IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA no.3271/Mum./2018
(Assessment Year : 2009–10)

Shri Ritesh K. Agarwal
501, Embassy Centre
Nariman Point, Mumbai 400 021
PAN – ABMPA1788L

……. Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–3(1)(2), Mumbai

……. Respondent

Assessee by : Shri S.L. Jain
Revenue by : Smt. Jyothilakshmi Nayak

Date of Hearing – 23.01.2020	Date of Order – 07.02.2020

O R D E R

PER SAKTIJIT DEY. J.M.

This is an appeal by the assessee against the order dated 27th April 2018, passed by the learned Commissioner of Income Tax (Appeals)–8, Mumbai, pertaining to the assessment year 2009–10.

2. In grounds no.1 and 2, the assessee has challenged the validity of re–opening of assessment under section 147 of the Income Tax Act, 1961 (for short *"the Act"*).

3. Brief facts are, the assessee, an individual, is engaged in the business of manufacturing of plastic packing material. For the assessment year under dispute, the assessee filed his return of income on 4th September 2009, declaring total income of ₹ 6,35,372. During the course of survey conducted under section 133A of the Act in assessee's business premises, it was found that the assessee has not claimed additional depreciation under section 32(1)(iia) of the Act during the period wherein he was eligible for deduction under section 80IC / 80IB / 80IA of the Act. Whereas, he started claiming additional depreciation thereafter. It was found that additional depreciation allowable to the assessee for the impugned assessment year was to the tune of ₹ 77,67,405. On the basis of the aforesaid information, the Assessing Officer re–opened the assessment under section 147 of the Act. During the assessment proceedings, the Assessing Officer called upon the assessee to explain why additional depreciation on new plant and machinery should not be computed and allowed in the impugned assessment year. In response, it was submitted by the assessee that additional depreciation being in the nature of an incentive can be claimed by the assessee at his own option. The Assessing Officer, however, did not accept the submissions of the assessee and proceeded to compute additional depreciation for the year under consideration at ₹ 68,49,775, and also allowed the same while computing the income. However, he reduced the deduction claimed

under section 80IC of the Act to that extent. Ultimately, he determined the income of the assessee at ₹ 6,35,370, exactly the same income as was returned by the assessee in the return of income. Though, the assessee challenged the assessment order so passed before the first appellate authority, inter–alia, on the ground that the re–opening of assessment is invalid, however, learned Commissioner (Appeals) did not entertain the grounds raised by the assessee and the appeal was ultimately dismissed.

4. The learned Authorised Representative submitted, the re–opening of the assessment has been made solely for the reason of allowing additional depreciation to the assessee. Therefore, the re–opening is not for the benefit of the Department but for the benefit of the assessee. He submitted, ultimately the Assessing Officer has allowed the additional depreciation and has determined the income at the same figure which was returned by the assessee in the return of income. Therefore, virtually, there is no escapement of income requiring re–assessment. In support of such submissions, the learned Authorised Representative relied upon the following decisions:–

i) Amar Nath Agarwal v/s CIT, [2015] 371 ITR 183 (All.);

ii) CIT v/s Ruchira Papers Ltd., [2013] 212 Taxman 009 (HP);

iii) Dulraj U. Jain v/s ACIT & Ors, [2018] 102 CCH 198 (Bom.);

iv) Smt. Usha Agarwal v/s ITO, ITA no.167/Agra/2018, dated 19.06.2018; and

v) Motto Tiles Pvt. Ltd. v/s ACIT, [2016] 386 ITR 280 (Guj.).

5. The learned Departmental Representative submitted, though, learned Commissioner (Appeals) has dealt with various other aspects of reopening, however, he has not specifically dealt with the aforesaid submissions of the assessee. Therefore, the issue may be restored back to his file for fresh adjudication.

6. We have considered rival submissions and perused the material on record. Undisputedly, the assessee has filed the return of income for the impugned assessment year offering the income of ₹ 6,35,372. The Assessing Officer has also completed the assessment determining the income at the very same figure. Therefore, there is no variation to the income returned by the assessee. Consequently, there is no extra tax demand by virtue of the assessment order. Further, it is evident, the Assessing Officer has re–opened the assessment only for the reason that the assessee has not claimed additional depreciation in the year under consideration. In our view, non–claiming of additional depreciation does not result in escapement of income. Rather, the assessee has deprived himself of a particular benefit provided under the statute. We fail to understand how this can lead to escapement of income. This view of ours gets further strengthened as ultimately the

Assessing Officer has determined the total income at the very same figure at which the assessee has filed the return of income. Therefore, it is proved beyond any shred of doubt that there is no escapement of income whatsoever to lead the Assessing Officer to form a belief that re–opening of assessment has to be made on account of escapement of income. It is trite law that the provision of section 147 of the Act is enshrined in the statute to enable the Revenue to assessee the income which has escaped assessment, thereby, the tax due on such income has not been paid by the assessee. Whereas, in the present case, it is the reverse. By re–opening the assessment, the Assessing Officer wants to confer certain benefit which the assessee at his own choice has not availed. This, in our view, cannot be the intent and purpose for which provisions of section 147 of the Act is provided in the statute. Therefore, in our considered opinion, the re–opening of assessment under section 147 of the Act in the present case has to be declared as invalid. Accordingly, we do so and quash the assessment order passed for the impugned assessment year. These grounds are allowed.

7. In view of our decision in the aforesaid legal grounds, the issue raised on merits in ground no.3, has become redundant, hence, not required to be decided at this stage. However, the issue is left open for adjudication if it arises in any other assessment year in future.

8. In the result, appeal is allowed as indicated above.

Order pronounced in the open Court on 07.02.2020

Sd/-	**Sd/-**
G. MANJUNATHA	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 07.02.2020

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai