

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.545/Coch/2019 : Asst.Year 2009-2010

The Asst.Commissioner of Income-tax, Corp.Circle 1(2) Kochi.	Vs.	M/s.Jojo Frozen Foods Private Limited 28/3030 Cheruparambath Road, Kadavanthra Kochi – 682 020. <b>PAN : AAACJ8843K.</b>
(Appellant)		(Respondent)

Appellant by : Sri.Mritunjaya Sharma, Sr.DR

Respondent by : Sri.P.M.Veeramani, CA

<b>Date of Hearing : 02.03.2020</b>	<b>Date of Pronouncement : 03.03.2020</b>
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**ORDER**

**Per George George K, JM**

This appeal at the instance of the Revenue is directed against CIT(Appeals)'s order dated 24.06.2019. The relevant assessment year is 2009-2010.

2. Two issues are raised in these appeals :
  - (i) whether the CIT(A) is justified in quashing the reopening of assessment as invalid;
  - (ii) whether the CIT(A) is correct in holding that the lapsed freezer deposits cannot be treated as income in the hands of assessee.
  
3. The brief facts of the case are as follow:

The assessee is a private limited company. It is engaged in the business of manufacture and dealer of ice cream and

frozen foods. The assessee was giving freezers to its dealers / distributors for storing the ice cream. For giving the freezers, the assessee was collecting deposits, which were refundable on termination of the dealership. The assessee as per the terms of agreement (entered between the assessee and dealer / distributor), could recover 25% of the deposit each year towards wear and tear, when agreements were terminated. According to the assessee, such recoveries were offered as income in the year in which the dealership was terminated and such recovery was made. The Revenue was of the view that 25% of the deposit should be treated as income in each year irrespective whether the dealership was terminated or not.

3.1 In the original assessment completed u/s 143(3) of the I.T.Act (order dated 29.12.2012), the Assessing Officer had made an addition of Rs.20,16,542, being lapsed liability towards freezer security deposit. The addition made by the Assessing Officer was deleted by the CIT(A) vide order dated 28.01.2013. The CIT(A) deleted the addition by following the ITAT order in assessee's own case for the earlier assessment years. The department appeal as against the order of the CIT(A) was dismissed by the Tribunal in ITA No.311/Coch/2013 (order dated 29.07.2013).

4. The department issued notice u/s 148 of the I.T.Act on 30.03.2016. The reason for issuance of notice u/s 148 of the I.T.Act was to bring to tax lapsed security deposits up to assessment year 2006-2007 in the current assessment year.

A sum of Rs.1,80,61,857 was treated as income towards lapsed liability in the reassessment order dated 30.12.2016 passed u/s 143(3) r.w.s. 147 of the I.T.Act (The present appeal proceeding is out of order of reassessment dated 30.12.2016).

5. Aggrieved by the reassessment completed, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority, the assessee raised two issues, viz., (i) whether the reopening of assessment is valid; and (ii) on merits whether the lapsed freezer deposit could be brought to tax in the current assessment year when the dealership agreement has not been terminated. The CIT(A) decided both the issues in favour of the assessee.

5.1 As regards the issue of validity of reopening of assessment, the relevant finding of the CIT(A) reads as follow:-

*"5. The appellant stated that the Notice u/s. 148 was issued on 30.03.2016 for A.Y. 2009-10, obviously beyond 4 years and, therefore, it could only be done if all the material facts were not disclosed fully and truly during the course of original assessment. The appellant had objected to reassessment on this ground and the AO dismissed the objection of the appellant with following remarks:*

*"The AR 's objections were considered and disposed off vide this office letter dated 26.12.2016. It was replied to the assessee that the materials relevant to receipt of freezer deposit necessary for the assessment were not fully and truly furnished by the assessee at the time of original scrutiny assessment. And the assessee company was requested to furnish the documents, accounts and any other evidence on which it relied in support of the Return filed for this A. Y. by issue of notice u/s. 143(2) of the Act dated 23.12.2016."*

*6. From the remarks of the AO, it is clear that the issue of Freezer Deposits was considered by the AO while framing*

*original assessment order. The AO has also not mentioned as to what material fact was not fully and truly disclosed by the assessee. A mere assertion, without giving any details of such non-disclosure, in my opinion, is not sufficient to reopen the case, beyond a period of 4 years, especially so, when the assessment has been completed u/s.143(3) and the issue has been considered by the AO during original scrutiny proceedings. Thus, on the facts of this case, in my opinion, the reassessment u/s. 147 is bad-in-law and needs to be quashed."*

5.2 With reference to the issue on merits, the CIT(A) followed the order of the ITAT in assessee's own case. The relevant finding of the CIT(A) reads as follow:-

*"7. On merits also, the issue of taxing the freezer deposits stands covered in favour of the appellant by the order of Hon'ble ITAT, Cochin Bench, in its own case for the instant Assessment Year itself. Understandably, the Department is in High Court on this issue. Until Hon'ble High Court reverse the order of the Hon'ble ITAT, the order of the Hon'ble ITAT stands good."*

6. Aggrieved by the order of the CIT(A), the Revenue has filed the present appeal before the Tribunal. The learned Departmental Representative strongly supported the assessment order and relied on the grounds raised.

6.1 The learned AR filed a brief written submission, which reads as follow:-

Issue before ITAT

1. Whether the reopening of the assessment for the assessment year 2009-10, which was originally completed u/s 143(3) by making addition towards freezer deposit received between AY 2009-10, was valid to consider the same addition in respect of freezer deposits received by the appellant from inception up to assessment year 2006-07.

2. Whether the freezer deposit collected by the appellant could be treated as income as a lapsed liability.

Particulars	Supporting document	Reference
Date of original assessment	Order u/s 143(3) dated 29.12.2011	Page 15-22 of the paper book.
Date of ITAT order dismissing department appeal against original assessment.	ITAT order No.311/Coch /2013 dated 29.07.2013	Page 3-6 of paper book.
Notice u/s 148	Notice dated 30.03.2016	Page 7 of the paper book.

Particulars	Reference in assessment order	Reference in CIT(A) order	Case law relied on
Whether there was failure on the part of the assessee to disclose truly and fully material facts during original assessment	<p>Discussion and conclusion in the original assessment – para 2.1 (page 16 of paper book)</p> <p>Conclusion in the original assessment – Para 2.7 (Page 18 of paper book)</p> <p>Para 2 (Page 13-14 of paper book) order dated 26.12.2016 rejecting assessee's objection to reopening.</p> <p>Paragraph 4 (internal page 2 of 8) of assessment order)</p>	Paragraph 6 (internal page 7 of 8) of the order of CIT(A)	IBS software Services Private Ltd. v. UOI (379 ITR 66 – Kerala)
Whether third proviso to section 147 is attracted that the addition is already a subject matter of appeal and hence beyond the scope of reopening	Para 4 (page 13-14 of the paper book) order dated 26.12.2016 rejecting the objections for reopening of the assessment.	Ground 2 of grounds of appeal, but no adjudication on this point.	Alcatel Lucent France and another v. CIT (384 ITR 113 – Delhi)
Whether the freezer deposit can be considered as income on account of lapsed	Para 9 and 10 of the assessment order.	Para 7 (page 7) of the order of CIT(A).	

liability in view of ITAT decision on the same point.			
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7. We have heard the rival submissions and perused the material on record. Admittedly, the re-opening of the assessment in the present case was made after four years from the end of the assessment year. Therefore, revenue ought to have been established in the reasons recorded for re-opening that there was failure on the part of the assessee to disclose fully and truly all material facts. The Hon'ble Kerala High Court in the case of IBS Software Services Private Ltd v. UOI ( 379 ITR 66) held that *"There are only two conditions to be satisfied according to section 147 of the Income-tax Act, 1961, that is, escapement of income chargeable to tax and reason available with the Assessing Officer to believe that chargeable income has escaped assessment. However, when the reassessment is attempted after the period of four years, necessarily, the question of absence of full and true disclosure by the assessee of material facts becomes relevant."* It was further observed by the Hon'ble High Court that *"If essential and basic documents which are to be necessarily examined before grant of exemption, were not gone into, it is the default of the officer and not the assessee....."*.

7.1 The Hon'ble Kerala High Court in the case of CIT vs Hindustan Latex Lid ( 389 ITR 407) held that *"It has to be pointedly noted here that action under the first proviso to Section 147, that is to say, for a period after the expiry of four years, can be generated only if the income chargeable to tax*

*has escaped assessment 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 Section 142(1) or Section 148 or to disclose fully and truly all material facts necessary for the assessment."*

7.2 In this case, the audited accounts filed by the assessee (Schedule F current liabilities and provision) reflected the following:

As at 31.03.2008 -----		As at 31.03.2009 -----
2,36,29,596	Deposit and Advances from customers	2,61,28,024

7.3 In the original assessment order completed u/s 143(3) of the I.T.Act, the taxability of freezer security deposits was considered and addition to the income was made by the A.O. The observation of the A.O. in original assessment reads as follows:

*"2.7 In the light of the foregoing discussion, it is evident that dealer deposit become taxable with efflux of time. The amount that is taxable is worked out and as per annexure 1 to this order. This comes to 20,16,542. The amount is added to the total income."*

7.4 The reasons recorded for reopening recorded by AO is as follows:-

*"Since the entire freezer deposits prior to A Y 2006-07 had already got lapsed by A Y 2009-10, the same ought to have been brought to tax in the A Y 2009-10. By not bringing to tax the lapsed freezer deposits*

*pertaining to the assessment years prior to 2006-07, there is short assessment of income in AY 2009-2010. I am therefore, satisfied that income to the tune of Rs.1,80,61,857 had escaped assessment within the meaning of clause (c) of the explanation to section 147 in so far as disallowance of the lapsed liability on account of freezer deposit for the period prior to AY 2006-07 already got lapsed."*

7.5 The Assessing Officer has not mentioned nor established that the re-assessment is proposed due to failure on the part of the assessee to disclose truly and fully all material facts which is a pre-condition when the notice u/s 148 of the I.T.Act is issued beyond a period of four years. While completing the original assessment, the lapsed liability was taxed on a proportionate basis over four years from the date of receipt, whereas in the re-assessment all the lapsed freezer deposits which were outstanding as on 31.03.2006 were taxed on the ground that the liability to repay has ceased. Thus, the re-opening was on a change of opinion. The Hon'ble Apex Court in the case of *ITO vs Techspan India Private Ltd and another ( 404 1TR 10)* has held as follows:-

*"The language of section 147 of the Income-tax Act, 1961 makes it clear that the Assessing Officer has the power to reassess any income which has escaped assessment for any assessment year subject to the provisions of sections 148 to 153. However, the use of this power is conditional upon the fact that the Assessing Officer has some reason to believe that income has escaped assessment. The words "reason to believe" in section 147 have to be interpreted schematically as a liberal interpretation would have the consequence of conferring arbitrary powers on the Assessing Officer who may even initiate reassessment proceedings merely on his*

*change of opinion on the basis of the same facts and circumstances which have already been considered by him during the original assessment proceedings. Such could not be the intention of the Legislature. Doing so would have the effect of giving the Assessing Officer the power of review. Section 147 confers the power to reassess and not the power to review. The provision was incorporated in the scheme of" the Act so as to empower the Assessing Officer to reassess any income on a ground which was not brought on record during the original proceedings and escaped his knowledge; and the fact would have material bearing on the outcome of the relevant assessment order."*

7.6 As mentioned earlier, admittedly reopening of assessment was initiated after four years and the original assessment order was completed u/s 143(3) of the I.T.Act. Therefore, the necessary precondition in such situation for reopening the assessment, is that the income has escaped assessment by reason of the failure on the part of assessee to disclose fully and truly all material facts. The Assessing Officer in the reasons recorded for issuance of notice u/s 148 of the I.T.Act had not mentioned that income has escaped assessment, on account of non-disclosure on the part of the assessee of full and true material facts necessary for completion of assessment. The taxability of lapsed freezer deposit on proportionate was basis of original assessment, whereas in the reassessment, the lapsed freezer deposit as on 31.03.2006 was sought to be taxed as income for assessment year 2009-2010. Therefore, the reassessment was initiated on mere change of opinion. Hence, going by the judicial pronouncements cited supra, we hold that reassessment order for assessment year 2009-2010 is bad in law.

7.7 As regards the issues on merits are concerned, we notice that the ITAT Cochin bench had dismissed the department appeal against the original assessment following its own orders for the earlier years on the ground that the said amount is taxable only in the year of termination and the assessee had already offered such amount to tax in the return of income filed by it. The observation of the Tribunal while dismissing the Revenue appeal is reproduced below for ready reference :-

*"We have considered the rival submissions on either side and relevant material on record. The issue arises is whether the deposits in respect of the freezer has to be considered as income of the assessee or not. As rightly submitted by the Id AR of the assessee that this issue was considered by the Tribunal in one of the assesses for the earlier assessment year and found that such deposits cannot be considered as income of the assessee. The only objection of the Id DR is that the appeal was filed against the order of the Tribunal and the same is pending before the High Court. But on a query from the Bench, the Id DR has clarified that the High Court has not granted any stay of the operation of the earlier order of the Tribunal. Since the CIT(A) has followed the order of the Tribunal, this Tribunal is of the considered opinion that mere pending of the appeal before the High Court against the order of the Tribunal cannot be a reason to take a different view. Therefore, by following the order of the Tribunal for the earlier assessment year, this Tribunal is of the considered opinion that the deposits collected by the assessee for freezer cannot be considered as income of the assessee."*

7.8 The above order of the Tribunal has not been reversed by the Hon'ble High Court. It was submitted by the learned AR, the appeals filed by the Revenue against the Tribunal's orders in assessee's own cases for earlier years was withdrawn for the reasons that tax effect in those cases were below the monetary limit. Therefore, following the Tribunal order, in

assessee's own case (supra), we hold that the freezer security deposit is taxable only on the year of termination of agreement between the assessee and the dealer / distributor. It is ordered accordingly.

8. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on this 03<sup>rd</sup> day of March, 2020.

Sd/-  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(George George K)**  
**JUDICIAL MEMBER**

Cochin ; Dated : 03<sup>rd</sup> March, 2020.  
Devadas G\*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-I, Kochi.
4. The CIT, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)  
**ITAT, Cochin**