IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI.NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)
AND
SHRI S RIFAUR RAHMAN (ACCOUNTANT MEMBER)

I.T.A. No.2026/Mum/2023
(Assessment year : 2014-15)

M/s Monarch & Qureshi Builders 76, Laxmi Palace, Mathuradas Road, Kandivali (West), Mumbai-400 067 **PAN : AAHM6954A**	vs	ACIT Circle-33(2) (Now jurisdiction with CC-1(2), Mumbai, Room No.906, 9th Floor Pratishtha Bhavan, Old CGO Annexe, Maharshi Karve Road, Mumbai-400 020
APPELLANT		**RESPONDENT**

Present for the Assessee	Shri Mahavir Jain (Ld. CA)
Present for the Department	Shri Anil K Das (Ld. Sr.DR)

Date of hearing	23/11/2023
Date of pronouncement	21/12/2023

O R D E R

Per N.K. Choudhry (JM):

This appeal has been preferred by the Assessee, against the order dated 03/04/2023 impugned herein passed by the Commissioner of Income-tax (Appeals)-47, Mumbai (in short, 'Ld. Commissioner') under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for the A.Y. 2014-15.

2. In the instant case, the Assessee had declared its income at Rs.67,94,660/- by filing its original return of income on 30/11/2014 which was processed under section 143(1) of the Act. Subsequently, the case of the Assessee was selected for scrutiny under CASS and consequently statutory notices under section 143(2) and 142(1) of the Act were issued, in response to which, the Assessee filed its submissions, which were considered and verified by the Assessing Officer and ultimately, the Assessing Officer made the addition of Rs.2,05,29,102/- under section 43CA of the Act by holding as under:-

"4. ***Addition of Rs./- u/s. 43CA of the I.T. Act. 1961.***

4.1. The assessee is in the business of development of Real estate and developing one SRA project consisting of three buildings i.e. Evershine Cosmic(Jogeshwari Road, Oshiwara, C.T.S. No. 567,567-1, to 144), Gaurav Legend, Oshiwara, Off Infinity Mall, C.T. S. NO. 581 to 585) and slum Buildings. The Evershine Cosmic has been completed till 17th Floor and further construction upto 21st floor completed. Building Saurav Legend RCC work completed upto 8th floor. PTC building is also under construction and completed till 8th floor. The assessee has completed construction of 6 rehabilitation building of ground + 7th floor and possession has already given to unit holders.

During the year, it has sold various flats of Building Evershine Cosmic & Gaurang Legend and registered the sale agreements made with buyers with Stamp Duty Authority. The details of sale of flats are reflected in the AIR information on the PAN database of the assesee. The copies of Index-II have been collected from the Stamp Duty Authorities. On perusal of Index-II of these registered

agreements, it is noticed that the Market value of the flats as per stamp duty authority is more than the agreement value of the flats.

Vide final show cause notice dated 05/12/2016; assessee has been show cause as to why provision of section 43CA should not be applicable in its case. The relevant portion of the show cause is reproduced as under:

"During the scrutiny proceedings, details of flats registered with stamp Authority were received. On verification of the Index, it is notice that Market value adopted by Stamp Duty Authority is more than the Agreement value of the property. The details of the same are given as under:"

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From the above chart, it is seen the provisions of section 43CA can apply to substitute the actual sale consideration with the stamp value. In view of section 43CA, the sale value has to be replacing against agreement value disclosed in the P & L account of the Assessee. ***Accordingly difference of Rs.2,05,29,102/- is added u/s. 43CA of the I.T. Act,1961 under tine head Business income.*** *Penalty proceedings under section 271 r.w.s. 271(1)(c) are separately initiated for concealing particulars of income and filing inaccurate particulars of income."*

3. The Assessee being aggrieved, challenged the said addition before the Ld. Commissioner mainly on the ground that provisions of

section 43CA of the Act which came into effect from 01/04/2014 are not applicable to the case of the Assessee, as the Assessee has made the booking and the sale of the flats prior to previous year i.e. before 1st April, 2013 and, therefore, provisions of section 43CA of the Act are not applicable. The Ld. Commissioner though considered the claim of the Assessee; however, not being influenced, came to the conclusion that provisions of section 43CA of the Act are applicable to the case of the Assessee and ultimately, affirmed the addition of Rs.2,05,29,102/- by holding as under:-

> *"07. I have perused the facts of the appellant case, the order of the Assessing Officer and the submission mace by the appellant during the appellate proceedings. As per facts of the present case, the assessee firm is engaged in the business of real estate development and during the relevant previous years, sold three from its residential project Evershine Cosmic and Gaurav Legend and all flats were sold at the value less than Fair Market Value (FMV)/DLC as on the date of registration of the sale deed. However, according to the appellant, for all these flats, the assessee firm had entered into agreement to sell prior to the start of the relevant previous year i.e., 01/04/2013. It was further argued that the provisions of Section 43CA of the Act were not made applicable for the sales undertaken by the appellant firm, as those entire sale deeds were registered during the relevant year.*
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> *7.1 However, the agreement to sell wherein all the terms and conditions with respect to the sale were finalized, was entered before the relevant previous year and consideration was received through account payee cheque.*
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> *7.2 The appellant, had, although, relied upon the various judgments as mentioned above but the pari materia contained in those judgments and the facts and circumstances mentioned in those judgments are altogether different and are not applicable to the facts of the present case. In most of the judgments, the entire sale consideration amount was already paid at the time of entering into agreement to sell.*
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> *7.3 Further, the assessee had failed to establish the entire sale consideration were received through payee's account cheque prior to*

01/04/2013 and also that the sale deeds were registered by the assessee during the relevant previous year only, therefore, since the appellant has disputed the applicability of provisions of Section 43CA of the Act on the ground that booking for sale of flats in question were made prior to the previous year which is prior to the date on which provisions of Section 43CA of the Act are applicable i.e. on 01/04/2013.

7.4 It is pertinent to note that the Legislature has specifically provided the remedy for a situation where the property is sold by an agreement and subsequently a sale deed is executed. Thus, in case of any difference of date of registration of the transfer of asset and date of agreement, then the value assessable by the Stamp Duty Authority in respect of such transfer, the date of the agreement shall be taken. For ready reference, provisions of Section 43CA are reproduced as under:

> ***43CA. (1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer ,the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer:***
>
> ***Provided that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duly does not exceed one hundred and Qften] per cent of the consideration received or accruing as a result of the transfer, the '. consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration:***
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> ***(2) The provisions of sub-section (2) ant: sub-section (3) of section 5UC shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).***

(3) Where the date of agreement fixing the value, of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in ' respect of such transfer on the date of the agreement.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account 93[or through such other electronic mode as may be prescribed94] on or before the date of agreement for transfer of the asset.

7.5 As per sub-section (3) and (4) of section 43CA, the benefit of prior agreement is granted if the consideration is received at the time of agreement other than cash. In the case in hand, the booking is claimed to have been made prior to 01/04/2013 whereas the sale deeds were executed after 01.04.2013 which falls in the previous year relevant to the assessment year under consideration, therefore, provisions of Section 43CA are applicable for the assessment year under consideration.

7.6 Thus, once the provisions itself has taken care of such a situation or difference in date of prior agreement, then the applicability of provisions cannot be questioned based on mere existence of prior agreement. The transfer under the provisions of section 43CA is recognized only when a registered document is executed and therefore, in view of the facts and circumstances of the case, since the transfer through sale deed is made during, the previous year relevant to the assessment year under consideration for which the provisions of Section 43CA are applicable. In such a situation, merely because an agreement has taken placed prior to 01/4/2013 would not take-away the transaction from the ambit of the provisions of Section 43CA of the Act. More particularly when the entire sale consideration was not made through account payee cheque at the time of entering into an agreement to sell.

7.7 Thus, while relying upon the decision of the Coordinate bench of this ^Tribunal in the case of M/s Spy tech Realtors Pvt. Ltd. Vs

ACIT in ITA No. 254/JP/2019 order dated 02/01/2020 wherein similar circumstances has been decided against the appellant, I am of the view that the Assessing Officer has rightly made the disallowance u/s 43CA in the case of the appellant. ***Thus, the addition of Rs.2,05,29,102/- This ground raised by the appellant is dismissed."***

4. The Assessee being aggrieved is in appeal before us. The Assessee before us also filed a petition dated 21/09/2023 for raising additional ground of appeal by talking refuge of the judgment rendered by Hon'ble Apex Court in the case of NTPC Ltd Vs CIT 229 ITR 383 (SC). The additional ground raised by the Assessee reads as under:-

"On the facts and circumstances of the case and in law, the notice u/s 143(2) issued by Income Tax Officer Ward 33(2)(3) *is without jurisdiction because as per instruction no.* 07/2011 *issued by CBDT appellants jurisdiction lies with the ACIT, hence the notice n/s 143(2) and consequential assessment order is bad in late and liable to be quashed."*

5. We have given thoughtful consideration to the claim of the Assessee and observe that the additional ground raised by the Assessee is a jurisdictional ground / legal ground which goes to the root of the case and emanates from the orders passed by the authorities below as well as documents available on record, hence, we deem it appropriate to allow the Assessee to raise the said additional ground.

6. Coming to the merit of additional ground, the Assessee has claimed that the CBDT vide Instruction No.01/2011 (F.No.187/12/2010-IT(A-1)/dated 31/01/2011 (as reproduced herein below) specified the monetary limits for making the assessments.

Order-Instruction - Income Tax

References have been received by the Board from the large number of taxpayers especially from the mofussil areas, that the existing monetary limits for assigning cases to Deputy Commissioners / Assistant Commissioners and ITOs is causing hardship to the taxpayers.

INSTRUCTION NO: 1/2011
[F.NO. 187/12/2010-IT(A-IT(A-1)]
DATED 31-1-2011

References have been received by tine Board from a large number of taxpayers, especially from mofussil areas, that the existing monetary limits for-assigning cases to ITOs and DCs/ACs is causing hardship to the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The Board had considered the matter and is of the opinion that the existing limits need to be revised to remove the abovementioned hardship.

An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001, when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:

	Income Declared		Income Declared	
	(Mofussil areas)		(Metro cities)	
	ITOs	ACs/DCs	ITOs	DCs/ACs
Corporate returns	Upto Rs. 20 lacs	Above Rs. 20 lacs	Upto Rs. 30 lacs	Above Rs. 30^ lacs
Non-corporate returns	Upto Rs. 15 lacs	Above Rs. 15 lacs	Upto Rs. 20 lacs	Above Rs. 20^ lacs

Metro charges for the purpose of above instructions shall be Ahmedabad Bangalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011."

7. The Assessee further claimed that according to the monetary limits set out by such Instruction No.1/2011 (supra) in the metropolitan cities, the ITOs are empowered to make the assessments of the corporate assesses upto Rs.30 lakhs as declared and above Rs.30 lakhs income declared by the Assessee, only Deputy Commissioners / Assistant Commissioners are empowered to make the assessments. In the instant case, admittedly, the income declared by the Assessee for the year under consideration is **Rs.67,99,440/-** and, therefore, only DC/ AC had the power to issue the notice under section 143(2) of the Act and to make the assessment. Somehow the notice under section 143(2) of the Act dated 31/08/2015 was issued by the Income-tax Officer, Ward 33(2)(3) who was not empowered and infact had no jurisdiction to decide the assessment over and above R.30 lakhs and therefore vitiated the assessment order dated 30/09/2016 passed under section 143(3) of the Act by the Assistant Commissioner of Income-tax, Circle-33(2)(3), Mumbai and hence, the assessment order itself is liable to be quashed.

7.1 The Assessee in support of its contention also relied upon various judgments. For the sake of brevity, we are reproducing below, the dictum laid down by the jurisdictional High Court in the case of Ashok Devichand Jain Vs UOI & Ors Writ Petition No.3489 of 2029 decided on 08/03/2022:

2. The primary ground that has been raised is that the Income Tax Officer who issued the notice under section 148 of the Act, had no jurisdiction to issue such notice. According to Petitioner as per instruction No. 1/2011 dated 31st January, 2011 issued by the Central Board of Direct Taxes, where income declared/returned by any Non-Corporate assessee is up to Rs. 20 lakhs, then the jurisdiction will be of ITO and where the income declared returned by a Non Corporate assessee is above Rs. 20 lakhs, the jurisdiction will be of DC/AC.

3. Petitioner has filed return of income of about Rs. 64,34,663/-and therefore, the jurisdiction will be that of DC/AC and not ITO. Mr. Jain submitted that since notice under section 148 of the Act has been issued by ITO, and not by DC/AC that is by a person who did not have any jurisdiction over Petitioner, such notice was bad on the count of having been issued by an officer who had no authority in law to issue such notice.

4. We have considered the affidavit in reply of one Mr. Suresh G. Kamble, ITO who had issued the notice under section 148 of the Act. Said Mr. Kamble, ITO, Ward 12(3)(1), Mumbai admits that such a defective notice has been issued but according to him, PAN of Petitioner was lying with ITO Ward (12)(3)(1), Mumbai and it was not feasible to migrate the PAN having returned of income exceeding Rs. 30 lakhs to the charge of DCIT, Circle 12(3)(1), Mumbai, as the time available with the ITO 12(3)(1) was too short to migrate the PAN after obtaining administrative approval from the higher authorities by 31st March, 2019

5. The notice under section 148 of the Act is jurisdictional notice and any inherent defect therein is not curable. In the facts of the case, notice having been issued by an officer who had no jurisdiction over the Petitioner, such notice in our view, has not been issued validly and is issued without authority in law.

6. In the circumstances, we have no hesitation in setting aside the notice dated 30th March, 2019."

7.2 We observe that though the Hon'ble High Court has dealt with the notice issued under section 148 of the Act; however, it is a fact that the Hon'ble High Court has also dealt with the Instruction No.1/2011 dated 31/01/2011 issued by the CBDT which is also under consideration before us and notice under section 148 of the Act is also

a statutory and jurisdictional notice and, therefore, goes to the root of the assessment. The Hon'ble High Court has clearly held that ITO who had issued the notice under section 148 of the Act had no jurisdiction over the petitioner. The notice under section 148 of the Act is a jurisdictional notice and any inherent defect therein is not a curable one.

7.3 We further observe that the co-ordinate bench of the Tribunal in the case of Ketan Tokershi Shah vs DCIT, Central Circle-2, Thane decided on 26/7/2023 also dealt with the identical issue and the Instruction No.1/2011 (supra) as well and following the judgment in the case of Ashok Devichand Jain vs UOI & Ors (supra) held the assessment completed under section 143(3) of the Act **by issuing notice under section 143(2) of the Act by the DCIT, Central Circle-2, Thane as without jurisdiction and consequently quashed the assessment**.

7.4 We further observe that the jurisdictional co-ordinate bench in the case of DCIT Vs Parmar Built Tech ITA No.4124/MUM/2012 also dealt with the identical issue and by following the judgment of the jurisdictional High Court in the case of Ashok Devichand Jain (supra), quashed the assessment order in the identical facts.

7.5 We further observe that Hon'ble co-ordinate bench of the Tribunal at Kolkata in the case of Bhagyalaxmi Conclave Pvt Ltd vs DCIT (ITA No.519/KOL/2019 & Ors decided on 03/02/2011) also dealt with the notice issued under section 143(2) of the Act and ultimately

held the notice issued by the DCIT as defective and consequently quashed the assessment by holding that the assessing authority, who passed the order under section 143(3) of the Act i.e. DCIT-13(1), Kolkata has not issued notice under section 143(2) of the Act and also for the reason that the jurisdiction of these cases lies with the ITO and not the DCIT.

7.6 It is trite to say that as per dictum of the Hon'ble Apex Court in the case of ACIT VS Hotel Blue Moon (2010) 321 ITR 362 (SC), the notice under section 143(2) of the Act is mandatory for making the assessment and therefore the same is required to be issued by the Assessing Officer, who has jurisdiction and is empowered to issue the notice under section 143(2) of the Act and to make the assessment. Hence, considering the peculiar facts and circumstances in totality specific to the effect ITO who issued the jurisdictional notice u/s 143(2) had no jurisdiction and infact was not empowered to make the assessment, and therefore respectfully following the dictum laid down by Hon'ble High Court in Ashok Devichand Jain case (supra) to the effect that *"inherent defect is not curable",* we do not have any hesitation to quash the assessment proceedings. Consequently, the assessment order itself is quashed.

8. Coming to the merits of the case, we observe, as we have already quashed the assessment order itself, hence, no purpose would be served by deciding the merits of the case / other issues raised by the Assessee which would be a futile exercise.

9. In the result, appeal filed by the Assessee is allowed.

Order pronounced in the open court on 21/12/2023.

Sd/- **sd/-**

(S RIFAUR RAHMAN)	(NARENDER KUMAR CHOUDHRY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dt : December, 2023
Pavanan

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar, **ITAT, Mumbai**