

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 10/VIZ/2019
(Asst. Year : 2006-07)**

The ACIT, Circle-2(1), vs. M/s. Lakshmi Constructions,
Guntur. D.No. 5-87-22, Sri Balaji
House, Lakshmipuram,
Guntur.

(Appellant) PAN No. AABFL 6560 B
(Respondent)

**C.O. No. 47/VIZ/2019
(Arising out of ITA No. 10/VIZ/2019)
(Asst. Year : 2006-07)**

M/s. Lakshmi Constructions, vs. The ACIT, Circle-2(1),
D.No. 5-87-22, Sri Balaji Guntur.
House, Lakshmipuram,
Guntur.

PAN No. AABFL 6560 B (Appellant) (Respondent)

Assessee by : Shri G.V.N. Hari – Advocate.
Department By : Smt. Suman Malik – Sr.DR
Date of hearing : 29/04/2019.
Date of pronouncement : 03/05/2019.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the Revenue and the Cross Objection by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-1, Guntur, dated 29/09/2018 for the Assessment Year 2006-07.

2. Facts of the case, in brief, are that the assessee firm engaged in execution of civil contract works in the name of M/s.Lakshmi Constructions, filed its return of income by admitting total income of Rs. 12,10,000/-. The return filed by the assessee was processed under section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as 'Act') on 14/02/2007 accepting the income returned. Subsequently, the case of the assessee was selected for scrutiny and assessment was completed under section 143(3) on 21/11/2008 determining the total at Rs. 12,67,554/-. Subsequently, the assessment was reopened for the reason that income chargeable to tax as an escapement assessment as interest on FDR, commission on sub-contracts and VAT tax refund were not considered as income while finalizing the scrutiny assessment under section 143(3). Therefore, a notice under section 148 was issued to the assessee and the case was reopened. The Assessing Officer has recorded the reasons for reopening as under:-

"On verification of the record for the A.Y. 2006-07, it was noticed that the as firm received amounts of Rs. 41,943/-, Rs. 2,79,980/- and Rs. 1,87,829/- totalling to Rs. 5,09,752/- on account of commission on sub-contracts, interest on FDR and VAT tax refund respectively. The assessment u/s 143(3) was completed by estimating the profit at 8% gross receipts clearing of interest on partners capital, remuneration of partners and depreciation. An amount of Rs. 5,09,752/- received by the assessee firm as

discussed above was not considered as income for assessing the income at Rs. 12,34,384/-."

Accordingly, the Assessing Officer has added an amount of Rs. 5,09,752/- and assessment was completed under section 143(3) r.w.s. 147 of the Act, dated 30/11/2012.

3. On appeal before the Id. CIT(A), the assessee has raised the following additional grounds:-

- "1. The assessment U/s 143(3) for the assessment year 2005-07 was completed on 27-11-2008. During the course of assessment proceedings, the appellant produced books of accounts, vouchers and all other information called for by the assessing officer, who after examination rejected the books and invoked the provisions of section 145(3) and estimated the net profit at 8%.*
- 2. However, the learned Assessing Officer initiated proceedings u/s 147 and the reasons, as mentioned in the assessment order, are that 'the income chargeable to tax has escaped assessment as interest on FDR, commission on sub-contract and VAT tax refund were not considered while finalizing the scrutiny assessment u/s143(3)'.*
- 3. Without prejudice to the merits of taxability of the above amounts, it is submitted that there is no fresh material, other than the details already furnished by the appellant before completion of the assessment u/s143(3), found by the learned Assessing Officer. There is no failure on the part of the appellant in furnishing all the relevant material before completion of the assessment u/s143 (3). It is a well settled proposition that without fresh material, proceedings u/s 147 cannot be initiated u/s147.*
- 4. It is prayed that the Honorable Commissioner of Income tax (Appeals) in the facts and circumstances of the case, be pleased to admit the following additional ground, in the interests of justice.*

"The learned Assessing Officer, in the facts and circumstances of the case, is not justified in initiating the proceedings u/s 147 and, therefore, the assessment consequent on such in valid notice is also invalid."

4. The Id. CIT(A) after calling the remand report from the Assessing Officer admitted the additional evidence and held that the notice issued by the Assessing Officer under section 148 beyond four years and the Assessing Officer has not alleged while recording the reasons that there is a failure on the part of the assessee to disclose all relevant facts necessary to complete the assessment fully and truly, therefore the notice is invalid. For the sake of convenience, the relevant portion of the order is extracted as under:-

"I have carefully considered the assessment order, statement of facts, grounds of appeal, additional ground of appeal and submissions of the appellant.

Before discussing and disposing the grounds of appeal raised as per Form 35, it is felt necessary to dispose the additional ground raised during the course of appellate proceedings.

The appellant raised an additional ground being a legal ground though raised for the first time during appellate proceedings the same has been admitted and a report has been called for from the AO. The ground raised, the comment of the AO and the counter comment of the appellant can be seen in this order as noted supra.

The assessment year considered by the AO is assessment year 2006-07 and scrutiny assessment u/s. 143(3) of the Act was completed on 21-11-2008. Subsequently notice u/s. 148 of the Act was issued on 07-11-2012 which means reassessment proceedings initiated beyond four years from the end of the assessment year. It is a fact that there is no new material brought on record or obtained by the AO from external source. The same record has been considered and reassessment has been made. In the original assessment the AO applied 8% on the gross turnover and estimated the income. The AO noted subcontract commission, interest on FDR and VAT tax refund credited to P&L a/c was not added to the estimated income

separately. For this reason the assessment was reopened. In the light of these facts the additional ground raised by the appellant has to be seen. To reopen and reassess the income of a case beyond 4 years and after regular scrutiny assessment, it is incumbent upon the AO to specify the failure on the part of the appellant in disclosing full and true material facts necessary for the assessment. In this case reasons recorded as mentioned in the assessment order does not indicate the failure of the appellant. It is also a fact that the amounts which were disallowed in the reassessment proceedings were reflected in P&L A/c and the same has been considered in the original assessment too. There is no new material which called for reassessment in this case. In the light of this the assessment order passed by the AO is invalid and the additions made are required o be deleted.

As per the assessment record the reasons recorded for reopening the assessment is as under:

"Reasons for issue of notice u/s 148 for Asst. Year 2006-07

"In this case, the assessment u. 14:3(3) was completed on 21-11-2008 on a total income of Rs. 12,67,554/- as against income admitted of Rs. 12,10,111. Subsequently, it is noticed that other income credited to the P&L account as detailed below is not taken as income of the assessee

<i>Interest on FDR</i>	<i>Rs. 2,79,980</i>
<i>Commission on sub-contract works</i>	<i>Rs. 41,943</i>
<i>VAT Tax refund</i>	<i>Rs. 1,87,829</i>

As the above sums totaling to Rs. 5,09,752/- have escaped assessment, I have reason to believe that income to the extent of Rs.5,09,752/- has escaped assessment and this is a fit case for issue of notice u/s 147 and bring the escaped income to tax with the prior approval of the Commissioner of Income tax.

Reasons for reopen:

The Assessee firm carrying civil contract works in the name and style of M/s. Lakshmi Constructions, filed its Return of Income for the AN, 2006-07 on 31-10-2010 declaring the total income of Rs. 12,10,000/-. The return of income filed was processed u/s. 143(1) on 14-2-2007. Subsequently the case was selected for scrutiny and the assessment was completed determining the income of the assessee at Rs. 12,67,554/- one estimation basis by invoking the provisions of Sec. 145(3) of the IT Act.

On verification of the record, it was noticed that the assessee received other income of Rs. 5,09,752/- by way of interest on FDR, Commission on subcontract and VAT Tax refund. This amount of Rs. 5,09,752/- was not added in the assessed income while finalizing the assessment proceedings. Hence, I have reason to believe that Income of Rs. 5,09,752/- chargeable to Tax has, escaped assessment. I believe this is a fit case for reopening the assessment for the A.Y. 2006-07 u/s.147 of the Income Tax Act, 1961."

It is seen from the reasons recorded as above there is no allegation of failure to disclose material facts fully and truly on the part of the appellant, in the reasons recorded as pointed out by the appellant. I have also gone through the submissions of the appellant and the case laws relied upon for the proposition that the AO is not empowered to reopen the case beyond four years on the basis of same material, without any other new/tangible material. It was also contended that the same set of material facts cannot be considered in piece meal manner.

Having regard to the facts of the case as discussed above, there appears merit in the arguments of the appellant. The reasons recorded do not allege about the failure of the appellant in disclosing the material facts fully and truly. This is a prerequisite to proceed further and to reassess income beyond four years once original assessment was completed under scrutiny. In view of this, the reassessment by the AO is incorrect.

The Hon'ble High court of Gujarat in the case of HariKishan Sunderlal Virmani (88 Taxmann.com 548) held that when there is no allegation of failure of the assessee in disclosing material facts fully and truly in the reasons recorded, the assessment is bad law. The relevant parts of the order are as under:

Head note:

".....there was no allegation of assessee's failure to disclose truly and fully material facts necessary for assessment".

5.3.....From the reasons recorded, it does not appear that verification of the material on record there is independent formation of opinion by the A.O. and that any income has escaped assessment due to any failure on the part of the assessee in not disclosing truly and correct facts/material necessary for assessment.....

5.4 At this stage it is required to be noted that even in the reasons recorded, there is no allegation that there was any failure on the part of the assessee in not disclosing truly and fully material facts necessary for assessment. Under the circumstances, the

assumption of the jurisdiction to reopen the assessment beyond the period of four years in exercise of powers under section 147 of the Act is bad in law and contrary to the provisions of section 147 of the Act. Under the circumstances, on the aforesaid ground alone, the impugned reassessment proceedings deserve to be quashed and set aside."

The Hon'ble High Court of Gujarat in the case of ALPS Technologies (P.) Ltd. (81 Taxmann.com 225) held that once the assessee disclose all the material facts and assessment has been completed then reopening the case on the same material facts is incorrect. The relevant part of the held portion is as under:

"In view of the facts and circumstances of the case when it is found that the assessee disclosed all true and correct facts necessary for the assessment and it cannot be said that the assessee did not disclose true and correct facts for the purpose of assessment, assumption of jurisdiction by the Assessing Officer to reopen the assessment beyond the period of four years is absolutely bad in law, illegal and contrary to the provisions of section 147 and, therefore, the impugned reassessment proceeding deserves to be quashed and set aside."

The Hon'ble High Court of Gujarat in the case Priyanka Gems (46 Taxmann.com 376) also held that without alleging the failure of the appellant in the reasons and also without having new material reopening the assessment beyond four years is invalid. The relevant parts of the order are as under:

"4. The objections against reopening of the assessment had been furnished on 1st January 2014 by the petitioner mainly on the ground that such reopening was beyond the period of four years from the end of the relevant assessment year; the issue was already examined during the scrutiny assessment; nothing comes out either from the reasons recorded or otherwise that the assessee had not fully and truly disclosed all material facts necessary for the purpose of assessment. It was further objected to on the ground that the very issue had been adjudicated twice in the earlier assessment years [A.V 2004-05 & 2005-06], where also, challenge made to the proceedings of re-assessment came to be upheld and such notices were quashed by this Court. The petitioner also, on the ground that such reopening was based on the audit objection, had made a request to drop the proceedings.....

11.....the reasons recorded by the Assessing Officer for

issuance of such notice shall need to be regarded at this stage. Reasons supplied to the petitioner clearly mentions that on verification of case record, it is found that the assessee had availed foreign currency loan from the certain banks under Post Shipment Credit/Packing Credit. Without further delving on the merits of this aspect, it could be thus seen that the Assessing Officer, while forming a belief that there was an escapement of income on account of failure on the part of the assessee to disclose truly and fully all material facts, has gathered the information from the record of the case. Thus, the material which has led him to form such a belief has come from the record itself, and therefore, the need would be to examine from the details furnished at the time of original assessment proceedings as to whether in fact there has been any failure on the part of the assessee disclose truly and fully all material facts as such reopening is beyond the period of four years.....

15. We notice that in the instant case also for AN 2006-07, the very issue has been raised, though concluded not only in the earlier years, but also, in the original assessment on due scrutiny. In absence of any new tangible material available with the Assessing Officer, on the basis of which he could form his belief that income chargeable to tax has escaped assessment, it is not open to the Assessing Officer to change his opinion by issuing the notice of re-assessment for the same being impermissible under the law."

Respectfully considering the above decisions having regard to the fact that the reasons recorded by the AG do not contain the allegation that the appellant failed in disclosing material facts fully and truly makes the assessment incorrect and requires deletion of additions made.

The appellant claimed that there is no new material which has been considered by the AO to reopen the case and on this count the appellant pleads that the assessment is bad in law. It is clear that no material from outside or no new material was considered by the AO in this case. In these identical facts, several courts held that assessment beyond four years is not valid. The Hon'ble Supreme Court of India in the case of Mewalal Dwarka Prasad (43 Taxman 40) held that once the primary facts are disclosed by the assessee, it cannot be held that full and true disclosure was not made and proceeding for reassessment is bad in law. The relevant part of the head note is as under to appreciate the issue.

".....The expression 'material facts' used in clause (a) refers

only to primary facts and the duty of the assessee is confined to disclosure of primary facts and he has not to indicate what factual or legal inferences should properly be drawn from the primary facts. In the facts appearing on the record, clause (a) of section 147 did not apply to the facts of the case as the alleged escapement of income for assessment had not resulted from failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for that year. The notice in the instant case did not indicate whether it was a case covered by clause (a) or clause (b). Clause (a) was not invocable, and reassessment under clause (b) was time barred. Since the proceedings before the High Court were under article 226 of the Constitution and not by way of reference under the Act, the jurisdiction of the Supreme Court was not advisory and confined to the questions referred for opinion. On the facts, ends of justice required intervention and the appeal of the assessee was to be allowed by holding that the notice under section 148 could not be sustained in law."

The Hon'ble High Court of Gujarat in the case of Jalil Abdulbhai Shaikh (91 taxmann.com 16) held that wherein return filed in response to reassessment notice, assessee declared undisclosed income found during search and Assessing Officer passed assessment order accepting same, another reassessment notice issued beyond a period of four years was unjustified in absence of any new information or material.

In view of the above decisions as there is no new material considered by the AD for reassessment, the reassessment is invalid. Hence, the ground raised by the appellant is allowed.

Once the additional ground is allowed, it is felt that disposal of other grounds of appeal only academical. Hence no separate adjudication was made on the grounds of appeal raised."

- 5.** On being aggrieved, Revenue carried the matter in appeal before this Tribunal.
- 6.** The Id. Departmental Representative has relied on the grounds of appeal, whereas Id. counsel for the assessee has strongly supported the order passed by the Id. CIT(A).

7. We have heard both the sides, perused the material available on record and orders of the authorities below.

8. In this case assessment is completed under section 143(3) on 21/11/2008 by determining total income of Rs. 12,67,554/-. Subsequently, the Assessing Officer has issued a notice under section 148 on the ground that there is an escapement of income in respect of the assessee firm received amounts of Rs. 41,943/- on account of commission on sub-contracts, Rs. 2,79,980/- on account of interest on FDR and Rs. 1,87,829/- on account of VAT tax returns and the assessment is completed u/s. 143(3) r.w.s. 147 on 30/11/2012. During the course of assessment proceedings, the assessee has submitted that all the details have been filed before the Assessing Officer, who by considering the same completed the assessment under section 143(3) and estimated the income of the assessee at 8%, therefore no addition required to be added on account of reopening of the assessment, however, the Assessing Officer not agreed with the submission of the assessee and assessment is completed under section 143(3) r.w.s. 147 by adding an amount of Rs. 5,09,752/-. On appeal, by raising additional grounds assessee has submitted that reopening is invalid. The Id. CIT(A) after calling the remand report and also by considering the reasons for reopening, he has noted that "there

is no allegation of failure to disclose material facts fully and truly on the part of the appellant and therefore the Assessing Officer is not empowered to reopen the case beyond four years on the basis of same material, without any other new/tangible material." By relying certain case laws, he held that the reopening is invalid. It is a fact that in this case the Assessing Officer reopened the assessment beyond four years. The proviso to section 147 provides as under:-

"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"

9. From the above, it is very clear that in a case where assessment is completed under section 143(3) of the Act, the Assessing Officer has to reopen the assessment as per provision to section 147 and he has to record a reason that there is a failure on the part of the assessee to disclose fully and truly all material facts and necessary to complete the assessment for that assessment year. In the present case, no such finding has been given by the Assessing Officer, therefore the Id. CIT(A) rightly

held that the reopening is invalid. Our view finds support from the judgments of the Hon'ble Gujarat High Court in the case of *Harikishan Sunderlal Virmani* (88 Taxmann.com 548) and in the case of *Priyank Gems* (46 Taxmann.com 376). Therefore, we find no infirmity in the order passed by the Id. CIT(A). Thus, this appeal filed by the Revenue is dismissed.

10. The cross objection filed by the assessee is barred by limitation by 23 days. No application for condonation is filed. Therefore, the cross objection filed by the assessee is dismissed in *limini*.

11. In the result, appeal filed by the Revenue and the C.O. filed by the assessee are dismissed.

Order Pronounced in open Court on this 03rd day of May, 2019.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated: 03rd May, 2019.

vr/-

Copy to:

1. *The Assessee – M/s. Lakshmi Constructions, D.No. 5-87-22, Sri Balaji House, Lakshmipuram, Guntur.*
2. *The Revenue – The ACIT, Circle-2(1), Guntur.*
3. *The Pr.CIT, Guntur.*
4. *The CIT(A)-1, Guntur.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.