IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

I.T.A. No. 628/HYD/2016
Assessment Year: 2006-07

M/s. Sanghi Industries Ltd., HYDERABAD **[PAN: AAECS5510Q]**	Vs	Deputy Commissioner of Income Tax, Circle-3(1), HYDERABAD
(Appellant)		**(Respondent)**

For Assessee : Shri K.A. Sai Prasad, AR
For Revenue : Smt. Alka Rajvanshi Jain, CIT-DR

Date of Hearing : 18-07-2018
Date of Pronouncement : 20-07-2018

O R D E R

PER B. RAMAKOTAIAH, A.M. :

This appeal by the assessee is against the order of the Commissioner of Income Tax (Appeals)-3, Hyderabad dated 10-02-2016. Even though assessee has raised as many as five grounds, the grounds pertaining to merits of deduction u/s. 80HHC of the Income Tax Act [Act] in the computation u/s. 115JB of the Act have been withdrawn and the issue is limited to Ground No.1 which is as under:

"1. The learned Commissioner of Income tax (Appeals), in the facts and circumstances of the case, is not justified in upholding the initiation of the proceedings u/s. 147".

2. The facts in brief are that, assessee filed return of income for the AY. 2006-07 on 29-11-2006 declaring loss of Rs. 1,15,25,795/- under the normal provisions and income of Rs. 80,59,75,288/- u/s. 115JB. While computing the book profits u/s. 115JB, assessee claimed a reduction of Rs. 11,73,17,779/- representing deduction u/s. 80HHC as provided in Clause-IV of Explanation-1 u/s. 115JB. Assessing Officer (AO) has completed the assessment u/s. 143(3) on 24-12-2008 determining gross total income at Rs. 12,69,26,546/- and after set-off of brought forward losses, the taxable income was determined at NIL under the normal provisions. While completing the scrutiny, AO also asked for the calculation sheet u/s. 80HHC and assessee vide letter dt. 17-11-2008 has furnished the calculation claiming an amount of Rs. 11,73,17,779/-as deduction u/s 80HHC. Thereafter, the adjusted book profit as computed by assessee, was accepted in the order u/s. 143(3).

2.1. A notice u/s. 148 was issued on 02-05-2011 i.e., after four years from the end of the assessment year. Assessee requested for reasons for reopening vide letter dt. 31-05-2011. AO vide letter dt. 26-07-2011 informed assessee that '*under computation of tax liability u/s. 115JB, the deduction u/s. 80HHC of Rs. 11,73,17,779/- given in the original assessment order was proposed to be added back to the book profits'.* Assessee objected to the initiation of proceedings u/s. 147 stating that all the relevant material facts to the proposed additions were very much available on record and was perused by the AO who has allowed these deductions. It was further

contended that no fresh material was brought on record to come to a different conclusion. Assessee relied on the judgment of Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd., [320 ITR 561] (SC) that AO cannot reopen an assessment on mere change of opinion. Assessee also contended that the reduction claimed u/s. 115JB was supported by the judgment of the Hon'ble Supreme Court in the case of Ajantha Pharma Ltd., Vs. CIT [327 ITR 305], wherein the Hon'ble court has stated that the provisions of Section 115JB is a complete code itself and therefore, on the basis of the provisions then existing, assessee has claimed deduction which was allowed. It was contended that the conditions for reopening were not satisfied.

2.2. The AO, however, was of the opinion that deduction u/s. 80HHC allowed u/s. 115JB was not correct as the main provisions of Section 80HHC stood withdrawn for the AY. 2006-07. AO also further stated that the decision of the Supreme Court in the case of Ajantha Pharma Ltd., Vs. CIT [327 ITR 305] is not applicable to the case on hand, since no deduction u/s. 80HHC was allowable for the AY. 2006-07 and he reproduced sub-section (1) and (1B) of Section 80HHC in the assessment order.

3. Assessee contested the issue before the Ld.CIT(A) submitting that AO has referred to the amended provisions of Section 115JB which was amended by the Finance Act, 2011 retrospectively and the same cannot be made applicable for AY. 2006-07. It was further submitted that the decision of the

Hon'ble Supreme Court in the case of Ajantha Pharma Ltd., Vs. CIT [327 ITR 305] was delivered on 09-09-2010 i.e., before initiation of proceedings u/s. 147. It was contended that no action can be initiated u/s. 147, after the expiry of four years from the end of the relevant assessment year unless income chargeable to tax has escaped assessment by reason of failure on the part of assessee to disclose fully and truly all the material facts necessary for assessment. Assessee also relied on various case law before the Ld.CIT(A) to contend that the judicial pronouncements hold that initiation of re-assessment proceedings u/s. 147 is bad in law, even after considering the retrospective amendment in Section 115JB. Ld.CIT(A), however, did not accept assessee's contentions and rejected the issue of reopening, relying on Explanation-2 of Section 147. Ld.CIT(A) held that the income in the original assessment dt. 24-12-2008 was clearly under assessed and excess relief was given in the form of 80HHC which is not on the statute. Therefore, there is abundant failure on the part of assessee to make a claim which is not there on the statute for which there is no column in the Income Tax returns. Accordingly, the CIT(A) held that notice issued by the AO is perfectly valid notice.

4. There is one more issue for reopening which was accepted by the AO in the course of re-assessment proceedings and is not subject matter of appeal even before the CIT(A). On merits of the claim, Ld.CIT(A) relied on the retrospective amendment on Section 115JB and upheld the action of the AO.

5. Ld. Counsel while withdrawing the grounds on merits due to retrospective amendment of the provisions, however, submitted that at the time of filing the return and also at the time of assessment, the provisions of Section 115JB allows reduction u/s. 80HHC and consequent to the interpretation given by the Hon'ble Supreme Court in the case of Ajantha Pharma Ltd., Vs. CIT [327 ITR 305] assessee is considered eligible for deduction u/s. 80HHC while computing income u/s. 115JB. Ld. Counsel also submitted that AO has examined this issue and placed on record a copy of the letter submitted during the assessment proceedings addressed to Dy.CIT, Range-3, dt. 15-11-2008 to substantiate that assessee has justified the claim u/s. 80HHC in the computation u/s. 115JB and AO having examined the same and on the basis of the interpretation available at that time, allowed the claim. It was further submitted that in the reasons recorded for reopening as communicated to the assessee, there is no finding that there is failure on the part of assessee in submitting the material facts. Since the notice u/s. 148 was issued after the end of four years from the relevant assessment year, the proviso to Section 147 will apply. Since there is no failure on the part of assessee, reopening itself is bad in law. It was submitted that making a claim, which may become not allowable subsequently, is different from not furnishing relevant material facts. Ld. Counsel relied on the principles laid down by the following three cases:

i. Tecumseh Products India Pvt. Ltd., Vs. ACIT and another [361 ITR 429] (AP);
ii. CIT Vs. Arvind Remedies Ltd., [378 ITR 547] (Mad);
iii. DIL Ltd., Vs. ACIT and Others [343 ITR 296] (Bom);

6. Ld.CIT-DR, however, in reply elaborately explained the provisions of Section 80HHC, withdrawal of deduction u/s. 80HHC w.e.f. AY. 2006-07 and the fact that assessee has claimed deduction which is not allowable u/s. 115JB. When pointed out that assessee is not contesting the issue on merits, only on the issue of reopening u/s. 147 for which there should be failure on the part of assessee. It was the DR's contention that making a wrong claim which is patently not allowable itself comes under the category of failure on the part of assessee. It was further submitted that the principles laid down by the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd., [320 ITR 561] (SC) is not applicable as the opinion taken by the AO itself is faulty and wrong on application of provisions. Since the opinion itself is wrong, AO can review the same and can reopen the assessment. Ld. DR further submitted that even though the Hon'ble Supreme Court analysed the provisions of Section 115JB and discussed about eligibility and deductibility, since the provisions of Section 115JB were amended by omitting Clause IV, V & VI by the Finance Act, 2011 and a deduction under the main provision of Section 80HHC itself is not allowable for AY. 2006-07, the claim of assessee is patently wrong. In view of that, the reopening is perfectly valid.

7. It was the contention of Ld.DR that while filing the returns itself, assessee has not disclosed the fact that claim of 80HHC is not allowable and AO is well within his powers to reopen the assessment after four years. It was fairly admitted that retrospective amendment of the Act is not the basis for reopening of assessment. Ld.CIT-DR relied on the case of Honda Siel Power Products Ltd., Vs. DCIT [340 ITR 53] (Delhi) for the proposition that merely because material lies embedded in material or evidence, which AO would have uncovered but did not uncover, is not a good ground to deny or strike down a notice for reassessment. He also relied on the decision of the Hon'ble High Court of Delhi in the case of Consolidated Photo & Finvest Ltd., Vs. ACIT [281 ITR 394] (Del) to submit that explanation 1 and 2 would apply and production of account books or other evidence from which the AO could with due diligence discover material evidence would not necessarily amount to disclosure within the meaning of the proviso.

8. We have considered the rival contentions and perused the documents on record as well as case law relied upon by the rival parties. There is no dispute to the fact that assessment has been completed u/s. 143(3) allowing assesse's claim u/s. 80HHC while computing deduction u/s. 115JB, even though no such deduction was allowed in the normal computation, though there was positive gross profit/income. The content of the letter filed by assessee before AO makes it clear that AO had enquired about the calculation u/s. 80HHC and assessee's claim of Rs. 11,73,17,779/- certainly pertains to the claim u/s. 115JB. Since AO has completed the

assessment after due enquiry, it has to be taken that AO has consciously allowed the deduction as claimed by assessee while computing the deduction u/s. 115JB.

8.1. For reopening of assessment u/s. 147, there are certain conditions provided under the Act. The provisions of Section 147 are as under:

"Section 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 (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.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

[(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;]

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;]

[(d) where a person is found to have any asset (including financial interest in any entity) located outside India.]

[Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.]

[Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.]"

(Emphasis supplied)

8.2. As can be seen from the above, AO has to A) record a satisfaction and B) there should be a reasonable belief and C) further, if the assessment is being reopening after the end of four years in a case of completed assessment u/s. 143(3), there should be failure on the part of assessee in disclosing fully and truly all the material facts necessary for assessment. It is the contention that assessee has furnished the complete details including the working sheet of the claim and so there is no failure on the part of assessee. It is the contention of Revenue that the claim being *per se* wrong, assessee has committed a blunder which was continued by the AO, therefore, AO is within his powers to reopen to complete the assessment, even after four years. Ld.CIT(A) invoked Explanation-2 to Section147 to state that 'excess claim or wrong claim' comes within the meaning of 'escapement of assessment'.

9. As can be seen from the facts of the record, assessee has not claimed any deduction u/s 80HHC in the normal computation. However, while filing the computation u/s. 115JB, a deduction u/s. 80HHC was claimed as per the provisions of Section 115JB as existing then. Section 115JB sub-clause (iv) in Explanation-1 is as under:

> *"(iv) the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section;*
> *……"*

9.1. This provision was on statute upto 31-03-2011 and was amended/omitted by the Finance Act, 2011 retrospectively from 01-04-2005. Thus, at the time of filing return, the provision was on statute and assessee has made a claim as per the statute. This cannot be stated as a wrong claim as contended by the DR. At that point of time, there was a dispute whether deduction u/s. 80HHC can be allowed independently of regular computation or not? This issue was settled by the Hon'ble Supreme Court with the decision in the case of Ajantha Pharma Ltd., Vs. CIT [327 ITR 305] which was delivered on 09-09-2010 that the provisions of Section 115JB is a self-contained code and the deduction u/s. 80HHC is allowable in the computation of book profits u/s. 115JB, even though there was an amendment in Section 80HHC restricting the deduction. It is well settled that law laid down by the Honourable Supreme Court is declaratory of the position as it always stood. Consequently, it cannot be stated that claim of assessee on the basis of the then existing provisions u/s. 115JB is a wrong claim. Moreover, the AO also examined the same in the course of assessment and having satisfied, allowed the claim. Therefore, successor officer in our opinion cannot review the above decision.

10. The issue boils down to the condition whether there was any failure on the part of assessee and whether AO has given any finding to that extent in the course of recording satisfaction while reopening the assessment. To examine this, it is necessary to extract the 'satisfaction note' recorded by AO which is as under:

"In this case, an assessment u/s. 143(3) was completed on 24.12.2008 for the AY: 2006-07 on a total income of Rs. NIL as per normal provisions after set off of brought forward losses to the extent of Rs. 12,69,26,546/-. However, Book Profit of Rs. 80,59,75,288/- as had been admitted by the assessee was brought to the tax u/s. 115JB of the IT Act 1961. Later, it was noticed that there was short computation of Book Profit by the assessee to the extent of Rs. 11,73,17,779/- in as much as it had reduced the Book Profit by claiming from it deduction u/s. 80HHC for Rs. 11,73,17,779/- which was not in order. There was no deduction allowable u/s. 80HHC for the assessment year under consideration i.e., AY: 2006-07. Hence the allowance of deduction u/s. 80HHC in the assessment has resulted in escapement of income to the extent of Rs. 11,73,17,779/- for the AY: 2006-07. Further the set off of losses/depn. Under normal provisions to the extent of Rs. 12,69,26,546/- is not in order.

I have, therefore, reason to believe that income of Rs. 17,73,17,779/- has escaped assessment for the AY: 2006-07 with in the meaning of section 147 of the IT Act 1961".

10.1. As can be seen from the above noting, there is no finding by the AO that there is failure on the part of assessee. The satisfaction was recorded on 02-05-2011 i.e., after the amendment has been brought on statute and after the end of four years from the relevant assessment year. Had the notice been issued before 31-03-2011, the parameters for consideration were entirely different but, since the notice was issued after 31-03-2011, the first proviso to Section 147 will clearly apply. There is no finding by the AO that there is failure on the part of assessee. The reliance on Explanation-2 to Section 147 by the CIT(A) is not applicable, as that explanation only qualifies what is 'escapement of income'. Even in the case of assessment completed u/s 143(3), there can be escapement of income, if wrong claim was allowed or excess claim was made. To satisfy that there is escapement of income, explanation can be resorted to. However, the main

section itself contain a restriction in reopening the assessment after the end of four years from the relevant assessment year. Unless that condition is satisfied- that there is a failure on the part of assessee in fully and truly disclosing the material facts necessary for completion of assessment,- reopening cannot be resorted to. In this case, there is no finding by the AO that there is failure on the part of assessee, as can be seen from the record.

11. In the case of Ravjibhai Nagarbhai Patel [387 ITR 639] (Guj) relied on by the Revenue, the facts indicate that the notice was issued after four years, but there is a finding that assessee failed to place on record the cost of acquisition of shares in 'K'. The nature of transaction of transfer of investment was not feasible from declaration made by assessee. There was failure by the AO to examine the transfer of shares in 'K' by acquisition of preferential shares in 'A'. Therefore, it was held that this was a case where further scrutiny would be permissible, even if the notice was reopening was issued beyond four years from the period of assessment year. As can be seen from the above facts of the case they are entirely different from the facts of the present issue. There is no finding that there is failure on the part of assessee. It is also noticed that AO did make enquiry before allowing the deduction u/s. 115JB, thus, the ratio decidenti in the above case does not apply to the facts of the case.

12. Further, there is no information at all, other than what assessee has furnished, for reopening of assessment and

as can be seen from the record, the reopening was done after the relevant provisions were withdrawn from statute by the Finance Act, 2011, even though the same was not admitted by the Revenue, either at the time of reopening or subsequently.

13. Ld. Counsel relied on the judgments of jurisdictional High Court in the case of Tecumseh Products India Pvt. Ltd., Vs. ACIT and another [361 ITR 429] (AP). In this case, the Hon'ble High Court has held as under:

"Before any notice is issued after the expiry of four years, the officer concerned must be satisfied that there has been an escapement in assessment of income, which is chargeable to tax and that this is because of the failure on the part of the assessee to make a return under section 139 of the Income-tax Act, 1961, or in response to a notice issued under sub-section (1) of section 142 or section148 for not disclosing the material facts. These conditions must be reflected in the notice itself. In the absence of the conditions, exercise of jurisdiction in issuance of the notice under the provision is patently illegal".

13.1. Similar view was expressed by the Hon'ble Madras High Court in the case of CIT Vs. Arvind Remedies Ltd., [378 ITR 547] (Mad) wherein notice was issued after four years and assessee contended that there is no failure on the part of assessee. In this case the Hon'ble High Court held as under:

"Held, dismissing the appeal, that the Assessing Officer had failed to record anywhere his satisfaction or belief that income chargeable to tax had escaped assessment on account of the failure of the assessee to disclose truly and fully all material facts necessary for assessment. On the contrary, it was the Assessing Officer who had failed to consider the materials placed before him at the time of regular assessment. Assuming that the claim in respect of those two heads had not been properly made, it could if at all be a ground for the Department to initiate proceedings under section 263 and not under section 147. The reassessment proceedings were not valid".

13.2. In the case of DIL Ltd., Vs. ACIT and Others [343 ITR 296] (Bom), the Hon'ble Bombay High Court considered similar issue of reopening of assessment, consequent to amendment with retrospective effect in Section 115JB. The Hon'ble Court held as under:

"Held, allowing the petition, that the reasons for reopening contained no reference to there being any failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. The primary requirement set out in the proviso to section 147 of the Income-tax Act, 1961, had not been fulfilled. That apart, it is evident that in so far as the diminution in the value of investment of Rs. 1.28 crores was concerned, clause (i) was inserted in Explanation 1 to section 115JB by the Finance (No.2) Act, 2009, with retrospective effect from April 1, 2001. Clause (i) of Explanation 1 was introduced to include in the book profits the amount or amounts set aside as provision for diminution in the value of any investment. In view of the retrospective amendment, the Assessing Officer might have reason to believe that income had escaped assessment. But that in itself was not sufficient for reopening an assessment beyond the period of four years. Beyond the period of four years when an assessment is sought to be reopened, there must be a failure on the part of the assessee to fully and truly disclose all material fact necessary for assessment. In fact, the retrospective amendment would negate the inference sought to be drawn of the failure to disclose material facts. In so far as the business development expenditure of Rs. 10.79 lakhs was concerned, it was also evident from the order of assessment that the claim of the assessee was disallowed by the Assessing Officer and the amount was added back to the income. Similarly, in regard to the gratuity and superannuation as well, there was ex facie no failure on the part of the assessee to disclose the material facts. The reasons disclosed to the assessee on July 11, 2011, in fact, merely indicated a reason to believe that income had escaped assessment. There was no reference whatsoever to the formation of an opinion that there was a failure on the part of the assessee to fully and truly disclose all material facts. Therefore, the basis on which the reopening was sought to be effected was contrary to law".

The principles laid down by the jurisdictional High Court as well as other High Courts are equally applicable to the present

facts of the case and Ld. Counsel has validly relied on the above judgments. The judgments relied upon by the Ld.CIT-DR does not apply to the facts of the present case as AO has enquired and assessee has submitted explanation in the course of assessment proceedings itself.

14. Since there is no finding that there is failure on the part of assessee in disclosing material facts at the time of original assessment and also on the fact that AO did enquire while allowing reduction of 80HHC u/s. 115JB, as per the then existing provisions and law, we are of the opinion that the reopening of assessment after four years from the end of assessment year is bad in law. Accordingly, we set aside the orders of CIT(A) and AO and restore the original assessment order. This Ground is allowed.

15. In the result, appeal of assessee is allowed.

Order pronounced in the open court on 20th July, 2018

Sd/-	Sd/-
(CHALLA NAGENDRA PRASAD)	**(B. RAMAKOTAIAH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated 20th July, 2018

TNMM

Copy to :

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2. The Deputy Commissioner of Income Tax, Circle-3(1), Hyderabad.

3. CIT (Appeals)-3, Hyderabad.

4. Pr.CIT-3, Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.