IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

MS. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 3186/Bang/2018
Assessment Year : 2008-09

M/s. Tata Power Solar Systems Limited, Unit 1, 78 Electronic City, Phase 1, Hosur Road, Bangalore – 560 100. **PAN: AAACT4660J**	Vs.	The Deputy Commissioner of Income Tax, Circle – 7 (1) (1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Sumeet Khurrana, CA & Shri Gurwinder Singh, CA
Revenue by	:	Shri N. Sukumar, Addl. CIT (DR)

Date of hearing	:	17.06.2019
Date of Pronouncement	:	28.06.2019

O R D E R

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the assessee and the same is directed against the order of ld. CIT(A)-7, Bangalore dated 20.09.2018 for Assessment Year 2008-09.

2. The grounds raised by the assessee are as under.

"*The grounds mentioned herein below are without prejudice to the each other.*

1. That the order passed by the learned Commissioner of Income-tax (Appeals) ["learned CIT(A)"] under section 250 of the Income-tax Act, 1961 ("Act") is bad in law and is liable to be quashed.

2. That the learned CIT(A) erred in facts and law in confirming the action of the learned Assessing Officer ("learned AO") in assuming the jurisdiction under section 147 of the Act.

3. That the learned CIT(A) erred in facts and law in confirming the action of the learned AO in not allowing the deduction claimed in respect of provision for EDM and advances written off.

4. That the learned CIT(A) erred in treating the written submissions

made before the AO during the course of appellate proceedings as 'additional evidence'.

That the Appellant craves leave to add to and / or to alter, amend, rescind, modify, the grounds herein above or produce further documents before or at the time of hearing of this Appeal."

3. It was submitted by ld. AR of assessee that ground no. 1 is general. Regarding ground no. 2 i.e. regarding validity of assessment proceedings, it was submitted that the issue was decided by CIT(A) as per para no. 5.3 of his order in which it is held by him that as per the judgment of Hon'ble Delhi High Court rendered in the case of Mega Corporation Ltd., it was held that in the light of section 124(3)(a) of the IT Act, an assessee is not entitled to question the jurisdiction of an Assessing Officer after expiry of one month from he date on which he is served a notice u/s. 142(1) or 143(2) or after the completion of assessment, whichever is earlier. For ready reference, we reproduce para 5.3 from the order of CIT(A) which reads as under.

"*5.3 The appellant has raised the grounds questioning the validity of the re-opening of the assessment on the ground that the AO did not have jurisdiction u/s 147 of the Act. As regards the contention about jurisdiction of the AO, the Hon'ble Delhi High Court vide its order dated 23-02-2017 in the case of Mega Corporation Ltd has held that in the light of section 124(3)(a) of the IT Act an assessee is not entitled to question the jurisdiction of an Assessing Officer after expiry of one month from the date on which he is served a notice u/s 142(1) or 143(2) or after the completion of assessment, whichever is earlier. The appellant received the notice u/s 148 but chose not to comply with the same. Even, there was no request for reasons recorded for reopening nor any objection was filed before the AO against the proceedings. Therefore, the contention of the appellant is found to be not sustainable.*"

4. Reliance was placed by him on the judgment of Hon'ble Apex Court rendered in the case of Andhra Bank Ltd. Vs. CIT as reported in [1997] 92 Taxman 534 (SC)., copy available on pages 74 to 76 of paper book. Reliance was also placed on Tribunal order rendered in the case of GMR Holdings (P.) Ltd. Vs. DCIT as reported in [2012] 18 taxmann.com 153 (Bang.), copy available on pages 42 to 55 of paper book and on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. GMR Holdings (P.) Ltd. as reported in [2018] 99 taxmann.com 343 (Karnataka), copy available on pages 56 to 59

of paper book. The ld. DR of revenue supported the orders of authorities below.

5. We have considered the rival submissions. We find that on page no. 1 of the assessment order passed by the AO on 31.01.2014 u/s. 143(3) r.w.s. 144 r.w.s. 147 of the IT Act, it is noted by the AO that the assessment was reopened vide issue of notice u/s. 148 dated 28.02.2013 which was served on the assessee on 04.03.2013. The reasons recorded by the AO are also reproduced by the AO on this page of the assessment order and as per the same, it is stated that as per the return of income filed by the assessee on 13.10.2008 declaring total loss of Rs. 61,82,65,877/-, assessment order was passed u/s. 143(3) on 25.11.2011 determining income at Rs. 23,98,23,450/- and subsequently, it was seen that assessee has debited an amount of Rs. 3,50,76,954/- towards "provisions for EMD deposit and advances". The AO has noted that any provision made in respect of any expenditure to be crystalised or to be incurred in future is not admissible deduction as per the IT Act, 1961 and therefore, this claim of assessee regarding provision is required to be disallowed and hence, the income amounting to Rs. 3,50,76,954/- has escaped assessment. In para no. 6 of the assessment order, it is noted by AO that assessee did not file return of income in response to notice u/s. 148 and the assessee has neither raised any objection to the notice u/s. 148 and assessee has not sought reasons for issuing notice u/s. 148. As per the judgment of Hon'ble Apex Court rendered in the case of GKN Driveshafts (India) Ltd. vs. ITO, 259 ITR 19, it was held that when a notice under Section 148 of the Income tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices, then the assessing officer is bound to furnish reasons within a reasonable time and on receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the present case, the assessee has neither filed return of income in compliance to the notice issued by the AO u/s. 148 nor asked for the reasons recorded by the AO for issuance of notice and has not raised before the AO any objection regarding the validity of reopening. In para 5.6.1 of his order, the ld. CIT(A) has noted about the

judgment of Hon'ble Karnataka High Court rendered in the case of Rinku Chakraborthy as reported in 242 CTR 425, in which it is held that whether income liable to tax has escaped assessment in the original assessment due to oversight and inadvertence or a mistake committed by the ITO, the ITO has the jurisdiction to reopen the original assessment and it is not necessary that for such reopening of such assessment, the information is to be derived from external source of any kind or disclosure of new and important matters subsequent to the original assessment. It was held that even if the information is obtained from the record of the original assessment after a proper investigation from the material on record or the facts disclosed thereby or from any enquiry or research into facts or law, reassessment is permissible and has duly considered the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Kelvinator of India Ltd. as reported in [2010] 228 CTR (SC) 488. In view of this fact that the assessee has not followed the prescribed procedure as per the judgment of Hon'ble Apex Court rendered in the case of GKN Driveshafts (India) Ltd. vs. ITO (supra) and respectfully following the judgment of Hon'ble Karnataka High Court rendered in the case of Rinku Chakraborthy (supra), we find no infirmity in the order of CIT(A) on this aspect.

6. Moreover, we examine the applicability of the judgment of Hon'ble Apex Court rendered in the case of Andhra Bank Ltd. Vs. CIT (supra) because reliance was placed by ld. AR of assessee on this judgment. In our considered opinion, this judgment is not applicable in the present case because the facts are different. In that case, the assessee has been accounting in respect of interest accrued / paid on purchases and sale upto the date of purchase or sale of government securities and subsequently, from Assessment Year 1959-60, the assessee changed the method of accounting, and the bank ignored the accrued amounts of interest paid or received relating to the broken periods. The revenue also accepted the said change upto 1962-63 but during the Assessment Year 1963-64, the AO objected to the change and also took the view that the excess amount realised from the transactions in securities constituted a revenue receipt and not a capital receipt as assessed in the earlier assessment order and on this basis, he reopened the assessment for Assessment Years 1960-61 to 1962-63 under

Clause (b) of Section 147 of the Income-tax Act, 1961. The Tribunal held in that case that this is illegal but Hon'ble High Court has accepted the view taken by revenue and under these facts, it was held by Hon'ble Apex Court that reopening in this case is based on change of opinion and therefore, not valid. In the present case, the facts are different. This is not the fact of the present case that in any earlier year, the stand of the assessee was accepted by the AO and later on, the AO is trying to take a different view. Therefore, in our considered opinion, this judgment of Hon'ble Apex Court is not applicable in the present case.

7. Now we examine the applicability of the Tribunal order rendered in the case of GMR Holdings (P.) Ltd. Vs. DCIT (supra). In this case, this was the stand of the revenue that profit on sale of investments (total income) which is inclusive of dividend income; interest income and other income, these income are to be classified under "Income from other sources", they have to be treated separately for tax purpose, it is also observed that the assessee-company has not set-off the business loss against the Capital Gains which is contrary to the provisions of the Income Tax Act, 1961. On second appeal before the Tribunal, the assessee contended that no income has escaped assessment because the business loss was set off against the long term capital gains as per the provisions contained in section 71(2) and it was pointed out that while framing the original assessment, the AO himself treated the interest income as well as the dividend income as business income, and therefore, there was a consistent view for those two income for the year under consideration as well as in the preceding and succeeding years, as such the notice issued u/s. 148 of the Act was only on the basis of change of opinion. In the present case, the facts are different and therefore, this Tribunal order is also not applicable in the present case.

8. Now we examine the applicability of the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. GMR Holdings (P.) Ltd. (supra). In this case, as per this judgment, Hon'ble Karnataka High Court has upheld the Tribunal order in which it was held that reopening u/s. 147/148 of IT Act could not be undertaken on a mere change of opinion or audit objection raised by

the internal auditors of the Department. In our considered opinion, this judgment of Hon'ble Karnataka High Court is also not applicable in the facts of present case. The ld. AR of assessee has also submitted a copy of letter dated 18.01.2013 written by the AO to the Director of Audit (ITRA) in which it is stated by the AO that the audit objection is not acceptable and it is requested that the same may be withdrawn and treated as settled under intimation to the AO. It was submitted that since the AO himself has stated in this letter that audit objection is not acceptable on the basis of some objection, reopening is not valid. In our considered opinion, this letter of the AO to the Director of Audit shows that the AO has not mechanically accepted the objection of the audited party and he has applied his mind and as per this letter, he was of the opinion that there is no escapement of income on this account. But this does not mean that any opinion framed at any point of time and intimated to the audit party is final and is binding on the AO. But notice u/s. 148 was issued by the AO on 28.02.2013 which is after more than one month from the date of this letter and in his period, the AO can come to a different conclusion after understanding the facts and therefore, because of this letter, it cannot be said that the reopening is not valid. Hence, we find no merit in this objection of the assessee and ground no. 2 of assessee's appeal regarding validity of reassessment is rejected.

9. Regarding ground nos. 3 and 4, it was submitted by ld. AR of assessee that in para no. 6.1 of his order, it is noted by CIT(A) that the assessee has filed copies of computation of income for Assessment Years 2004-05 to 2007-08 in support of his contention. But he held that these documents being additional evidence are not admissible under Rule 46A. He submitted that in the interest of justice, the matter should be restored back to the file of CIT(A) for fresh decision after admitting these documents. The ld. DR of revenue supported the order of CIT(A).

10. We have considered the rival submissions. First of all, we reproduce para 6.1 from the order of CIT(A). The same is as under.

> "*6.1 Thus, the appellant claims that the amount of Rs 3,50,76,954 has not been debited in the P&L account but claimed as an allowable deduction in the computation of income. Only the provision for EMD for current year amounting Rs 38,06,969 has been debited in the P&L account. The amount of Rs 3,88,83,923 is the provisions for EMD and duty drawback made in different earlier years but offered to tax*

subsequently being credited to profit & loss account under the head other income. The appellant has claimed this amount as deduction in the current year as actual realization had been less as compared to the claim made. Thus it is claimed that the net amount of Rs 3,50,76,954 claimed as an allowable deduction comprises of provisions for EMD and advances reversed/ written back and write off of provision for EMD and advances. However, the claim of the appellant that these amounts were provisions created earlier and offered to tax before written back/reversed in the current year has not been substantiated with details of amounts claimed, years of claim and reversal etc. with supporting evidence. The appellant has filed copies of computation of income for AYs 2004-05 to 2007-08 in support of its claim. These documents being additional evidence are not admissible under Rule 46A as the appellant has deliberately chosen to not comply with the notice under section 148 and did not file any details or submission before the AO. Admission of the additional evidence cannot be claimed as a matter of right and it is the duty of the assessee to explain the circumstances which prevented it from submitting such documents before the lower authorities. Since the assessee had defied compliance to assessment proceedings and thus has no sufficient cause to furnish these documents before the AO, the same cannot be admitted at this stage. The ITAT, Bangalore in case of Anupam Kothari, ITA No 837 (Bang) 2012 held that for admission of additional evidence, it is required for the assessee to show that authorities had decided its grounds without giving sufficient opportunity to adduce evidence. The ITAT Chandigarh vide order dated 23-05-2013 in the case of Rishi Sagar, 36 taxmann.com 508 has held that where assessee had failed to produce documents during assessment and failed to establish reasonable cause therefor, additional evidence could not be accepted in appeal. Considering above, the additional evidence filed by the appellant cannot be accepted."

11. In our considered opinion, the claim of the assessee is this that this amount of EMD has become bad in the present year and therefore, this write off should be allowed in the present year. In our considered opinion, writing of bad debts is allowable on mere write off but in respect of write off of advances / deposits, the assessee has to establish that the same has become bad and it can be allowed int hat year only in which it has become bad. In the present case, as per para 7.3 of the assessment order, it is stated by the AO that the assessee does not desire to be heard on the issue and the assessee has nothing to say and no evidence to furnish in connection with the amount of Rs. 3,50,76,954/- debited to P&L account on account of provision for EMD deposits and advances. Hence it is seen that as per the assessment order, this is the case of the AO that the assessee has not furnished any detail. Regarding granting of opportunity to the assessee by the AO, it is seen that

notice u/s. 142(1) was issued by the AO on 17.01.2014, date of hearing was fixed on 24.01.2014. It is noted by the AO that none appeared on that date and the assessment order was passed on 31.01.2014 without granting any further opportunity to the assessee and when some details were furnished before the CIT(A), it is noted by him that these are additional evidences and the same is not admissible under Rule 46A as the assessee has deliberately chosen to not comply with the notice u/s. 148 and did not file any details or submission before the AO. Under these facts as discussed above and in the interest of justice, we feel it proper to restore back this matter to the file of CIT(A) for fresh decision after admitting the evidences which the assessee may like to bring on record. We order accordingly. We set aside the order of CIT(A) on this issue on merit and restore the matter back to his file for fresh decision after allowing sufficient opportunity to both sides and if the AO or assessee brings any additional evidence on record, the same should be admitted and examined and thereafter, necessary order should be passed as per law by CIT(A). In view of this decision, we do not make any comment on the merit of the issue. These two grounds are allowed for statistical purposes.

12. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(BEENA PILLAI)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 28th June, 2019.
/MS/

Copy to:

1. Appellant	4. CIT(A)
2. Respondent	5. DR, ITAT, Bangalore
3. CIT	6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.