

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

I.T.A. No.59/DEL/2018
Assessment Year: 2009-10

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| Rites Ltd., Scope Building, Scope Minar, Laxmi Nagar, New Delhi. | Vs. | Addl. CIT, Special Range-7, New Delhi. |
| TAN/PAN: AAACR0830Q | | |
| (Appellant) | | (Respondent) |

I.T.A. No.680/DEL/2018
Assessment Year: 2009-10

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| Addl. CIT, Special Range-7, New Delhi. | Vs. | Rites Ltd., Scope Building, Scope Minar, Laxmi Nagar, New Delhi. |
| TAN/PAN: AAACR0830Q | | |
| (Appellant) | | (Respondent) |

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|------------------------|--|----|------|
| Assessee by: | Shri R. S. Singhvi, CA and Shri Shri Satyajit Goel, CA | | |
| Respondent by: | Shri Govind Singhal, Sr.D.R. | | |
| Date of hearing: | 18 | 02 | 2021 |
| Date of pronouncement: | 17 | 05 | 2021 |

ORDER

PER AMIT SHUKLA, JM

The aforesaid Cross Appeals have been filed by the Revenue as well as by the assessee against impugned order dated 16.10.2017, passed by Id. CIT(A)-XXXVIII, Delhi for the quantum of assessment passed u/s.147/143(3) for the

Assessment Year 2009-10. In the Revenue's appeal only grounds raised reads as under:

"1. On the facts and under the circumstances of the case, ld. CIT(A) has erred in law and facts in deleting the addition of Rs.483.69 lakhs being donation to the Railway Minister Welfare and Relief Fund ignoring that it was a CSR expenses which is not an allowable expenditure for business purpose u/s.37(1) of the IT Act."

2. Whereas in the assessee's appeal, the assessee has raised various grounds, especially challenging validity of reopening u/s.147/148. The grounds raised by the assessee read as under:

"1(i) That on facts and circumstances of the case, the Ld. CIT(A) was not justified in upholding validity of notice u/s 148 without appreciating proviso to section 147 of the Income Tax Act, 1961.

(ii) That original assessment having been completed u/s 143(3) and there being no case of any failure on part of the assessee in disclosing full and true particulars of income at the time of original assessment, the case falls under the first proviso to section 147 and as such the impugned notice u/s 148 is invalid and without jurisdiction.

(iii) That in absence of any new tangible material, the reasons recorded are merely on the basis of material already on record and as such the reopening u/s 148 is based on change of opinion and same is bad in law.

(iv) That even otherwise, re-appreciation of same material being impermissible under the provisions of section 148, the

reassessment proceedings are invalid and in contravention to the scheme of the Act.

2(i) That on facts and circumstances of the case, the Ld. CIT(A) was not justified in confirming disallowance of Rs 87.54 Lakhs being claim of business loss in respect of unrealized claim of TDS, which is a permissible deduction u/s 37/36(1)(vii) of the Income Tax Act, 1961.

(ii) That the claim is in respect of unrealized TDS credit and same being a genuine business liability or unrealized debt, the disallowance is illegal, arbitrary and in disregard to provisions of section 37/36(1)(vii) of the Act.

(iii) That in any case, the disallowance is merely on the basis of change of opinion and same is not sustainable in the case of reassessment u/s 147 of the Act.

3(i) That on facts and circumstances of the case, the Ld. CIT(A) was not justified in confirming disallowance of Rs. 77.86 Lakhs on account of claim of warranty and commitment charges.

(ii) That the claim of warranty and commitment charges is in respect of business activities of the appellant and same being integral part of the business, the disallowance is misconceived and in total disregard to past history of the case.

(iii) That the claim of warranty and commitment charges being a regular feature and based on reasonable estimates, the impugned disallowance is in total disregard to past accepted history and principle laid down by Hon'ble Supreme Court.

(iv) That in any case, the disallowance is merely on the basis of change of opinion and same is not sustainable in the case of reassessment u/s 147 of the Act.

4. That on facts and circumstances of the case, the assessing officer has erred in not allowing full credit of TDS and advance

tax as appearing in Form 26AS and supported from TDS certificates on record.

5. That the assessee craves leave to add, amend, alter or forgo any or all of the grounds as may be necessary and in the interest of justice.

6. That the orders of lower authorities are not justified on facts and same are bad in law.”

3. Since assessee has challenged the very validity of re-assessment proceedings, therefore, same is being taken up first.

4. The brief facts are that the assessee is a Government of India undertaking engaged in the business of consultancy in transport sector in India and abroad and other additional activities such as exports and leasing, technical consultancy etc. The return of income for the Assessment Year 2009-10 was filed on 25.09.2009 declaring income of Rs.196,51,50,476/- which was later on revised to Rs.191,59,00,220/-. The said return was selected for scrutiny and thereafter assessment was passed u/s.143(3) vide order dated 03.03.2013 at an income of Rs.196,64,28,067/- wherein various additions/disallowances were made which ultimately got deleted from the stage of ld. CIT(A) and ITAT. After the completion of the assessment in the aforesaid manner, the Assessing Officer sought to reopen the case u/s. 147 vide issuance of notice u/s.148 on 23.03.2016 which was after the expiry of four years, from the end of the relevant assessment year, on the ground of escapement of income and

re-verification of fact already available on record. The reasons recorded by the Assessing Officer for reopening the assessment read as under:

“In this case, the assessee filed its return of income on 25.09.2009 at an income of Rs 1,96 51,50,476/-. Thereafter the assessee had filed revised computation of income declaring income at Rs. 1,91,59,00,220/-. The assessment order u/s 143(3) was passed on 03.03.2013 at an income of Rs. 1,96,64,28,064/-. The assessee in this case is engaged in the field of railway sector.

2, Subsequently, it was noticed that as per profit and loss account the assessee has debited Rs. 87.54 lakh and Rs. 77 86 lakh for provision doubtful advances, TDS & Banks and commitments respectively. As the provision made was not an ascertained liability as such expenditure was not allowable.

3 In addition, it was noticed that the assessee in point No. 13(d) of 3 CED report had declared that it did not recognize income of Rs.1704.53 lakh (as per point no.7 of schedule B and no.15 to notes to accounts) from its Subsidiary. On the other hand, the assessee had made a provision of Rs.6300 lakhs towards exposure in Tanzania Railways Ltd, Tanzania a foreign subsidiary against which income of Rs. 1704.53 lakh was not offered by the assessee. As such income Rs. 1704.53 lakh was not assessed.

4. Again, it was noticed that the assessee has made donation of Rs. 483.69 lakh for Railway Minister Welfare & Relief Fund Scrutiny of assessment record reveals that the amount of donation is not an allowable deduction u/s 80G as

per Income tax Act. Further, the assessment record of the assessee did not show any evidence of payment the said donation.

5. After perusal of the above mentioned information and facts, I have reason to believe that an income of at least Rs. 2353.62 lacs for AY. 2009-10 has escaped from assessment. Approval for initiating proceedings u/s. 147 r w. 149(1)(b) r.w.s. 151 of the Income Tax is requested from PCIT-7, New Delhi for determination of income of the assessee in AY 2009-10.”

5. Thereafter, the Assessing Officer completed the assessment u/s.147/143(3) vide order dated 31.12.2016 after making following additions:-

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|---------------------------------------|------------------|
| a. Claim of unrealized debt | Rs.87,54,000/- |
| b. Disallowance of commitment charges | Rs.77,86,000/- |
| c. Disallowance of Expenses | Rs.4,83,69,000/- |

6. Validity of reopening was challenged before the Id. CIT (A) also and detailed submissions were made which were dealt and incorporated in the impugned appellate order from pages 2 to 7. However, the Id. CIT (A) rejected the assessee's contention after concluding as under:

“3.4 Thus, information on basis of which Assessing Officer had initiated proceedings under section 147 was certain and, it could be construed to be sufficient and relevant material on basis of which a reasonable person could have formed a belief that income had escaped assessment. It is also observed there was due compliance of provisions of section 151 of IT Act, 1961. Thus, there was reason to believe that income of the appellant-

company had escaped assessment on account of failure on the part of the appellant to disclose fully and truly all material facts/particulars of its income necessary for its assessment. For the reasons mentioned above, it has to be held that the reassessment proceedings initiated by the Assessing Officer were within jurisdiction and valid in the eyes of law in as much as reasons recorded by the Assessing Officer satisfied the requirement of section 147. The decisions relied upon by the AR are on a different footing. Therefore, reassessment/proceedings initiated by the Assessing Officer under section 147/148 are upheld.”

7. We have heard both the parties at length and perused the relevant finding given in the impugned order as well as material placed on record. On perusal of the ‘reason recorded’ and material on record, it is an undisputed fact that in this case the original assessment u/s.143(3) was made vide order dated 03.03.2012 after detailed scrutiny proceedings and verification of audited accounts, Audit report and books of account. Thereafter, various disallowances were made which ultimately stood deleted from the appellate stage. Now after the expiry of four years from the end of the relevant assessment year, the ld. Assessing Officer has again sought to reopen the said assessment u/s.147/148 on the ‘reasons’ incorporated above. From a bare perusal of the ‘reasons’, it is seen that there is no tangible material which has been referred to or brought on record having live link nexus with the income escaping assessment. The ld. Assessing Officer is

trying to revisit the profit and loss account and audit report which was already there on the record and duly verified and scrutinized during the original assessment proceedings which is evident from the narration on every count in the reasons that, **“it was noticed that**” (as highlighted by us in bold above).

8. In cases where assessment has been completed u/s.143(3) and same is being sought to be reopened after the expiry of four years from the end of the relevant assessment year, the statute put fetters on the power of the Assessing Officer in terms of *first proviso* to Section 147 which provides that, where an assessment under sub-section (3) of section 143 or 147 has been made for the relevant assessment year, then no action shall be taken under section 147/148 after the expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year 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 sub-section (1) of section 142 or section 148; or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. Thus, the reopening in the aforesaid circumstances is permissible only when, *firstly*, any income chargeable to tax has escaped assessment by the reason of the failure on the part of the assessee to make return; or *secondly*, failure to disclose fully and truly all material facts necessary for the assessment. In so far as the first condition

is concern, it is an undisputed fact and also accepted by the Assessing Officer that return of income u/s.139(1) was filed on 25.09.2009 and also revised return was filed on 03.03.2013 which is mentioned in the assessment order u/s.143(3) as well as in reasons also. In so far as second condition is concerned, that is, the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, same has not been ascribed by the Assessing Officer in his reasons recorded. Nor is it so from the plain reading of reasons recorded. If the Assessing Officer has to validly assume jurisdiction after coming to his *prima facie* reason to believe that income any chargeable to tax has escaped assessment due to failure on the part of the assessee disclosed fully and truly all material facts, then he has to demonstrate such failure in his reasons and it should not be mere bald statement. Here in this case, the reasons itself speaks that all the points on which Assessing Officer had sought to raise in his reasons recorded were already disclosed in the P&L account or in the audit report and nothing has been found which was not disclosed which could lead to any inference of income chargeable to tax has escaped assessment. There was absolutely no failure on part of the assessee to disclose truly and fully all material facts necessary for assessment. The duty of the assessee is to disclose all the primary facts necessary for the assessment in his return of income and in the audited financial statements. Thereafter, the legal inference has to be drawn by the

Assessing Officer. The *proviso* to section 147 puts embargo of time limit of four years from the end of the relevant assessment year where assessments have been done under section 143(3), if the twin conditions provided therein are not met. Thus, the said proviso is an explicit safeguard which prohibits the Assessing Officer from exercising the power to re-assess where the assessment has already been completed u/s. 143(3). If there is any oversight or inadvertent mistake of the Assessing Officer in the original assessment proceedings which has been discovered by him later on reconsideration of same material, then it tantamount to 'change of opinion', more so in cases where the reopening is hit by *first proviso* to Section 147 (*supra*). In such cases, law does not permit the Assessing Officer to reopen a concluded assessment after expiry of 4 years from the end of the relevant assessment year like in the present case.

9. In the latest judgment of Hon'ble Supreme Court in the case of **PCIT vs. L&T Ltd., reported in (2020) 268 Taxman 390**, the Hon'ble Supreme Court wherein the question for consideration was; "*Whether on the facts and circumstances of the case, the Tribunal was correct in law in holding that the notice issue u/s.148 was not valid on the ground that Assessing Officer has not demonstrated the failure of the assessee in disclosing the material fact?*" Their Lordships after reproducing the reasons recorded by the Assessing Officer for issuing notice u/s.148 observed as under:

"2. The appeal as arises out of the judgment of the Income Tax

Appellate Tribunal in which it was held that the notice of reopening which was issued beyond the period of 4 years from the end of the relevant assessment year, was invalid. We may reproduce the reasons recorded by the Assessing Officer for issuing such a notice :

"(i) It was seen from the records that while computing the deduction u/s 80-IA, certain pass through components like Fuel adjustment Charges (FAC), electricity duty, wheeling charges, grid support charges etc. have not been considered for arriving at the market value of the electricity.

(ii) For the purpose of claiming deduction u/s 80-IA, excess profit from the generation of electricity has been shown as against '16% return on investment' fixed by the Ministry of Power.

(iii) Various expenses like interest, commission, brokerage and corporate overheads were not debited to the separate Profit & Loss A/c. Further, sales and administrative expenditure is not proportionate to the expenditure debited in consolidated P&L A/c to the profit of 80-IA units, which has resulted in excess deduction u/s 80-IA.

(iv) The assessee claimed deduction u/s 80-IA, 80HHB, 80HHBA, 80-HHC, 80HHE etc. However, exemption claimed u/s 80-IA was not reduced from other chapter VI-A deduction as per provisions contained in Section 80-IA.

(v) Deduction u/s 80-IA was wrongly claimed in respect of work on contract basis for various Govt. Agencies, which cannot be considered as infrastructure provider."

3. Perusal of the reasons recorded by the Assessing Officer would show that the Tribunal was perfectly correct in coming to

the conclusion that the notice of reopening of assessment was invalid. From the reasons we gather that there was no element of lack of true and full disclosure on the part of the assessee, which resulted into any income chargeable to tax escaping assessment. The reasons clearly reveal that the Assessing Officer was proceeding on the material which was already on record. In the absence of the statutory requirement of income chargeable to tax have been escaped assessment due to the failure on the part of the assessee to disclose truly and fully all material facts been satisfied, the Tribunal correctly held that the notice of reopening of assessment was invalid. No question of law arises.”

10. The judgment of Hon’ble Supreme Court in principle will apply *mutatis mutandis* on the present ‘reasons’ also, because here in this case there is no element of law of true and full disclosure on the part of the assessee and the reasons of the assessment order was based on the material which was already on record. Thus, such a reason cannot clothe the Assessing Officer with the jurisdiction to complete the assessment after the expiry of four years from the end of the relevant assessment year.

11. Hon’ble Jurisdictional Delhi High Court in the case of **Oracle India Pvt. Ltd. vs. ACIT, as reported in (2017) 397 ITR 480 (Del)**, held that where audited accounts were already available with the Assessing Officer and form part of the assessment record, then merely suggesting that there was failure on the part of the assessee to compute and declare the true taxable income without further clarification would not

justify reopening of the assessment after the limitation period of four years.

12. Thus, we hold that the re-assessment proceeding initiated vide notice dated 23.03.2016 is bad in law and *void ab initio* and consequently the entire assessment is quashed. Since, we have already quashed the re-assessment proceedings, all other issues raised on merits by the Revenue as well as by the assessee have become infructuous.

13. In the result, the appeal of the assessee is allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 17th May, 2021.

Sd/-

**[ANIL CHATURVEDI]
ACCOUNTANT MEMBER**

DATED: 17th May, 2021

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Sd/-

**[AMIT SHUKLA]
JUDICIAL MEMBER**