

**THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD**

**BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No. 120/Hyd/2017
Assessment Year: 2007-08**

M/s Amsri Builders Pvt. vs. The Dy. CIT, Central
Ltd., Secunderabad. Circle – 1(2), Hyderabad.

PAN – AAECA2834R
(Appellant) (Respondent)

**ITA No. 121/Hyd/2017
Assessment Year: 2007-08**

M/s Amsri Constructions vs. The Dy. CIT, Central
Pvt. Ltd., Secunderabad. Circle – 1(2), Hyderabad.

PAN – AAFCA5309Q
(Appellant) (Respondent)
Assessee by : Shri K.C Devdas
Revenue by : Smt. B.K Vishnu Priya

Date of hearing : 06-03-2018
Date of pronouncement : 23-05-2018

ORDER

PER P. MADHAVI DEVI, J.M.:

ITA No. 120/Hyd/2017:

This is assessee's appeal for the A.Y 2007-08, against the order of the CIT(A)-12, Hyderabad dated 21.07.2016. At the outset, it is noticed that the appeal is time barred by one day, and the assessee has filed an application for condonation of delay. Being satisfied with the reasons given in the application for condonation of delay, the delay

that the delay is due to the Managing Director of the company being out of station at the relevant point of time, the delay is condoned.

1.1 In this appeal, the assessee has raised the following grounds of appeal:

“1. The order of the Hon’ble CIT(A) is erroneous in law as well as facts of the case.

2. The Hon’ble CIT(A) ought to have held that the A.O erred in initiation of proceedings u/s 147 of the IT Act without having any information on record.

3. The Hon’ble CIT(A) ought to have observed that the A.O erred in arriving at the conclusion that the interest bearing funds were utilized for making interest free advances.

4. The Hon’ble CIT(A) ought not to have restricted such disallowance to 50% of interest claim of Rs. 49,09,097/- and therefore, ought to have deleted the disallowance.

5. Any other ground will be raised at the time of hearing.

2. Brief facts of the case are that, the assessee company engaged in the business of real-estate and construction activity, filed its return of income for the A.Y 2007-08 declaring ‘Nil’ income on 10.09.2008. Which is acknowledged by receipt dated 15.09.2008. Thereafter, the A.O observed that the assessee has given interest free advances to three concerns, it has borrowed funds at an interest and thus was of the opinion that interest income to the extent of Rs. 49,09,097/- has escaped assessment.

Therefore he reopened the assessment by issuance of a notice u/s 148 of the Act dated 26.03.2014 after duly recording the reasons for reopening. In response to the said notice, assessee filed a letter dated 23.03.2015 requesting the A.O to treat the original return filed on 10.09.2008 as the return filed in response to the notice u/s 148 of the Act.

3. During the reassessment proceedings u/s 147, of the Act the assessee was asked to show cause as to why the proportionate interest debited to the profit and loss account should not be disallowed as interest bearing funds were utilized for giving interest free loans to related and also unrelated parties. In response to the same, the assessee, vide letter dated 16.02.2015, submitted that the advance of Rs. 20.37 crores given to M/s Amsri Builders Pvt Ltd., and a sum of Rs. 3 crores paid to APR constructions during the F.Y 2006-07 are trade advances and that in the subsequent years, land was registered in the name of M/s Amsri Builders Pvt Ltd., but the same were grouped under the schedule of loans and advances. It was submitted that the assessee had advanced the funds in pursuance of its objectives of carrying on construction and

real-estate activities and hence these are the trade advances for which interest cannot be charged.

4. But the A.O was not convinced with the assessee's contentions. He observed that the assessee has not furnished any supporting documentary evidence to prove that the sum of Rs. 20.37 Crores given to M/s Amsri Builders Pvt Ltd., and Rs. 3 Crores given to APR Constructions are trade advances. Further, in respect of the advance of Rs. 3.28 crores given to M/s Alpex International Ltd., it was observed that the same was claimed to have been refunded by them on 03.04.2007. Therefore he held that the entire advances of Rs. 26.65 Crores are to be treated as interest free loans and the interest of Rs. 49,09,097/- debited to the profit and loss account was to be disallowed. Since assessee has not claimed interest expenditure in the profit and loss account, he reduced the above notional interest income from capital work-in-progress and thus revised the capital work-in-progress. Thus the income returned by the assessee and assessed by the A.O was Rs. Nil. Aggrieved, the assessee preferred an appeal before the CIT(A), challenging both the validity of the reassessment proceedings as well as the

reduction of the capital work-in-progress. The CIT(A) confirmed the order of the A.O and the assessee is in second appeal before us.

5. The Ld. Counsel for the assessee, while reiterating the submissions made by the assessee before the authorities below, submitted that the assessee had filed the return of income and the same was accepted without any scrutiny and the reassessment notice u/s 148 of the IT Act was issued on 26.03.2014 i.e after 4 years and within six years from the end of the relevant assessment year in which the return was filed. He submitted that all the relevant material was filed by the assessee before the A.O and it was only on perusal of the very same material that the A.O had formed an opinion and sought to reopen the assessment. He submitted that even where the assessments are completed u/s 143(1) there has to be tangible material for the A.O to reopen the assessment u/s 148 of the Act, he placed reliance upon the following decisions:

1) *CIT Vs Kelvinator of India*, reported in [2010] 320 ITR 561 (SC).

2) *CIT Vs. Atul Kumar Swami*, reported in [2014] 362 ITR 693 (Delhi).

3) *Ratna Trayi Reality Services Pvt Ltd., Vs. ITO, reported in [2013] 356 ITR 493 (Guj).*

4) *CIT Vs. Orient Craft Ltd. reported in (2013) 354 IR 536 (Delhi).*

6. Further, he submitted that the A.O has not brought any income to tax even in the reassessment proceedings and therefore there was no escapement of income, particularly since the assessee had not commenced its business activity and had not computed any business income u/s 28 of the IT Act. He submitted that by reducing the capital work-in-progress, it has not resulted in the reduction of losses or increase of income and therefore, the reassessment proceedings are not valid.

7. Even on merits, the Ld. Counsel for the assessee submitted that the assessee did not have funds to carry on its business activities and therefore had borrowed the funds, which were advanced to M/s Amsri Builders Pvt Ltd., as trade advances for land and also to other concerns for business purposes. He submitted that the A.O has not doubted the genuineness of the payments but has only held that the assessee ought to have charged interest, since it was having interest bearing funds. In support of his contentions that trade advances which are for commercial expediency cannot be treated as interest free

advances and notional interest cannot be charged on such funds, he placed reliance on the decision of the Hon'ble Supreme Court of India in the case of S.A Builders 298 ITR page 1 (SC). Further, according to him, the reopening of assessment has not resulted in any enhancement of income and therefore the reassessment proceedings are bad in law.

8. The Ld. DR on the other hand, supported the orders of the authorities below and submitted that assessee has failed to prove the business, and commercial expediency of making interest free advances to the concerns from the interest bearing funds and therefore the disallowance is justified.

9. Having regard to the rival contentions and material on record, we find that the assessee has filed the return of income and the same was not taken up for scrutiny u/s 143(3) of the Act by the A.O. After the lapse of the nearly five and half years, the A.O had issued the notice u/s 148 of the Act, for reopening of the assessment. As seen from the assessment order wherein the reasons for reopening are reproduced, the A.O did not have any fresh material before him to come to the conclusion that the income of the assessee has escaped assessment. In fact, he has gone

through the very same material which was filed by the assessee to come to the conclusion that the assessment needed to be reopened. According to the Ld. Counsel for the assessee, the A.O had the time to scrutinize the assessment and has chosen not to do so and therefore he is presumed to have applied his mind to the material available on record and accepted the returned income. While Sec. 147 of the IT Act permits reopening of the assessment where income of an Assessee escaped assessment Sec. 149 prescribes the time limit for issuance of a notice u/s 148 of the IT Act, Sec 149 reads as under:

(1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c)1 ;

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

10. In the case before us, the assessee's case falls under Sub Sec. (1) clause (b), as the assessee has filed its return of income, but no assessment has been made. The notice

u/s 148 is after four years but within a period of six years. The notice u/s 148 is therefore within a period of limitation. But, was there any tangible material before the A.O to form an opinion about escapement of income? The Hon'ble Supreme Court of India, in the case of Kelvinator India (cited supra) has held that A.O is deemed to have applied his mind if facts are on record and reopening u/s 147 on change of opinion is not permissible even within four years. However, in the said case, the assessment was passed u/s 143(3), which was sought to be reopened. In the case of CIT Vs. Atul Kumar Swami (cited supra) the Hon'ble Delhi High Court held that where the return was accepted u/s 143(1), and notice u/s 148 was issued on the basis of same material and nothing more, the reassessment u/s 147 is not valid. In the case of Ratna Trayi Reality Services Pvt Ltd., (cited supra) the Hon'ble Gujarath High Court held that even in the case of reopening of assessment which was previously accepted u/s 143(1) of the IT Act without scrutiny, the A.O would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax has escaped assessment. In the case of CIT Vs Orient Craft Ltd., (cited

supra), the Hon'ble Supreme Court held that even to reopen an assessment / completed u/s 143(1), there has to be tangible and fresh material. Respectfully following the above judgments, we agree with the contention of the Ld. Counsel for the assessee that where there was no tangible material before the A.O to come to a conclusion that the income of the assessee has escaped assessment, the A.O cannot reopen the assessment after four years from the end of the relevant assessment year. Therefore, we are of the opinion that the reopening of the assessment by issuance of the notice u/s 148 of the Act is not sustainable and is accordingly set aside. In the result the assessee appeal is allowed.

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11. In this appeal, the assessee is aggrieved by the order of the CIT(A)-12 Hyderabad dated 21.07.2016. The facts on this case are similar to facts in the case of M/s Amsri Builders Pvt Ltd., in ITA No. 120/Hyd/2017.

12. The only difference between these two cases is that in the case of M/s Amsri Builder Pvt Ltd., the A.O has initiated the reassessment proceedings on the directions of the DDIT investigations as is recorded in the reasons for

reopening of the assessment. The reasons for reopening of the assessment are placed at page No. 72 of the paper book and for the sake of ready reference they are reproduced hereunder:

“Information has been received from DDIT, Unit-II(4), Hyderabad that as per the profit and loss account t he assessee has debited interest on loans under the head financial expenses to the extent of Rs. 27,94,521/-. Further, the assessee company has admitted Nil income from the Fin. Year 2006-07 relevant to the A.Y. 2007-08. During the F.Y it has given interest bearing funds for interest free loans under the head Loans and advances to its related concern M/s Amsri Builders to the tune of Rs. 4,66,27,855/- and no interest has been charged by the company. Hence, the expenses incurred towards interest expenses to the extent of Rs. 27,94,521/- is disallowable”.

13 From the above reasons, it is clear that the reopening of the assessment is merely on the information received from the DDIT and the A.O has not applied his mind to that information received from DDIT. No doubt, it is in held in various cases that the A.O can receive information from any quarter about the escapement of income, but it has been held that the A.O has to independently apply his mind to such material to come to the conclusion that the income of the assessee has escaped assessment. As is evident from the reasons recorded, the A.O has not applied his mind independently before recording the reasons for reopening of the assessment. Therefore, there is no

tangible material before the A.O to come to the conclusion that there is escapement of income. On this ground alone the reassessment proceedings are liable to be set aside. On the very same grounds, the reopening of the assessment in the case of Amsri Builder Pvt. Ltd., for the A.Y 2007-08 has been set aside vide order even dated in the above paragraphs.

14. For the very same reasons, the assessee's appeal for the A.Y 2007-08 is treated as allowed and the reassessment order is set aside.

Pronounced in the open court on 23rd May, 2018.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, Dated: 23rd May, 2018.

KRK

- 1) *M/s Amsri Builders Pvt Ltd., & M/s Amsri Constructions Pvt ltd. C/o B. Narsing Rao & Co. CAs, Plot No. 554, Road No. 92, Jubilee Hills, Hyd-96.*
- 2) *Dy. CIT. Central Circle 1(2), Hyderabad.*
- 3) *CIT(A)-12, Hyderabad.*
- 4) *Pr. CIT, Central, Hyderabad.*
- 5) *The Departmental Representative, ITAT, Hyderabad.*
- 6) *Guard File.*