

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SHRI AMIT SHUKLA, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No.2486/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2004-05)

RBS Equities (India) Limited [formerly known as ABN AMRO Asia Equities (India) Limited] 83/84, Sakhar Bhavan, Behind Oberoi Towers, Nariman Point, Mumbai-400 021.	बनाम/ Vs.	Deputy Commissioner of Income- tax, 4(1) Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACH 1596D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Niraj Sheth
प्रत्यर्थी की ओर से/Respondent by	:	Shri A.K. Kardam

सुनवाई की तारीख / Date of Hearing	:	21/12/2015
घोषणा की तारीख / Date of Pronouncement	:	03/02/2016

आदेश / ORDER

PER RAJESH KUMAR, A. M:

This appeal by the assessee is directed against the order dated 20-01-2012 of Commissioner of Income Tax (Appeals)-9, Mumbai (Hereinafter called as the CIT(A)) for assessment year 2004-05. The assessee has raised the following grounds of appeal:

1. Additions made on account of employee bonus - Rs. 1,27,43,909

- a) *The learned CIT(A) erred on facts and in law, in upholding the order of the AO and confirming the addition of Rs.1,27,43,909 on account of employee bonus.*
- b) *The learned CIT(A) erred on fact and in law, in confirming the addition, which was made by the AO on a mere suspicion without bringing on record substantive evidence to show that the Appellant has incurred the expenditure during the captioned assessment year.*
- c) *The learned CIT(A) erred on facts and in law, in rejecting the affidavits produced from the employees on the ground that the specific date of receiving the balance amount of the discretionary bonus that was deferred is not mentioned in the affidavits.*
- d) *The learned CIT(A) erred on facts and in law, in not taking into consideration the remaining documents produced before him as additional evidence, even though, the same have been admitted by him for proper adjudication on the matter.*

The Appellant prays that the addition made on account of employee bonus be deleted.

2 Without prejudice to Ground 1 - Additions made on account of employee bonus to be restricted to Rs.8,425,725

- a) *Without prejudice to Ground 1, the learned CIT(A) erred on facts and in law, In not restricting the amount of addition on account of employee bonus to Rs.8,425,725.*
- b) *The Appellant submits that for the financial year ended 31 March 2004, it has discharged the entire bonus liability in respect of five employees. Further, the Appellant submits that it had staggered bonus payments pertaining to four employees of which one employee had resigned from the organization in May 2004.*

Without prejudice to Ground 1, the Appellant prays that said addition be restricted to the bonus amount paid to the remaining three employees amounting to Rs.8,425,725.

Additional Ground is as under:-

3. Re-opening of assessment is invalid

The learned Assessing Officer ('AO') has erred on facts and in law in reopening the assessment and assuming jurisdiction under section 147 of the Act.

2. The assessee has raised an additional ground raising the issue of wrong re-opening of the assessment u/s 147 r.w.s. 148 of the Act which was never raised before the lower authorities. The ld. AR for the assessee submitted that the issue raised in the additional ground being legal and emanated from the assessment records and therefore, the assessee was very much within its right to raise this issue notwithstanding the fact that it was raised for the first time, before this Hon'ble Bench. The ld. counsel for the assessee vehemently submitted before us and argued that the materials referred in the reasons recorded were never made available or supplied to the assessee including the statements of employees and therefore the assessee was never confronted with the materials used against it while framing the assessment order. The ld. counsel strongly relied on the decision of the apex court in the case of National Thermal Power Corporation Ltd Vs CIT 229 ITR 383 (S.C.) in defence of his arguments. The ld. counsel ultimately prayed that the matter be restored to the AO in the interest of justice and the AO be directed to decide the matter afresh after affording proper and reasonable opportunity to assessee.

3. Per contra , the Departmental representative strongly opposed the admission of additional ground challenging the re-opening of assessment u/s 147 r.w.s. 148 of the Act for the reasons that the same was never raised before the AO or CIT(A).The ld DR further submitted in defence of his arguments that the assessee was given

adequate and sufficient opportunities during the assessment proceedings to reply to all the issues and therefore the assessee should not be allowed to raise the issue before this Hon'ble Forum as this would unnecessary drag the matter again.

4. We have heard the rival submissions of the counsels of both the sides and perused the materials on records. We are confining our decision on the limited issue of additional ground raised by the assessee without going into merits of the case. The additional ground raised by the assessee is qua the re-opening of assessment u/s 147 r.w.s. 148 of the Act which was never raised either before the AO or CIT(A) and thus being raised for the first time before us. This is an legal issue arising and emanating from the assessment records and therefore the same is being admitted in view of Hon'ble apex court decision in the case of National Thermal Power Corporation Ltd Vs. CIT (supra). We find from the records before us that the assessee filed its return of income on 28.10.2004 declaring its income at Rs. 31,72,60,080/-. After processing the return u/s 143(1) of the act on 17.03.2005, the case was selected for scrutiny and the assessment was framed vide order dated 28.12.2006 at Rs. 35,41,34,680/- which was agitated before the CIT(A) and the appeal of the assessee was partly allowed. Pertinent to state that a survey was conducted on the assessee on 22.02.2005 u/s 133A of the Act during which some documents were seized regarding bonus to staff.

5. The assessment was re-opened u/s 147 r.w.s. 148 of the Act after recording reasons u/s 148(2) of the Act and due notice u/s 148 of the Act was issued and served upon the assessee. The copy of reasons recorded for issuing notice u/s 148 of the Act was supplied to the assessee and the same was replied by the assessee but never challenging the re-opening the assessment. It has been argued by the AR that the statements relied on by the revenue for re-opening the case of the assessee were never supplied to the assessee and therefore he strongly pleaded before us to send the case back to AO. We observe from the records and arguments of the Id. AR that statements/materials relied to re-open the case was never supplied to the assessee. We therefore, restore the matter to the file of the AO with the direction to supply the materials used such as statement of the employee used for recording reason and to issue notice u/s 148 of the Act to the assessee and decide the matter afresh after affording proper and reasonable opportunity to the assessee which in our opinion would meet the interest of justice.

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

Order pronounced in the open court on 3rd February, 2016

Sd/-
(Amit Shukla)
न्यायिक सदस्य / Judicial Member

Sd/-
(Rajesh Kumar)
लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :03.02.2016
Ps. Ashwini

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

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

आदेशानुसार/ BY ORDER,

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