IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

BEFORE PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER &
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.1113/Del/2024
(Assessment Year : 2017-18)

Madhulika Mishra B-1501, Tower-4, Enchante, Lodha New Cuffe Parade, Wadala East, Mumbai-400 022 **PAN No. ASPPM 9325 H**	Vs.	**ITO** Ward – 5(1)(5) Noida
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Ganesh Raj Gopalen, C.A. and Shri Kirit Vasan. R. C.A.
Revenue by	Shri Jatender Kumar Kale, Sr. D.R.

Date of hearing:	01.08.2024
Date of Pronouncement:	01.08.2024

ORDER

PER PRADIP KUMAR KEDIA, AM :

The captioned appeal has been filed by the assessee against the first appellate order of the Ld. Commissioner of Income Tax (Appeals) – National Faceless Appeal Centre (NFAC), Delhi dated 12.01.2024 arising from the assessment order dated 29.03.2022 passed by the ITO, Ward – 5(2)(1), G. Budh Nagar (hereinafter referred to as 'AO') under Section 147 r.w.s 144 of the Income Tax Act, 1961 (the Act) concerning Assessment Year 2017-18.

2. The grounds of appeal raised by the assessee reads as under:

1. On facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre

("CIT(A)/NFAC") erred in holding that the Appellant did not fulfill the conditions mentioned in section 249(4)(b) of the Income-tax Act, 1961 (the "Act") with respect to the appeal filed by the Appellant under section 246A of the Act and further erred in holding that the said appeal as not fit for admission in terms of section 249 of the Act.

2. *On facts and in the circumstances of the case and in law, the learned CIT(A)/NFAC erred in not granting sufficient opportunity to the Appellant to make an application under proviso to section 249(4) of the Act, if applicable.*

3. *On the facts and circumstances of the case and in law, the CIT(A)/ NFAC ought to have appreciated that the Assessing Officer had erred in reopening the assessment under section 147 and completing the same without duly serving the notice under section 148 as required under the law, and further, even though he was not the jurisdictional officer.*

4. *On the facts and circumstances of the case and in law, the CIT(A)/NFAC ought to have appreciated that the Assessing Officer had erred in not serving a show-cause notice under section 144 in accordance with law and consequently did not provide an opportunity to the appellant before passing the final assessment order under section 147 r.w.s. 144 of the Act*

5. *On the facts and circumstances of the case and in law, the CIT(A)/NFAC ought to have appreciated that the Assessing Officer had erred in concluding that there was sale of immovable property situated at 1501, Lodha Enchannate, B Wing, New Cuff Parade, Wadala, Mumbai and making an addition of Rs.2,38,64,480/- as capital gains to the appellant when there was a purchase of the said immovable property during the year by the appellant's spouse jointly with her.*

6. *The above grounds of appeal are made without prejudice to one another. The appellant carves leave to add, alter or modify any of the above grounds of appeal."*

3. When the matter was called for hearing, the learned Counsel submitted at the outset that the case was reopened on the premise that the assessee has sold immovable property of Rs.3,97,74,132/- and also received salary of Rs.3,73,347/- for the F.Y. 2016-17 relevant A.Y. 2017-18 but however has not filed the return of income. The learned Counsel submitted that the information gathered by the Revenue is factually

flawed. While the assessee has earned salary as stated, there was no sale of property during the year under consideration as alleged and therefore, no capital gain was accrued as further alleged. In fact, the correct position was opposite. The assessee had actually purchased some property on the same amount during the year where she was merely a co-owner along with her husband. The source of purchase of property was salary earned by the husband and substantial loans secured by husband from HDFC Ltd. amounting to Rs. 3.47 crore. The learned Counsel thus submitted that as against the property of Rs.3.97 crore purchased, a sum of Rs.3.47 crore was financed out of bank loans and remaining amount was paid out of the accumulated resources of the husband. The name of the assessee who is spouse of Mr. Jitesh Shah, is inserted only as a matter social security and to cover the risk under General Laws. It is common in Indian Society to add name of spouse in such agreement. The assessee has not paid any amount whatsoever for the purchase of the property which is wrongly alleged by AO to be sale of the property. To assert such stand, the learned Counsel placed an affidavit duly verified and deposed on oath by the assessee negating sale of any residential property and also non-service of notices on her leading to non-compliances before the Assessing Officer. The learned Counsel thus submitted that the impugned additions made in the hands of the assessee are wholly unjustified being opposed to the basic facts of the case. The learned Counsel accordingly sought appropriate brief in the matter.

4. The learned DR for the Revenue, on the other hand, submitted that opportunity were provided to the assessee by the AO as well as by the CIT(A) to divulge the facts and therefore, the submissions made here before the Tribunal, cannot be taken as sacrosanct and requires factual verification for which the assessee has lost the opportunity.

5. On perusal of first Appellate Order, it seen that the CIT(A) has dismissed the appeal of the assessee summarily on account of non-compliance of Section 249(4)(b) of the Act alleging the non-payment of advances tax liability and thereby held that the appeal before the CIT(A) is not maintainable. It was contended on behalf of assessee that there will be no advance tax liability on the salary income and therefore, there is no breach of provisions of section 249(4)(b) of the Act. The remaining income assessed towards sale of property in the hands of the assessee is on account of gross misconception of facts by the AO wrongly treating purchase of the property as sale thereof.

6. The plea of the assessee for non workability of impediment under section 249(4)(b) of the Act appears quite convincing in the facts of the case. In this circumstances, narrated on behalf of the assessee appeal of the assessee is found to be maintainable before the CIT(A).

7. We now advert to the affidavit dated 17.06.2024 placed before the Tribunal. The contents of the affidavit are reproduced hereunder :

AFFIDAVIT

"I, Smt. MADHULIKA MISHRA, daughter of Shri Vishnu Kumar Mishra (PAN ASPPM9325H) residing at B 1501, Tower 4, Enchante, Lodha New Cuffe Parade, Wadala, Mumbai-400 022 solemnly affirm as under:

1. Notice under section 148 of the Income tax Act 1961 dated 30.3.2021 for AY 2017-18:

1.1 A Notice under section 148 was reportedly issued and sent by Income-tax Officer, Ward 5(2)(1), Budh Nagar, Noida on 30.3.2021 by Speed Post to 1541, Opposite Chimmaya, Near Lal Market, Arun Vihar, Noda 201301, Uttar Pradesh India ("Noida address").

1.2 The house at the above address was allotted to my father, Shri Vishnu Kumar Mishra, by the Armed Forces when he was posted in Delhi. He vacated the said house when he was transferred in 2011. I state that I have *not been residing at that address since my marriage in 2011 when I moved to Mumbai*

1.3 I have been residing at Flat B 1501, Tower 4, Enchante, Lodha New Cuffe Parade, Wadala, Mumbai-400 022 since May 2018. I have given my current address in Mumbas as my place of residence in the income-tax returns filed for AY 2018-19 onwards till date. My latest income-tax returns for AY 2020-21, filed on 20 12 2020, state the same address in Mumbai.

1.4 I state that I have not been residing at the Noida address, and I did not receive the Notice under section 148 dated 30.3.2021.

1.5 I received only one notice under section 142(1) dated 15.2.2022 issued by the Income- tax Officer Ward 5(2)(1), Budh Nagar, Noida requiring information about the purchase of immovable property during the Financial Year 2015-16 and my bank statements for that period. The notice was received on my email mmishra86@gmail.com to which I responded on 1.3.2022.

1.6 I further state that I was not aware of the reassessment proceedings for AY 2017-18 until after the order under section 148 was passed on 29.3.2022.

2. Letters from National Faceless Appeal Centre seeking clarification u/s 249(4)(b):

2.1 The Income-tax Officer Ward 5(2)(1), Budh Nagar, Noida completed the reassessment under section 147 read with section 144 of the Act vide his Order dated 29.03.2022.1 filed an appeal with the Commissioner of Income-tax (Appeals) on 21.05.2022.

2.2 A letter was issued by the National Faceless Appeal Centre (NFAC) on 26.12.2023 seeking clarification on the amount of tax paid not mentioned and that Form - 35 as incomplete/not filled properly, especially Col. No. 8 and 9 of that form seeking compliance within 5 days of receipt of the said letter. The said letter was sent by email by NFAC. A reminder letter was issued by the NFAC on 04.01.2024 giving a final opportunity seeking a response before 10.1.2024. The reminder letter was also sent by email by the NFAC.

2.3 I was travelling during the period from 21.12.2023 till 4.1.2024 visiting my relatives when I was not accessing my email due to intermittent connectivity. Moreover, I was amid marital discord at that time, which resulted in my moving out of my house with my minor son to a rented flat.

Due to the resulting emotional upheaval at that time, 1 state that I was not in a suitable frame of mind to notice these letters and respond to them within the short period of 4-5 days given for their compliance. I state that the two letters came in quick succession and in the middle of my personal problems that 1 missed the letters and could not reply to them.

2.4 I state that I did not deliberately fail to respond to the letters from the NFAC dated 26.12.2023 and 4.1.2024, and it was due to reasons beyond my control.

3. No sale of residential flat at Mumbat as mentioned in Order u/s 148 dated 29.3.2022:

3.1 I state that the residential flat at B 1501, Tower 4, Enchante, Lodha New Cuffe Parade, Wadala, Mumbai-400022 was purchased by my husband, Shri Jitesh Shah (PAN AXDPS1954K) with me jointly for a consideration of Rs. 3,97,74,132/-

3.2 I state that my spouse, Shri Jitesh Shah, filed his income-tax returns for AY 2017-18 under section 139(1) of the Act, declaring salaries of Rs. 1,29,01,004/- and a total income of Rs. 1,25,78,710/- and paying total taxes for the year of Rs. 42,64,957/-.

3.3 I state that my spouse, Shri Jitesh Shah, along with me as a Co-borrower, obtained a Housing Loan from Housing Development Corporation Ltd for a sanctioned loan Amount Rs. 3,47,00,000/-.

3.4 I state that my spouse, Shri Jitesh Shah and I had sufficient funds to pay the consideration of the flat purchased of Rs. 3,97,74,132/-

3.5 I state that I had not sold immovable property at B 1501, Tower 4, Enchante, Lodha New Cuffe Parade, Wadala, Mumbai 400 022 for a sale consideration of Rs. 3,97,74,132/- as mentioned erroneously in the Order under section 147 of the Act."

Sd/-
MADHULIKA MISHRA

8. In the light of categorical assertions made in the affidavit, it appears that the Revenue has wrongly proceeded on misappreciation of facts of substantive nature. The purchase of property has been construed as sale of property leading to such

exorbitant additions and protracted litigation. The verification was put in motion by the AO on such footing. However, in the absence of any reply from the assessee before the AO or before the CIT(A), the correct facts did not surface for consideration of Revenue. Hence in the fitness of things, the matter needs to be remanded back to the file of the Assessing Officer for determination of the issue involved afresh in accordance with law. It shall be open to the assessee to adduce all evidences and furnish explanations on the correct state of affairs before the AO without any demur. The Assessing Officer shall pass a speaking order after taking into account the evidences as may be placed and explanation thereon. Needless to say reasonable opportunity shall be given to the assessee in this regard.

9. In the result, appeal of assessee is allowed for statistical purposes.

Order was dictated and pronounced in the open court on 01.08.2024

Sd/-

(YOGESH KUMAR US)
JUDICIAL MEMBER

Sd/-

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Date:- 01.08.2024

*Priti Yadav, Sr. PS**

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI