IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER) AND SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

ITA No. 7963/MUM/2019
Assessment Year: 2010-11

Famy Care Pvt. Ltd., 3rd floor, Bardy House, 12/14, V.N. Road, Fort, Mumbai-400 001. **PAN No. AAACF 0632 Q** **Appellant**	**Vs.**	ACIT-2(1)(2), Room No. 561, 5th floor, Aayakar Bhavan, Mumbai-400020. **Respondent**

Assessee by	:	Ms. Ritu Kamal Kishore, AR
Revenue by	:	Mr. S.N. Kabra, DR
Date of Hearing	:	14/09/2021
Date of pronouncement	:	12/11/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The present appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-4, Mumbai [in short 'CIT(A)'] for the assessment year 2010-11 dated 22.10.2019 and arises out of assessment completed u/s 143(3) r.w.s. of the Income Tax Act, 1961 (in short the Act).

2. The brief facts of the case are that the assessee had filed its return of income on 30.03.2012 for the assessment year 2010-11 declaring total income at Rs. Nil and showing loss of Rs. 17,13,32,790/– The case was selected for scrutiny assessment and assessment was completed u/s 143(3) vide order dated 26.03.2013 assessing total income at Rs. Nil. Subsequently, the Assessing officer(AO) initiated reassessment proceedings by issue of notice u/s 148 dated 31.03.2017 and assessment was completed making

disallowance of purchases of Rs. 1,06,82,780/- made from M/s Praneta Industries Limited (Now known as M/s Adhaar Ventures India Limited). The AO has also added the disallowance to the book profit computed u/s 115JB of the Act.

The AO has held the said purchases as bogus on the basis of information received from DCIT, Central Circle -2(2) Mumbai that in the course of search on Shirish Shah certain loose papers were discovered whereby it had transpired that assessee had made bogus purchases from one of the shell companies controlled by Shirish Shah and that the assessee had failed to discharge the onus cast upon it to prove that the purchases were genuine. Before the AO, the assessee had submitted the acknowledgement of return of income of purchase party, their annual return of income and their confirmation of account Stock Register, copy of invoices and Bank statement highlighting the payments made for purchases. However, the notice issued u/s 133(6) to the supplier at the given addresses had been returned unserved. He held that the genuineness of the transaction is not established and has disallowed purchases of Rs. 1,06,82,780/- u/s 37 of the Act.

3. Aggrieved, the assessee preferred an appeal before CIT(A). The CIT(A) has partially allowed the appeal of the assessee by restricting the disallowance @ 12.5% of the total purchases and also restricted the addition to book profit @ 12.5% of total purchases.

4. The assessee is in appeal before us raising the following grounds of appeal:

> *"1. On the facts and circumstances of the case and in law, both the Ld. AO and the Ld. CIT (A) erred in confirming the AO's action of reopening the assessment u/s. 147 by issue of notice dated 31.03.2017 u/s. 148, which is barred by limitation, bad-in-law, illegal and otherwise void for want of jurisdiction.*

2. On the facts and circumstances of the case and in law, both the Ld. AO and the Ld. CIT (A) erred in confirming the AO's action of reopening the assessment u/s. 147 by issue of notice dated 31.03.2017 u/s. 148, which is barred by limitation in view of the first proviso to section 147 of the Income Tax Act, 1961.

3.On the facts and in the circumstances of the assessee's case and in law the Ld. CIT(A) erred in confirming the addition to the extent of 12.5% of alleged total bogus purchases of Rs. 1,06,82,780/-.

4. On the facts and in the circumstances of the assessee's case and in law the Ld. CIT(A) erred in confirming the AO's action of making an addition of Rs. 1,06,82,780/- to the books profit u/s. 115JB in respect of alleged bogus purchases.

5. In grounds 1 & 2, the assessee has challenged the validity of issue of notice u/s 148 of the Act. The Ld. AR has contended that the regular assessment had been completed u/s 143(3) vide order dated 28.03.2013 wherein, no addition in respect of purchases was made by the Ld. AO. The reopening of assessment by issue of notice u/s 148 on 31.03.2017 is after the expiry of 4 years from the end of the relevant assessment year, the period of 4 years having ended on 31.03.2015.

The assessee also placed on record the notice issued u/s 142(1) during the course of regular assessment proceedings seeking the details of purchases above Rs. 10,00,000/- and the reply submitted by the assessee wherein details of purchases above Rs. 10,00,000/- were furnished as per annexure 7 to the letter dated 29.08.2012.

It was vehemently argued that there was no failure on the part of the assessee to make a return u/s 139 or in response to a notice issue u/s 142(1) or section 148 or to disclose fully and truly all material facts necessary for its assessment for the assessment year 2010-11. Accordingly, the AR contended that reopening of assessment u/s 147 by issue of notice dated 31.03.2017 is barred by limitation in view of the first proviso to section 147. The Ld. AR also contended that during the course of assessment proceedings, though the AO

was specifically requested to provide the information stated to have been received from DCIT Central Circle – 2(2), Mumbai and the statements of Shirish Shah on the basis of which the reasons were recorded and reopening initiated, the AO did not provide the same. The AR has drawn our attention to para 3.4 of assessment order wherein, this fact was accepted by the AO. The AR contended that the AO has made additions solely on the basis of the statement recorded, without providing the copy of the said statement/s and without allowing an opportunity to verify the contents of the statement or to cross examine the person on whose statement, the AO has relied upon to make the addition.

6. Ld. DR has relied on the findings of the lower authorities to contend that the reopening is valid. He submitted that the same arguments put forth before CIT(A) and Ld CIT(A) has dealt with the issues.

7. We have carefully considered the rival submissions and the material placed on record. We notice from the facts on record that the original assessment was completed u/s 143(3) on 28.03.2013 and that the notice u/s 148 has been issued after the expiry of four years from the end of the relevant assessment year, the notice having been issued 31.03.2017, whereas the four-year period has expired on 31.03.15. In the notice issued by the AO, we find that there is no mention of any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for the year under consideration. The evidence on record clearly establishes that the details of purchases were filed during the course of regular assessment proceedings. When the primary facts have been disclosed at the time of the regular assessment and when there is no allegation in the reasons recorded that there has been failure on the part of the assessee to disclose fully and truly all the

relevant facts necessary for assessment, the reopening is bad in law, being barred by limitation in view of 1st proviso to section 147 of the Act. For the sake of convenience, we reproduce the 1st proviso to section 147 of the Act 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 4 years from the end of 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 of income u/s 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose ally and truly all material facts necessary for his assessment, for that assessment.*

In this view of the matter, we are supported by the judgement of the Jurisdictional High Court in the case of Ipca Laboratories. vs. Gajanand Meena & others (251 ITR 416) wherein it is held that 1st proviso to Section 147 of the Act clearly states that no action can be taken for reopening the assessment after four years unless the AO has reason to belief that income has escaped assessment by the reason of failure on the part of assessee to disclose fully and truly all the material facts necessary for assessment. We also get support from the decision of Hon'ble Jurisdictional Bombay High Court in the case of Hindustan Lever Ltd. vs. R.B. Wadkar, DCIT (137 TAXMAN 479) wherein it is held that when the assessment was completed under section 143(3) of the Act no action can be taken under section 147 after expiry of four years from the end of relevant assessment year unless any income chargeable to tax has been escaped assessment for such assessment year by the reason of failure on the part of assessee to disclose all the material facts necessary for assessment for that assessment year. The reasons recorded for issuing notice provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer must disclose in the reasons as to nature of fact and material not disclosed by the assessee fully and truly

which was necessary for assessment for that assessment year. On perusal of reasons recorded by AO which are placed at page no.80 of the paper book, we find that the AO has not specified that there was failure on the part of assessee to disclose all material facts necessary for its assessment during the course of regular assessment proceedings.

As mentioned in Para 9 & 10 above, it is evident that a specific query was raised by the Assessing Officer with respect to purchases claimed by the assessee and the same was appropriately replied to by the assessee. The reply having been found satisfactory the assessment was completed accepting the claim of purchases. Once again the very same issue is sought to be raised for the purpose of reopening which is otherwise not permissible in law as the same is based on a change of opinion. It cannot be said that there was any failure on the part of the assessee to fully and truly disclose all the material facts. The present case, in our opinion, could be said to be squarely covered by the decision of the Supreme Court rendered in the case of CIT vs. Kelvinator India, reported in (2010) 2 SCC 723, wherein the Supreme Court observed as under;

> *"5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4- 1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-14- 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.*
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> *6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended*

on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

8. We quote hereinbelow the relevant portion of Circular No.549 dated 31-10-1989, which reads as follows:

> *"7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same." (emphasis supplied)*

9. For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

8. On the facts of the instant case we find that when there is no case for Revenue that assessee had failed to disclose all material facts fully and truly, the impugned notice under Section 148 of the Act issued to the assessee for the purpose of reopening of the assessment beyond the period of four years is not sustainable in law. Therefore, the case of the assessee is covered by proviso to section 147 of the Income Tax Act, and the reopening being bad in law, we hereby quash the assessment order passed u/s 143(3) r.w.s 147 of the Act. The ground nos.1 & 2 raised by assessee are allowed.

8.1 As we have quashed the assessment framed by the Ld. AO under Sec. 143(3) r.w.s 147, we refrain from adjudicating on grounds 3 and 4 as the assessment no longer survives, the same having been quashed.

9. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 12/11/2021.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: **12/11/2021**
Rahul Sharma, Sr. P.S.

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.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai