

IN THE INCOME-TAX APPELLATE TRIBUNAL "A" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.58/Mum/2011 (Assessment Year 2002-03)

M/s Rusan Pharma Ltd. 58-D, Government Industrial Estate, Charkop, Kandivali (W), Mumbai-67. PAN: AABCR3179H	Vs.	ACIT Circle 9(3) 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-20.
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Appellant

Respondent

Appellant by : Shri G.P. Mehta (AR)
Respondent by : Shri Rajesh Kumar Yadav (DR)
Date of Hearing : 25.04.2018
Date of Pronouncement : 18.07.2018

ORDER

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of the Income-tax Act (the Act) is directed against the order of Id. Commissioner of Income-tax (Appeals)-20 [Id. CIT(A)], Mumbai dated 26.11.2010 for Assessment Year 2002-03.

The assessee has raised the following grounds of appeal:

01. The orders passed by the learned lower authorities are bad in law and bad in facts.
02. The assessment order passed in pursuance of notice issued u/s.148 of the IT. Act, 1961, after expiry of four years from the end of the assessment year in question is ab-initio void, inasmuch as, appellant's case is covered by the first proviso below section 147 of the IT. Act, 1961.
03. The assessment order passed in pursuance of notice issued u/s.148 of the IT. Act, 1961, is ab-initio void, inasmuch as, said notice was issued merely on the basis of change of opinion.
04. Having regard to the facts of the case, provisions of law and judicial propositions, provisions of sec.147 / 148 of the IT. Act, 1961, are not attracted at all in the case of the appellant. Consequently, assessment order under reference is untenable in law.
05. The learned CIT(A) has grossly erred in up-holding the validity of assessment order in clear disregard of the judicial propositions laid down by the Hon'ble Apex Court and jurisdictional High Court.
06. The learned lower authorities have grossly erred in making an addition

of Rs. 6,468,490/- on account of insurance claim received due to loss on account of earthquake under the head business income, even though the entire receipt was attributable to capital WIP at Kandla Unit.

07. The learned lower authorities have grossly erred in taxing Rs. 6,468,490/- being insurance claim received, without considering the loss of Rs. 12,479,927/- incurred due to damage/destruction of capital WIP on account of earthquake.

08. The learned lower authorities have grossly erred in taxing Rs. 5,513,267/- being profit on sale of machinery, without appreciating the evidence on record and explanation of the appellant.

09. Having regard to the facts of the case, provisions of law and judicial interpretations, the addition of Rs. 5,513,267/- is wholly untenable in law.

2. Brief facts of the case are that the assessee-company is engaged in the manufacturing of Pharmaceuticals and Medicines. For assessment year 2002-03 the assessee filed its return of income on 31.10.2002 declaring total income of Rs. 51,20,350/-. Subsequently, the revised return of income was filed on 21.11.2003 declaring total income of Rs. Nil. The assessment was completed on 21.03.2005 assessing the total income at Rs. 94,39,940/-. The assessment was reopened under section 147 of the Act. Notice under section 148 dated 01.08.2008 was issued to the assessee. In response to the notice under section 148 the assessee has not filed return of income. The assessment was reopened after four year from the end of relevant assessment year. The reasons of reopening was communicated to the assessee vide letter dated 09.04.2009. The assessment was reopening that the assessee has deducted the sale value of machinery of Rs. 78.18 crore from the block of asset resulting in excess allowance of depreciation and insurance claim received of Rs. 64.20 Lakh was not offered for tax as income. The assessment was completed on 28.12.2009 under section

143(3) r.w.s. 147 of the Act under section 143(3) read with section 147 on 28.12.2009. The assessing officer made addition the insurance claim of Rs. 64,68,490/- as “Business Income” and addition on profit on sale of machinery of Rs. 55,13,267/- under the head “income from other sources”. On appeal before the Id. CIT(A), the reopening and both the addition were upheld. Therefore, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the submissions of the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and have gone through the orders of lower authorities and material available on record. Ground No.1 is general in nature and needs no adjudication and the same is dismissed.
4. Ground No.2 to 5 relates to validity of reopening under section 147 in pursuance of notice under section 148. The Id. AR of the assessee submits that the assessment was reopened on 01.08.2008 by issuing notice under section 148. The reasons of reopening was provided to the assessee vide letter dated 09.04.2009. The assessment was reopened on two issues (i) that the assessee has not deducted the capital receipt on account of sale of machinery of Rs. 78.18 Lakhs from the block of asset thereby resulting excess claim of depreciation amounting to Rs. 219.54 Lakhs (ii) that assessee received Rs. 64.68 Lakhs against insurance claim of Rs. 124.20 Lakhs, however, no details were furnished in the Profit & Loss Account.

The same should have been treated as income. Hence, there is under assessment to the tune of Rs. 64.68 lakhs. However, while passing re-assessment order no addition was made on first issue related with sale of machinery. Though, the Assessing Officer made the other addition. The Id. AR of the assessee submits that the reasons recorded by Assessing Officer are not valid reasons. No fresh or tangible material came to the notice of Assessing Officer. All details were filed by assessee and were available before the Assessing Officer. The assessee made full disclosure in its Audited profit and loss account. The assessee has invited our attention at page No.39 of Paper Book, wherein the assessee has disclosed about the settlement of insurance claim of loss suffered in Earthquake. Therefore, the notice is prima facie is wrong. And the assessment proceeding initiated on the basis of wrong reasons of reopening is non-est in the eyes of law. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Supreme Court in CIT Vs. Kelvinator India Ltd. [220 ITR 561 (SC)], Bombay High Court in Asian Paints vs. DCIT [308 ITR 195], Tribunal in ITO Vs Essential Moto (17 TTR 281 Chd Trib) and Maharashtra Airport Development Company Ltd Vs DCIT (150 ITD 709 Mum Tri).

5. On the other hand the Id. DR for the revenue supported the order of the authorities below. The Id. DR further submits that the assessing officer has sufficient reasons to believe that the income chargeable to tax has escape

from assessment and he must have tangible material to believe about such escapement. In support of his submission the Id DR for the revenue relied on the decision of Bombay High Court in Dr. Amin Pathology Vs JCIT (252 ITR 673), I.P. Patel Vs DCIT 27 taxmann.com 200 (Gujrat) and the decision of Hon'ble Supreme Court in ACIT Vs Rajesh Jhawari (2007) 61 Taxman 316 (SC).

6. We have considered the rival submissions of the parties and further gone through the orders of the lower authorities. The assessment for the year under consideration (AY- 2002-03) was completed on 21.03.2005 under section 143(3), assessing the total income of Rs. 94,39,940/- against the Nil income. The assessee contested the additions up to the Tribunal. The assessment was reopened under section 147 on 01.08.2008. The assessment was reopened after four year of the end of relevant assessment year. Therefore, the reopening is covered by first proviso of section 147 of the Act. We have noted that the assessing officer while reopening recorded that *“from the verification of the record it has been noticed that the assessee has not deducted capital receipt of Rs. 78.18 lacks on sale of Machinery and claimed excess depreciation and further noted that receipt of the insurance claim of Rs.64.68 lacks had not credited to profit and loss account”*. The assessing officer has not reopened the assessment on the basis of new or tangible material which came to his notice, rather formed his opinion on the basis of material available on record. From the reasons

recorded it obvious that reasons mentioned by assessing officer are is essentially the product of the 'perusal of the record'. Therefore, the assessing officer reopened the assessment on his change of opinion.

7. The Hon'ble Apex Court in CIT Vs Kalvinator of India Ltd (supra) while explaining the scope of section 147 has laid down the following ration of law;

“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”

8. The Hon’ble Bombay High Court in *Asian Paints Ltd Vs DCIT (supra)* held that the Assessing Officer cannot take recourse to the provision of section 147 for his own failure to apply his mind to the material which, according to him, is relevant and which was available on record. Nothing new had happened. No new material had come on record, no new information had been received; it was merely a fresh application of mind by the same Assessing Officer to the same set of facts and the reason that had been given was that the same material which was available on record while assessment order was made was inadvertently excluded from consideration. This amounted to opening of the assessment merely because there was change of opinion which was impermissible. Therefore, the reassessment was not justified. The coordinate bench of Tribunal in *Maharashtra Airport Development Co. Ltd Vs DCIT (supra)* held that when the assessee furnished various details regarding commencement of business activity relating to the paid up capitals, expenditure incurred,

services rendered, etc. while responding to the quarries. And it is also evident from the order that the assessee does not have any fresh or tangible material which works out as 'livewire' to the assessing officer to form an opinion or create reason to believe that there is concealment of income. It was also obvious from the written reasons mentioned by assessing officer that the basis of reopening is essentially the product of the 'perusal of the record'.

9. In view of the above factual and legal discussion, we find that the reasons recorded for reopening of the assessment by assessing officer is on the basis of material available on record and the re-assessment is based merely on change of opinion. The case law relied upon by Id. DR are not applicable on facts of the present case. In case of Rajesh Jhaveri (supra), the assessment was processed u/s. 143(1), similarly in case of Dr. Amin's Pathology the assessment was processed u/s. 143(1). However, in case of I.P. Patel (supra) the assessment was reopened by AO on the basis of information received from external agency i.e., from the office of Jt. Commissioner of Customs. Therefore, the case law relied upon by the Id. DR are entirely on different facts. Hence, the Ground No. 2 to 5 of the appeal is allowed.

10. Since we have allowed the legal issues raised by the assessee, therefore the discussion on other grounds of appeal raised by the assessee on merit become academic.

In the result, appeal filed by assessee is allowed.

Order pronounced in the open court on 18.07.2018.

**Sd/-
G.S. PANNU
ACCOUNTANT MEMBER**

**Sd/-
PAWAN SINGH
JUDICIAL MEMBER**

Mumbai, Date: 18.07.2018

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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

**BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai**