IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 278/Asr/2018
Assessment Year: 2010-11

Ess Kay Bhatta Co., Village Dhudike, Moga.	vs.	Income Tax Officer, Ward-I, Moga
[PAN: AABFE 8945P] **(Appellant)**		**(Respondent)**

Appellant by : S/Sh. Arun Gupta & Bhasin Aggarwal (C.As.)
Respondent by: Sh. Charan Dass (Sr. D.R.)

Date of Hearing: 01.04.2019
Date of Pronouncement: 28.06.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the Order by the Commissioner of Income Tax (Appeals)-3, Ludhiana ('CIT(A)' for short) dated 23.3.2018, dismissing the assessee's appeal contesting its' assessment u/s. 143(3) r/w s. 147 of the Income Tax Act, 1961 ('the Act' hereinafter) vide order dated 01.12.2016 for the Assessment Year (AY) 2010-11.

2. The first challenge to the impugned order is *qua* the validity of the notice u/s. 148 of the Act which, raised per Grounds 2 & 3 of the appeal, was argued first in-as-much as an acceptance of the same may render as of no consequence the other Grounds impugning the assessment under appeal. The same is accordingly taken up first.

3. The facts, in-so-far as are relevant, are that the assessee-firm, running a brick- kiln, was assessed in the first instance u/s. 143(3) of the Act vide order dated 02.11.2012, making an addition for Rs.1,20,000/- to the returned income (on 16/9/2010) of Rs.1,81,850, assessing the income at Rs.3,01,850/- (PB pages 21-22). Notice u/s. 148(1) was subsequently issued on 10.12.2015 on the ground that the coal freight account for the year revealed freight payments, aggregating to Rs.2,36,755/-, made in contravention of sec. 40A(3), which had been omitted to be disallowed while framing the original assessment u/s. 143(3). The assessee failing to prove that the cash payments to the truck drivers had in fact been made in sums of Rs.19,000/- each over several days, as claimed, the Assessing Officer (AO) effected the disallowance thereof. The assessee challenged the same on several grounds, including the validity of the notice u/s. 148(1) dated 10.12.2015 and, thus, of the reassessment proceedings, on the ground that the said notice, issued after four years from the end of the relevant assessment year, could not have been in law issued as there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for the computation of his income for the relevant year. There was in fact no allegation by the AO to that effect (refer Grounds 2 & 3 of the Appeal). The ld. CIT(A), after relying on a number of decisions, held as under:

> "4.6 The above discussion makes it very clear that for valid reopening of assessment, which is covered with (by) *proviso* to sec.147, (the) A.O. has to specifically mention (in) the reasons to believe that the income has been escaped. In the instant case, reasons recorded as mentioned in para No.2.2 above, I do not find any infirmity in the reopening (of) proceedings. Accordingly, these grounds of appeal are dismissed."

Aggrieved, the assessee is in second appeal.

4. I have heard the parties, and perused the material on record.

Without doubt, there has been an escapement of income chargeable to tax from assessment, i.e., *prima-facie*, inasmuch as income has been under-assessed on

account of non-disallowance u/s. 40A(3) (refer *Explanation 2(c)* to sec.147), validating the AO's reason to believe *qua* the same as well as the recording thereof u/s. 148(2). That, however, is not the only condition to be positively satisfied for the issue of a valid notice u/s. 148 (1). Where being issued beyond a period of four years from the end of the relevant assessment year, in a case where the assessment for the relevant year had earlier been made u/s. 143(3), as in the instant case, the said notice can be issued only where there is, *inter alia*, a failure on the part of the assessee to disclose fully and truly all material facts necessary for the computation of his income for the relevant year (refer first *proviso* to s. 147).

Now, to begin with, there is no allegation in its' respect either in the reasons recorded or even in the ensuing assessment order. In fact, even where made, it would not hold as the 'statement of coal freight account' relied upon by the AO in forming his reason to believe an escapement of income from assessment on account of non-disallowance of freight expenditure ostensibly inadmissible u/s. 40A(3), stands furnished during the course of the original assessment proceedings. That is, the very same ledger account, on the basis of which the AO discovers the omission to make the disallowance u/s. 40A(3) and, thus, an escapement of income in the instant case, is that already furnished by the assessee during the original assessment proceedings, and toward which the ld. counsel for the assessee, Sh. Gupta, would during hearing draw the attention of the Bench to para-1 of the impugned assessment order, noting the same. *How could, then, one wonders, it be said or construed that there has been a failure on the part of the assessee to disclose fully and truly all material facts necessary for the computation of his income, which is a condition precedent for a valid issue of notice u/s. 148(1), i.e., in terms of the first proviso to section 147*? It is trite law that the obligation on the assessee extends to furnishing the relevant, primary facts, and the inference to be drawn therefrom, viz. as to admissibility or otherwise of a specific claim or

allowance, is to be by the Revenue authorities (refer, inter alia, *CIT v. Burlop Dealers Ltd*. [1971] 79 ITR 609 (SC). The impugned order completely fails to address this specific charge by the assessee.

Further still, it could also be argued that the relevant account having been furnished on being called for during the original proceedings, the same can only be regarded as having been examined thereat by the assessing authority, who though chose not to make any disallowance u/s. 40A(3). Reference to the said account in the instant proceedings, thus, amounts to a review, a change of opinion, impermissible in law. The argument, valid in principle, would however require the assessee to show that it was show caused *qua* the impugned disallowance (u/s. 40A(3)), or otherwise queried in its respect, in the original proceedings. And which has not been at any stage.

The Revenue has thus not been able to show the assessee's failure to disclose the relevant facts, only which would qualify its' action for reopening as valid in law, with, on the contrary, the assessee exhibiting otherwise. Though, strictly speaking, the ld. CIT(A) failing to address this specific issue raised before her per Gds. 2 & 3, the matter should travel back to her file for adjudication, it is not considered either necessary or advisable in the facts and circumstances of the case to do so. The issue raised is purely legal, with all the facts necessary for its adjudication being on record and, in fact, not in dispute.

5. In view of the foregoing, I have, accordingly, no hesitation in holding the initiation of the re-assessment proceedings, and the consequent re-assessment, in the instant case, as bad in law. The assessee has raised several other grounds, including *qua* the merits of the disallowance under reference. The same, however, would not survive in view of the categorical finding as to the invalidity of the initiation of the reassessment proceedings in law. The same, accordingly, even as

clarified during hearing itself, are not being adverted to, being, in fact, in this view of the matter, not subject to arguments. I decide accordingly.

6. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on June 28, 2019

Sd/-
(Sanjay Arora)
Accountant Member

Date: 28.6.2019
/PK Ps.

Copy of the order forwarded to:

(1) The Appellant: M/s. Ess Kay Bhatta Co., Village Dhudike, Moga.
(2) The Respondent: Income Tax Officer, Ward-I, Moga
(3) The CIT(Appeals)-3, Ludhiana
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

True Copy

By Order