IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE SMC BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.756/Ind/2019
Assessment Year: 2007-08

M/s Ganpat Pannalal Main Road, Harda	बनाम/ Vs.	ITO-1 Harda
(Appellant)		(Revenue)
P.A. No.AAFFM4284P		

Appellant by	Shri Ashish Goyal & Shri N.D. Patwa, ARs
Respondent by	Shri K.G. Goyal, CIT-DR
Date of Hearing:	**12.03.2020**
Date of Pronouncement:	**18.05.2020**

आदेश / O R D E R

This appeal by the assessee is directed against order of the CIT(A)-1, Bhopal dated 05.04.2019 pertaining to the assessment year 2007-08. The assessee has raised following grounds of appeal:

1.That on the facts and in circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the action of the AO for reopening of the case u/s 147 by issuing notice u/s 148.

2.That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Rs. 2,80,304/- made by the AO out of deduction claimed u/s 80(IB)(1l) of the Act without considering the explanation offered by the appellant and without considering the fact that as per the supplementary deed no remuneration is to be given to the partners.
3.That on the facts and in the circumstances of the case, charging of interest u/s 234B and 234C is not justified.
4.That on the facts and in the circumstances of the case, initiation of penalty proceedings u/s 271(1)(c) is not justified.
5.That the appellate craves, leave to add, to urge, to alter or to amend any of the grounds of appeal on or before the date of hearing.

3. Briefly stated facts are that the case of the assessee was reopened and the assessment u/s 143(3) r.w.s 147 of the Income Tax Act 1961(hereinafter called as 'the Act') was framed vide order dated 27.03.2015. The reason for reassessment as per the assessing officer was that the assessee has declared business income of Rs.5,56,193/- and claimed the deduction of Rs.5,33,933/- u/s 80IB(11A) of the Act. It was further observed that the allowable salary

to the partners worked out to the extent of Rs. 2,80,304/-. The assessee had claimed the deduction without allowing salary to the partners. As per provisions of section 40(b)(v)(2) the maximum salary to the partners to the extent of Rs.2,80,304/- was required to be allowed before deduction of u/s 80IB(11A) of the Act. Hence, involving revenue effect of Rs.94,350/-. Thereafter, the assessing officer framed assessment thereby the addition of Rs.2,80,304/- was made.

4. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions dismissed the appeal. Now the assessee is in appeal before this Tribunal.

5. Ld. counsel for the assessee Shri Ashish Goyal, vehemently argued that the reopening is bad in law. It is contended that the reopening was after expiry of 4 years.

There is no allegation that the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment year. Ld. counsel for the assessee in support of this aspect has taken through the reasons recorded by the assessing officer and placed reliance on the judgment of the Hon'ble Bombay High Court rendered in the case of *Hindustan Lever Ltd. vs R.B. Wadkar (2004) 190 CTR (Bom.) 166,* to buttress the contention that the assessing officer was required to make allegation of furnishing inaccurate particulars. Further Ld. counsel for the assessee reiterated the submissions as made in the written synopsis on this issue. The submissions of the assessee are reproduced as under:

> ***GROUND NO.1: VALIDITY OF REASSESSMENT***
>
> *1.**Failure on part of assessee - no mention in the reasons:*** *It is an uncontroverted fact that reopening is after 4 years from end of A.Y. and already an assessment was*

completed u/s. 143(3). Proviso to section 147 is clearly attracted.

The Id AO must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment. Reliance is placed on Hindustan Lever Ltd. vs R.B. Wadkar (2004) 190 CTR (Bom.) 166, wherein this Court has held as under:

- *"It is for the AO to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form iiis.opinton. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the*
. concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reached to the Court, on the strength of affidavit or oral submissions advanced. Impugned notice quashed"

Further reliance is placed on the following cases:
a. Shri Warana Sahakari Oudh Utpadak Prakriya Sang

2841TR 477 (80m.)
b.HCL Technologies Ltd. (2017) 397 ITR 469 (Del.)
c.Cadila Healthcare 334 ITR 420 (Guj.)
d.Ohampur Sugars Mills 330 ITR 72 (All.)
e.City & Industrial Oevt Corp. of Maharashtra (2014) 103 OTR 377 (80m.) f Firstsource Solutions (2019) 176 OTR 151 (80m.)

2.<u>No Failure to disclose full and truly all material facts</u>

During the original assessment proceedings, the notice along with Questionnaire u/s 142(1) dated 24.09.2009 was issued on appellant (PB 39-42). Queries relating to Partner's salary were raised in Q 22.

In response, the AR of the assessee attended and furnished the details as per questionnaire. (Refer PB 45 Para 2 of Assessment order). The return of Income along with the Audited accounts (PB-5-34) and various other enclosures as per the below list were also filed:

a.Income tax return (PB- 1-4)
b.Reply claiming 80IB(11A) dated 24.08.09 (PB 43)
c.Form 10CCB - Audit report u/s. 80lB (PB 35-38)
d.Form No 3CD - Specifically Par 18 about particulars of payment to persons specified u/s 40(b) (PB 7(para g)) and u/s. 40A(2) (PB 7 (Back), para 18). Annexure - B. (PB 11)
e.Explanation filed before AO on 23.03.2011. (PB 54-55)

It is pertinent to note that in original assessment proceedings, the fact that no salary was given to partners and details of deduction claimed by assessee u/s 80IB(l1A) was on record.

The explanation filed before AO on 23.03.2011 (PB 54-55) was before the reassessment proceedings were initiated on 24.03.2014.

There was no failure on part of the assessee to disclose fully and truly all material facts necessary for assessment. The reopening is beyond 4 years and it attracts the 1st Proviso to Sec 147. Thereby making the reassessment invalid.

In this behalf, the following observation of the Supreme Court in the judgment Ganga Saran and Sons P. Ltd. v. ITO [1981J 130 ITR 1 will be relevant (page 11) :

. "The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have

weighed with the Income-tax Officer in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147(a). 1/ there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income-tax Officer could not have reason to believe that" any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid. "

3. <u>There is No Escapement of Income</u>

- *The Id. lower authorities have blown hot and cold in the same breathe. On the one hand, they say that deduction u/s. 80IB(l1A) shall be disallowed as remuneration shall reduce !he profit. But, the profit is nor reduced While calculating the business income.*

If the profit is reduced, the profit under business/ profession shall be recomputed; and it is only then the deduction u/s. 80IB(l1A) shall be recomputed.

Thus, Id lower authorites had totally misguided themselves. If full effect was given to the provision, the effect of recomputation was nil.

4.<u>Merely Based on Audit Objection.</u> The reopening of the assessment without any basts, merely a change of opinion and is purely based on audit objection; is not permissible IL and Fs Investment Managers Ltd Vs ITO (2008) 298 ITR 32 (80m).

Also held in by Supreme Court in Indian & Eastern Newspaper Society [1979] 2 Taxman 197 (SC) that view expressed by internal audit party on a point of law cannot be regarded as "information" for purposes of initiating proceedings under section 147. Thus, audit objection, by itself, cannot be a reason to believe.

5. <u>No fresh Information</u>

It was submitted that reopening of the assessment was based on reappraisal of the same facts which were available at the time of assessment completed under section 143(3) of the Act, and the reassessment

> *proceedings initiated merely on the basis of change of opinion were, bad in law .*
> *6.<u>Reopening based on Change of opinion</u>*
> *The Hon'ble Bombay High Court in Idea Cellular Ltd. v. Dy. CIT [200B]301ITR 407 (80m.) held .that once all the material with' regard to particular issue is before the AD and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him.*
> *The appellant relies on the judgment in CIT Vs Kelvinator of India 320 ITR 561 (SC)(FB) to contend that on a mere change of opinion, reopening cannot be done.*
> *It is pertinent to note that in original assessment proceedings, the fact that no salary was given to partners and details of deduction claimed by assessee u/s 80IB(l1A) was on record.*
> *The explanation filed before AD on 23.03.2011 (PB 54-55) was before the reassessment proceedings were initiated on 24.03.2014.*

6. On the contrary, Ld. DR opposed the submissions and contended that the reopening has been validly done. He contended that the assessee failed to make true disclosure of particulars. He submitted that the reason for reopening is self-speaking, he therefore, relied on the decision of the authorities below.

7. We have heard the rival submissions perused the material available on records and gone through the orders of authorities below. In the present case the assessment was opened by issuing requisite notice on the following grounds.

(i) the assessing officer observed that on perusal of record, it is transpired that the assessee has shown business income at Rs. 5,56,193/- and claimed the deduction of Rs.5,33,933/- u/s 80IB(11A) of the Act. It was observed by the assessing officer that the allowable salary to the partners worked out to the extent of Rs.2,80,304/-. The assessee had claimed the deduction without allowing the salary to the partners. So far issue of reopening of the assessment is concerned, there was no infirmity into the order of the authorities below as it was incumbent upon the assessee to disclose true particulars before claiming the deductions.

(ii) Ground No.2 is against the disallowance of deduction u/s 80IB(11A) of the Act. It is contended that the assessee has claimed deduction u/s 80IB(11A) without allowing salary to partners, if the salary was allowed to the partners, then allowable deduction will be reduced by Rs.2,80,304/-. It is contended that the assessee firm has executed supplementary deed on 15.09.04, and as per the same, no salary was given to the partners and hence the assessee has not given the salary. Thus, when the partnership deed does not allow the remuneration to partners, no remuneration can be given to the partners.

8. Ld. CIT(A) did not consider this supplementary deed. Further it is contended that the authorities have blown hot and cold in the same breathe. On the one hand, they say that deduction u/s 80IB(11A) shall be disallowed as remuneration shall reduce the profit. But, the profit is not reduced while calculating the business income. If the profit

is reduced, the profit under business/profession shall be recomputed and it is only then the deduction u/s 80IB(11A) shall be recomputed. Thus, authorities below had totally misguided themselves. If full effect was given to the provision, the effect of re-computation was nil.

9. Ld. DR opposed the submissions and supported the orders of the authorities below.

10. I find merit into the contention of the assessee that if the profit is reduced, the profit under the business/ profession shall be recomputed and it is only then the deduction u/s 80IB (11A) shall be recomputed. If full effect was given to the provision, the effect of re-computation of income would be nil. Therefore, the Ld. A.O is hereby directed to delete the addition.

11. This ground of assessee's appeal is allowed.

Order was pronounced in the open court on 18 .05.2020.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Indore; दिनांक Dated : 18 /05/2020
Patel/PS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore