

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

Before Shri Shamim Yahya (ACCOUNTANT MEMBER)

AND

Shri Pawan Singh (JUDICIAL MEMBER)

ITA No. 4868/Mum/2018  
(Assessment year : 2009-10)

Aditya Dalmiya 36, 5 <sup>th</sup> Floor, Vishnu Mahal D Road, Churchgate, Mumbai-400 020 PAN : ACLPD1591Q	vs	ITO-17(1)(1), Mumbai
<b>APPELLANT</b>		<b>RESPONDEDNT</b>
Appellant by		Shri Biren Gabhawala
Respondent by		Shri Chaitanya Anjaria
Date of hearing		30-07-2019
Date of pronouncement		30-07-2019

**ORDER**

**Per Pawan Singh, JM :**

This appeal by assessee is directed against the order of CIT(A)-55, Mumbai, dated 11-05-2018. The assessee has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in holding that the learned Assessing Officer issued the notice u/s 148 of the Income Tax Act, 1961 on the reasons which were correct as the appellant has not shown net income in the original return without appreciating the

fact that the appellant had filed return of income on 27/01/2010 declaring total income of Rs.3,32,493/-.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in holding the action of the Assessing Officer as correct relating to reassess the issue of "deemed dividend" other than the issues in respect of which proceedings u/s 147 of the Act were initiated especially when the reasons for the latter ceased to survive.

3. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in upholding the action of the learned Assessing Officer in making an addition of Rs.14,37,978/- u/s 2(22)(e) of the Act, without appreciating that the transaction between the company and your appellant is in the nature of current account and not a loan or advance.

4. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) erred in confirming addition of Rs. 14,37,978/- u/s 2(22)(e) of the Act observing that your appellant could not provide any documentary evidences in support that amount of Rs.28,42,880/- was purely a current account transaction between appellant and the company over looking the facts that your appellant filed on 2/3/2015 the required details vide two separate letters dated 27/02/2015."

2. Brief facts of the case are that the assessee is a director in Usha Knitting & Processing Pvt Ltd, filed his return of Income for AY 2009-10 on 27-01-2010 declaring income from salary and other sources of Rs.3,32,493. Subsequently, the assessee filed revised return on 24-02-2014 declaring total income of Rs.9,52,640. The revised return was time barred; hence no cognizance was taken. The assessing officer reopened the assessment u/s 147. The notice u/s 148 dated 30-04-2014 was issued and served on the assessee. In response to the notice u/s 148, the assessee filed return of income on 20<sup>th</sup> May, 2014 declaring total income at Rs.9,52,640. The assessee requested for reasons for reopening of the assessment. The assessing Officer provided the following reasons for reopening:-

*" In this case information has been received from the DDIT (INV.) Unite VIII(3), Mumbai, that the assessee has made investment of Rs. 1 crore to UTI fixed maturity Plan-yearly series (YEMP 03/09). The payment for such investment was made through the Kotak Mahindra bank A/c. No.0961200001140 of M/s. Usha Knitting & Processing P Ltd. The source of funds for this investment was Bank OD/FDR maturity. The above investment matured on 23.04.2010 at Rs. 1,08.69,200/--. Further, it is noticed that entire maturity amount was credited in hunk account of Shri Adifya Dalmia and*

*not to the<sup>1</sup> bank account of M/s. Usha Knitting & Processing P Ltd. This maturity amount was credited in assessee's Axis Bank A/c. No.447010100033530 It is also noticed that an amount of Rs.99,80,730.43/- is shown as maturity proceeds from ICICI mutual fund on 14.01.2009, but the corresponding capital gain or loss was not reflected in assessee's 1TR of A. Y.2009-10.*

*In consideration of the above fact discussed and on going through the material available, I have reason to believe that income of Rs.2,08,49,930/- chargeable to tax has escaped assessment for A. Y. 2009-10. No assessment under sub section 3 of the section 143 or 147 of the IT Act. 196} has been made in this case. "*

3. After supplying the reasons for reopening, the AO proceeded to re-assess the income of the assessee. During the re-assessment, the assessee was asked to furnish the source of investment made in the mutual fund and redemption thereon. In response to the notices, the assessee stated that he has made investment from the account of M/s Usha Knitting & Processing Pvt Ltd in which he was shareholder and director. Regarding the redemption of mutual fund, assessee stated that the same has been incorporated in the return filed on 20-05-2014 and the assessee has earned long term capital gain on it. The assessee further stated that assessee has to pay Rs.28,42,880 to the company M/s Usha Knitting &

Processing Pvt Ltd on the amount of finance paid for making investment in mutual fund. The AO examined the shareholding of M/s Usha Knitting & Processing Pvt Ltd wherein the assessee is a director and found that the assessee was holding more than 10% share of the company. The AO issued show cause notice as to why amount received from M/s Usha Knitting & Processing Pvt Ltd upto 31<sup>st</sup> March, 2009 should not be taxed in the hands of the assessee as dividend u/s 2(22)(e) of the Act. The assessee further filed his reply dated 04-03-2013. In the reply, the assessee stated that the assessee has received the amount from Assessee Company in the nature of current account in regular course of business. The reply of assessee was not accepted by AO. The treated the amount of Rs.28,42,880 as deemed dividend u/s 2(22)(e) in the hands of the assessee. The AO further noted that the assessee has received only Rs.14,37,978 as on 31-03-2009, therefore, only Rs.14,37,978 was treated / taxed as deemed dividend u/s 2(22)(e). No other additions was made by AO. On appeal before CIT(A), the action of AO in reopening as well as making addition u/s 2(22)(e) was sustained. Thus further

aggrieved by the order of CIT(A) assessee has filed present appeal before us.

4. We have heard the Ld.AR of the assessee and Ld.DR for the revenue and perused the material available on record.

5. Grounds 1 & 2 relate to reopening u/s 147 and the validity of the re-assessment order and grounds 3 & 4 relate to addition u/s 2(22)(e) of Rs.14,37,978. The Ld.AR of the assessee submits that the AO reopened the assessment on the issue of investment of Rs.1 crore to UTI fixed maturity Plan-yearly series and the maturity amount credited in the account of assessee; however, no addition was made by AO. The AO re-assessed income on an issue other than the issue on which assessment was reopened. The AO assumed jurisdiction on different issue and made the addition u/s 2(22)(e) which was not the reason for reopening of assessment. The Ld.AR further submits that no addition was made on the ground on which assessment was reopened. Therefore, the AO was not justified when the reasons for initiation of those proceedings ceased to survive. The Ld.AR further submits that the reasons for initiation for which reason

to believe was recorded where income escaping assessment in respect of credit earned on maturity of UTI fixed maturity Plan-yearly series. But same having not been done, the AO proceeded to make the addition on account of deemed dividend which is not permissible under the scheme of Income-tax Act. The Ld.AR, therefore, submits that re-assessment order passed by AO is bad in law. Hence, the addition made in re-assessment is void ab initio. In support of his submissions the Id AR for the assessee relied on the decision of Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd vs CIT (ITA No.148/2008 dated 03-06-2011) and the decision of jurisdictional High Court in CIT vs Jet Airways (I) Ltd 331 ITR 236 (Bom).

6. On the other hand, the Ld. DR for the revenue supported the orders of lower authorities. The Ld. DR submits that the AO was right and justified in making addition on deemed dividend after being satisfied on the issue on which assessment was reopened and proceeded to take the other issues which came to his notice subsequently.

7. We have considered rival submissions of the parties and gone through the orders of authorities below. There is no dispute that the assessment was reopened by AO to examine the source of fund for investment in UTI fixed maturity Plan-yearly series credited in the account of assessee and not to the account of M/s Usha Knitting & Processing Pvt Ltd. However, during the course of re-assessment proceedings, the AO explained that assessee is a director in M/s Usha Knitting & Processing Pvt Ltd and also brought on record that the capital gain earned by assessee on a transaction on sale of UTI fixed maturity Plan-yearly series has been duly disclosed in the return of income. During the assessment proceedings, the AO examined the applicability of provisions of section 2(22)(e). Admittedly, the issue of deemed dividend u/s 2(22)(e) was not the reason for initiation of proceedings u/ 147. Admittedly, no addition on the issue on which proceedings were initiated u/s 147 was made. The AO made addition of Rs.14,37,978 u/s 2(22)(e).

8. The Hon'ble Bombay High Court in CIT Vs Jet Airways (supra), while considering the question of law whether upon

the issuance of a notice under section 148 of the Income-tax Act, 1961 read with section 147, the Assessing Officer does not assess or, as the case may be reassess the income which he has reason to believe had escaped assessment and which formed the basis of a notice under section 148, is it open to the Assessing Officer to assess or reassess independently any other income, which does not form the subject-matter of the notice. The Hon'ble Court held that if the income, the escapement of which was the basis of the formation of the reason to believe, is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment.

9. The Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd vs CIT in ITA No.148/2008 dated 03-06-2011 by following the decision of jurisdictional High Court in CIT vs Jet Airways (I) Ltd 331 ITR 236 (Bom) held that:

"18. We are in complete agreement with the reasoning of the Division Bench of Bombay High Court in the case of Jaganmohan Rao (supra). We may also note that the heading of Section 147 is "income escaping assessment" and that of

Section 148 "issue of notice where income escaped assessment". Section 148 is supplementary and complimentary to Section 147. Sub-section (2) of Section 148 mandates reasons for issuance of notice by the Assessing Officer and sub-section (i) thereof mandates service of notice to the assessee before the Assessing Officer proceeds to assess, reassess or recompute escaped income. Section 147 mandates recording of reasons to believe by the Assessing Officer that the income chargeable to tax has escaped assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. As per explanation (3) if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under Section 147 regarding assessment or reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under Section 148.

19. In the present case, as is noted above, the Assessing Officer was satisfied with the justifications given by the assessee regarding the items viz., club fees, gifts and presents and provision for leave encashment, but, however, during the

assessment proceedings, he found the deduction under Section 80 HH and 80-I as claimed by the assessee to be not admissible. He consequently while not making additions on those items of club fees, gifts and presents, etc., proceeded to make deductions under Section 80HH and 80I and accordingly reduced the claim on these accounts.

20. The very basis of initiation of proceedings for which reasons to believe were recorded were income escaping assessment in respect of items of club fees, gifts and presents, etc., but the same having not been done, the Assessing Officer proceeded to reduce the claim of deduction under Section 80 HH and 80-I which as per our discussion was not permissible. Had the Assessing Officer proceeded not to make disallowance in respect of the items of club fees, gifts and presents, etc., then in view of our discussion as above, he would have been justified as per explanation 3 to reduce the claim of deduction under Section 80 HH and 8-1 as well.

21. In view of our above discussions, the Tribunal was right in holding that the Assessing Officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings are initiated but he was not so justified when the reasons for the initiation of those proceedings ceased to survive. Consequently, we answer the first part of question in affirmative in favour of Revenue and the second part of the question against the Revenue."

10. Considering the decision of Delhi High Court in Ranbaxy Laboratories Ltd vs CIT (supra) wherein the Hon'ble Delhi High Court followed the decision of jurisdictional High Court in the

case of CIT vs Jet Airways (I) Ltd (supra) holding that if the income, the escapement of which was the basis of the formation of the reason to believe, is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. Therefore, we find merit in the contention of the assessee that the addition made in the re-assessment order which was not the basis of reason for reopening the assessment, is invalid. Therefore, grounds 1 & 2 of the appeal are allowed.

11. Considering the fact that we have held the assessment order as invalid, therefore, the discussion on merit of the case become academic.

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

Order pronounced in the open court 30-07-2019.

Sd/-

Sd/-

(Shamim Yahyu)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt 30<sup>th</sup> July, 2019

Pk/-

Copy to :

1. Appellant

2. Respondent  
3. CIT(A)  
4. CIT  
5. DR  
/True copy/

By order

Asstt. Registrar, ITAT, Mumbai