

\$~28

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 24.01.2023*

+ **ITA 47/2023 & CM Nos.3416-17/2023**

PR. COMMISSIONER OF INCOME TAX-7Appellant
Through: Mr Puneet Rai, Sr. Standing Counsel.

versus

SOUTH DELHI PROMOTERS LTD.Respondent
Through: Gautam Jain, Advocate and Mr Ajit
Jha, Advocate

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J (ORAL):

CM. APPL. 3416/2023

1. Allowed, subject to just exceptions.

ITA 47/2023 & CM. APPL. 3417/2023 [Application filed on behalf of the
appellant seeking condonation of delay of 175 days in filing the appeal]

2. This appeal is directed against the order dated 16.12.2021 passed by
the Income Tax Appellate Tribunal [in short, "Tribunal"] concerning
Assessment Year (AY) 2007-08.

3. The Tribunal, *via* the impugned order, has sustained the deletion of
addition of Rs.16,88,65,000/- under Section 68 of the Income Tax Act, 1961
[in short, "the Act"].

4. To be noted, the Commissioner of Income Tax (Appeals) [in short,
"CIT(A)"] *via* order dated 28.10.2016 had ruled in favour of the

respondent/assessee on merits, and hence deleted the aforementioned addition.

4.1. Aggrieved by the aforementioned order passed by the CIT(A), the appellant/revenue had preferred an appeal.

5. The record shows, that the respondent/assessee had also preferred cross objections. The cross objections of the respondent/assessee were not on merits, but limited to the ground that the initiation of proceedings under Section 147 of the Act were without jurisdiction.

5.1 The Tribunal, *via* the impugned order, has ruled both on the appeal preferred by the appellant/revenue, and the cross objections filed on behalf of the respondent/assessee.

5.2 The impugned order has allowed the cross objections of the respondent/assessee, and on merits, the Tribunal has sustained the deletion ordered by the CIT(A).

6. Mr Puneet Rai, who appears on behalf of the appellant/revenue, says that fresh information was received by the Assessing Officer (AO) from the Investigation wing, and therefore, proceedings were initiated under Sections 147/148 of the Act. It is Mr Rai's contention that the respondent/assessee was a beneficiary of accommodation entries from S.K. JainGroup.

7. Having heard Mr Rai at some length, we find from the record, that the following has emerged:

7.1. The respondent/assessee was subjected to scrutiny assessment, and thereafter, an order dated 24.12.2009 was passed concerning the aforementioned AY i.e., AY 2007-08.

7.2 During the course of assessment, the AO, *inter alia*, sought information with regard to the share application money amounting to

Rs.16,88,65,000/- received by the respondent/assessee.

8. A perusal of the record shows that the applicants had subscribed for Rs.16,88,65,000/- equity shares having face value of Rs.10/- at a premium of Rs. 90/-. Upon making enquiries with regard to the identity, genuineness and credit worthiness of the applicants, an assessment order, as noticed above, was framed on 24.10.2009 under Section 143(3) of the Act.

9. It is in this broad backdrop, that the Tribunal directed its attention both to the initiation of proceedings under Section 147/148 of the Act and the merits of the case.

10. A perusal of the impugned order shows, that the Tribunal meticulously examined the record of the AO, which included the reasons given for re-opening, after the notice dated 12.06.2014 under Section 148 of the Act was issued.

10.1 The reasons furnished to the respondent/assessee for re-opening the assessment made under Section 143(3) of the Act via order dated 24.10.2009 are extracted in paragraph 7 of the order passed by the Tribunal.

10.2 The Tribunal, also for purposes of ruling on the issue concerning the legal tenability of the reopening of assessment, in the context of the proviso appended to Section 147 of the Act, had examined the relevant order sheets generated by the AO to satisfy itself, as to whether the issue regarding the receipt of money by the respondent/assessee with regard to share capital had been examined. In this context, paragraph 9 of the Tribunal's order becomes important.

11. A perusal of paragraph 9 shows that not only did the AO examine the issue regarding infusion of share capital by the respondent/assessee, *albeit* at a premium, but he also examined the receipt of unsecured loans from other

entities/persons.

12. Having examined the various order sheets generated by the AO, the Tribunal recorded that three share applicants namely Mr Shukal Kapoor, Ms Vaine Kapoor and representatives of an entity going by name Tirupati Venketeswera Colonisers Pvt. Ltd., were produced for examination before the AO on 21.12.2009 and 22.12.2009, and that the statements of these persons were recorded.

13. Having regard to the aforesaid, the Tribunal concluded that the pre-requisites for reopening the assessment under Section 147/148 of the Act as they obtained at the relevant time were not fulfilled. In other words, according to the Tribunal, there were the following flaws in re-opening the assessment:

13.1 The reasons for reopening the assessment furnished by the AO did not record that there was a failure on the part of the respondent/assessee to disclose, truly and fully, all material facts necessary for carrying out the assessment.

13.2 That enquiries had been made relating to infusion of share capital including share premium and unsecured loans taken by the respondent/assessee during period in consideration.

14. Based on these findings of facts which are now assailed before us, the Tribunal concluded that the prerequisite for jurisdiction under Section 147 of the Act with regard to a case falling under the first proviso was not fulfilled.

14.1 In other words, since more than four years had passed from the end of the relevant AY, reassessment proceedings could not have been triggered unless there was a demonstrable failure on the part of the

respondent/assessee to disclose, truly and fully, all material facts.

15. It was also the view of the Tribunal that this was a case of change of opinion concerning the assessment which had already been concluded.

16. Insofar as the failure on the part of the AO is concerned, the Tribunal notes that even according to the respondent/assessee, as indicated hereinabove, accommodation entries had been received by the respondent/assessee from one of the accommodation entry providers, i.e., S.K. Jain Group, amounting to Rs.5.65 Crores.

17. In this context, the Tribunal again returned a finding of fact that none of the 99 share capital applicants were found in the list of accommodation entry providers. As per the Tribunal, the AO had not applied his mind as to how the assessee was linked to the accommodation entry provider.

18. Therefore, the Tribunal's view was that the AO failed to apply its mind independently and that it reopened the concluded assessment based on directions of Director of Investigation (DIT), Delhi and he did not form his own reasons to believe that income chargeable to tax had escaped assessment. The Tribunal's concern was that had the AO applied its mind, he would have noticed that during the period under consideration, the respondent/assessee had received Rs.16.88 crores towards share capital and Rs.10.63 crores towards unsecured loans, the documents *qua* which had been placed on the record. Given this position, the cross objections of the assessee were allowed. Thus, having concluded that the cross objections of the respondent/assessee were viable, the Tribunal did not think it necessary to go into the merits of the case.

19. We have closely examined the record. None of the findings of the fact recorded by the Tribunal have been assailed before us. We have no

difficulty in agreeing with the Tribunal that the respondent/assessee was put to scrutiny with regard to the infusion of share capital and had furnished the relevant information sought by the AO when the initial assessment order was framed under Section 143(3) of the Act. The Tribunal, therefore, was right in reaching the conclusion that this was a case of change of opinion, and therefore, the first proviso to Section 147/148 was applicable, the pre-requisites of which having not been fulfilled, re-assessment proceedings could not have been triggered.

20. For the foregoing reasons, we are not inclined to interdict the order passed by the Tribunal.

21. No substantial questions of law arose for our consideration.

22. The appeal is accordingly dismissed.

23. Consequently, CM. APPL. 3417/2023 shall stand closed.

RAJIV SHAKDHER
(JUDGE)

TARA VITASTA GANJU
(JUDGE)

JANUARY 24, 2023 / ha