

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'A' BENCH: CHENNAI**

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी मंजूनाथा, लेखा सदस्य के समक्ष  
**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND**  
**SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A No.2425/Chny/2019  
**Assessment Year: 2011 - 2012**

Shriram EPC Limited,  
No.18/03,  
Rukmani Lakshmipathy Road,  
1<sup>st</sup> Floor, R.A. Building,  
Egmore, Chennai – 600 008.

The Assistant Commissioner of  
Income Tax,  
**Vs.** Company Circle – 6(1),  
Chennai – 600 034.

**[PAN: AAFCS 1410C]**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by  
प्रत्यर्थी की ओर से /Respondent by

: Mr. R. Sivaraman, Advocate  
: Mr. S. Bharath, CIT

सुनवाई की तारीख/Date of Hearing

: 15.07.2021

घोषणा की तारीख /Date of Pronouncement

: 03.08.2021

**आदेश / ORDER**

**PER V. DURGA RAO, JUDICIAL MEMBER:**

This appeal filed by the assessee is against the order of the learned Commissioner of Income Tax, (Appeals)-15, Chennai in I.T.A. No.101/2018-19/CIT(A)-15 dated 21.06.2019 relevant to the Assessment Year 2011 - 2012.

2. Brief facts of the case are that the Assessee company filed its return of income for the Assessment Year 2011 – 2012 on 29.11.2011 by declaring a total income of Rs.67,57,69,760/-. The return of income filed by the Assessee was processed u/s.143(1) of the Income Tax Act, 1961 on 10.11.2012. The Assessee has filed a revised return of income on 31.03.2013 admitting an income of Rs.64,86,88,971/-. The return was taken up for scrutiny under CASS and a notice u/s.143(2) was issued and the scrutiny assessment was completed u/s.143(3) of the Income Tax Act, 1961 on 30.03.2014 by assessing a total income of Rs.70,53,32,202/-.

3. Subsequently, a notice u/s.148 of the Income Tax Act, 1961 was issued to the Assessee for the Assessment Year 2011 – 2012 on 29.03.2018 on the ground that there is an escapement of income by recording the reasons as under:

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**ANNEXURE**

“Vide response dated 08.06.2018 through e-proceeding seeking reasons for issue of notice u/s.148. As per your request, this office is furnishing the reasons for issue of notice u/s.148 as under:

It is seen from the Schedule 11 of the Balance Sheet, an amount of Rs.31,587.74 lakhs has been shown under Sundry Creditors. In the break up details in respect of the same, an amount of Rs.6,390.95 lakhs has been shown as provision for cost (liability). The payment from the cost provision of Rs.6,360.95 lakhs as on 31.03.2011 were made from April 2011 to September 2011. As seen the same was

paid in the next year, which shows that the same was not paid during the year and a mere provision was only made. Therefore, the provision for cost amounting to Rs.6,360.95 lakhs needs to be brought to tax.

ANU RADHA S  
CORP. CIRCLE – 6(1), CHENNAI”

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4. The Assessee has raised an objection for reopening of the assessment vide letter dated 28.06.2018 stating that the original assessment was completed u/s.143(3) of the Act by considering all the details. Unless any 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 the assessment year, reopening cannot be made.

5. The objections raised by the Assessee was considered by the Assistant Commissioner of the Income Tax by order dated 26.11.2018 and noted that it is seen from the Schedule-11 of the balance-sheet an amount of Rs.315.87 crores has been shown under Sundry Creditors. In the break up details in respect of the same, an amount of Rs.63.61 crores has been shown as provision for cost (liability). Therefore, the Assessing Officer came to a conclusion that there is an escapement of income and the objections raised by the Assessee is rejected and the assessment was completed u/s.143(3) of the Act r.w.s.147 of the Income Tax Act, 1961 dated 28.12.2018.

6. On appeal, before us, the learned Commissioner of Income Tax (Appeals) confirmed the order of the Assessing Officer.

7. On being aggrieved, the Assessee carried the matter before the Tribunal. The learned Counsel for the Assessee has submitted that the notice issued by the Assessing Officer u/s.148 of the Income Tax Act, 1961 dated 29.11.2018 is beyond four years and Proviso to Section 147 of the Act applies. As per the Proviso, unless the Assessing Officer has recorded in the assessment for reopening that there is a failure on the part of the Assessee to disclose fully and truly all the materials facts to complete the assessment, the Assessing Officer cannot reopen the assessment. Since, such finding is not available in the reasons recorded, the reopening is not valid. For the above preposition, the learned Counsel for the Assessee relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax and Another Vs. Foramer France reported in 264 ITR 566. He also relied upon the decision of the Jurisdictional High Court in the case of Fenner (India) Limited Vs. Deputy Commissioner of Income Tax reported in 241 ITR 672 and submitted that in view of the above two decisions of the Hon'ble

Supreme Court and the Hon'ble High Court the reopening u/s.147 of the Income Tax Act, 1961 is invalid.

8. On the other hand, the learned Departmental Representative strongly relied upon the order passed by the authorities below.

9. We have heard both the sides, perused the materials available on record and gone through the orders of the authorities below.

10. In this case, the original assessment was completed u/s.143(3) of the Income Tax Act, 1961 dated 30.03.2014. In the original proceedings, u/s.143(3) of the Income Tax Act, 1961, the Assessing Officer was asked the details in respect of the provisions for cost of Rs.63.61 lakhs, (which is in page no.33 of the paper-book). In response to that, the Assessee has filed all the details in respect of the provisions of cost as required by the Assessing Officer, (which is in page no.35 of the paper-book), Annexure – III.

11. The Assessing Officer after considering the explanations given by the Assessee and also the details, the assessment is completed u/s.143(3) of the Income Tax Act, 1961. Therefore, it has to be considered that the Assessing Officer after examining all the details, completed the assessment.

12. Subsequently, a notice u/s.148 of the Income Tax Act, 1961 was issued to reopen the assessment. It is an undisputed fact that the reopening is beyond a period of four years. Once, the assessment is reopened which is beyond four years, where assessment is completed u/s.143(3) of the Act, then Proviso to Section 147 of the Act applies. For the sake of convenience, the relevant portion of the Proviso to Section 147 is extracted as under:

*“Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section 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 relevant material facts necessary for assessment, for that assessment year.”*

13. From the above Proviso, it is clear that there should be a failure on the part of the Assessee to disclose fully and truly all the material facts necessary for that assessment for that particular assessment year.

In this case, the reasons recorded (supra) clearly indicates that, there is no such finding recorded by the Assessing Officer for the reopening of the assessment, (which is at page no.101 of the paper-book and reproduced at paragraph – 3 of this order).

14. In this context, the Hon'ble Supreme Court in the case of Commissioner of Income Tax and Another Vs. Foramer France (supra) held as under:

*“From the decision of the High Court (see [2001] 247 ITR 436 that (i) section 147 substituted in the Income-tax Act, 1961 by the Direct Tax Laws (Amendment) Act, 1987, had made a radical departure from the original section 147, inasmuch as clauses (a) and (b) had been deleted and under the proviso thereto notice for reassessment would be illegal if issued more than four years after the end of the assessment year, if the original assessment were made under section 143(3); (ii) section 153 related to the passing of an order of assessment and not to the issuing of a reassessment notice under section 147 / 148, (iii) the direction or finding contemplated by section 153(3)(ii) had to be a finding in relation to the particular assessee and the particular year and to be a finding it had to be directly involved in the disposal of the case; (iv) on the facts, the notices issued under section 148 on November 20, 1998, to the Assessee for reopening the original assessments for the assessment years 1988-89, 1989-90 and 1990-91, on the basis of the Appellate Tribunal's decision rendered in the case of Boudier Christian relating to the assessee's technicians deputed to India, the income of the assessee was to be treated as fee for technical services and not as business income as assessed in the original assessments for those assessment years, were without jurisdiction as they were barred by limitation in view of the proviso to section 147, as amended by the Direct Tax Laws (Amendment) Act, 1987, as that was the provision that was applicable on November 20, 1998, when the reassessment notices were issued and admittedly there was no failure on the part of the assessee to disclose fully and truly all material facts for assessment; (v) on the facts, the notices were bad as they were only on the basis of a change of opinion and the law that an assessment could not be reopened on a change of opinion was the same before and after amendment by the Direct Tax Laws (Amendment) Act, 1987, of section 147, and (vi) as the notices were without jurisdiction, the assessee should not be relegated to the alternative remedy, the Department preferred appeals to the Supreme Court. The Supreme Court saw no reason to differ and dismissed the appeals.*

*Decision of the Allahabad High Court in Foramer vs. CIT [2001] 247 ITR 436 affirmed.*

*Civil Appeals Nos.5269 to 5271 of 2001.*

*Appeals by special leave against the judgement and order dated August 17, 2000 of the Allahabad High Court, in W.P. Nos.181 to 183*

of 1999. The judgement of the High Court is reported as Foramer Vs.CIT [2001] 247 ITR 436 (All).

*R.P. Bhatt, Senior Advocate (K.C. Kaushik, Pritish Kapur and B.V. Balram Das, Adcoates with him) for the appellant.*

*M.L. Verma, Senior Advocate (V.U. Eradi and P.N. Puri, Advocates with him) for the respondent.*

### **ORDER**

*We have heard the learned Counsel for the parties and considered the facts of the case. We see no reason to interfere with the decision of the High Court. Accordingly, the civil appeals are dismissed with costs.”*

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15. The Hon'ble Jurisdictional High Court in the case of Fenner (India) Limited Vs. Deputy Commissioner of Income Tax held as under:

*“The pre-condition for the exercise of the power under section 147 within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the Assessing Officer that any income chargeable to tax has escaped assessment for the assessment year. In cases where the initiation of proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the Assessee. Failure to do so, would vitiate notice and the entire proceedings. Mere escape of income is insufficient to justify the initiation of action after the expiry of four years. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment. Thus, the duty of an assessee is limited to fully and truly disclosing all the material facts. The Assessee is not required thereafter to prepare a draft assessment order. If the details furnished by the assessee were in conformity with the requirement of all applicable laws and known accounting principles, it is for the Assessing Officer to reach such conclusion as he considered was warranted from such data and any failure on his part to do so cannot be regarded as the assessee's failure to furnish the material facts truly and fully. Any lack of comprehension on the part of the Assessing*

*Officer in understanding the details placed before him cannot confer jurisdiction for reopening the assessment, long after the period of four years had expired. Further, if the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact and in the absence of a record to that effect, it cannot be held that the notice is capable of being regarded as a valid notice."*

16. Keeping in view all the facts and circumstances of the case and by considering the proviso to Section 147 of the Act and also by following the judgement of the Hon'ble Supreme Court in the case of Commissioner of Income Tax and Another Vs. Foramer France and also in the case of Fenner (India) Limited Vs. Deputy Commissioner of Income Tax (supra), we hold that the reopening is not valid.

17. The Assessee has further submitted that in this case, the assessment is reopened on account of an audit objection. In response to the audit objection, the Assessing Officer has replied vide letter dated 06.03.2018 stating that there is no escapement of income and that the audit objection may be dropped. He further submitted that the Principal Commissioner of Income Tax vide letter dated 16.03.2018 addressed to the Principal Director of Audit accepting the proposal of the Assessing Officer, requested the Audit party to drop the proceedings. He further submitted that as per the CBDT Circular No.9/2006, dated 17.03.2016, once the Principal Commissioner of

Income Tax / Commissioner of Income Tax does not accept the audit objection, no remedial action needs to be taken in such cases. He also submitted that the same circular has been considered by the Hon'ble Jurisdictional High Court in Tax Case Appeal Nos.66 & 67/2018 by order dated 7<sup>th</sup> May, 2020 in the case of Principal Commissioner of Income Tax, Chennai Vs. M/s. SKI Retail Capital Limited, Chennai wherein it is held that the Assessing Officer after application of mind found that there is no escapement of income and also requested the audit wing to drop the proceedings, did not change his mind and the said finding is *per se* unsustainable and submitted that on this count also reopening is invalid.

18. On the other hand, the learned Departmental Representative relied upon the orders of the learned Commissioner of Income Tax as well as the Assessing Officer.

19. We have heard both the sides, perused the materials available on record and gone through the orders of the authorities below.

20. In this case, the Assistant Commissioner of Income Tax forwarded the letter to the Deputy Director of Revenue Audit dated 06.03.2018, wherein he has stated that the break-up for the cost of provision as on 31.03.2011 of Rs.63.61 crores and details of payment made

subsequently from April 2011 to September 2011. The cost of provision booked of Rs.35.36 crores during the year has ascertained liability and not the ad hoc provision, the same has been settled. He further noted that the Assessee has followed the accounting standard-VII consistently and the provision for cost made by the Assessee for the Assessment Year 2011 – 2012 is an ascertained liability. They were incurred subsequently and they are well supported with the technical estimates. Besides, there is no provision claimed by the Assessee Company for the year under consideration.

21. Further, the Assessee also recognized the income from such provision for the year under consideration and therefore the said provision to cost is not an ad hoc provision. The objection raised by the Revenue Audit Party' [RAP] may please be dropped. Subsequently, the Principal Commissioner of Income Tax vide letter dated 06.03.2018 addressed to the Principal Director of Audit accepting the proposal made by the Assistant Commissioner of Income Tax requested that the objection raised with regard to the issue may be dropped and intimation to that effect may be sent to this office at an early date.

22. Subsequently, the Assessing Officer had issued a notice u/s.148 of the Income Tax Act, 1961 on 29.03.2018. In this context, it is necessary to quote the CBDT Circular No.8/2016 dated 17.03.2016 as the same

has been considered by the Hon'ble Jurisdictional High Court in the case of Principal Commissioner of Income Tax, Chennai Vs. M/s. SKI Retail Capital Limited, Chennai wherein it is held as under:

"20. CBDT, New Delhi had issued Instruction No.9/2006 dated 07.11.2006 pertaining to Instruction on Receipt / Revenue Audit Objections and in para 4 had dealt with remedial action and in Modification of Instruction 9/23006, CBDT, New Delhi had issued Circular No.8/2016 dated 17.03.2016 and it is relevant to extract the same:

"Instruction 9 of 2006 lays down the guidelines and procedure for attending to Revenue Audit Objections. The Instruction inter-alia mandates the initiation of remedial action in the case of Revenue Audit Objection is not accepted by the Department. The Board has considered the effect of such remedial action and its ultimate fate in appeal. Accordingly, to mitigate the effects of the Instructions, para 4 and para 5 of the Instruction are deleted with immediate effect and replaced by the following:

4. **Remedial Action:**

- i. An Audit Objection should be accepted and remedial action should be taken in case where the audit objection relating to an error of facts or an issue of law is found to be correct.
- ii. Appropriate remedial action should invariably be initiated within two months of the receipt of the Local Audit Report, and necessary orders should be passed within six months thereafter.
- iii. Where the PCIT / CIT does not accept the Audit Objection, he may record his reasons for doing so and inform the AG accordingly within two months from the date of receipt of the LAR. No remedial action needs to be taken in such cases."

21. It is the submission of the learned Senior Standing Counsel appearing for the Revenue by inviting the attention of this Court to sub-para No.3 to Para 4 of Circular No.8/2016 dated 17.03.2016 that such an exercise was contemplated by the Principal Commissioner

of Income Tax / Commissioner of Income Tax and whereas the order for reopening of the assessment was passed by the Assessing Officer / Income Tax Officer and as such, the said instructions will not apply to the facts of this case.

22. It is also pointed out by the learned Senior Standing Counsel appearing for the Revenue that the Assessing Officer, after reopening of the assessment, had recorded a categorical finding that the credit balance as on 31.03.2017 amounting to Rs.5,30,99,960/- is treated as deemed dividend in the hands of the respondent / Assessee and it is an independent finding recorded *dehors* the contents of the audit objections and the Tribunal, in the impugned common order, had failed to deal with the said issue and merely recorded finding that the Assessing Officer did not apply his mind as to the income escaping assessment. The Assessing Officer after application of mind, found that there was no escapement of income and also requested the Audit Wing to dropping proceedings did change his mind and the said finding is *per se* unsustainable.”

23. In this case, the Assessing Officer categorically stated that the Assessee is following consistently the same accounting methods and also cost of provision booked to Rs.35.36 crores during the year under consideration is an ascertained liability and not an ad hoc provision and the same has been paid subsequently. The cost of provision claimed is allowable, as the Assessee is following Mercantile System of Accounting.

The Assessee has not made any excess provision for the year under consideration and also recognized the income from such purchases for the year under consideration. The same findings of the Assistant Commissioner of Income Tax in toto was accepted and forwarded to the Principal Director of Audit (Central).

24. In this case, the Assessing Officer as well as the Principal Commissioner of Income Tax having written a letter to the Audit party for

dropping the proceedings should not have proceeded with the issue of notice u/s.148 of the Act to reopen the assessment. Therefore, we are of the considered view that the Assessing Officer as well as the Principal Commissioner of Income Tax had categorically stated to the Audit party that there is no escapement of income on account of provision for liability, erred in issuing notice u/s.148 of the Act to reopen the assessment by recording reasons that there is an escapement of income contrary to the CBDT Circular No.8/2016, where it was stated that 'when the Principal Commissioner of Income Tax is not accepting the audit objection, no remedial action can be taken. In our opinion, the Assessing Officer is not correct as per the judgement of the Hon'ble Jurisdictional High Court in reopening the assessment where the Assessing Officer after application of mind found that there is no escapement of income and also requested the audit party to drop the proceedings, did not change his mind. Hence, the said finding *per se* is unsustainable.

25. We therefore by respectfully following the decision of the Jurisdictional High Court, are of the opinion that the reopening of the assessment is not valid on this count also. In view of the above, the notice issued by the Assessing Officer dated 29.03.2018 is quashed.

26. As far as the merit of the case is concerned, once reopening is quashed, it is immaterial to go into the merits of the case. Thus, this ground of appeal raised by the Assessee is allowed.

27. In the result, the appeal of the Assessee in I.T.A. No.2425/Chny/2019 is allowed.

*Order pronounced on 3<sup>rd</sup> August, 2021 in Chennai.*

**Sd/-**

(श्री जी मंजूनाथा)

**(G. MANJUNATHA)**

लेखा सदस्य/**ACCOUNTANT MEMBER**

**Sd/-**

(वी दुर्गा राव)

**(V. DURGA RAO)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 3<sup>rd</sup> August, 2021

IA, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/**Copy to:** 1. अपीलार्थी/Appellant  
2. प्रत्यर्थी/Respondent  
3. आयकर आयुक्त (अपील)/CIT(A)  
4. आयकर आयुक्त/CIT  
5. विभागीय प्रतिनिधि/DR  
6. गार्ड फाईल/GF