

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, G, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI**

**Before Shri Saktijit Dey, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.7404/Mum/2012
Assessment Year: 2004-05**

ACIT (OSD) CIT 3(1) R.No.607, Aayakar Bhavan, M.K. Rd. Mumbai -400020 (Revenue)	बनाम/ Vs.	M/s. Greenland Fertilizers Ltd. 75-B, Mittal Court, Nariman Point Mumbai-400021 (Respondent) P.A. No.AAACH1784M
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Revenue by	Shri Nitin Waghmode (DR)
Respondent by	None

सुनवाई की तारीख / Date of Hearing :	18/01/2016
आदेश की तारीख / Date of Order:	12/02/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Revenue against the order of Ld. Commissioner of Income Tax (Appeals)-7, Mumbai {(in short 'CIT(A)}}, dated 17.08.2012 for the assessment year 2004-05, passed against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) r.w.s. 147 of the Act.

2. During the course of hearing, none appeared on behalf of the Respondent and arguments were made by Shri Nitin Waghmode, Departmental Representative (DR) on behalf of the Revenue.

3. In this appeal, the Revenue is aggrieved with action of Ld. CIT(A) in quashing reopening of the assessment of the assessee u/s 147 of the Act. During the course of hearing, none appeared on behalf of the assessee. An adjournment application was received dated 13th January 2016, but the same was rejected as it was noted from the perusal of the order sheet entries that none has appeared earlier also on various occasions. Ld. DR has relied upon the order of the AO.

3.1. We have gone through the orders of the lower authorities. The brief background is that in this case original assessment was done u/s 143(3), vide order dated 29.09.2006. Subsequently, notice was issued u/s 148 (dated 28.03.2011). The perusal of the assessment order reveals that reopening has been done after recording following 'Reasons':

"In this case, the assessment was completed u/s. 143(3) on 29.09.2006 assessing the total loss of Rs.3,16,92,2301"-.

2. On perusal of the records, it is observed that auditors in their report had mentioned that the payable includes a sum of Rs. 1,35,44,600/- arising on account of exchange

fluctuation translated in terms of Indian Rupee as on 31.03.2004 as there will only notional gain and this is not in accordance with AS-11(7). Directors in their report had mentioned that due to continuous loss over years, the amounts payable but the company for discharging the liabilities will be a difficult task and the revaluation of exchange gain will result in notional income and hence decided that it was not necessary to revalue the import liability in terms of exchange valuation.

3. The action of the assessee is nor correct, it is necessary for the assessee to provide for the gain or loss due to exchange variation at the end of the year. In this regard, reliance is placed on the decision of the Hon'ble S.C. in the case of CIT vs. Canara Bank Ltd wherein it was held that by virtue of change in exchange rate of currency, excess amount is realized by an assessee, it shall be treated as capital receipt if it is kept as an investment; otherwise it is a revenue receipt. Losses due to such exchange variation are being claimed as revenue expenditure invariably by all the assessee and therefore, such exchange gains are also required to be offered for taxation. Omission to offer the exchange gain had resulted in excess quantification of loss to the extent of Rs. 1,35,44,600/.

4. Thus, I have a reason to believe that the assessee had not made a full and true disclosure in the return of income. As such I have reason to believe that the income of Rs. 1 35.44,600/ - chargeable to tax under the provisions of the I.T. Act, 1961 had escaped assessment for AY 2004-05."

3.2. During the course of assessment proceedings, the assessee submitted that the reopening was invalid, as the

complete facts were submitted before the AO during the course of assessment proceedings and only thereafter, assessment order was passed on merits. On the correctness of the "Reasons" also, it was submitted that notional income could not be added as income on account of notional foreign exchange gain, and these "Reasons" were invalid from this angle also. But, AO framed the reassessment order and addition on account of notional foreign exchange gain was made.

3.3. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein reopening was contested by the assessee in addition to the grounds raised on merits. The detailed submissions were made before the Ld. CIT(A) challenging the validity of the reopening. After considering all the submissions and material held on record, Ld. CIT(A) decided the same in favour of the assessee by holding that reopening was invalid in the eyes of law. The relevant portion of his order is reproduced below:

"4. Even I find that the appellant company has also raised the issue before me that the appellant's case was completed u/s 143(3) of the Act and subsequent to that reassessment u/s 147 is incorrect as no new details or any inaccurate particulars of income or concealment of income was noticed by the A.O. All the details were filed by the appellant company with the return of income along with prescribed statutory audit report, balance sheet

and trading & profit & Loss A/c. Even the fact taken by the A.O. for recording the reason for issuance notice u/s. 148 of the Act was taken from the record, as the A.O. himself took note from Form 3CD report, which was based on audit objection and hence the appellant agitated to this effect. Based on this submission itself, the appellant's AR requested to annul the Assessment Order.

To ascertain the appellant contention, a letter dated 22/06/2012 was given to subsequent to that the A.O. through letter dated 26/06/2012 of Addl.CIT-3(1) submitted its report. The relevant portion of the same is extracted as under.

"2. On verification of the records, it is seen that the assessment in this case was reopened u/s 147 r. w. s.148 subsequent to the Audit objection raised by the revenue audit.

3. It is pertinent to mention that the reopening of assessment was not done in view of revenue audit objection per se but in view of clear position of law regarding the taxability of gain of exchange fluctuation arising to the assessee during the year under consideration. Without prejudice to the above, it is further submitted that reopening of assessment was done for the purpose of taking remedial action in accordance with instructions laid down by the Board in Instruction No. 9/2006 dated 07/11/2006."

6.6 Having taken note of the A.O.'s report I find

that the reopening itself was not justified and correct, as it is based on Audit Objections. I find that the jurisdictional Bombay High Court has clearly held in the case of Purity Techtexile Pvt. Ltd. vs. ACIT reported in 325 IFR 459 that merely on audit objection, reopening of assessment is unjustified and incorrect. Further to that even as far as on merit, I am of the considered view that the provisions of section 43A is in relation to capital receipt, which is purchased through foreign exchange. Further, even exchange fluctuation which takes place has to be recognized in accordance to provision of Sec. 43A of the Act. But it is a fact on record as per section 43A of the Act itself that the same should be only recognized only on actual payment of aforesaid sum.

6.7 Further to that even I find that the notional gain which arise to the appellant is no where income of the appellant which should be taken for payment of tax, as the appellant has huge loss, which clearly depicts in the return of income. Hence in this case recognizing notional income was not correct and justified, as to this effect the appellant has taken note of AS-11. Further to that, I also find that the said fact was also recorded in the audit report in para-4(iv) of the report, which is as under:-

(iv,) In our opinion, the Balance Sheet and Profit and Loss account dealt with by this report comply with the accounting Standards referred to in sub section (3C)

of section 211 of the companies Act, 1956. Excepting that the payable includes a sum of Rs. 1,35,44,600/- arising on account of exchange fluctuations translated in terms of Indian Rupees as on 31/03/04, as there will only notional gain. This is not in accordance with AS-11(7).

In view of all these facts, I am not in agreement with the A.O. that the aforesaid sum was taxable on pretext on reopening of assessment as well as on merit. Hence in view of the same, keeping reliance on jurisdictional High Court's decision in the case of M/s. Purity Techtexile Pvt. Ltd. (Supra) and M/s. ICICI Home Finance Co. Ltd. vs. ACIT in Writ Petition No.430/2012, the addition som made by the AO is deleted. Thus, the appellant's these grounds of appeal are allowed."

3.4. The perusal of the findings of the Ld. CIT(A) reveals that the Ld. CIT(A) has called for remand report from the AO to ascertain the basis of recording of 'Reasons' by the AO. It was confirmed on the basis of remand report sent by the AO that AO had no fresh material in his possession and the 'Reasons' were recorded on the basis of return, balance sheet and tax audit report of the assessee held in the assessment records. We have also perused the 'Reasons' recorded by the AO as reproduced in the assessment order. It is noted by us that in this case original assessment was done u/s 143(3) and notice u/s 148 has been issued on 28.03.2011 and the assessment year is 2004-05. Thus, reopening has been done after the

expiry of 4 years from the end of the assessment year. Under such circumstances, the reopening can be done, as per law, subject to the limitation as provided in first proviso to section 147, which provides that reopening cannot be done after the expiry of four years where the original assessment was done u/s 143(3), unless, any income chargeable to tax escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The perusal of the 'Reasons' recorded by the AO reveals that there is no allegation of any failure on the part of the assessee in disclosure of material facts. Rather the case is reverse. Apparently, there was full disclosure on the part of the assessee in accounts filed with the return of income. The AO recorded the 'Reasons' on the basis of information disclosed by the assessee in his return, accounts and audit report. Thus, the reopening is clearly barred by limitation and beyond the provisions of law in view of aforesaid proviso to section 147. It is further noted that no fresh tangible material has come into the possession of the AO, at the time of the recording of the 'Reasons'. It is settled law that in absence of a fresh tangible material coming into the possession of the AO, no belief can be formed about escapement of income. It is further noted by us that 'Reasons' have been recorded on the ground that foreign exchange fluctuation gain was taxable on notional basis. The belief of escapement of income is without any legal basis the AO has not even analysed the facts properly before recording the 'Reasons'. It has not been mentioned in the 'Reasons' whether the impugned foreign exchange fluctuation gain,

sought to be taxed on notional basis, was on account of revenue or capital transactions. It could be brought to tax as income, if at all it was feasible under the law, only when the resultant gain was on account of revenue transactions. If underlying transactions leading to foreign exchange fluctuation gain were on capital account, then it could not be treated as income. Thus, in our considered view the impugned 'Reasons' are factually and legally invalid in the eye of law.

3.5. Thus, viewed from any angle, the reopening was bad in law and has been rightly quashed by the Ld. CIT(A) by relying upon the judgments of Hon'ble Bombay High Court in the case of Purity Techtexile Pvt. Ltd. vs. 325 ITR 459 (Bombay) & M/s. ICICI Home Finance Co. Ltd. vs. ACIT (Writ Petition no.430/2012). We do not find anything wrong in the findings of the Ld. CIT(A) and these are upheld. Thus, grounds raised by the Revenue are dismissed.

4. In the result, this appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 12.02. 2016.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 12/02/2016

Patel, P.S. नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai