

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “C” KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2196/Kol/2014
Assessment Year :2008-09

Income Tax Officer, Ward-11(1), P-7, Chowringhee Square, 6 th Floor, Aayakar Bhawan, Kolkata-69	V/s.	M/s Srei Capital Markets Ltd. 86C, Topsia Road, (South), Kolkata-46 [PAN No.AAGCS 8875 A]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

C.O. No.05/Kol/2015
(a/o ITA No.2196/Kol/2014)
Assessment Year: 2008-09

M/s Srei Capital Markets Ltd. 86C, Topsia Road, (South), Kolkata-46	V/s.	Income Tax Officer, Ward- 11(1), Aayakar Bhawan, 6 th Floor, P-7, Chowringhee Square, Kol-69
Co-objector	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Amit Agarwal, ACA & Shri Vijay Shah, FCA
राजस्व की ओर से/By Respondent	ShriArindam Bhattacharya, Addl. CIT-SR-DR
सुनवाई की तारीख/Date of Hearing	07-09-2017
घोषणा की तारीख/Date of Pronouncement	22-09-2017

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue and Cross Objection (CO) by the assessee are for the assessment year 2008-09. Both are directed against the order of Commissioner of Income Tax (Appeals)-XII, Kolkata dated 26.09.2014

05.08.2011. Assessment was framed by ITO Ward-11(1), Kolkata u/s 147/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 30.12.2011.

Shri Arindam Bhattacharya, Ld. Departmental Representative represented on behalf of Revenue and Shri Amit Agarwal and Shri Vijay Shah Ld. Authorized Representatives appeared on behalf of assessee.

First we take up assessee's CO No.05/Kol/2015.

2. Assessee in its CO has challenged the initiation of re-assessment proceedings u/s 147 of the Act on the ground that the re-assessment is based on mere change of opinion and it is fresh application of mind to the same set of facts.

3. Briefly stated facts are that assessee is a limited company and engaged in business of merchant banking, underwriting, fund mobilization and project consultancy. The assessee for the year under consideration filed its return of income on 01.10.2008 disclosing loss of ₹1,35,95,472/- which was processed u/s 143(1) of the Act dated 18.09.2009.

4. Subsequently, the AO observed that the assessee has claimed excessive bad debt to the tune of ₹90 lakh which was allowed u/s 143(1) of the Act. Accordingly, the AO found his belief that the income of the assessee has escaped assessment under section 147 of the Act and accordingly issued notice under section 148 of the act after recording the reasons as detailed under:-

"8.07.10. On examination of assessment records and perusal of the profit and loss accounts reveals that the assessee debited a sum of Rs.3.32 crore on account of bad debts. From the balance sheet it appears that there was sundry debtors of Rs.9,77,790/- (exceeding 6 months) and no debtors below 6 months. However, on examination of the assessment record for the AY 2007-08 it is found that there was sundry debtors of Rs.70,86,260/- (exceeding 6 months) and Rs.81 lakhs (below 6 months) totaling Rs.151,86 lakhs. Since the sundry debtor for the AY 2008-09 has been shown of Rs.9.77 lakhs, the assessee at best can write off bad debts to the tune of Rs.1.42 crore but the assessee has written off bad debts to the extent of Rs.2.32 crore resulting in excess claim of Rs.90 lakhs. These led to escapement of income amounting to Rs.90 lakhs and resulted in revenue loss.

I am, therefore, satisfied that income of the assessee for the AY 2008-09 has escaped assessment which resulted in undercharge of Income-Tax. Therefore, this is a fit case to issue notice under section 148 of the IT Act for the AY 2008-09."

Ld. AR for the assessee before us challenged the initiation of re-assessment proceedings under section 147 of the Act vide covering letter dated 02.09.2009 by submitting that all the necessary material facts for the doubtful debts/ bad debts were available in the records of the Revenue. He further stated that in the schedule 13 (Administrative & Other Expenses), the amount of ₹2,32,05,353/- has been debited on account of bad debt / advance written off. He stated that the nomenclature itself speaks about the fact that said written off amount includes the amount written off in respect of sundry debtors and advances.

He submitted that from the provisions of section 147 of the Act, it can be seen that for the purpose of initiating reassessment proceedings the AO should have reasons to believe that the income has escaped assessment. But in the instant case, the reasons recorded by the AO do not form firm belief or finding in this regard that the income has escaped assessment. He stated that the Explanation (2)(b) to Section 147 creates a deeming fiction of income having escaped assessment in cases where an assessment has not been made, the act of taking notice cannot be at arbitrary whim or caprice of the AO but must be based on a reasonable foundation through the sufficiency of the evidence or material.

The Id. AR further submitted that there was no fresh/ material/ information / which came to the possession of the AO for initiating the re-assessment proceedings u/s 147 of the Act. In fact the AO after processing the return u/s. 143(1) has applied his mind on the same set of facts / material which were available on record. Thereafter AO changed his opinion from the same set of information and initiated proceedings u/s. 147 of the Act. Ld. AR in support of assessee's claim has relied on the following orders:-

- i) CIT vs. Orient Craft Ltd (2013) 354 ITR 536 (Del) wherein the Hon'ble Delhi High Court after considering the decision in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Lt. (2007 291 ITR 500 (Hon'ble Supreme Court) Sec. 147 makes no distinction between an order passed u/s. 143(3) and the intimation u/s. 143(1) it is not permissible to adopt different standards while

- interpreting the words “reason to believe” vis-a-vis Sec. 143(1) and Sec. 143(3).
- ii) Where the reason for reassessment discloses that the AO has formed his belief on the basis of the return of income, it is nothing but a review of earlier proceedings, not permissible in view of Apex Court decision in CIT vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)
 - iii) Recently jurisdictional ITAT in the case of Vesuvius India Ltd. vs. DCIT IT No.2138/Kol/2013 held that reassessment pursuant to intimation u/s. 143(1) is not permissible in absence of new tangible material.

Ld. AR for the assessee requested the Bench that the issue may be decided on merit.

On the other hand, Ld. DR submitted that the notice u/s 148 of the Act was issued within the time as provided under the Act. Moreover there was no assessment proceedings u/s 143(3) of the Act. Therefore, it cannot be said that the AO has initiated the re-assessment proceedings merely on the basis of change of opinion. He heavily relied on the order of Authorities Below.

5. We have heard the rival contentions of both the parties and perused the material available on record. The undisputed facts are that assessee has claimed the deduction of the following amounts;

- | | |
|---------------------------|----------------|
| a) advance written off ₹ | 2,08,21,616.00 |
| b) bad debt written off ₹ | 23,83,737.00 |

The AO after processing the return u/s. 143(1) of the Act observed that the opening sundry debtor shown by assessee for ₹1.51 crores whereas closing the sundry debtor was shown for ₹ 9,77,790/-only. Therefore this was of the view that the assessee at the most can write off sundry debtors for an amount of ₹1.42 crores. But the assessee in the instant case has written off bad debt for ₹2.32 crores. As a result, assessee has claimed excess bad debt for ₹90 lakh. Accordingly, re-assessment u/s 147 of the Act was initiated by the AO.

6. Indeed, the time available to the revenue for scrutiny proceedings u/s 143(3) of the Act in the instant case was available up to 30.09.2009. As the time for issuance of notice u/s 143(2) of the Act was expired, therefore, the AO initiated the re-assessment proceedings u/s. 147 of the Act by issuing

notice u/s. 148 of the Act vide dated 28.07.2010. At this juncture we would like to reproduce the provisions of section 147 of the Act which reads as under:-

“147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

***Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*

[Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India,, chargeable to tax, has escaped assessment for any assessment year:]

[Provided [also] that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

Explanation 1.- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.”

"Sec.147: If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year; concerned .

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully

and truly all material facts necessary for his assessment, for that assessment year"

A plain look at the above statutory provision makes it clear that the re-assessment proceedings u/s. 147 of the Act can be initiated for re-assessment only when Assessing Officer has reasoned to believe that income chargeable to tax has escaped assessment. For holding reason to believe there should be some tangible material available in the hands of the AO that the income has escaped assessment. On perusal of the reasons recorded by the AO for initiation of re-assessment proceedings u/s. 147 of the Act, we find that it was based merely on the financial statements of the assessee which were very much available to the AO before processing the same u/s 143(1) of the Act.

The law is well settled that there has to be tangible fresh material in the possession of the AO before initiating the re-assessment proceedings u/s. 147 of the Act. In relation to instant case, there is no ambiguity that there was no fresh material gathered by the AO for initiating the proceedings u/s. 147 of the Act. In holding so, we find guidance and support from the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Orient Craft Ltd.* (2013) 354 ITR 536 (Del) wherein after considering the judgment of Hon'ble Supreme Court in the case of *ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* (2007) 291 ITR 500 (SC), wherein the Hon'ble court has held:-

“Finality of intimation under section 143(1) can be disturbed only if Assessing Officer has 'reason to believe'”

- *The assessee's contention that even an assessment made under section 143(1) of the Act can be reopened under section 147 if the Assessing Officer has 'reason to believe' that income chargeable to tax has escaped assessment, is sound. It is true that no assessment order is passed when the return is merely processed under section 143(1) and an intimation to that effect is sent to the assessee. However, it has been recognized by the Supreme Court itself in Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500/161 Taxman 316 (SC), that even where proceedings under section 147 are sought to be taken with reference to an intimation framed earlier under section 143(1), the ingredients of section 147 have to be fulfilled; the ingredient is that there should exist 'reason to believe' that income chargeable to tax has escaped assessment. This judgment, does not give a carte blanche to the Assessing Officer to disturb the finality of the intimation under section 143(1) at his whims and caprice; he must have reason to believe within the meaning of the section. [Para 8]*

In absence of any tangible material, there will be a review in guise of reopening

- *In CIT v. Kelvinator of India Ltd. [2010] 187 Taxman 312/320 ITR 561 (SC) it was observed that after 1-4-1989 the Assessing Officer has power to reopen provided there is 'tangible material' to come to the conclusion that there is escapement of income. The judgment has laid emphasis on two more aspects: that there can be no review of an assessment in the guise of reopening and that a bare review without any tangible material would amount to abuse of the power. [Para 12]*
- *The assumption of the Revenue that somehow the words 'reason to believe' have to be understood in a liberal manner where the finality of an intimation under section 143(1) is sought to be disturbed is erroneous and misconceived.*
- *There is no warrant for such an assumption because of the language employed in section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore, it is not permissible to adopt different standards while interpreting the words 'reason to believe' vis-à-vis section 143(1) and section 143(3). [Par 13]*
- *An assessee in whose case the return was processed under section 143(1) cannot be placed in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression '**reason to believe**' in cases where assessments were framed earlier under section 143(3) and cases where mere intimations were issued earlier under section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed. [Para 13]*
- *The Supreme Court in Rajesh Jhaveri Stock brokers (P.) Ltd.'s case (supra) has held that the strict requirements of section 147 can be compromised. On the contrary, from the observations it would appear clear that the court reiterated that 'so long as the ingredients of section 147 are fulfilled' an intimation issued under section 143(1) can be subjected to proceedings for reopening. The Court also emphasized that the only requirement for disturbing the finality of an intimation is that the Assessing Officer should have '**reason to believe**' that income chargeable to tax has escaped assessment. 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 had 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. [Para 14]

- *In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income 'on going through the return of income' filed by the assessee after he accepted the return under section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer. The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words 'reason to believe' vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the Assessing Officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147. [Para 15]"*

Similarly, we also rely on the order of Co-ordinate Bench of this Tribunal in the case of *Vesuvius India Ltd. vs. DCIT* in **ITA No.2138/Kol/2013** dated 03.05.2017. The relevant extract is as under:-

"5.10. In view of our aforesaid findings, the change of opinion is explicit for the Asst. Years 2000-01 and 2001-02. For the Asst. Year 2002-03, the necessary ingredients of section 147 of the Act were not fulfilled by the Id. AO. we hold that there is no tangible material available with the Id. AO for reopening the assessment for the Asst. Years 2000-01, 2001-02 and 2002-03 and hence the reassessment proceedings thereon deserves to be quashed in line with the judicial precedents relied upon. Since the reassessment proceedings of the Id. AO are quashed on the preliminary ground of assumption of jurisdiction by the Id. AO for the Asst. Years under a, we reframe in to give our opinion on the merits of the additions made in the reassessment. We hold that the reassessment proceedings are held to be invalid for the Asst. years 2000-01, 2001-02 and 2002-03 in view of the aforesaid findings, we also refrain to give our opinion on the other aspect of argument of the Id. AR that, the Id. AO did not dispose of the objections for reasons recorded by way of passing a speaking order thereby depriving the assessee of legitimate right of preferring writ jurisdiction against the said order. The arguments advanced in this regard by the Id. AR and judicial precedents relied thereon are left open. Accordingly, the grounds raised by the assessee for the Asst. Years under appeal are allowed."

Besides the above, we also rely on the judgment of Hon'ble Apex Court in the case of *CIT Vs. Kelvinator of India Limited* reported in 320 ITR 561 (SC) wherein it was held as under :

*“Prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under two conditions, viz., if (a) the ITO had reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax had escaped assessment for that year, or (b) the ITO had in consequence of information in his possession reason to believe that income chargeable to tax had escaped assessment for any assessment year. The fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 with effect from 1-4-1989 those conditions are given a go-by and only one condition has remained, viz., where the Assessing Officer has reason to believe that income has escaped assessment, the section confers jurisdiction to reopen the assessment. Therefore, post 1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words '**reason to believe**', failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of '**mere change of opinion**', which cannot be per se reason to reopen. One must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess, but the reassessment has to be based on fulfilment of certain pre-conditions and if the concept of '**change of opinion**' is removed as contended on behalf of the department, then in the garb of reopening the assessment, review would take place. One must treat the concept of '**change of opinion**' as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, the Assessing Officer has power to reopen, provided there is '**tangible material**' to come to conclusion that there is escapement of income from assessment. Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word '**opinion**' in section 147. However, on receipt of representations from the companies against omission of the words '**reason to believe**', the Parliament re-introduced the said expression and deleted the word '**opinion**' on the ground that it would vest arbitrary powers in the Assessing Officer.”*

As in the present case, we find that the AO is unable to discern the link between the tangible material and the formation of the reasons to believe that income had escaped assessment. In the case on hand the information of bad debts/ advance written off is very much emanating from the audited financial statement available with the AO. Thus the reopening on the basis of financial statement *per se* does not refer to the tangible material gathered from independent sources. Thus we find that the manner of recording satisfaction

remains the same even in the case where no scrutiny assessment was conducted. Therefore respectfully following the co-ordinate Bench order and other judgments as discussed above, we hold that the re-assessment was not valid and in view of above CO filed by assessee is allowed.

Coming to Revenue's appeal in ITA No.2196/Kol/2014.

7. Since we have already held the re-assessment as illegal, the appeal filed by the Revenue has become academic and therefore it is dismissed as infructuous.

8. In the result, Revenue's appeal is dismissed as infructuous.

9. **In the result, CO of assessee stands allowed and that of appeal of Revenue stands dismissed as infructuous.**

Order pronounced in the open court 22/09/2017

Sd/-
(न्यायिक सदस्य)
(N.V.Vasudevan)
(Judicial Member)
Kolkata,

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
(Accountant Member)

*Dkp, Sr.P.S

दिनांक:- 22/09/2017 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-
2. राजस्व/Revenue-
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।