IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1729/Del./2013
(ASSESSMENT YEAR : 2004-05)

M/s. R. Systems International Ltd., B – 104A, Greater Kailashi – I, New Delhi.	vs.	ITO, Ward 15 (1), New Delhi.

(PAN : AABCR9541B)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Satyen Sethi, Advocate
REVENUE BY : Shri R.S. Negi, Senior DR

Date of Hearing : 19.04.2016
Date of Order : 22.04.2016

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. R. Systems International Ltd. (hereinafter referred to as 'the assessee'), by filing the present appeal sought to set aside the impugned order dated 01.02.2013 passed by the Commissioner of Income-tax (Appeals)-XVIII, New Delhi qua the assessment year 2004-05 on the grounds inter alia that :-

> "1) Under the circumstances and facts of the case, whether the authorities below were justified in assuming jurisdiction u/s 148 of the Act; after lapse of more than four years mainly on the basis of material already held on record and on the similar point which has been duly examined and verified at the time of original assessment

u/s 143 (3) of the Act, and merely in view of the revenue audit objection.

The unjustified and uncalled for action is untenable under the law, as such urged and liable to be cancelled.

2) In view of the facts and under the circumstances, the assessee company denied to be assessed u/s 1471143(3) of the Act; after lapse of more than four years, merely on change of opinion after completion of regular assessment u/s 143(3) of the Act on the strength of revenue audit objection pointing out the mistake of law and in the absence of any fresh material held on record.

The unlawful and unjustified action of the AO is urged and liable to be set aside/cancelled.

3) Under the circumstances, the learned AO grossly erred in law and on facts in calculating the book profit u/s 115JB of the Act; at Rs.2,28,70,485/- with her own presumption and assumptive view as under:-

(a) by adding loss under the normal provisions of the Act as loss u/s 10B of the Act Rs.56,47,764/-

(b) by not adding expenses relating to Income to which provision of Sec.10B of the Act; apply as per Expln.[1](t) -

Total Exp. As per P&L A/c Export Sales
44,79,02,204 X 42,87,60,787 = Rs.41,41,22,550/-
Total Sales
46,37,34,471

(c) by not reducing Income to which provision of Sec.10B of the Act; apply (export sales) – Expln.[1](ii) Rs.42,87,60,787/-

It is prayed that the apparent adjustment as provided under Expln.[1](f) as in item no. 3(b) and [1](ii) to sub-sec. 2 of Sec.115JB of the Act as in item no. 3(c) hereinabove; may kindly directed to be made while computing book profit u/s. 115JB of the Act, in case action of assuming jurisdiction under the provision of sec.148 of the Act is legally found to be justified under the law.

4) The CIT(A) also erred in law and on facts in upholding the action of charging Interest u/s 234B of the Act; at Rs.3,83,499/-, on the basis of book profit computed in pursuant to retrospective amendment by the Finance Act, 2009 w.r.e.f u/s 115JB of the Act and also erred in charging Interest u/s 234D of the Act; of Rs.5,59,592/-. The arbitrary action is urged and liable to be cancelled.

> 5) The appellant craves to be allowed to add any fresh/additional grounds of appeal and/or withdraw, modify any of the grounds of appeal either before or at the time of hearing of appeal."

2. Briefly stated the facts of the case are : assessment of the assessee was completed for the assessment year 2004-05 declaring net loss of Rs.47,53,665/- under section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') in December 2006 and thereafter notice u/s 148 of the Act along with reasons for reopening of assessment was served upon the assessee on 30.03.2011 and consequently, Shri Narender Nath, CA put appearance and pleaded that the return originally filed by the assessee may be treated as compliance to the notice u/s 148 of the Act.

3. The AO observed that as per the record, the assessee has tax liability u/s 115JB of the Act on the book profit of Rs.1,36,64,830/- which has earlier been charged to tax. However, the assessee challenged the same on the ground that clause (i) to Explanation 1 to section 115JB of the Act was not in existent, though amendment has retrospective effect w.e.f. 01.04.2001, the notice u/s 148 of the Act is not valid. The AO noticed that as per profit & loss account, the assessee has shown Rs.1,67,74,508/- as provision for diminution of the value of the investment, which is added back as per clause (i) of Explanation 1 of section 115JB of the Act for

calculating the book profit. The AO also noticed that the income/expenditure relating to any income to which section 10B applies has not been adjusted in the book profit of the assessee, who has shown a loss of Rs.56,47,764/- on account of business eligible for claim of deduction u/s 10B of the Act and the same is liable to be added while computing the book profit of the assessee company. Consequently, the AO made an addition of Rs.2,28,70,485/- on account of book profit u/s 115JB of the Act.

4. Assessee carried the matter before the ld. CIT (A) who has partly allowed the appeal vide impugned order. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. The ld. AR for the assessee challenging the impugned order contended inter alia that there has not been any failure on the part of the assessee to disclose the full and true material facts at the time of filing the return on account of omission to compute book profit at Rs.1,36,64,830/-; that the AO has erred in reopening the assessment after the expiry of four years from the end of the

assessment year on the basis of retrospective amendment that the reopening of the assessment on the basis of audit objection is not admissible; that the AO has assumed the jurisdiction merely on the basis of change of opinion which is not permissible under law; that the CIT has not applied his mind before according approval to reopen the assessment. However, on the other hand, the ld. DR for the revenue relied upon the orders passed by the AO as well as ld. CIT (A).

7. Undisputedly, assessment of the assessee was completed u/s 143(3) at a loss of Rs.47,53,665/- for the assessment year 2004-05 in December 2006 and assessment was reopened vide notice dated 30.03.2011 u/s 148 of the Act i.e. after a period of four years from the end of the assessment year. It is also not disputed that reassessment has been made vide impugned order on the basis of retrospective amendment of section 115JB.

8. The first question arises for determination is "as to whether there has been any failure on the part of the assessee to disclose full and true material facts at the time of filing the return for the assessment year under consideration"?

9. The AO recorded reasons for reason to believe that income has escaped assessment as under :-

> "the assessment of M/s R Systems International Ltd. for the assessment year 2004-05 was completed after scrutiny in December 2006 determining a loss of Rs.47,53,665/-. On verifying the records, it is seen that the assessee had tax liability under section 115JB on the book profit of Rs.1,36,64,830/-, however, the tax under the said provision was not charged……..
>
> Thus, the assessee has failed to disclose all material facts truly and fully that were necessary for assessment……
>
> In view of the above facts, I have reason to believe that income chargeable to tax has escaped assessment……"

10. A bare perusal of the assessment order goes to prove that the AO only after perusal of the profit and loss account has noticed that the assessee has shown Rs.1,67,74,508/- as provision for diminution in the value of investment and held that the provision for diminution in the value of investment is to be added back by invoking the provisions contained under clause (i) of Explanation 1 of section 115JB of the Act while calculating the book profit. Secondly, the AO noticed that the assessee has shown a loss of Rs.56,47,764/- on account of business eligible for claim of deduction u/s 10B of the Act and held that the same is not to be adjusted in the book profit of the assessee. Thirdly, the AO noticed that as per profit & loss account, assessee has debited Rs.37,57,891/- as provision for doubtful debts and advances but the AO held that the same being unascertained liability is to be added back while computing the book profit and proceeded to compute

the book profit of the assessee under amended provisions of section 115JB as under :-

"Net Profit (as per P&L A/c)			Rs. 5,77,346/-
Add	1)	Provision for Income Tax	Rs. 2,50,000/-
	2)	Provision for Wealth Tax	Rs. 14,398/-
	3)	Provision for diminution in Value of assets (Para 3.2)	Rs.1,67,74,508/-
	4)	Loss u/s 10B of IT Act (para 3.3)	Rs. 56,47,764/-
	5)	Provision for doubtful debts and advances	Rs. 37,57,891/-
	Less :		
	1)	Provision for Income Tax Written	Rs. 17,45,233/-
	2)	Provision for deferred tax (asset)	Rs. 22,06,189/-
	Book Profit		Rs.2,28,70,485/-"

11. A bare perusal of the reasons recorded by the AO for reopening of the findings returned in the assessment order goes to prove that this is not a case of failure on the part of the assessee to disclose the full and true material facts, rather it is a case wherein AO was required to determine as to whether amended provisions u/s 115JB are applicable to the case of the assessee at the time of completion of original assessment. When the assessee has placed on record profit & loss account, books of account, audited balance sheet, on the basis of which assessment u/s 143(3) has been completed, he cannot be faulted merely by recording that, *"the assessee has not disclosed full and true material facts"*.

12. Hon'ble Jurisdictional High Court in judgment cited as **Atma Ram Properties Pvt. Ltd. vs. DCIT - 343 ITR 141 and Swarovski India (P.) Ltd. vs. DCIT - (2014) 368 ITR 601 (Del.)** held that mere recording of reason for reopening that the assessee has failed to disclose full and true facts, is not sufficient for reopening the assessment in a case covered by First Proviso to section 147 of the Act unless AO explains as to why and how the assessee had failed to make full and true disclosure of the material facts. In the instant case, the AO has not specifically indicated as to how and what material facts has not been disclosed by the assessee. More so, undisputedly when the assessee has placed on record profit & loss account, books of account, audited balance sheet, tax audit report and certificate in Form 29B during scrutiny of its assessment which was completed u/s 143(3) by the AO after applying his mind, we are of the considered view that there is no failure on the part of the assessee to disclose full and true material facts sufficient to reopen the case under First Proviso to section 147 of the Act.

13. Now, the next question arises for determination is, "as to whether the assessment can be reopened after the expiry of four years from expiry of assessment year on the basis of the retrospective amendment"?

14. Ld. AR for the assessee by relying upon the judgment cited as **DIL Ltd. vs. ACIT – (2012) 343 ITR 296 (Bom.)** contended that the AO is not empowered to reopen the assessment after expiry of four years on the basis of retrospective amendment.

15. Hon'ble High Court of Bombay in the case of Dil Ltd. (supra) held as under :-

> "Section 115JB, read with section 147, of the Income-tax Act, 1961 - Minimum alternate tax - Non-disclosure of primary facts - Assessment year 2004-05 - For assessment year 2004-05, Assessing Officer completed assessment of assessee on 30-8-2006 and computed book profit under section 115JB at a certain amount - Subsequently, Assessing Officer reopened said assessment on 8-3-2011 - Reasons for reopening assessment were to effect that while computing book profit (i) amount set aside as provision for diminution in value of investment, (ii) amounts set aside to provisions made for meeting gratuity and superannuation liabilities, and (iii) amount of business development expenditure, had not been added back to book profit - Whether since reasons recorded by Assessing Officer, in fact, merely indicated a reason to believe that income of assessee had escaped assessment and there was no reference whatsoever to formation of an opinion that there was a failure on part of assessee to fully and truly disclose all material facts necessary for assessment, reopening of assessment beyond period of four years was contrary to law - Held, yes [In favour of assessee]"

16. Ratio of the judgment (supra) is duly applicable to the facts and circumstances of the case because in the instant case also, the AO has completed assessment of assessee u/s 143(3) by computing the book profit u/s 115JB at Rs.(-)1,42,73,435/- but reopened the assessment after the expiry of four years by merely recording that, *"on verifying the records, it is seen that the assessee had tax liability u/s 115JB on book profit to fRs.1,36,64,830/-, however, tax*

under the said provision was not charged….. The omission resulted in short levy of Rs.10.71 lakh."

17. Hon'ble jurisdictional High Court in judgment cited as **CIT vs. Sil Investments Ltd. – (2011) 339 ITR 166** has also dealt with identical issue *"as to whether assessment can be reopened on the basis of retrospective amendment after the expiry of four years"* and answered in the negative by making following observations :-

> "Section 147/148 read with section 80HHC of the Income-tax Act, 1961 - Income escaping assessment - Non-disclosure of primary facts - Assessment years 2001-02 and 2002-03 - In course of assessment proceedings, assessee's claim for deduction under section 80HHC was allowed - After expiry of four years from end of relevant assessment year an amendment to section 80HHC was brought about by way of Taxation Laws (Amendment) Act, 2005 with retrospective effect from 1.4.1998 - In terms of said amendment, certain conditions were to be fulfilled for allowability of deduction under section 80HHC in respect of Duty Entitlement Pass Book Scheme where turnover of assessee was more than Rs. 10 crores. - It was an admitted position that those conditions were not there in 'relevant section at time when assessee filed return or even when original assessments were made - It was also not disputed that the original assessments had been completed prior to four years of their reopening and, therefore, the notices un de r section 148 were issued by invoking the proviso to section 147 - Assessee challenged initiation of reassessment proceedings - Tribunal, on an examination of material on record, concluded that all relevant facts were available on record and that it could not be said that at time when assessee filed return, he had failed to disclose fully and truly all material facts necessary for assessment because amendment which was introduced retrospectively was not there at all - Accordingly, reassessment proceedings were set aside - Whether, on facts, Tribunal had rightly concluded that proviso to section 147 could not be invoked merely because there was an amendment in future which was introduced retrospectively and covered period in question - Held, yes - Whether, therefore, impugned order of Tribunal was to be confirmed - Held, yes"

18. So, by applying the law laid down by the Hon'ble High Court in judgments, **Dil Ltd. vs. ACIT and CIT vs. Sil Investments Ltd.** (supra) discussed in the preceding paras, we are of the considered opinion that assessment cannot be reopened after expiry of four years on the basis of retrospective amendment from the end of the assessment year.

19. Now, the next question arises for determination is, "as to whether AO can reopen the assessment on the basis of mere change of opinion"?

20. As we have already discussed in the preceding paras that the assessment of the assessee was duly accepted by the AO u/s 143(3) and again after expiry of four years, assumed jurisdiction to reopen the assessment under amended provisions contained u/s 115JB which is not permissible under law. Identical issue has been decided by the Hon'ble Jurisdictional High Court in case of **Madhukar Khosla vs. ACIT - 354 ITR 356** wherein the Hon'ble Jurisdictional High Court has also followed its own decision rendered in the case titled as **CIT vs. Orient Craft Ltd**., the operative part of the judgment (supra) is reproduced as under :-

> "The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (supra) would also appear to be self-defeating, because if an "intimation" is not

> an "assessment" then it can never be subjected to Section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to Section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke Section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under Section 143(3) and another applicable where an intimation was earlier issued under Section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under Section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements."

21. Following the law laid down by the Hon'ble jurisdictional High Court in the judgment, **Madhukar Khosla vs. ACIT** (supra) discussed above, we are of the considered view that assuming of jurisdiction by the AO in this case is bad in law for the reasons inter alia that when the assessee had specifically placed on record profit and loss account and books of account, audited balance sheets, tax audit report and certificate in Form No.29B in response to the query raised by the AO during the assessment proceedings that, "as to why assessment be not made at the book profit u/s 115JB of the Act", the assessee has duly explained the

working of the book profit and it certainly amounts to change of opinion.

22. Lastly, it is contended by the ld. AR for the assessee that CIT has not applied his mind while according approval for reopening and relied upon judgment cited as **Vijay Rameshbhai Gupta vs. ACIT – (2013) 32 taxman.com 41 (Guj.)**. A bare perusal of the order passed by the CIT according approval for reopening goes to prove that he has accorded the approval in mechanical manner without applying his mind particularly when AO himself has not enunciated the reasons except quoting the language of section 147, the approval accorded by CIT is not sustainable. Identical issue has been decided by the Hon'ble High Court of Gujarat in the judgment, **Vijay Rameshbhai Gupta vs. ACIT** (supra), wherein it has been held that where Commissioner approved suggestions made by the audit party, such approval could not be seen as substantial compliance of section 151 where notice for reopening was issued after a period of four years from end of the assessment year. Judgment (supra) is applicable to the facts and circumstances of this case. Moreover, all the three adjustments of Rs.1,67,74,508/-, Rs.56,47,764/- and Rs.37,57,891/- on account of provision of diminution of value of assets, loss u/s 10B and provision for doubtful debts and advances respectively have been

made by invoking the retrospective amendments made to section 115JB which is not permissible as has already been discussed by us in the preceding paras.

23. In view of what has been discussed above, we hereby allow the present appeal filed by the assessee.

Order pronounced in open court on this 22nd day of April, 2016.

Sd/-	**sd/-**
(G.D. AGRAWAL)	**(KULDIP SINGH)**
VICE PRESDIENT	**JUDICIAL MEMBER**

Dated the 22nd day of April, 2016
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XVIII, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
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