

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 6366/DEL/2013  
[A.Y 2001-02]

M/s MKM Finsec [Pvt] Ltd  
301, Dhaka Chamber  
2068/39, Naiwala,  
Karol Bagh, New Delhi

Vs.

The I.T.O  
Ward - 6 (1)  
New Delhi

PAN: AAACM 6961 H

(Applicant)

(Respondent)

Assessee By : Shri Somil Agarwal, Adv  
Shri Madhav Kapur

Department By : Shri Vijay Kumar Chadha, Sr. DR

Date of Hearing : 17.09.2019  
Date of Pronouncement : 17.09.2019

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the  
Commissioner of Income Tax [Appeals] - 9, New Delhi dated 27.09.2013  
pertaining to assessment year 2001-02.

2. Vide ground No. 1, the assessee has challenged the validity of the assessment order framed u/s 143(3) r.w.s 147 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] claiming that the reopening of the assessment and framing the impugned assessment order is bad in law and beyond jurisdiction.

3. Since this issue goes to the root of the matter, we proceed to decide this at the outset.

4. Facts emanating from the assessment records reveal that during the year under consideration return, of income was filed on 31.10.2001, declaring income at Rs. 71,540/-. The return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee. During the course of scrutiny assessment proceedings, books of account were produced and test checked. Subsequently, assessment order was framed vide order 27.02.2004 u/s 143(3) and returned income was assessed at Rs. 2,91,540/-.

5. On 27.07.2008, the Assessing Officer issued notice u/s 148 of the Act thereby reopening the completed assessment. The reasons for reopening the assessment read as under:

*"In this case, information has been received from Director of Income tax. (Investigation), New Delhi that (during the relevant assessment year, this assessee had received cheque amount(s) of Rs. 10,20,000/- in the nature of accommodation entry. These accommodation entries are received in lieu of payment of cash of equivalent amount plus commission thereon to the entry operator. For obvious reasons, these cash transactions are not routed through the books of account of the assessee. Therefore, I have reason to believe that an income of Rs. 10,20,000/- and commission @ 2% amounting to Rs.20,400/- has escaped assessment in the assessment year-2001-02. In addition to this, as per the information supra, the assessee was also engaged in the activity of providing accommodation entries. During the relevant assessment year, it had reportedly provided such accommodation entries to the tune of Rs.3,47,71,006/-. On this amount, the commission @2% comes out to be at Rs.6,95,420/-.*

*On the basis of this information. I have reason to believe that the incomes described above have escaped assessment and the case is fit for issuing Notice U/s 148 of the 1.1. Act 1961*

*The case for Assessment Year 2001-02 was assessed u/s 143(3). It is therefore requested that the necessary approval may kindly be obtained from CIT, Delhi-11, New Delhi, as per the provisions of section 151 of the Income Tax Act, 1961."*

6. As mentioned elsewhere, the original assessment order was framed vide order dated 27.02.2004 and completed assessment has been reopened vide notice dated 27.07.2008. It can be safely concluded that the notice u/s 148 of the Act was issued beyond four years from the end of the relevant assessment years, First proviso to section 147 of the Act squarely apply and the same is as under:-

*“Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.*

7. The mandate of this proviso is that income that has to be taxed must have escaped assessment by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

8. There is not even a whisper in the reasons recorded for the reopening of the assessee relating to non disclosure of full and true facts by the assessee. The Hon'ble High Court of Delhi in the case of Haryana Acrylic Manufacturing Company 308 ITR 38 had the occasion to consider a similar issue and observed as under:-

*“20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade (P.) Ltd.'s we had agreed with the*

*view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above.*

9. A similar view was taken by the Hon'ble High Court of Punjab and Harayana in the case of Dulichand Singhania 269 ITR 192, the relevant part reads as under:-

*“13. The entire thrust of the findings recorded by the AO in his order dt. 13th March, 2003 is to justify his satisfaction about escapement of income. According to him, it was a clear case of escapement of income as defined in Expln. 2 to Section 147 as the assessee had been allowed ITA No. 98/RPR/2012 & C.O. No. 01/RPR/16 and Others . A.Y. 2004-05 5 excessive relief under Section 800 of the Act. However, it is not necessary for us to go into*

*the merits of this finding as the second requirement of the proviso has not been satisfied obviously. The reasons recorded by the AO for initiation of proceedings under Section 147 of the Act have already been reproduced above. A bare perusal of the same shows that the satisfaction recorded therein is merely about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Absence of this finding, which is a "sine quo non" for assuming jurisdiction under Section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the AO wholly without jurisdiction. As already observed, the learned counsel for the Revenue has conceded that neither in the reasons recorded nor in the order dt. 13th March, 2003, has the assessee been charged with failure to disclose, fully and truly all material facts necessary for his assessment. In Fennei (India) Ltd. v. Dy. CTT (2000) 241 ITR 672 (Mad), similar matter had come up for consideration before the Madras High Court and it has been held as under:*

*"The precondition for the exercise of the power under Section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably "entertained by the AO that any income chargeable*

*to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further precondition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Section 142 or Section 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the AO does not acquire jurisdiction to initiate any proceeding under Section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the AO must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. The relevant words in the proviso are, ".....unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee....."*

*Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on ITA No. 98/RPR/2012 & C.O. No. 01/RPR/16 and Others . A.Y. 2004-05 6 the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment.*

*Whenever a notice is issued by the AO beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons referred to in the main paragraph of Section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the AO to record that anyone or all the circumstances referred to in the proviso existed before the issue of notice under Section 147." Similarly, in Aivind Mills Ltd. v. Dy. CTT (2000) 242 ITR 173 (Guj) it was held as under: "It is a clear case where the AO has no reason to link escapement of income from assessment with non-disclosure of any material fact necessary for his assessment at the time of original assessment but is due to an erroneous decision on the question of law by the AO. Thus, the case*

*is squarely covered by the proviso to Section 147 and not Section 149. Initiation of proceedings under the proviso being clearly barred by time, the AO could not have assumed jurisdiction by issuing notice under Section 148 in respect of the asst. yr. 1982-83."*

10. As we have already pointed out, during the course of scrutiny assessment proceedings the books of account were examined and test checked. In light of these facts, coming back to the reasons recorded for reopening of the assessment as mentioned elsewhere, it can be seen that the Assessing Officer has borrowed the information received from the Director [INV] and on the basis of this information, he had reason to believe that income has escaped assessment and it is a fit case for reopening.

11. Considering the facts of the case in totality, in light of the judicial decisions discussed hereinabove and keeping in mind the first proviso to section 147 of the Act, we are of the considered view that the notice issued u/s 148 of the Act is without jurisdiction and deserves to be set aside.

12. The ld. DR has relied upon the decision of the Hon'ble High Court of Delhi in the case of Nova Promoters 18 Taxmann 217. But we find that this decision of the Hon'ble High Court is misplaced on the facts of the case in hand.

13. Notice u/s 148 of the Act is set aside and accordingly the assessment order so farmed is quashed.

14. Since we have quashed the assessment order, we do not find it necessary to dwell into the merits of the case.

15. In the result, the appeal of the assessee in ITA No. 6366/DEL/2013 is allowed.

**The order is pronounced in the open court on 17.09.2019.**

**Sd/-**

**[KULDIP SINGH]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 17<sup>th</sup> September, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	