

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2381/MUM/2018
Assessment Year: 2008-09**

Asst. Commissioner of Income Tax-22(3),
Room No. 305, Piramal Chambers,
Lalbaug, Mumbai-400012.

M/s Sanjay Sunil Bajaj,
Vs. 133/7, Fountain Head
Society S.V. Road, Khar
(W), Mumbai-400029.

Appellant

**PAN No. AMPKB2675G
Respondent**

Revenue by : Mr. V. Vinod Kumar, DR
Assessee by : None

Date of Hearing : 07/10/2020
Date of Pronouncement : 09/10/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2008-09. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-32, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s 147 the Income Tax Act 1961, (the 'Act'). Although the case was fixed for hearing on 19.02.2020 and 07.10.2020, neither the assessee nor his authorized representative appeared before the

Tribunal on the above dates. As there is non-compliance by the assessee, we are proceeding to dispose off this appeal, after examining the materials available on record and after hearing the Ld. Departmental Representative (DR).

2. The grounds of appeal filed by the Revenue read as under :

1. On the facts and in the circumstances of the case and in law. the Ld. CIT(A) erred in holding the reassessment proceedings as invalid stating that it is a case of change of opinion ignoring the fact that the A.O. formed no opinion in the first place as is evident from the original assessment order.
2. On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in not deciding the appeal on merits with regard to the issue of disallowance under section 40(a)(ia) of the Act, ignoring the fact that the Assessing Officer has followed the provisions of section 147 of the Income Tax Act, 1961, as he had sufficient reason to believe that the income chargeable to tax had escaped assessment.
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not deciding the appeal on merits with regard to the issue of disallowance under section 40(a)(ia) of the Act ignoring the ratio laid down by the Hon'ble Supreme Court in the case of ACIT Vs Rajesh Jhaveri Stock Brokers (P.) Ltd. (2007) 291 ITR 500, wherein it was held that at the initiation stage, what is required is 'reason to believe' but not the established fact of escapement of income.

3. Briefly stated, the facts of the case are that the assessee filed his return of income for the assessment year (AY) 2008-09 on 26.09.2008 declaring total income of Rs.67,83,235/-. The assessment was completed by the Assessing Officer (AO) u/s 143(3) on 22.12.2010 assessing the total income at

Rs.69,33,740/-. Thereafter, the AO reopened the assessment u/s 147 on the basis of the following reasons:

“In the instant case, the assessee had filed return on 26.09.2008 declaring income of Rs.67,83,235/-. The assessment was completed u/s 143(3) of the Act, 1961 on 22.12.2010 determining total income of Rs.69,33,740/-.

The assessee Shri Sanjay Sunil Bajaj took over the affairs of the proprietary firm on 19.02.2007 on the demise of his father Shri Sunil M Bajaj. During the financial year 2007-08 the assessee had claimed deduction on account of bad debt amounting to Rs.18,89,031/- for the sundry debtor prior to 18.02.2007 on the contention that business is continue.

During the same FY assessee had paid labour charges amounting to Rs.5,11,23,710/ but the TDS was not deducted as per section 194C. The assessee can't take two different contradictory stands for availing two different benefits one for claiming deduction of bad-debt & another for non deduction of TDS. Therefore, the provisions of chapter XVIIB are applicable to assessee's case and that as TDS was not deducted provision u/s 40(a)(ia) are attracted & deduction of expenditure is not admissible.

In view of the above, I have reason to believe that the assessee has concealed particulars of its income, income chargeable to tax of Rs.5,11,23,710/- , in the meaning of section 147 of the I. T. Act.

Therefore, I have reason to believe that the assessee has concealed particulars of its income, and therefore, income chargeable to tax, has escaped assessment in the of the meaning of section 147 of the I. T. Act.”

3.1 In response to a query raised by the AO to explain why labour charges amounting to Rs.5,11,23,710/- should not be disallowed u/s 40(a)(ia) as no TDS has been made u/s 194C of the Act, the assessee filed a reply stating that “the provisions of section 194C are very clear regarding the exemption from

deduction of TDS from payments i.e. the payer (being an individual) whose gross turnover/sales does not exceeds Rs.40 lakhs in the immediately preceding financial year (i.e. FY 2006-07), the assessee is not liable to deduct TDS on such payments in the FY 2007-08.”

However, the AO was not convinced with the above reply of the assessee and made a disallowance of Rs.5,11,23,710/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) by following the decision in *CIT v. Kelvinator of India Ltd.* (2010) 320 ITR 561 (SC), *CIT v. Foramer France* (2003) 264 ITR 566 (SC), *MJ Pharmaceuticals Ltd. v. DCIT* (2008) 297 ITR 119 (Bom), *Carlton Overseas P. Ltd. v. ITO* (2009) 318 ITR 295 (Del) held that :

“I have perused the details filed by the appellant. The AO during the original assessment proceedings had called for the details of the labour charges paid and the reasons for the non-deduction of TDS on the same. The appellant vide letter dated 11.08.2010 had submitted the details of the same. The AO had completed the assessment not making any addition of the labour charges paid.

This clearly means that the AO had inquired of the details of the labour charges and once satisfied that no addition needs to be made for the same, the AO completed the assessment without making any adjustment to the total income.

The issuance of the notice u/s. 148 recording that the income had escaped assessment as the appellant did not comply with the TDS provisions is nothing but change in opinion of the appellant, which is not permissible under law as well as plethora of judicial precedents mentioned above.

In light of the facts and judicial analysis, I am of the view that the re-opening of the assessment is due to change in opinion of the AO and accordingly, not valid in law.

The re-assessment proceedings are hereby dropped. This ground of appeal is allowed.

Having held that the assessment is bad in law and invalid in Ground No. 1, the other grounds of appeal do not need any adjudication and accordingly, the same are not being dealt with.”

5. Before us, the Ld. DR submits that the AO has rightly reopened the assessment by issuing notice u/s 148 of the Act. In this regard reliance is placed by him on the decision in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (supra).

6. We have heard the Ld. DR and perused the relevant materials on record. The reasons for our decisions are given below.

In *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (supra), the Hon’ble Supreme Court held that intimation u/s 143(1)(a) is not an assessment, therefore, notice u/s 148 is validly issued. Here in the instant case, we are concerned with issuance of notice u/s 148 after the completion of assessment u/s 143(3) of the Act. Therefore, the above decision relied on by the Ld. DR is distinguishable from the present case.

A perusal of the documents clearly indicates that the assessee had filed details of labour charges *vide* his letter dated 11.08.2010 before the AO. Further, he explained to the AO *vide* letter dated 25.08.2015 that the provisions of section 194C are not applicable since his gross turnover/sales does not exceed Rs. 40 lakhs in the immediately preceding financial year.

In the case of *Kelvinator of India Ltd.* (supra), the Hon’ble Supreme Court held that after substitution of section 147 by the Direct Tax Laws (Amendment) Act, 1987, concept of ‘change of opinion’ must be treated as an

in-built test to check abuse of power by Assessing Officer and therefore, after 01.04.1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment ; reasons must have a live link with formation of belief.

In *Foramer France* (supra), the Hon'ble Supreme Court, observing that the law prevailing on date of issue of impugned notice would apply to instant case, and since new section 147 had come into force w.e.f. 01.04.1989, provisions of that section were applicable, held that "since admittedly there was no failure on the part of the petitioner to make return or to disclose fully and truly all material facts necessary for assessment, proviso to section, which bars issue of notice u/s 148 after expiry of 4 years from end of relevant assessment year, squarely applied to facts of instant case and therefore, impugned notice was barred by limitation."

In *CIT v. Srusti Diam* (2015) 57 taxmann.com 392 (Bom), the Hon'ble Bombay High Court held that "where assessee made available details of labour charges which was duly accepted by the Assessing Officer during regular proceedings, reopening of same for current year on the basis of material obtained during subsequent year, was unjustified.

In the instant case, the AO has issued the notice u/s 148 beyond 4 years from the relevant assessment year. In view of the above factual scenario, we are of the considered view that the AO has reopened the assessment on the basis of a mere change of opinion and therefore, the same cannot be sustained. Therefore, we uphold the order of the Ld. CIT(A)

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

**Order pronounced through notice board under rule 34(4) of the
Income Tax (Appellate Tribunal) Rules, 1963.**

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 09/10/2020
Rahul Sharma Sr. PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai