

आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री कुल भारत, न्यायिक सदस्य

तथा

श्री मनीष बोरड, लेखा सदस्य के समक्ष

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. Nos. 151 & 152/Ind/2013		
निर्धारणवर्ष/ Assessment Year : 1999-2000 & 2000-01		
M/s. Ajit Ajay Estate & Resorts Pvt.Ltd., (Now known as M/s. Ajit Club & Resorts Pvt.Ltd., Sector-A, Bakhtawar Ram Nagar, Indore.	vs.	Income-tax Officer, 2(3), Indore.
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN: AAECA0582A		

अपीलार्थी की ओर से/Appellant by	:	Shri Anil Kamal Garg and Shri Arpit Gaur, CAs
प्रत्यर्थी की ओर से/Respondent by	:	Shri K. G. Goyal, Sr. DR

सुनवाई की तारीख/Date of hearing	:	05.06.2018.
उद्घोषणा की तारीख/Date of pronouncement	:	07.06.2018

आदेश / O R D E R

PER KUL BHARAT, J.M. :

These two appeals filed by the assessee pertaining to assessment years 1999-2000 and 2000-01. Since identical grounds have been raised, both the appeals were taken up together and are being disposed of by this consolidated order.

2. First, we will take I.T.A.No. 151/Ind/2013 – for assessment year 1999-2000.

3. The assessee has raised following grounds of appeal :-

1. (a) *That, on the facts and under the circumstances of the case, the learned CIT(A) grossly erred in law in upholding the validity of issuance of Notice u/s. 148 and initiation of reassessment proceedings u/s. 147 of the Income-Tax Act, 1961.*

(b) *That, the learned CIT(A) grossly erred in upholding the reopening of the assessment by giving an erroneous finding that the appellant*

failed to raise any objection against the reopening at the appellate stage.

2. *That, on the facts and in the circumstances of the case, the learned CIT(A) grossly erred in sustaining addition to the extent of Rs. 1,02,97,300/- out of the addition of Rs. 1,14,49,500/- made by the learned AO under the head 'Advance Money for Plot at Shell City', by invoking provisions of section 68 of the Income-Tax Act, 1961.*
3. *That, on the facts and in the circumstances of the case, the learned CIT(A) grossly erred in confirming addition of Rs.10,00,000/- made by the learned AO in the name of 'Sunny Co-operative Housing Society', by invoking provisions of section 68 of the Income-Tax Act, 1961, without considering the material fact that the appellant was not required to establish source of the source.*
4. *That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.1,00,000/- made by the AO on account of unexplained share application money in the name of Shri Premchand Borasi without considering and appreciating the material fact that the appellant*

had proved the identity of the share applicant, genuineness of the transaction and creditworthiness of the share applicant beyond all doubts by submitting all documentary evidences.

4. Briefly stated, the facts are that the case of the assessee was reopened and the assessment was framed u/s 143(3) vide order dated 30.03.2004. While framing the assessment, the AO made addition of Rs. 1,14,49,500/- in respect of advance money for plot at Shell City, Rs. 1,50,000/- on account of credit in the name of M/s. Sunny Builders Private Limited, Rs. 10 lakhs on account of credit in the name of Sunny Co-operative Housing Society and also addition on account of unproved share application of Rs. 1 lakh in the name of Shri Premchand Borasi. Aggrieved by this, the assessee preferred appeal before the Ld. CIT(A), who sustained the finding of the AO. Now the assessee is in appeal before this Tribunal.

5. At the out-set, the Ld. Counsel for the assessee submitted that the assessment framed suffers from illegality as against the reasons recorded for reopening.

The assessee has raised objection which has not been disposed of by the AO. He submitted that even there is no whisper in the assessment order about reasons recorded and the objection raised by the assessee. He submitted that the AO was required to dispose of the objection by way of separate order in the light of the judgement of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Limited vs. ITO and others, (2003) 259 ITR 19 (S.C.)

6. On the contrary, Ld. Departmental Representative opposed the submissions.

7. In the rejoinder, the Ld. Counsel for the assessee has taken us through the reasons recorded and the objections raised by the assessee, which is enclosed in the paper book filed by the assessee. We are reproducing below the

reasons recorded by the ITO, 2(3), Indore, and objections raised by the assessee for the sake of clarify :-

REASONS RECORDED BY ITO, 2(3), INDORE
Dated 31.03.03 :

"During the assessment proceeding for the assessment year 2000-01, the assessee vide letter dated 29.11.2002 furnished the details of the deposits of Rs. 1,75,43,719/- from the members of the shell city on account of advances against the proposed sale of plots in shell city. Out of Rs. 1,75,43,719/- there was a deposit of Rs. 1,14,49,500/- during previous year relevant to assessment year 1999-2000. The assessee was asked to prove the identity, capacity and genuineness of transactions in respect of aforesaid deposit. The assessee furnished the photocopies of the applications from the members for the allotment of membership and plot in shell city. The assessee furnished the copies of accounts of members as appearing in account books of the assessee for the previous year relevant to assessment year 99-00. On perusal of the copies of the a/c of the members it was noticed that there were deposits of Rs. 1,00,00,000/- or so in the name of following members :-

1.	Ashok Kashyap	Rs. 1,00,000/-	Vide application dt Nil
2.	Anil Kumar Chandratra	Rs. 1,00,000/-	-do-
3.	Banveer Chaudhary	Rs. 1,00,000/-	-do-
4.	Bharat Borasi	Rs. 1,00,000/-	-do-
5.	Dilip Borasi	Rs. 1,00,000/-	-do-
6.	Gaurishanker Borasi	Rs. 1,00,000/-	-do-

7.	<i>Jitendra Borasi</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
8.	<i>Smt. Kaushalyabai</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
9.	<i>Smt. Meena Bai</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
10.	<i>Mahendra Kadam</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
11.	<i>Mukesh Vyas</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
12.	<i>Manju Karda</i>	<i>Rs. 1,19,500/-</i>	<i>-do-</i>
13.	<i>M.L.Srivastava</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
14.	<i>Nand Lal Borasi</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
15.	<i>Prakash Dhanak</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
16.	<i>Rajesh Maheshwari</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
17.	<i>Rajesh Agrawal</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
18.	<i>Rajendra Borasi</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
19.	<i>Ranveer Choudhary</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
20.	<i>Smt. Roopa Bai</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
-		<i>Rs. 1,00,000/-</i>	<i>-do-</i>
22.	<i>Salim Kokkar</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
23.	<i>Surya Kanta Gupta</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
24.	<i>Vijay Pradhan</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
25.	<i>Vishabhnath Borasi</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
26.	<i>Multan Singh</i>	<i>Rs. 1,00,000/-</i>	<i>Copy of application not furnished</i>
27.	<i>Naresh Parmar</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
28.	<i>Niraj Parmar</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
29.	<i>Anirudh Gupta</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
30.	<i>Dinesh Borasi</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
31.	<i>Gulab Choudhary</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
32.	<i>Govind Ram Mittal</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
33.	<i>Vishal Parmar</i>	<i>Rs. 1,00,000/-</i>	<i>-do-</i>
	<i>Total</i>	<i>Rs. 33,19,500/-</i>	

On perusal of copies of applications it was noticed that columns meant for date of deposit, amount of deposits and name of father were blank. In additions to above, the assessee also shown the deposit of Rs. 81,30,000/- from the other members for allotment of membership and plots. The assessee furnished only photo copies of the applications, but did not furnish any supporting

evidences to prove the identity, capacity and genuineness ,of the transactions in respect of aforesaid deposits. Thus, the assessee prima facie failed to prove the identity and capacity to advance the amount of credit and genuineness of the transactions cumulatively as required u/s 68 of the Act. Therefore, the income of Rs. 1,14,49,500/- escaped income within the meaning of Section 148 of the Act.

The assessee also shown the credit of Rs. 5,00,000/- each on 29.9.98 and 5.10.98 in the name of Sunny Coop Housing Society Limited but failed to produce aforesaid person for examination and to prove the identity, capacity and genuineness of transactions. Thus, the assessee failed to prove the identity and capacity (to advance the amount of credits) and genuineness of transaction in respect of aforesaid credit of Rs. 10,00,000/- cumulatively as required u/s 68 of the Act. Therefore, income of Rs. 10,00,000/- escaped assessment within the meaning of Section 148 of the Act. Issue notice u/s 148 of the Act.

The assessee vide letter dated 27.12.02 shown the deposit of share applications money at Rs. 1,00,000/- in the name of Shri Premchand Borasi. The assessee was asked to prove the identity, capacity and genuineness of the transactions. Therefore, income of Rs. 1,00,000/-

escaped assessment within the meaning of Section 148 of the Act.

In view of the above income of Rs. 1,35,49,500 (Rs. 1,14,49,500/- + 10,00,000/- + 1,00,000/-) escaped assessment within meaning of Section 148 of the Act. Issue notice u/s 148 of Act.

Sd/-ITO 2(3) Indore."

Objections raised by the Ld. Authorized Representative of the assessee before the ITO Wd.2(3), Indore vide letter dated 22.10.2003

"Sub: Objection to the issue of notice u/s 148 on the basis of reason recorded – A.Y. 1999-2000.

We hereby object to the action of the AO in issuing notice u/s 148 of the Income-tax Act, 1961, on following grounds:-

- 1. That the action of the AO is without jurisdiction. As per Section 147 "If the AO has reason to believe" He can invoke the section, as reason to believe are stronger than the satisfaction of AO. The power of AO are not unbridled one. And it cannot be mechanical reopening of the assessment.*

1.1 *The assessee has received Rs. 1,14,49,500/- during previous year relevant to assessment year 1999-2000 from the booking of plots at its real estate project. The complete list of applicant, photocopy of applications, copy of accounts of each member is already in the Department records. During the assessment proceeding of assessment year 2000-2001 it was submitted before the AO that the assessee is having business of the real estate development. It is developing real estate at shell city. It is in the process of developing plots for residential purpose with modern facilities. It has advertised widely and marketed its project through various channels to the public at large and invited application for allotment and therefore sale of plots to prospective customers in need of a residential plots. It has also formulated scheme for payment of booking amount in instalments over 3 to 5 years. An on completion of the development sale and possession of the plot of the prospective customers.*

1.2 *With aggressive marketing strategies the assessee was able to attract apprx. 250 prospective customers who booked the plot at shell city. All the customers have ,opted for payment in instalments spread over 3 to 5 years. The sale transaction was to complete after the payment of the sale consideration, registry of plot and handing over the possession to the customers. It was also submitted that these credit are not covered by the Section 68 of the Income-tax Act, 1961,. It was further submitted that the customer have been attracted for booking of plots through advertisement and other modes of marketing from public at large and it would not be out of place to mention that one has to keep in mind the legal maxim lexnon cojit ad impossibidia which means "the law does not compel a man to do that which he can not possibly perform."*

1.3 *If a person goes to shop and have a buys a product, the shopkeeper is only concerned about his payment of the product and nothing else. We have also sold our product i.e. plots to*

our customers who are paying in instalments. Therefore, it was urged that necessary enquiry may be directly made from the customer. The AO conducted his enquiry through inspector from few customers who confirmed the transaction. We have also requested that all surrounding circumstances and objective facts may be considered on common human, experience in life and reasonable conclusion not on the basis of suspicion or probabilities be drawn.

- 1.4 Therefore, the action of the AO on above ground is arbitrary, unjustified, illegal and biased*
- 2. That the only information on the basis of which reopening was done are list of plot holders (customers), their applications and copy of accounts. The ITO had not made any investigation from the customers despite requested by the assessee and therefore there is no reason to believe that the income has escaped assessment and it has been held that suspicion is not belief.*

3. *That the belief entertained by the AO is arbitrary or irrational there is no rational or intelligible nexus between the reason and the belief.*
4. *That assessee has received Rs. 5.00 lakhs from Sunny Cooperative Housing Society Ltd. During the assessment proceedings of assessment year 2000-2001 the assessee submitted confirmation and copy of bank accounts of the creditor and the transaction stands proved, therefore, reopening on this ground is erroneous and illegal.*
5. *That the assessee had received the share application money of Rs. 1.00 lac, from Mr. Premchand Borasi. The assessee had submitted the copy of share application and bank account. It was also submitted that issue of share are not covered by Section 68 as held by various courts. It was submitted that he is sitting MLA still the AO doubting the identity of him therefore this ground of reopening is arbitrary, biased and illegal.*

In view of above, we have strong objection to the action of the AO in concluding that income has escaped assessment."

8. We have considered the facts, rival submissions and perused the material available on record. Admittedly, the assessee had raised the objection against reopening of the assessment. The AO was required to dispose of those objections before framing the assessment. We, therefore, deem it proper to set-aside the assessment order and restore the objection raised by the assessee to the file of Assessing Officer to be disposed of. The AO thereafter would frame the assessment de novo, if he does not accept the objection raised by the assessee.

9. In the result the appeal filed by the assessee is allowed for statistical purposes.

10. In I.T.A.No. 152/Ind/2013 for the assessment year 2000-01, the following grounds have been raised by the assessee.

1. *That, the learned CIT(A) grossly erred, both on facts and in law, in confirming addition of Rs. 1,80,000/- made by the Assessing Officer out of disallowance of*

'Directors Remuneration'.

2. *That, on the facts and in the circumstances of the case, the learned CIT(A) grossly erred in sustaining addition to the extent of Rs.45,02,014/- out of the addition of Rs.60,94,214/- made by the learned AO under the head 'Advance Money for Plot at Shell City', by invoking provisions of section 68 of the Income-Tax Act, 1961.*
3. *That, on the facts and in the circumstances of the case, the learned CIT(A) grossly erred in confirming the addition of Rs. 10,00,000/- made by the learned AO on account of advance from Sunny Co-operative Housing Society by invoking provisions of Section 68 of the Income-Tax Act, 1961*
4. *That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.2,00,000/- made by the AO on account of unexplained share application money in the name of Shri Premchand Borasi without considering and appreciating the material fact that the appellant had proved the identity of the share applicants, genuineness of the transactions and creditworthiness of the share applicants beyond all doubts by submitting all documentary evidences.*
5. *That, the learned CIT(A) erred, in confirming addition of*

Rs.48,350/- made by the Assessing Officer on account of 'Foreign Traveling Expenses'.

6. *That, the learned CIT(A) erred, in confirming addition of Rs.10,000/- made by the Assessing Officer, on ad-hoc basis, by estimating the closing stock of the restaurant.*
7. *That, the learned CIT(A) erred, in not allowing the claim of the appellant in respect of unabsorbed depreciation and depreciation on Hotel Building.*

11. The Ld. Counsel for the assessee has adopted the same arguments as taken in I.T.A.No. 151/Ind/2013 for the assessment year 1999-2000. He submitted that in this appeal also the assessment framed suffers from illegality as against the reasons recorded for reopening. The assessee has raised objection which has not been disposed of by the AO. He submitted that the AO was required to dispose of the objection by way of separate order in the light of the judgement of the Hon'ble Supreme Court in the

M/s Ajit Ajay Estate & Resorts P.Ltd., Indore -: 17 :-

case of GKN Driveshafts (India) Limited vs. ITO and others,
(2003) 259 ITR 19 (S.C.)

12. We have considered the facts, rival submissions and perused the material available on record. In this appeal also, the assessee had raised the objections against reopening of the assessment and the Assessing Officer was required to dispose of those objections before framing the assessment. We, therefore, deem it proper to set-aside the assessment order and restore the objection raised by the assessee to the file of Assessing Officer to be disposed of. The AO thereafter would frame the assessment de novo, if he does not accept the objection raised by the assessee.

13. In the result, the appeal filed by the assessee is allowed for statistical purposes.

14. Consequently, both the appeals filed by the assessee in I.T.A.Nos. 151 & 152/Ind/2013 for the assessment years

M/s Ajit Ajay Estate & Resorts P.Ltd., Indore -: 18 :-

1999-2000 and 2000-01 are allowed for statistical purposes.

The order pronounced in the open court on 07.06.2018.

Sd/-
(मनीष बोरड)
लेखा सदस्य
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(कुल भारत)
न्यायिक सदस्य
(KUL BHARAT)
JUDICIAL MEMBER

Indore; दिनांक Dated :07/06/2018

CPU/SPS*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore