and income has consequently escaped assessment"

(c) The respondent assessee objected to the reopening of the notice. However, the Assessing Officer did not accept the same and proceeded to pass an order dated 30th December, 2011 under Section 143(3) r/w Section 147A of the Act.

(d) On appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] dismissed the respondent assessee's appeal *inter alia* holding that the information received from Revenue authorities at Nashik did not call for reopening of the assessment. Thus, upholding the order dated 30th December, 2011 of the Assessing Officer.

(e) Being aggrieved, the respondent assessee carried the issue in appeal to the Tribunal. The impugned order of the Tribunal records the fact that the document on the basis of which the reopening notice has been issued was found in course of search carried out on third party viz. Ashoka Buildcom Ltd. The document obtained itself was bereft of any particulars, in as much as, it does not contain the names of the purchasers nor the name of the assessee, further it is neither signed nor dated. On receipt of the above document from the Income Tax Department, Nashik, the impugned order records that the Assessing Officer has not examined the information to reach a reasonable belief that the income chargeable to tax has escaped the assessment. On the basis of the above, the impugned order records that the reopening notice was issued only on the basis of the suspicion and not on the belief that the income chargeable to tax has escaped assessment. The impugned order further records that at the time the earlier order was passed due enquiry was done. Further, the reliance upon the statement of Mr. Kulkarni, an employee of Ashoka Buildcom Ltd. was also found by the Tribunal not sustainable as it had been retracted. In the aforesaid view, the Tribunal held that reopening notice was without jurisdiction being without formation of reasonable belief that income chargeable to tax has escaped assessment.

(f) The grievance of the Revenue before us is that the information received by the Assessing Officer required to be investigated and for that reason, the reopening notice was validly issued.

(g) We find that the impugned order of the Tribunal records the fact that the issue with regard to on-money had been examined at length and deliberated upon the Assessing Officer during the assessment proceedings completed under Section 143(3) r/w Section 153A of the Act on 23rd December, 2009. In this case, admittedly the assessment order passed on 23rd December, 2009 was under Section 143(3) r/w 153A of the Act on the respondent assessee. This assessment was a result of the search on respondent assessee in March, 2008 *inter alia* in respect of suppression of sale consideration. In fact, the three buyers i.e. Mrs. Asha Katariya, Mr. Satish Parakh (Individual) and Mr. Satish Parekh (HUF) had all in their statements recorded on 10th March, 2008 u/s 131 had stated that they did not pay any consideration in excess of that recorded in the agreement. Therefore, this itself is evidence of the 'on-money' in respect of the three flats was subject to enquiry leading to order dated 23rd December, 2009. Further, we find that the Assessing Officer has proceeded on the basis of the documents obtained during the course of the search on third parties were documents to which the presumption under Section 132(4A) of the Act would apply to the assessment of respondent assessee. This cannot be as the documents were recovered during a search made on third party and not on the respondent assessee. Therefore, such a presumption can be applied only in respect of assessment of third party on whom the search was made. It cannot be the basis to form a reasonable belief that income chargeable to tax has escaped assessment in case of respondent assessee.

(h) Thus, in the above view the finding of the Tribunal that the Assessing Officer had no reason to believe that income chargeable to tax has escaped assessment is a possible view in the facts of the present case. Accordingly, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

4. <u>Regarding question (ii) :-</u>

(a) This question on merits of the dispute becomes academic. This for the reason that the jurisdictional question as framed in question (i) has been answered in favour of the respondent assessee and against the appellant Revenue. Thus, the Revenue has no jurisdiction to enter the merits of the dispute. In the above view, question (ii) is not entertained.

5. The appeal is dismissed. No order as to cost.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**