

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No.2884/M/2019
Assessment Year: 2009-10**

DCIT, Central Circle-8(1), Room No.656, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Shreya Life Sciences Pvt. Ltd., 301/A, Shreya House, Pereira Hill Road, Andheri (East), Mumbai - 400 058 PAN: AADCS 9890C
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Mohanlal Jain, A.R.
Revenue by : Shri Vijaykumar Subramaniam, D.R.

Date of Hearing : 15.07.2021
Date of Pronouncement : 27.10.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 28.02.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2009-10.

2. The Revenue has raised the following grounds of appeal:

"1. Whether on the facts and circumstances of the case and in the law, the Ld CIT(A) erred in cancelling the assessment made on the basis of notice issued u/s 148 without appreciating that the reopening u/s 147 was done by the AO on the basis of information received from Investigation Wing, Mumbai and does not constitute change of opinion?

2. Whether on the facts and circumstances of the case and in the law, the Ld CIT(A) was incorrect in treating the notice u/s 148 void ab initio without appreciating that the reasons recorded and their disposal therein amply justify the reopening beyond 4 years in view of the decision of Hon'ble Supreme Court in the case of Raymond Woollen Mills (1999) 236 ITR 34(SC)?"

3. The only effective issue raised by the Revenue is against the order of Ld. CIT(A) cancelling the reassessment order as framed under section 143(3) read with section 153A of the Act dated 31.12.2019. The facts in brief are that the assessee filed the return of income on 30.07.2009 under section 153A of the Act declaring a loss of Rs.8,88,79,721/- and thereafter the assessment was framed by the AO. Thereafter the assessment was re-opened u/s 147 of the Act by issuing notice under section 148 of the Act on 30.03.2016 after recording reasons for reopening u/s 148(2) of the Act. The statutory notices were duly issued and served upon the assessee. The assessee complied with the notice by submitting that return filed by the assessee originally may kindly be treated as return filed in response to notice under section 148 of the Act. The AO called for various details and information from the assessee during the assessment proceedings and finally framed the assessment under section 143(3) read with section 147 read with 144C(iii) of the Act vide order dated 18.01.2018.

4. The assessee challenged the order before the Ld. CIT(A) on legal issue of jurisdiction as well as on merit. The Ld. CIT(A) allowed the appeal of the assessee on legal issue by holding the reopening of assessment under section 147 read with section 148 of the act is invalid by observing and holding as under:

"7. The submission of Appellant is duly considered along with the contents of assessment order dated 31.12.2009 and the reasons recorded for initiation of reassessment proceedings. The reasons recorded can be split into two parts. They are (a) the second line *"Further, the assessee company had made payment to sister concern A/f/s. Sfrerya Corporation — Russia of Rs, 128.91 cr. for A.Y. 2003-04 to 2009*10, is nothing but adjustment of profit i.e. approximate 20%."* in para 2 of 9 reasons recorded and (b) remaining portion of para 2 combined with para 3.

8. In course of proceedings under section 153A, on 19.11.2009 following discrepancies were pointed so as to show cause on completion of assessment.

As a result of the incriminating papers and documents seized during the course of search you as the Managing Director had declared an undisclosed income of Rs.20 Crores to cover up the following discrepancies:-

- (a) Huge amounts taken by you from the company books in cash for your personal expenses on the basis of IOU's, which were later on recorded as the expenses of the company.*
- (b) Payment of illegal Hawala Commission in the garb of travelling expenses to one Dr. Kishore Harbada for arranging bogus purchase and sale bills of circular trading, which were used by the company for raising finances from the banks by bill discounting.*
- (c) Huge payments to sister concern Ws. Shreya Corporation, Russia by way of reimbursement of marketing expenses.*
- (d) Unaccounted sales of scrap of raw material and packing material."*

9. It can be seen that in respect of former i.e. (a) above no basic details are recorded, why it is fresh tangible material and how reason to believe that income has escaped assessment is formed is not recorded. There is overall vagueness. Same issue was considered in assessment under Section 153A. Reasons recorded is assessment order dated 31.12.2009 of which extract is reproduced below:

In the face of the above mentioned data the assessee has not been able to produce any evidence to establish the reasonableness of the reimbursement by it to its sister concern of the Marketing and Sales expenditures. The Bombay High Court in the case of CIT v/s. Shatrunjay Diamonds (2003) 261ITR 258 held that "In cases where the payee is a sister concern and therefore an interested person, the burden of proving that the payment made was reasonable u/s. 40A(2)(a) Shifts on the assessee." As the assessee has failed to discharge this onus, 10% of the expenses claimed as marketing expenses reimbursed to an associate enterprise namely Shreya Corporation, Russia are disallowed u/s. 40A(2)(a) as being excessive payment for the services obtained as compared to the fair market value of the same. During the year the assessee has reimbursed Rs. 16.47 Crs. to Shreya Corporation and accordingly Rs.1,60,47,000/- is added to the income of the assessee.

It is found that re-assessment is initiated not on basis of fresh material and more a change of opinion, by changing 10% to 20% of a considered decision.

10. In respect latter i.e. (b) in para 7, I of I find that there is no new material before Assessing Officer. In this case an assessment under section 143(3) r.w 153A was completed on 31.12.2009. Extract from the said assessment order is as under:

"The Chief Financial Officer Shri R. Krishna Nagpal in his statement 25/04/2008 admitted to the obtaining of bogus Hawala purchase and sale bills from Dr. Harbada to the tune of Rs.26 Crores in F. Y.2Q06-Q7 and Rs.80 Crores in F.Y.2007-08 for raising liquidity through Bill Discounting. He also admitted that Shri Sujit Kumar Singh, Kiran Matkar, Prashant Desai, Vinayak Killedar, S. Natu and Arun Kamat employees from the Accounts and Finance

Division were also privy to the said transactions. They all admitted that the cost of acquiring such Hawala Bills ranged from 1% to 1.75% and the same were recorded as expenses by way of fictitious entries under various heads like Traveling, Transportation etc. The assessee did not furnish the details of the total payments made on this count, the Account Heads under which the same was debited and the source of payment. In the absence of any such relevant details, the said expenditure on the average of 1% of the bogus bills obtained is disallowed as unexplained expenditures u/s. 69C of the I. T. Act, 1961."

From the reasons recorded, it can be seen that the band of commission initially stated is 1 to 1.75% and Assessing Officer adopted 1%. In paragraph 2 of reasons recorded, the Assessing Officer relies on a statement recorded on 25.04.2008 i.e. a statement that was available well before the completion of original assessment on 31.12.2009. This is made use of to initiate reassessment proceedings. Thus the initiation is clearly not based on any new material and a conscious decision to fix commission at 1% is sought to be altered by initiation of reassessment proceedings. This is impermissible in scheme of things under section 147.

11. Secondly proviso 1 to section 147 applies to issues raised for initiation of reassessment proceeding. Here reassessment was initiated 4 years after end of AY. No failure on part of assessee is established. The issues figure in assessment / evidence in order dated 31.12.2009. The document used to initiate reassessment proceedings was considered by Assessing Officer in original assessment. This also has vitiated initiation of reassessment proceedings.

12. On account of reasons stated in paragraph 8, 9, 10 and 11, it is held that the initiation of reassessment proceedings by way of issue of notice under section 148 on 30.03.2016 to be void *ab initio*. Hence I cancel the assessment made on the basis of the said notice.

As a result of above, grounds 2 to 6 has turned inconsequential and needs no adjudication.

The appeal is allowed."

5. After hearing the rival contentions of both the parties and perusing the material on record including the appellate order and reasons recorded under section 148(2) of the Act to reopen the assessment, we find that there is no new material before the AO to form belief that income has escaped assessment. As is apparent from the reasons recorded, the AO relied on the statement recorded on 25.04.2008 which was available before

the AO at the time of original assessment proceedings which culminated under section 143(3) read with section 153A of the Act vide order dated 31.12.2009 in which the assessee has admitted that the commission ranges from 1% to 1.75% and the framed the assessment after accepting 1% commission. Now the AO while reopening the assessment sought to review his own order by changing the commission of 1% already concluded by the AO on the basis of documents available during the original assessment proceedings. Besides we note that Ld. CIT(A) has recorded a finding that the reassessment proceedings were initiated after 4 years from the end of the assessment year and therefore the condition as envisaged by proviso to section 147 of the Act are not satisfied. Therefore proviso to section 147 provides that reassessment proceedings can be initiated only if there is failure on the part of the assessee to disclose truly and fully the materials fact relating to income which has escaped assessment but in the present case there is no failure on the part of the assessee and therefore reassessment proceedings have rightly been struck down and quashed by the Ld. CIT(A). In view of these facts, we are inclined to uphold the order passed by the Ld. CIT(A) by dismissing the appeal of the Revenue.

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 27.10.2021.

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 27.10.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.