IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'C' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
And Ravish Sood (Judicial Member)

ITA No. 1087/Mum/2019
Assessment year: 2008-09

Prakash Ramji Gavali ..... **Appellant**
B-48, Gurudev Apartments,
R.C Marg, Chembur Naka,
Chembur, Mumbai 400071
[PAN:AFHPG4585Q]

Vs

Income Tax Officer 3(2) .....**Respondent**
Mumbai

Appearances by
Venugobal Nair *for the appellant*
Kumar Padmapari Bohre *for the respondent*

Date of concluding the hearing: October 3rd 2019
Date of pronouncement : December 17th, 2019

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated dated 02.08.2018 passed by the CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act 1961, for the assessment year 2008-09.

2. The appeal is time barred by 94 days but the assessee has moved a condonation petition, duly supported by an affidavit. Having perused the material on record, and having heard the rival contentions, we are inclined to condone the delay and proceed to take up the matter on merits. Ordered, accordingly.

3. To adjudicate on this appeal, it is sufficient to take note of the fact that there was no addition, in the impugned reassessment proceedings, on account of the reasons for which the assessment was reopened. The issue, whether an addition can at all be made in the reassessment proceedings whether are not additions on account of the reasons for which reopening is done, stands concluded, in favour of the assessee, by Hon'ble Jurisdictional High Court in the case of CIT vs Jet Airways [(2010) 331 ITR 236 (Bom)]

> ***11. The rival submissions which have been urged on behalf of the revenue and the assessee can be dealt with, both as a matter of first principle, interpreting the section as it stands and on the basis of precedents on the subject. Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has the power to assess or reassess the income, which he has reason to believe had escaped assessment and also any other income chargeable to tax. The words "and also" cannot be ignored. The interpretation which the Court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word***

"and". The words "and", as well as "also" have been used together and in conjunction.

The Shorter Oxford Dictionary defines the expression "also" to mean 'further, in addition, besides, too'. The word has been treated as being relative and conjunctive. Evidently, therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess: (i) 'such income'; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the season 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. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from 1-4-1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.

12. In CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 2971 , the Supreme Court dealt with the following question of law in the course of its judgment:—

"Where an item unconnected with the escapement of income has been concluded finally against the assessee, how far

in reassessment on an escaped item of income is it open to the assessee to seek a review of the concluded item for the purpose of computation of the escaped income?"

The issue which arose before the Supreme Court was whether, in the course of a reassessment on an escaped item of income could an assessee seek a review in respect of an item which stood concluded in the original order of assessment. The Supreme Court dealt with the provisions of section 147, as they stood prior to the amendment on 1-4-1989. The Supreme Court held that the expression "escaped assessment" includes both "non-assessment" as well as "under assessment". Income is said to have escaped assessment within the meaning of the section when it has not been charged in the hands of an assessee during the relevant assessment year. The expression "assess" refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of section 147. The expression "reassess" refers to a situation where an assessment has already been made but the Assessing Officer has reason to believe that there is under assessment on account of the existence of any of the grounds contemplated by Explanation 1 to section 147. The Supreme Court adverted to the Judgment in V. Jaganmohan Rao v. CIT [1970] 75 ITR 373 , which held that once an assessment is validly reopened, the previous under assessment is set aside and the Income-tax Officer has the jurisdiction and duty to levy tax on the entire income that had escaped assessment during the previous year. The Court held that the object of section 147 enures to the benefit of the revenue and it is not open to the assessee to convert the reassessment proceedings as an appeal or revision and thereby seek relief in respect of items which were rejected earlier or in respect of items not claimed during the course of the original assessment proceedings.

The judgment in V. Jaganmohan Rao's case (supra) dealt with the language of sections 22(2) and 34 of the Act of 1922 while the judgment in Sun Engg. Works (P.) Ltd.'s case (supra) interprets the provisions of section 147 as they stood prior to the amendment on 1-4-1989.

13. The effect of the amended provisions came to be considered in two distinct lines of precedent on the subject. The first line of authority, to which a reference has already been made earlier, adopted the principle that where the Assessing Officer has formed a reason to believe that income has escaped assessment and has issued a notice under section 148 on certain specific

issues, it was not open to him during the course of the proceedings for assessment or reassessment to assess or reassess any other income, which may have escaped assessment but which did not form the subject-matter of the notice under section 148. This view was adopted in the Judgment of the Punjab and Haryana High Court in Vipan Khanna's case (supra) and in the judgment of the Kerala High Court in Travancore Cements Ltd.'s case (supra). This line of authority, would now cease to reflect the correct position in law, by virtue of the amendment which has been brought in by the insertion of Explanation 3 to section 147 by Finance (No. 2) Act of 2009. The effect of the Explanation is that once an Assessing Officer has formed a reason to believe that income chargeable to tax has escaped assessment and has proceeded to issue a notice under section 148, it is open to him to assess or reassess income in respect of any other issue though the reasons for such issue had not been included in the reasons recorded under section 148(2).

14. The second line of precedent is reflected in a judgment of the Rajasthan High Court in CIT v. Shri Ram Singh [2008] 306 ITR 343 . The Rajasthan High Court construed the words used by Parliament in section 147 particularly the words that the Assessing Officer 'may assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings' under section 147. The Rajasthan High Court held as follows :

". . . if is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax, which has escaped assessment for any assessment year, with respect to which he had "reason to believe" to be so, then, only in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under section 147.

To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his "reason to believe", had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him

with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

15. Parliament, when it enacted the Explanation (3) to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Explanation 3 consequently provides that the 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 under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd.'s case (supra) and of the Punjab & Haryana High Court in Vipan Khanna's case (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh's case (supra), Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT v. Atlas Cycle Industries [1989] 180 ITR 3191. The decision in Atlas Cycle Industries' case (supra) held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries' case (supra) and of the Rajasthan High Court in Shri Ram Singh's case (supra) would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.-

16. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148

setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted 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. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

4. learned CIT(A), however, has declined to follow the above judicial precedent on the ground that Hon'ble Punjab & Haryana High Court has taken a contrary view in the case of Majinder Singh Kang vs CIT [(2012)344 ITR 358 (P&H)] and, as noted by Hon'ble Punjab & Haryana High Court in the case of CIT vs. Mahak Finvest Pvt. Ltd. [(2014) 367 ITR 769 (P&H)], Hon'ble Supreme Court has dismissed Special leave Petition against the said judgement. Learned CIT(A), in this background, has observed as follows:-

5.4 Hon'ble Court has dearly mentioned that since the SLP has been dismissed by the Hon'ble Apex Court therefore the judgement of Hon'ble' Bombay High Court in the case of M/s, JET Airways would not come to the rescue of the assessee.

5.5 I accordingly hold that the decision of Hon'ble Jurisdictional High Court does not remain binding in the light of dismissal of SLP against the decision of Hon'ble Punjab & Haryana High Court in the case of Majinder Singh Kant. I accordingly hold that after insertion of explanation 3 to section 147 with effect from 01.04.1989, the Assessing Officer is empowered to assess such income which conies lo his notice subsequently and there is no requirement of making addition un uic issue on which the case was reopened if the same is found acceptable during the assessment proceeding. The ground no. 4 is accordingly dismissed.

5. The assessee is aggrieved and is in appeal before us.

6. We have heard the rival contentions, perused the material in record and duly considered facts of the case in the light of the applicable legal position.

7. The reasoning adopted by learned CIT(A) is patently incorrect and unsustainable in law. it is well settled in law that dismissal of SLP against an order or judgement of the lower forum is not an affirmation of the same. In the recent case of P Singaraveln & Ors. Vs District Collector (Civil Appeal Nos 9533 to 9537 of 2019, judgement dated 18.12.2019), Hon'ble Supreme Court has reiterated the above legal position as follows:-

……Be that as it may, it must be noted that all the above orders of this Court were passed at the stage of admission itself. ……

7. It is evident that all the above orders were non-speaking orders, inasmuch as they were confined to a mere refusal to grant special leave to appeal to the petitioners therein. At this juncture, it is useful to recall that it is well-settled that the dismissal of an SLP against an order or judgment of a lower forum is

not an affirmation of the same. If such an order of this Court is non-speaking, it does not constitute a declaration of law under Article 141 of the Constitution, or attract the doctrine of merger. The following discussion on this proposition in Kunhayammed v. State of Kerala, (2000) 6 SCC 359, is relevant in this regard:

"(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court

which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC."

This view has also been adopted in a plethora of decisions of this Court, including the recent decision in Khoday Distilleries v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., (2019) 4 SCC 376.

8. Clearly, therefore, the decision of Hon'ble Jurisdictional High Court, in the case of Jet Airways (supra), still holds the law and continues to be a binding judicial precedent for us. Admittedly, it is a non speaking dismissal of SLP in the case of Manjinder Singh Kang's case (supra).

9. In view of the above legal position, the plea of the assessee indeed deserved to be upheld. We, accordingly, direct the Assessing Officer to delete all the additions in the impugned reassessment proceedings. The assessee gets the relief accordingly.

10. Given our above directions, all other issues raised in the appeal are rendered academic.

11. In the result, the appeal is allowed, in the terms indicated above. Pronounced in the open court today on the 17th day of December,2019

Sd/-	Sd/-
Ravish Sood	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 17th of December, 2019

Nishant Verma Sr.PS

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai