IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

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

I.T.A. No.1421/Kol/2014 Assessment Year : 2007-08		
G.S.Atwal & Co.(Engg.) Pvt. Ltd. 4B, Little Russell Street, Kolkata-700071.	**V/s**.	D.C.I.T., Central Circle-XX, 110, Shantipally, Aaykar Bhawan Poorval, Kolkata-700107.
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Soumitra Chowdhury, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Arindam Bhattacharjee, Addl. CIT.Sr.DR
सुनवाई की तारीख/Date of Hearing	04.09.2017
घोषणा की तारीख/Date of Pronouncement	31.10.2017

आदेश /O R D E R

Per Waseem Ahmed, AM

This appeal by the assessee is against the order of ld. Commissioner of Income Tax (Appeals)-Central-III, Kolkata dated 28.04.2014. Assessment was framed by D.C.I.T., Central Circle-XX, Kolkata u/s /143(3) of the Income tax Act, 1961 (hereinafter referred to as 'the Act ') vide his order dated 11.12.2012 for assessment year 2007-08.

2. The assessee has raised the following grounds of appeal:

"1. For that on the facts of the case, the order of the Ld. C.LT.(A) is completely arbitrary, unjustified and illegal.

2. For that on the facts of the case, the Ld. CIT(A) was wrong in dittoing the order of the A.O. and not considering the facts that the A.O. reopened the assessment u/s. 148 on 27.5.2011, although the assessment u/s. 143(3) was completed on 02.04.2009 on the same set of facts, therefore, the order passed by the Ld. CIT(A) is completely arbitrary unjustified and illegal and should be deleted.

3. For that on the facts of the case, the Ld. CIT(A) was wrong in dittoing the order of the A.O. and not considering the facts that the A.O. reopened the assessment u/s. 148 on 27.5.2011 after a lapse of 2 years, although the assessee has disclosed truly and fully all the materials facts necessary at the time of assessment u/s. 143(3) which was completed on 02.04.2009, therefore, the order passed by the Ld. CIT(A) is completely arbitrary unjustified and illegal and should be deleted.

4. For that on the facts of the case the Ld. CIT(A) was wrong in dittoing the order of the A.O. and confirming the addition of Rs.1,20,96,824/ - on account of bad debts written off u/s. 36(1)(vii) of the I.T. Act which is completely arbitrary unjustified and illegal.

5. For that the interest u/s. 234D amounting to Rs.12,43,779/- charged mechanically is wrong & illegal.

6. For that the appellant reserves the right to adduce any further ground or grounds, if necessary, at or before the hearing of the appeal."

3. The assessee, in this first ground of appeal, has challenged the reassessment proceedings initiated u/s 147 of the Act on the ground that the reopening is not as per the provisions of law.

4. Briefly stated facts are that the assessee is a private limited company and engaged in the business of engineering and contracts. The assessee for the year under consideration files its return of income dated 07.10.2007 disclosing the total income of Rs.6,71,43,930/- which was processed u/s 143(1) of the Act dated 17.09.2008. Subsequently the case of the assessee was selected for scrutiny and accordingly assessment was framed u/s 143(3) of the Act vide order dated 02.02.2009 at 6,83,41,330/-.

5. Subsequently the AO found that the income of the assessee has escaped assessment and accordingly issued notice u/s 148 of the Act vide dated 25.05.2011. subsequently the assessee furnished the reasons to believe for initiating re-assessment proceedings u/s 147 of the Act which are detailed as under :-

" It is seen from the profit & loss a/c of the Tisco Joda West Job for the year ended 31.3.2007 that bad debt of Rs.1,20,96,824/- was written off there. Same has been allowed as such in assessment. A review of the records reveals that it actually represented the advance paid to parties long back in TISCO transportation job which could not be realised.

Sec.36(1)(vii) read with sec.36(2) of the I.T.Act proves that a bad debt which is written off as irrecoverable in the accounts is allowable as deduction if the debt has been taken into account in computing the income of the assessee in a previous year.
In the instant case, since the original transaction represents 'payment of advance to parties', the same appears not includible in computing the income of the assessee in any earlier previous year.

Further, it is apparent from records that the debt has been resulted from business of mining etc and not from business of money lending."

The assessee against the initiation of reassessment proceedings u/s 147 of the Act submitted that the bad debt has been allowed in the original assessment proceedings after due verification. Therefore the same cannot be considered for the initiation of proceedings u/s 147 of the Act. However, the AO disregarded the submission of the assessee and held the proceedings initiated u/s 147 of the Act as per the provision of law.

6. Aggrieved, assessee preferred an appeal before the ld. CIT(A). The assessee before the ld. CIT(A) submitted that all the necessary details were duly filed to the AO at the time of original assessment framed u/s 143(3) of the Act. Therefore on the same set of facts the AO cannot initiate the proceedings u/s 147 of the Act. However, the ld. CIT(A) rejected the claim of the assessee by observing as under :-

2.3.2 Addressing the specific grounds of appeal:

Having gone at length to unravel the correct perspective of the essential root facts in preceding Para 2.3.1. above, to now adjudicate on the various grounds of appeal - on the initiation of the reassessment proceedings, on the merits of the claim for deduction as bad- debt, etc - it is now clear, and the logic just flows.

Yet, it is not proper to jump to conclusions, so I will address the issues put forth in the grounds of appeal.

Ground No.	*Issue*	*Decision*
1	*General*	*Dismissed*
2.	*That the reassessment had been initiated on the same set of facts as in the earlier regular assessment made u/s 143(3)*	*It is not the same set of facts - but it is the true colours of the same set of facts.* *The essential facts - pertinently the narration style of the debit*

		to the P&L a/ c - was factually incorrect, and therefore misleading. It ia not 'bad debts', but 'advances written-off", Thus the presentation of the primary facts itself was erroneous, and therefore the Assessing Officer was misled in the earlier regular assessment u/s 143(3). This has been discussed in detail at Para 2.3.1 above. *The reopening of the assessment is a case of under assessment in terms of Explanation 2 (c) (i) to section 147. (u, ~* *Ground is Dismissed. ~ .*
3	*That the reopening of assessment after 2 years on the same set of facts and on the same material is completely bad in law and should be quashed.*	*It is not the same set of facts. This has been explained to ground no. 2 above.* *As regards mention about the time period - of 2 years, it seems that this ground has been put forth so as to, in some way, invoke the 1st Proviso to section 147. Yes it is that the said 1 st Proviso to section 147 is in instances where there had earlier been assessment ii]» 143(3); but the Proviso is applicable only when 4 years have elapsed after the end of the AY. In this case, the notice u/s 148 was issued on 27.05.2011. Therefore, it is still only 3 years, and therefore the Proviso does not come to the rescue of the appellant.* *Ground is Dismissed.*
4	*That the AO re-opened u/s 148 on the same set of facts, although the assessee had disclosed* *truly and fully all the material facts necessary at the time of assessment u/s 143(3), and therefore that the reopening of the assessment is completely,*	*This ground is related to ground no. 3 above. The mention about having disclosed truly and fully all the material facts necessary at the time of assessment - is the phrase used in the said 1 st Proviso to section 147. As addressed to in ground* *no. 3 above, the 1 st Proviso to*

	unjustified and illegal	*section 147 is inapplicable here.* *Ground is dismissed.*

Being aggrieved by the order of ld. CIT(A) assessee is in second appeal before us.

7. The ld. AR before us filed a paper book which is running from pages 1 to 128 and submitted that the query with regard to the bad debts was duly raised by the AO in the original assessment proceedings u/s 142(1) of the Act vide dated 27.01.2009. The ld. AR drew our attention on the relevant page 14 of the paper book where the query for the bad debt written off was raised by the AO. The ld. AR further submitted that in response to the query raised by the AO necessary details for the bad debts were duly replied. The necessary details of the bad debts are placed at page-4 of the paper book.

On the other hand, the ld. DR vehemently supported the orders of the authorities below.

8. We have heard the rival contentions and perused the materials available on record. In the instant case, the assessee has challenged the reassessment proceedings framed u/s 147 of the Act on the ground that the AO has formed his reason to believe from the same set of documents which are available at the time of reassessment proceedings. As per the ld. AR the reassessment proceedings on the same set of documents available at the time of original assessment u/s 143(3) cannot be relied. However, the revenue authorities disregarded the contention of the assessee and held that the reassessment proceedings u/s 147 of the Act is valid in accordance with law.

9. From the above facts, we find that the AO at the time of original assessment has duly verified the bad debts written off by the assessee. It is an undisputed fact that the assessee has written off the advances which were claimed as bad debts. The advance written off were classified as bad debts in the books of accounts and the allegation of the ld. CIT(A) that nomenclature used by the assessee is misleading and therefore reopening is valid in the eyes of law. In this regard we disagree with the view taken by the ld. CIT(A) on the ground that the nomenclature cannot be the decisive factor for initiating the reassessment proceedings u/s 147 of the Act. In the

instance case, the relevant data /information was available before the AO at the time of assessment and it was duly verified. Thus, it can be inferred that the AO in the original assessment proceedings has not consciously made the disallowance of bad debts. Thus, in our considered view the initiation of proceedings u/s 147 of the Act on the same set of documents is nothing but mere change of opinion. In this regard we find support and guidance from the judgments of the Hon'ble Supreme Court in the case of *CIT vs Kelvinator of India Ltd.* Reported in 320 ITR 561 (SC) wherein it has been held as under :-

> *"The concept of "**change of opinion**" on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income-tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989. After the amendment, the Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on mere change of opinion. The concept of ((change of opinion "*must be treated as an in- built test to check the abuse of power. Hence after April 1, 1989, the Assessing Officer has power to reopen an assessment, provided there is ((tangible material*" to come to the conclusion that there was ent income from assessment. Reason must have a link with the formation of the belief"*

10. Further, reliance is also placed on the following judgments wherein it is repeatedly held that re-opening of assessment on mere change of opinion is not sustainable:

> (1) M.J. Pharmaceuticals Ltd vs. CIT (2008) 297 ITR 119 (Bom) (Assessment Year 2003- 2004), in this case, the Hon'ble High Court observed as under:
>
> *"Issue regarding addition of amount of deferred taxation for computing book profits u/s. 115JB having been raised by the AO at the time of original assessment u/s. 143(3) and no addition having been made by AO on the account on being satisfied with the explanation of the assessee reopening of assessment on the very same issue suffered from change of opinion in the absence of any fresh material hence invalid. "*
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> (2) D. T. & T. D. C. Ltd. vs. CIT (2010) 324 ITR 234 (Del.), in the said case, it was held as under:
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> *"The assessing officer has been given power to reassess under section 147 upon certain conditions being satisfied, and the assessing officer does not have power to review. If such a change of opinion were to be permitted as a ground of reassessment then it would amount to granting a licence to the assessing officer to review his decision, which he does not have under the provision of section 147."*

(3) Asteroids Trading & Investment P. Ltd. vs DCIT (2009) 308 ITR 190 (Bom)**,** in the said case, it was held that since no new material brought on record, reassessment on change of opinion of officer not valid.

(4) Asian Paints Ltd. vs. DCIT (2008) 308 ITR 195 (Bom), in this case, the Hon'ble High Court observed that mere change of opinion of A.O. not ground for reassessment.

(5) ICICI Prudential Life Insurance Co. Ltd. (2010) 325 ITR 471 (Bom), in the said case, the Hon'ble Bombay High Court held that re-opening of assessment on the same ground in the absence of any tangible material was based on mere change of opinion and therefore is not sustainable.

10.1 Based on the ratio of judgment decided in the aforesaid cases, it follows that no valid proceeding u/s.147 could be initiated even within a period of four years on mere change of opinion, if all material facts had been disclosed by the assessee and the AO had complete knowledge of all such materials and further, the assessment had also been completed after taking into consideration all such material facts.

11. Therefore, following the above the conclusion can be drawn in case of the assessee that in absence of new information or detail being available to the AO, after completion of the original assessment u/s.l43(3) of the Act, proceedings initiated u/s.l47 of the Act for the relevant assessment year is not valid.

12. It is clear in the present case of the assessee that the "***reason to believe***" is based on non existing material and therefore in absence of tangible material to reach a reasonable belief that the income liable to tax has escaped assessment, the entire proceeding initiated u/s.147 of the Act is liable to be quashed. Reference in this connection is invited to the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Amitabh Bachchan*, ITA No.4646 of 2010 wherein it was held as under:

> *"The assessee had made a claim for 30% adhoc expenditure. This was withdrawn by the assessee when asked by the AO to substantiate. The reopening on the basis that the said adhoc expenditure constituted "unexplained expenditure" u/s 69 was based on the same material. There was no fresh tangible material before the AO to reach a reasonable belief that the income liable to tax has escaped assessment. It is a settled position of law that review under the garb of reassessment is not permissible. "*

13. Again, at this juncture attention is invited to the recent decision of the Hon 'ble Delhi High Court in the case of *PR. Commissioner of Income-tax v. Tupperware India (P.) Ltd*. reported in [2016] 236 Taxman 494, wherein the Court while observing that 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), held as under:

> *"The reopening order of the Assessing Officer only refers to the report of statutory auditor under section 44AB which report was already enclosed with the return filed by the assessee. Therefore, factually, there was no new material that the Assessing Officer came across so as to have treasons to believe that the income had escaped assessment. "*

14. In view of the above decisions, we note here that the assessee's case is on a much better footing than the above-said cases, since in the case of the assessee the assessment was originally completed u/s.143(3) of the Act and complete details of the receipt of rental income from the leasehold property at Delhi were already filed before the AO at the time of completion of assessment u/s.143(3) of the Act.

15. We also find that reliance was placed by the Ld. CIT(A) on the decision of the Bombay High Court in the case of Amaya Infrastructure Pvt. Ltd vs. ITO [WP No. 787 of 2016], where the reopening of proceeding u/s.147 of the Act was held justified. But the facts of the instant case are totally different with that case. In that case it was held that reopening of assessment u/s.147 of the Act can be challenged either under Article 226 of the Constitution of India or by challenging it before the authorities under the Act, but if the assessee responds to the S. 142(1) or 143(2) notices, it means that he has submitted to the AO's jurisdiction and is stopped for filing a Writ Petition to challenge the same.

16. However, as evident from above, the facts of the assessee's case are completely different. In the present case, the reasons recorded by the AO dated 09/03/2012 were challenged by the assessee by filing objection petition dated 02/0412012 as evident from the submission of the assessee before AO at the time of reassessment under section 147 of the Act.

17. In view of the above, we quash the proceeding u/s.147 of the Act which were initiated beyond the period of four years from the end of the relevant assessment

year and there was no failure on the part of the assessee to disclose fully and truly all material facts in course of the original assessment and the reassessment made u/s.143(3)/147 of the Act.

18. As the issue has been decided by us on technical ground we refrain our-self from adjudicating the issue on merit. The appeal of the assessee is allowed.

Order pronounced in the open court on 31/10/2017

Sd/- Sd/-

(न्यायिक सदस्य) (लेखा सदस्य)
(N.V.Vasudevan) (Waseem Ahmed)
(Judicial Member) (Accountant Member)

*RG.SPS
दिनांकः- 31/10/2017 **कोलकाता** ।

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

1. अपीलार्थी / Appellant
2. प्रत्यर्थी / Respondent
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Kolkata / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।