

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 2541/Mum/2017

(निर्धारण वर्ष / Assessment Year 2009-10)

Auro Gold Jewellery P. Ltd. Cama Industrial Estate, Unit No.2, Sun Mills Compound, Lower Parel, Mumbai-400 013	Vs.	The Dy. Commissioner of Income Tax, Central Circle- 5(2), Aayakar Bhavan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AACCA3860H		

अपीलार्थी की ओर से / Appellant by	:	Shri Reepal Traishawalo, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Maurya Pratay, DR

सुनवाई की तारीख / Date of hearing:	03-06-2019
घोषणा की तारीख / Date of pronouncement :	03-06-2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the assessee is arising out of the order of Commissioner of Income Tax (Appeals)-53, Mumbai [in short CIT(A)], in appeal No. CIT(A)-53/DCCC-5(2)/IT-141/15-16 vide dated 31.12.2016. The Assessment was framed by the Dy. Commissioner of Income Tax, Central Circle 5(2) (in short 'DCIT/ ITO/ AO') for the A.Y. 2009-10 vide



dated 02.02.2016 under section 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of assessee is against the order of the AO reopening the assessment under section 147 r.w.s 148 of the Act and confirmed by CIT(A) without appreciating that the reopening was carried out beyond four years from the end of the assessment year and original assessment year completed under section 143(3) of the Act and all the material facts for computing correct income were fully and truly disclosed by the assessee. For this assessee has raised the following ground No. 1: -

“1. The learned Commissioner of Income tax (A) erred in upholding the reopening of the assessment without appreciating the fact that the reopening of assessment was carried out after expiry of period of 4 years from the end of the assessment and year and all the material facts for computing the correct income had been fully and truly duly disclosed and hence, the reopening of the assessment is bad in law and liable to be quashed.”

3. Briefly stated facts are that the assessee company is engaged in the business of manufacturing and trading of gold, jewellery, bullion and diamonds. A search and seizure action was carried out on the business and residential premises of the assessee under section 132 of the Act by the Department on 25.09.2008, whereby various documents as well as hard disks of the computer were found and seized. The assessee filed its return of income for the relevant AY 2009-10 on 29.09.2010 along with audited annual report, tax audited report in form No. 3CA and 3CD and



statutory audit report under the companies Act 1956. Original assessment was completed by the AO under section 143(3) read with section 153A of the Act by making various additions to the return income of the assessee. Subsequently, the assessment was reopened by issuing notice under section 148 of the Act dated 12.02.2015. In response to notice under section 148 of the Act, the assessee filed a letter to the AO objecting to the reopening of assessment vide letter dated 07.12.2015. The AO also supplied copy of reasons recorded vide letter dated 31.08.2015 and the reasons recorded read as under: -

“In the instant case, a search action under section 132 of the income tax act, 1961 was conducted on 25/09/2008 and consequently assessments were completed under section 143(3) for AY 09-10 on 31.12.2010.

It has been observed that the assessee operates Margin Trading Facility Account in Derivative Segment. Realized Margin Trading Facility Account is credited to profit and loss account at regular basis. However in respect of Unrealized Margin Trading Facility Account the accounting policy employed has been found to be inconsistent. The assessee used to carry the Unrealized Margin Trading Facility Account to the balance sheet till AY 2006-07 and it was not credited to P&L a/c. During year 2007-08 the accounting policy was changed and Unrealized Margin Trading Facility Account was credited to



P&L a/c instead of taking it to the balance sheet. During AY 2009-10 again, the accounting policy in respect of Unrealized Margin Trading Facility Account has been changed and it was credited to the profit and loss account and due to the change in accounting policy the profit for the year has been reduced by an amount of Rs 5,33,79,948/- as stated in the schedule K to the accounts for the year 2008-09. However, as seen from the clause 11(b) of Tax Audit report the tax auditor has stated that there was no change in the method of accounting employed vis a vis the method employed in the immediately preceding previous year. Thus, the statement of the tax auditor is not in conformity with the accounting policy as stated in schedule K to the annual account. Since, the assessee does not follow any accounting policy consistently, the amount of Rs 5,33,79,948/- should be added back.

Omission to do has resulted the under assessment of income of Rs. Rs 5,33,79,948/-. During the proceedings, when the assessee was enquired about the same, the assessee submitted that "during the year company has changed accounting policy in respect to



unrealized Margin Trading Facility by transferring Margin Trading account to Profit and loss account at closing rate. Earlier, the unrealized profit/loss at the yearend was not recognized since the facility was valued at contract rate. The change in policy In case of this item due to oversight we have not mentioned in clause 11(b) of 3CO issued by us": During the course of the proceedings, the failure on the part of the assessee has been established as the assessee has not fully and truly disclosed all the material facts necessary for his assessment which has led to escapement of his income for AY 2009-10. The assessee has himself admitted non disclosure of material facts in the audit report fully and truly.

On the basis of the aforesaid tangible material available with me now, I have reason to believe that income of Rs 5,33,79,948/- has escaped the assessment for AY 2009-10 within the meaning of section 147 of the IT act. The notice u/s 148 r.w.s 147 is, therefore being issued to the assessee to reassess such income and also any other income chargeable to tax which has escaped the assessment, which comes to my



office subsequently in the course of proceedings for reassessment for AY 2009-10.”

4. The AO framed the reassessment under section 143(3) read with section 147 of the Act and made addition on account of unrealized margin trading profit on account of change in accounting policy and assessing the income amounting to Rs. 5,33,79,948/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) confirmed the action of the AO reopening of assessment by observing in Para 4.3.1 as under: -

“4.3.1 I have considered the submissions of the appellant and perused the materials available on record. The issue for adjudication is whether the A.O. was justified in reopening the assessment u/s.147 of the Act beyond four years of the end of the relevant A.Y. and whether, while doing so, he had complied with the terms of the first proviso to section 147. It is a matter of record that the assessment of the appellant was completed u/s.143(3) of the Act on 31.12.2010. Thereafter, on scrutiny of the record, it was noticed that the appellant had entered into forward exchange contracts purportedly to cover its exposure in foreign currency. It was also noticed that the appellant had changed the accounting policy in respect of unrealized margin trading facility account in derivative segment during the relevant period



and due to the change in the accounting policy, the profit for the year had been reduced by an amount of Rs.5,33,79,948/- as stated in the Schedule 'K' to the accounts for the F.Y.2008-09. It was also noticed that the appellant had not been following a consistent policy in regard to the unrealized margin trading facility account. Till A.Y.200607. The appellant used to carry unrealized margin trading facility account to the balance sheet rather than the P & L Account. During A.Y.2007-08, the accounting policy was changed by the appellant and the unrealized margin trading facility account was credited to the P & L Account and not taken to the balance sheet. However, while computing business profit, the same was reduced from the profit as per P & L Account. During AY 2009-10 again, the accounting policy in respect of unrealized margin trading facility account was changed and the loss of Rs.5,33,79,948/- on open contracts in foreign currency was not only charged to the P & L Account but also claimed as deduction which resulted in reducing the business profit for the relevant period. It was also noticed that the tax auditor in clause 11(b) of the tax audit report (Form 3CD) had stated that there was no change in the method of accounting employed vis-a-vis the method employed in the



immediately preceding previous year. This clearly shows that the reopening of assessment was based not on subjective opinion or suspicion of the AO but on discovery of the fresh material on scrutiny of the case records of the appellant. The belief entertained by the A.O. was that of an honest and reasonable person based upon reasonable grounds. It is well accepted that fresh or tangible material for the purpose of re-assessment may not be alien to the record.”

5. Aggrieved, now assessee is in appeal against confirmation for reopening of assessment. Before us, the learned Counsel for the assessee argued that the original assessment was completed under section 143(3) of the Act vide order dated 31.12.2010. Notice under section 148 of the Act was issued vide dated 12.02.2015. The reopening is beyond four years. It was argued by the learned Counsel that the assessee's case falls under the proviso to section 147 of the Act. For this, the learned Counsel for the assessee argued that the entire facts relating to accounting policy for unrealized margin trading profit, which is patently correct because for the assessment year 2009-10 till date, the assessee has consistently followed the same policy and accounting practice. Hence, there is no change in policy till AY 2008-09 as alleged by AO in the reasons recorded. It was stated that the change in accounting policy was only once, which is from AY 2009-10 and same continued to be followed thereafter. The learned Counsel for the assessee explained before us that for AY 2006-07, assessee's accounting policy was not to



account gain/loss on the profit arising out of purchase and sale on the date of Balance sheet.

6. On the other hand, the learned Sr. DR relied on the re-assessment order and the order of CIT(A) and argued that reopening is on reasons recorded after formation of reasonable belief by the AO.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted from the facts that for FY 2006-07 the assessee's accounting policy was not to account gain/ loss on the open contract of purchase and sales on the date of balance sheet. The assessee changed the system of accounting of gain in A.Y.2007-08 and accordingly, accounted gain in the book of account. However while computing business profits, the same was reduced from P& L account. Therefore, for the purpose of computing business profit, there is no change as compared to A.Y.2006-07. To prove this the assessee produced the return of income for AY 2007-08 before the AO. The assessee followed this policy in A.Y.2008-09 as in A.Y.2006-07. Hence for A.Y. 2006-07, 2007-08, and 2008-09 assessee consistently followed the same policy for computing business profits. There were two views prevailing during the period 01.04.2005 to 31.03.2008, for the purpose of computing business profit. During F.Y.2008-09, the assessee under impression that department is of the view that the open contract should be valued as on the date of balance sheet and gain/loss should be accounted in P&L Account. Hence, in this A.Y.2009-10 the assessee changed the policy and accounted gain/loss in the Profit and loss account. Therefore the assessee has disclosed all the material facts for the assessment fully and truly.



8. The learned Counsel for the assessee also drew our attention to balance sheet and audited accounts including audit report and notes on account particularly note No. 9C which read as under: -

“C. During the year the company has changed its accounting policy in respect of unrealized Margin Trading facility by transferring Margin Trading account to Profit and Loss account at closing rate earlier, the unrealized profit / loss at the yearend was not recognized since the said facility was valued at contracted rate. As a result of the change in policy, profits for the current year are lower by Rs. 5,33,79,9485/-”

9. We are of the view that there is no failure on the part of the assessee to disclose any change in its accounting policy in respect of unrealized margin trading profit by transferring margin profit account to profit and loss account at closing rates. According to us, once there is no failure on the part of the assessee to disclose the material fact for completion of its assessment for the relevant assessment year, there cannot be any reopening of the assessment. For this the learned counsel for the assessee relied on the decision of Hon'ble Bombay High Court in the case of Arthur Anderson & Co. vs. ACIT [2010] 324 ITR 240 (Bombay) and stated that disclosure in balance sheet is also amounts to disclosure. We noted that the assessee has made disclosure in the notes 2 accounts from part of the balance sheet and profit and loss account and therefore, it cannot be said that the assessee had not fully and truly disclosed all material facts necessary for the assessment. Merely, the assessee has not mentioned this fact in form No. 3CD due to oversight



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does not amount to non-disclosure of material facts when the same has been duly disclosed in the notes 2 accounts, which form part and partial of the balance sheet and profit and loss account and has to be read along with the same. In view of the above facts, we are of the view that the reopening on the same set of facts without any tangible material came to the notice of the AO after assessment, reopening is bad in law. We quash the reopening and allow the appeal of assessee on this issue.

10. Since, we have quashed the reassessment, the assessee has raised the other issues also on jurisdiction as well as on merits, we refrain ourselves from adjudicating the same.

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

Order pronounced in the open court on 03.06.2019.

Sd/-

(एन. के. प्रधान/ NK PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 03.06.2019.

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai