

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

ITA NO. 753/MUM/2017 : **A.Y : 2010-11**

Raju Manilal Shah Vs. ITO, Ward-13(1)(1),
(Prop. M/s. Indo Foreign Mumbai. (Respondent)
Hardware Store)
193, Nagdevi Street,
Mumbai 400 003.
PAN : AADPS9224M (Appellant)

Appellant by : Shri Vijay Mehta

Respondent by : Shri M.K. Singh

Date of Hearing : 28/06/2019

Date of Pronouncement : 20/08/2019

ORDER

PER G.S. PANNU, VICE PRESIDENT

The captioned appeal filed by the assessee is directed against the order passed by the CIT(A)-28, Mumbai dated 11.11.2016, for previous year relevant to assessment year 2010-11, which in turn, arises out of an order passed by the Assessing Officer under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act') dated 27.03.2014.

2. In this appeal, assessee has raised the following Grounds of appeal :-

“1. The CIT(A) has erred in law and on facts in upholding the order passed by the Assessing Officer u/s. 143(3) r.w.s. 147 of the Income-tax Act, 1961 which is illegal and bad in law.

2. The CIT(A) has erred in law and on facts in not holding that the reopening of the assessment by issuing notice u/s. 148 of the Act was illegal and bad in law.

3. The CIT(A) ought to have held that since the objections to initiation of action u/s. 147 of the Act were not disposed off by passing a speaking order as mandated in *GKN Driveshaft (India) Ltd. v. ITO [259 ITR 19 (SC)]*, the consequent order passed u/s. 143(3) r.w.s. 147 of the Act was illegal and bad in law.

4. The CIT(A) has erred in law and on facts in upholding the order of the Assessing Officer computing the total income of the appellant at ₹ 2,16,74,540/- as against ‘NIL’ income declared by the assessee.

5. The CIT(A) has erred in law and on facts in confirming the assessment of a sum of ₹ 4,16,818/- under the head ‘LTCG’ in respect of a property situated in Baroda as against the correct amount of ₹ 1,26,818/-.

6. The CIT(A) has erred in not directing the Assessing Officer to grant set off of brought forward loss against income assessed by him.”

3. Briefly put, the relevant facts are that the assessee, an individual, filed his return of income for assessment year 2010-11 on 30.07.2011 declaring total income at NIL. In the return of income so filed, he declared income under various heads, viz. Income from Salary, Business and Profession and Capital Gains. The assessee had brought forward business loss of Rs. 2,17,64,567/- which were set-off against the income of the current year. The Assessing Officer noted that since assessee had filed the return of income for assessment years 2008-09 and 2009-10 on 31.03.2010 belatedly, the assessee was not eligible to carry forward and

set-off the losses in terms of Section 74 of the Act. The Assessing Officer thus recorded the reasons for reopening on this ground and issued notice under Section 148 of the Act dated 06.03.2013 for reopening of assessment. In response to the same, assessee filed return of income and sought for reasons for reopening, which were supplied to him. The assessee vide letter dated 03.09.2013 filed his objection to the reopening of assessment stating that the assessee has not claimed any brought forward loss of subject years, instead assessee has set-off the unabsorbed depreciation and losses of year prior to assessment year 2008-09 against the income of the current year. It was further stated that the returns of income of years prior to assessment year 2008-09 were filed on time; and, as such, the losses of those years were rightly available for set-off and thus requested to drop the reassessment proceeding. The assessee also submitted that inadvertently, the assessee has set-off the losses as per return of income instead of assessed losses as per assessment order of concerned year and filed revised computation to that effect. The Assessing Officer without disposing of the objections raised by the assessee proceeded to complete the reassessment proceedings and passed an order under Section 143(3) r.w.s. 147 of the Act dated 27.03.2014 after making addition on various grounds. Before the CIT(A), assessee challenged the order of Assessing Officer, both on legal ground and on merits. The CIT(A) rejected the ground raised by the assessee and upheld the action of the Assessing Officer. Aggrieved by the order of the CIT(A), assessee is in appeal before us.

4. Before us, the learned Representative for the assessee challenged the reopening on the ground that the reasons recorded by the Assessing Officer were

factually incorrect and the reassessment based on the said reasons is bad in law and *void ab initio*. The learned Representative pointed out that the reasons for reopening states that the assessee has set-off the losses pertaining to assessment years 2008-09 and 2009-10 against his income for the current year and return of income for the said years were filed beyond the due date; and, as such, the set-off of losses is not allowed to the assessee in terms of Section 74 of the Act. Therefore, the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment to the extent of losses set-off by the assessee. The learned Representative submitted before us copy of return of income for assessment year 2010-11 and submitted that losses set-off by the assessee pertained to assessment years 2005-06, 2006-07 and 2007-08 for which returns of income were filed by the assessee well within the due date and as such, the brought forward losses of those years were rightly set-off by the assessee in accordance with the provisions of Section 74 of the Act. Thus, all the brought forward losses and depreciation pertained to years prior to assessment year 2008-09. Further, the learned Representative submitted the copy of assessment order for assessment year 2005-06 wherein it is stated that return of income for the said year was filed on 31.10.2005, i.e. before the due date. Further, copy of assessment order for assessment year 2007-08 was also submitted, wherein also it was mentioned that the return for the said year was filed on time. It was also stated in the assessment order that business loss incurred by the assessee was allowed to be carried forward. Our attention was also drawn to the assessment order for assessment years 2008-09 and 2009-10 wherein the Assessing Officer has produced the chart depicting the losses of assessment years 2005-06 to 2007-08 as allowed to be carried forward. Thus, it was argued that the losses set-off by

the assessee are assessed losses and the same are held to be eligible for carry forward and set-off by the Assessing Officer himself in the assessment order for previous year; and, as such, there is no contravention of the provisions of Section 74 of the Act. Thus, there was no escapement of income as alleged by the Assessing Officer in the reasons for reopening and as such, the reopening is *void ab initio* and bad in law.

5. On merits, the learned Representative submitted that during the year under consideration, assessee sold business assets in the form of immovable properties and the gain arising from the sale of business assets was adjusted against the brought forward business losses. In the course of reassessment proceeding, the Assessing Officer held that the gains arising from sale of immovable properties was in the nature of Capital Gains and the same cannot be adjusted against the brought forward business losses as the brought forward business losses can be adjusted against only business income of the assessee. The learned Representative submitted that the assets were used for the purpose of business of the assessee. Thus, he argued that the gains arising from sale of business asset was rightly set-off by the assessee against the brought forward business losses of the assessee.

6. On the other hand, the Id. DR relied on the orders of lower authorities to contest that the reopening was rightly done. He also relied on the decision of Hon'ble Supreme Court in the case of *Home Finders Housing Ltd. vs. ITO, [2018] 94 taxmann.com 84* to contest that merely because reason for reopening were not disposed off, the same will not render the reassessment proceedings invalid.

He further argued that as per Section 50 of the Act, gains arising from sale of depreciable asset cannot be set-off against the brought forward business losses of the assessee.

7. We have carefully considered the rival submissions and perused the material on record. Firstly, we shall deal with the challenge to reassessment. In this regard, we find that the reasons for reopening clearly states that assessee has set-off the losses pertaining to assessment years 2008-09 and 2009-10 against the income of the current year, however returns of income for assessment years 2008-09 and 2009-10 were filed belatedly; and, as such, the same were not eligible to be carried forward and set-off as per Section 74 of the Act. The assessee has thus contravened the provisions of Section 74 of the Act while setting off the losses and, therefore, he had reason to believe that the income to the extent of business losses set-off has escaped assessment. As pointed out by the learned Representative, the assessee had not set-off the losses for assessment years 2008-09 and 2009-10 but losses of the year prior to assessment year 2008-09 were set-off against the income of the assessee for the current year. Further, the learned Representative submitted that the returns of income for assessment years 2005-06, 2006-07 and 2007-08 were filed before the due date. The copies of the assessment order for assessment years 2005-06 and 2007-08 and for assessment years 2008-09 and 2009-10 have been referred to establish that the losses set-off by the assessee were eligible for set-off and this fact was stated in the assessment order of these years. Thus, the reasons for reopening were factually incorrect and reopening based on factually incorrect reasons is bad in law and *void ab initio*.

8. The learned DR has not controverted the above factual matrix. We thus find that the reasons recorded by the Assessing Officer were, in fact, incorrect. It is a trite law that the power of reopening is an extraordinary power and cannot be exercised in a routine manner at the whims and fancy of the Assessing Officer. The Assessing Officer shall exercise utmost care while exercising his powers under Section 147 of the Act. The section lays down the requirement to record the reasons for reopening before reopening the assessment. Such reasons should have nexus with the escapement of income and should clearly spell out the manner and the quantum of income that has escaped assessment. We thus hold that the reopening based on incorrect reasons is not permissible; and, as it goes to the root of the matter, we hold that the reassessment proceedings are *void ab initio* and bad in law. We accordingly set-aside the order passed by the Assessing Officer under Section 143 r.w.s. 147 of the Act.

9. As regards reliance by learned DR on the decision of Hon'ble Supreme Court in the case of *Home Finders Housing Ltd. (supra)* we find that the learned Representative before us has not challenged the reopening on this ground and, therefore, the decision cited by the learned DR is not relevant.

10. It is also pertinent to mention here that the issue on which the case of the assessee was reopened was different from the issue on which the addition has been made. It is also pertinent here to refer to the decision of the Hon'ble Bombay High Court in the case of *CIT vs. Jet Airways (I) Ltd., [2011] 331 ITR 0236* wherein it was held that Assessing Officer may assess or reassess the income in

respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice; however, if after issuing a notice under Section 148, the Assessing Officer accepts the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment has, as a matter of fact, not escaped assessment, it is not open to him independently to assess some other income. Thus, on this parity of reasoning also, we hold that reassessment and addition made pursuant to said reopening is bad in law and the same should be deleted.

11. Since we have held the initiation of reassessment proceeding as bereft of validity, the entire assessment order stands quashed, as such all other issues raised in this appeal, relating to merits of the addition, are rendered academic.

12. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 20th August, 2019.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Mumbai, Date : 20th August, 2019

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "D" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai