

**आयकर अपीलीय अधिकरण, मुंबई “ ई” खंडपीठ**  
**Income-tax Appellate Tribunal -“E”Bench Mumbai**  
**सर्वश्री राजेन्द्र,लेखा सदस्य एवं, संदीप गोसाईं, न्यायिक सदस्य**  
**Before S/Shri Rajendra,Accountant Member and Sandeep Gosain, Judicial Member**  
**आयकर अपील सं./I.T.A./596/Mum/2008,निर्धारण वर्ष /Assessment Year: 2004-05**

SHRM Food & Allied Services Pvt.Ltd. Kolsite House, 1 <sup>st</sup> Floor, 31/A, Shah Industrial Estate, Off Veera Desai Road, Andheri (W), Mumbai-400 053. <b>PAN:AAACT 2529 E</b>	Vs.	The Income tax Officer Ward-8(3)(1) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

**Revenue by:** Shri V. Justin- DR

**Assessee by:** Shri J.D. Mistry

सुनवाई की तारीख / **Date of Hearing:** 14.03.2018

घोषणा की तारीख / **Date of Pronouncement:** 30.05.2018

**आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश**

**Order u/s.254(1)of the Income-tax Act,1961(Act)**

**लेखा सदस्य, राजेन्द्र के अनुसार- PER RAJENDRA, AM-**

Challenging the order dated 03.02.2007 of the CIT(A)-XXIX, Mumbai, the assessee has filed the present appeal. Assessee-company, a joint venture between SHRM Group of France and Radhakrishna Group engaged in the line of institutional Food Services, filed its return of income on 27/10/2004, declaring total income at Rs. NIL. The Assessing Officer(AO) completed the assessment on 28/12/2006, u/s. 143(3)r.s.147 of the Act, determining its total income at Rs.15.77 lakhs.

2.First Ground of appeal, is about validity of re-opening of assessment as per the provisions of section 148 of the Act. Originally, the return of income was processed u/s.143(1)of the Act, on 29.03.2005. Later on, the AO issued a notice under section 148 of the Act, as he was of the opinion that the taxable income had escaped assessment. The reasons recorded for reopening read as under :-

*"The assessee is engaged in catering and house-keeping business filed the return of income on 27/10/2004 declaring nil income after adjusting carry forward losses of Rs. 15,77,522/- and paid tax on book profit of Rs.10,48,904/-. The assessee had received Rs.4,61,946/- on interest from bank deposit and Rs.450/- as interest accrued from long term investment and Rs.10,24,435/- as interest. There was not actual business activity during the relevant previous year. But the assessee has shown the "interest income" as "business income" and claimed set off from carried forward business loss.*

*The interest income needs to be assessed under the head "Income from other sources" and set off should not be allowed from carried forward business loss to "Income from other sources" and set off should not be allowed from carried forward business loss to "Income from other sources". Therefore, there is an escapement of taxation to the income of Rs.10,24,436/-.*

*Further, the assessee has not added provision for doubtful debts of Rs.5,04,300/- to the book profit in the working of income u/s. 115JB which has resulted in escapement of taxation to the income of Rs.5,04,300/- for MAT income purpose.*

*Therefore,I have reason to believe that this income of Rs.10,24,436/- and Rs.5,04,300/- (for MAT purpose only) have escaped taxation and it is fit case for reopening assessment by issuing notice u/s. 148 of the I. T. Act 1961.”*

While completing the re-assessment,the AO held that the interest income received by the assessee was to be assessed under the head ‘income from other sources’,relying upon the case of Tuticorin Alkaline Chemiclax Ltd.(227ITR172).He also held that the assessee did not add provisions for doubtful debts,amounting to Rs.5.04 lakhs,to the book profit in the working of income,computed u/s.115JB of the Act.

3.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA)and made detailed submissions.The assessee challenged the re - opening and made the submissions on merits also.However,the FAA upheld the reopening, but partly allowed the appeal filed.He also held that interest income was to assessed as income from other sources,that the assessee had not carried out any business during the year under appeal,that the AO was justified in adding Rs.5.04 lakhs to the income of the assessee computed u/s. 115JB of the Act,that as per the amended provisions of section 115JB unascertained liabilities were to be added to its MAT-income.

4.During the course of hearing before us,referring to the order,dated 25.02.2008,giving effect to the Appellate order of the FAA,the Authorised Representative (AR),stated that in the computation of income same income was assessed that was appearing in the original assessment i.e.in the intimation passed u/s.143(1)of the Act,that the carry forward of the loss was identical to the carry forward of the intimation,that the AO had initiated re-opening proceedings on two counts,that in the earlier years the interest income was assessed as business income by the AO.s,while passing order u/s.143(3)of the Act(Pg.45 of the PB),that while deciding the appeal for the year 2001-02 the then FAA had decided both the issues in favour of the assessee,that amended provisions of section 115JB were applicable from AY. 2009,that same were not effective for the year under appeal.He relied upon the cases of Indo Swiss Jewels Ltd(284ITR389);Paramount Premises(P.)Ltd.(260ITR259);Tarak L Gandhi (27 SOT72);Rallis India Ltd. (323ITR54).HCL Comnet Systems and Service Ltd.( 305 ITR 409).

5.We have heard the rival submissions and perused the material before us.We find that the AO had issued the notice u/s.148 of the Act(Pg.8 of the PB.),after recording reasons,as mentioned in the earlier part of the order.A perusal of the reasons recorded prove that re-opening was initiated by the AO on two counts

i).offering interest income under the head business income as against the income from other sources and

ii).not adding provisions for doubtful debts of Rs.5.04 lakhs in the MAT working.

**5.1.**We find that while passing an order u/s.143(3)of the Act for the AY.s.1997-98,1998-99 and 2002-03(Pg.s 40-45 of the PB.),the AO.s have assessed the interest income under the head business income for those AY.s.It is a fact that intimation u/s.143(1)was issued for the year under consideration.But,it would not mean that the issue of computing the interest income under a particular head was not deliberated upon on the earlier occasions.In the year under consideration,he assessed the same income,in the reassessment proceedings,as income from other sources.We are aware that principles of res-judicata are not applicable to income tax proceedings and the AO can change his stand in subsequent AY.s about taxability of a particular item or head/(s)of income.But,such a stand has to be based on some logic-it cannot be left to his whims and fancies.Rule of consistency is very much applicable to income tax proceedings and the departmental authorities have to give some reasonable basis,if they want to deviate from the path they had followed in the earlier AY.s. Without assigning some plausible reason,the AO.s cannot choose a new path in the subsequent year.Tax matters require and demand consistency.In the case of International Tractors Ltd. (397ITR696) the Hon'ble Delhi High Court has,referring to the principle of consistency,held that deductions allowed in the earlier assessment years should not be withdrawn unless the 'circumstances have changed.'

In the case under consideration,the AO has not brought any new facts/changed circumstances that could be held to be foundation of the decision to hold interest income,as income from other sources as against business income,as held in the earlier AY.s.On the same facts and circumstances,he changed the head of income for the year under appeal without bringing on record the distinguishing features as compared to earlier year.One of the reason was that during the year under consideration the assessee had not carried out any business.But,it is a fact in the subsequent two AY.s.,the assessee had shown Rs.4.66 crores and Rs. 9.57 crores as compared to the income for the AY.s.2002-03 and 2003-04 at Rs.2.19 and Rs.1.12 crores respectively.In these circumstances,it has to be held that there was lull in the business for the year under appeal.But,such a phenomenon is not an uncommon thing in the business world. Temporary lull in business should not have been used as a tool to change the head of the income.From AY.1997-98 to AY.2003-04,the assessee was showing interest income under the head business income and the AO had accepted the claim made by the assessee.As stated

earlier,at least four assessments for earlier years were passed u/s.143(3)of the Act and the interest income was never assessed as income from other sources.So,in our opinion,there was no justification for changing the head of interest income for the year under appeal.We hold that re-assessment proceedings should not have been initiated in the matter under consideration.Reassessment is a serious step and cannot and should not be taken lightly,as it unsettles a settled position.Here,we would like to refer to the case of Rallis(supra)delivered by the Hon'ble Supreme Court.In that matter the petitioner had filed its return of income for the AY. 2004-05 on 29/10/2004, and had declared a loss of Rs.52.87 crores.While computing this loss, it claimed a deduction of bad debts amounting to Rs.12,00,43,394/-.It also computed a book loss of Rs. 42.14 crores u/s. 115JB.The return of income was revised on 31/03/2006,so as to declare a loss of Rs.53.20 crores.The return was selected for scrutiny assessment by a notice u/s.143(2)of the Act.The AO issued two questionnaires during the course of the assessment proceedings, one of them being on 29/09/2006.A specific query was raised in regard to the allowability of the bad debts claimed by the petitioner u/s.36(1)(vii) r.w.s.36(2) and on the computation of book profits u/s.115JB.The petitioner responded to the queries by its letters. The AO passed an order of assessment on 29/12/2006,by which the claim in respect of bad debts was disallowed to the extent of Rs.5.54 crores.The AO,however,allowed the claim to the extent of Rs. 6.46 crores. After recomputing the book profits,he assessed the income of the petitioner u/s.115JB at Rs.41.95 crores.The FAA allowed relief to the petitioner in respect of the bad debts but confirmed the disallowance in respect of book profits u/s.115JB .As a result of his order,entire claim on account of bad debts in the amount of Rs. 12 crores came to be allowed u/s.36(1)(vii).Cross-appeals were filed by the petitioner and by the Revenue.On 16/07/2008, a notice u/s.148 was issued to the petitioner by the AO. Deciding the writ petition against the notice,the Hon'ble High Court held as under:

*“A mere change of opinion would not justify the Assessing Officer in seeking a recourse to the powers under sections 147 and 148 of the Income-tax Act, 1961, and there must be tangible material before the Assessing Officer to prove that income chargeable to tax has escaped assessment. The validity of the notice issued by the Assessing Officer in seeking to reopen the assessment must be determined with reference to the reasons which are found in support of the reopening of the assessment.These reasons cannot be allowed to be supplemented on a basis which was not present to the mind of the officer and could not have been so present on the date on which the power to reopen the assessment was exercised.*

In the case before us,no tangible material was existing before the AO that could prove that interest income assessed as business income in earlier years should be taxed under the head income from other sources.

**5.2.**Now,we would take up the issue of computation of income under the provisions of section 115JB of the Act.The Hon'ble Apex Court in the matter of Apollo Tyres Limited (255

ITR 273)has held that while working out the book profit u/s.115JB of the Act,the AO has no power to disturb the figures shown in the P & L a/c.prepared in accordance with Part II and III of the Schedule VI of the Companies Act.The assessee had made the provisions for the debts that were doubtful of recovery.The AO has not brought on record facts proving that provision were for unascertained liability.At the time of filing of return of income the stand taken by the assessee was supported by the judgments/orders of the Hon'ble Court/ Tribunal. The effect of amendment to the section 115JB that are effective from 01/04/2001,has been deliberated upon by the Hon'ble Bombay High Court in the matter of Rallis India Ltd.(supra) as under:

*“For the computation of book profits under section 115JB , the Assessing Officer has to accept the authenticity of the accounts maintained in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956, which are certified by the auditors and passed by the company in its general meeting. The Assessing Officer does not have jurisdiction to go beyond the net profits as shown in the profit and loss account, save and except to the extent which is provided for in the Explanation. Under Explanation (1)(c) the increase shall be of the amount or amounts set aside for meeting liabilities other than ascertained liabilities. In order that clause (c) should apply, there must be a provision ; the provision must be for meeting a liability and the liability in question must be other than an ascertained liability. The Supreme Court in held that a debt which is payable by the assessee must be distinguished from a debt which is receivable by the assessee. A provision for bad and doubtful debts is made to cover up the probable diminution in the value of the asset, namely, a debt which is an amount receivable by the assessee. Such a provision cannot be regarded as a provision for a liability because even if a debt is not recoverable, no liability could be fastened upon the assessee. Subsequent to the decision of the Supreme Court in Parliament amended Explanation (1) to section 115JB by the Finance Act of 2009 inserting clause (i) in Explanation (1) so as to provide for the amount or amounts set aside as provision for diminution in the value of an asset. The amendment was made with retrospective effect from April 1, 2001.*

*.....on the date on which the Assessing Officer purported to exercise his power to reopen the assessment under section 147 , the legislative amendment by the insertion of clause (i) to Explanation (1) to section 115JB had not been brought into force on the statute book. The order of the Assessing Officer with reference to the computation of book profits under section 115JB was at the least a probable view and as a matter of fact the correct view to take in view of the decision of the Supreme Court in . It is well-settled that the law laid down by the Supreme Court is declaratory of the position as it always stood. In any event, the view of the Assessing Officer was supported by the interpretation placed even contemporaneously in the judgment of the court in and in the judgments of the Delhi High Court ..... In the circumstances, there was no warrant for reopening the assessment in exercise of the power conferred under section 147.”*

Considering the above,we hold that there was no justification for issuing a notice u/s.148 of the Act to the assessee for reassessing the income as per the provisions of section 115 of the Act also.

**5.3.**We have also noticed that income of the assessee after giving effect to the order of the FAA would remain same.Therefore,the ratio of Tarak L. Gandhi(supra)would be applicable to the fact of the case.

After considering the peculiar facts and circumstances of the case, we have arrived at the conclusion that the order passed by the AO u/s.143(3)r.w.s.147 of the Act was bad in law. So, reversing the order of the FAA, we hold that there was no justification for initiating reassessment proceedings. Effective ground of appeal is decided in favour of the assessee.

As a result appeal filed by the assessee stands allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on 30<sup>th</sup> May, 2018.  
आदेश की घोषणा खुले न्यायालय में दिनांक 30 मई, 2018 को की गई।

Sd/-

(संदीप गोसाईं / Sandeep Gosain)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 30.05.2018.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "E" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

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आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar  
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.