आयकर अपीलीय अधिकरण

मुंबई पीठ "बी "

श्री विकास अवस्थी, न्यायिक सदस्य एवं

श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "B", MUMBAI

BEFORE VIKAS AWASTHY , JUDICIAL MEMBER &

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

आअसं. 797/मुं/2021 (नि. व. 2012-13)

ITA NO.797/MUM/2021(A.Y.2012-13)

आअसं. 798/मुं/2021 (नि. व. 2011-12)

ITA NO.798/MUM/2021(A.Y.2011-12)

आअसं. 799/मुं/2021 (नि. व. 2010-11)

ITA NO.799/MUM/2021(A.Y.2010-11)

Dy. Commissioner of Income Tax,
Central Circle – 6(3),
Room No.1926, 19th Floor,
Air India Building, Nariman Point,
Mumbai 400 021 ..... अपीलार्थी /Appellant

बनाम Vs.

M/s. Marathon Nextgen Realty Limited,
Marathon Futurex Mafatlal Mill Compound,
N.M.Joshi Marg, Lower Parel,
Mumbai 400 013.
PAN: AAACP-8032-E ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri J.P. Bairagra with
Ms. Rupa Nanda

प्रतिवादी द्वारा/Respondent by : Shri C.T. Mathews

सुनवाई की तिथि/ Date of hearing : 23/02/2022

घोषणा की तिथि/ Date of pronouncement : 25/03/2022

<u>आदेश/ ORDER</u>

PER VIKAS AWASTHY, JM:

These three appeals by the Revenue are directed against the orders of Commissioner of Income Tax(Appeals)-54, Mumbai [in short ' the CIT(A)'], for the

assessment years 2010-11, 2011-12 and 2012-13, respectively. All the three impugned orders are of even date i.e. 17/02/2021. The Revenue in all the three appeals have raised identical grounds of appeal. The issue, validity of reopening of assessment beyond a period of four years is common in all these appeals. Since, the grounds of appeal and the issue in appeals are identical, these appeals are taken up together for adjudication and are decided by this common order.

2. The appeals are decided in seriatim of assessment year. The appeal of the Revenue in ITA No.799/Mum/2021 for assessment year 2010-11 is taken as lead case and hence, the facts are narrated from the said appeal.

ITA NO.799/MUM/2021- A.Y.2010-11:

3. As per the defect notice by the Registry, this appeal is time barred by eight days. The ld.Departmental Representative submitted that the impugned order was passed on 17/12/2021 and appeal was filed on 17/05/2021. The marginal delay in filing of the appeal is on account of COVID-19 Pandemic. The Hon'ble Supreme Court of India taking Cognizance for Extension of Limitation in filing of the appeals/petitions/suits during pandemic on its own motion vide order dated 23/03/2020 reported as 117 Taxmann.com 66 (SC) has extended the limitation period for filing of the appeals on account of COVID -19 pandemic. The appeal has been filed by the Revenue within the extended time. Hence, in effect there is no delay in filing of the appeal.

4. We have heard the submissions made by ld.Departmental Representative on alleged delay in filing of appeal. We find merit in the submissions with regard to alleged delay of eight days. Thus, in view of the judgment of Hon'ble Apex Court (supra) we find that there is no delay in filing of the appeal.

5. Shri J.P. Bairagra appearing on behalf of the assessee made three fold submissions assailing reopening of assessment. The first argument of ld. Authorized

Representative for the assessee is that the assessment for assessment year 2010-11 has been reopened beyond the period of four years on the basis of 'audit objection' and 'change of opinion'. There is no fresh incriminating material for reopening the assessment. The ld. Authorized Representative of the assessee submitted that since, reopening is beyond a period of four years, the first Proviso to section 147 of the Income Tax Act, 1961 (in short 'the Act') would get attracted. Therefore, for reopening assessment after expiry of four years from the end of the relevant assessment year the Assessing Officer has to show that income chargeable to tax has escaped assessment as the assessee has failed to disclose fully and truly all material facts necessary for the assessment. In the present case, in the reasons recorded for reopening there is no whisper about assessee's failure to disclose fully and truly all material facts necessary for the assessment. The ld. Authorized Representative for the assessee referred to the reasons for issue of notice u/s. 148 of the Act at page 2 and 3 of the paper book.

5.1 The ld. Authorized Representative for the assessee made his second argument that the assessment has been reopened on the basis of audit objections. The ld. AR of the assessee referring to the reasons submitted that the Assessing Officer has time and again in the reasons has mentioned, it is on '*Audit scrutiny*' of the records that some alleged short comings are revealed. Thus, it is evident that reopening is triggered by audit objection. The ld. Authorized Representative for the assessee asserted that reopening of assessment on the basis of mere audit objections is unsustainable. In support of his contention the ld. Authorized Representative for the assessee placed reliance on the decision rendered in the case of Indian & Eastern Newspaper Society vs. CIT; 119 ITR 996 (SC).

5.2. The ld. Authorized Representative for the assessee further contended that in reply to the audit objections, the Assessing Officer furnished his detailed reply justifying the assessment order u/s. 143(3) of the Act and requested for dropping

audit objection. The ld. Authorized Representative for the assessee referred to the letter of the Assessing Officer addressed to the Principal Director of Audit dated 20/07/2016 at page 7 to 9 of the paper book. The ld. Authorized Representative for the assessee asserted that on the one hand the Assessing Officer has recommended for dropping audit objection and on the other the Assessing Officer has initiated reopening of assessment. This clearly shows that it is not Assessing Officer's own belief to reopen the assessment. The assessment has been reopened solely on the basis of objections raised by the audit party

5.3 The third argument of ld. Authorized Representative for the assessee assailing reopening of assessment is that reopening of assessment is result of change of opinion. The ld. Authorized Representative for the assessee submitted that no new material came to the knowledge of the Assessing Officer after scrutiny assessment u/s. 143(3) of the Act. Reopening on the basis of re-appreciation of very same material is a clear case of 'change of opinion'. Reopening on the basis of change of opinion is unsustainable. To support his argument the ld. Authorized Representative for the assessee *inter-alia* placed reliance on following decisions:

(i) CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC)

(ii) IL & FS Investment Managers Ltd. vs. ITO, 298 ITR 32 (Bom)

(iii) Trent Ltd. vs. DCIT, 135 taxmann.com 222(Bom)

(iv) CIT vs. Reliance Industries Ltd. 382 ITR 574(Bom)

5.4. The ld. Authorized Representative for the assessee summed up his arguments supporting the impugned order and stated that the CIT(A) has rightly held reassessment proceedings are bad in law for the reasons:

(i) Reopening is based on audit objections;

(ii) Reopening is a result of change of opinion; and

(iii) The Assessing Officer has nowhere in the reasons for reopening of the assessment order alleged that assessee has failed to make full and true disclosure of all facts necessary for the assessment.

6. *Au Contraire*, Shri C.T. Mathews representing the Department vehemently defended reopening of assessment and prayed for reversing the findings of CIT(A) in holding reopening bad in law. The ld. Departmental Representative submitted that the Assessing Officer was justified in reopening the assessment as income had escaped assessment. The proposal to drop audit objection from the Assessing Officer is not the final word. The CBDT vide Instruction No.6/2017 dated 21/07/2017 has clarified that the PCIT is authorized to take decision whether the audit objection is acceptable or not. In some cases, it is the Range Head on whose consent audit objections can be dropped. The letter dated 20/07/2016 that was referred to by the Authorized Representative for the assessee is merely a proposal. The final call to drop audit objections is taken by the PCIT and the orders of the PCIT on the aforesaid proposal have not been placed on record by the assessee. The ld. Departmental Representative placing reliance on CBDT Circular/Instruction dated 21/07/17, 16/04/2007, 18/10/2013 and 14/05/2015 submitted that the report of the Assessing Officer has no legal sanctity as it is against the instructions from Board issued from time to time. The ld. Departmental Representative submitted that there is no bar in reopening of assessment on the basis of audit objection. The ld. Departmental Representative in order to support his contention placed reliance on the following decisions:

(i) Honda Siel Power Products Ltd. vs. DCIT, 340 ITR 53(Delhi)
(ii) Calcutta Discount Co. Ltd. vs. ITO, 41 ITR 191 (SC)
(iii) Gruh Finance Ltd. vs. JCIT, 243 ITR 482 (Guj)
(iv) Central Province Manganese Ore Co. Ltd., 191 ITR 662(SC)
(v) Raymond Woolen Mills vs. ITO, 236 ITR 34(SC)
(vi) Asstt. CIT vs. Rajesh Jhaveri Stock Broker, 291 ITR 500 (SC)

6.1 The ld. Departmental Representative further submitted that it is not a case of change of opinion, as has been held by the CIT(A). A detailed chart was prepared to reveal the facts behind the returned income, assessment order passed u/s.143(3) of the Act and the order u/s. 147 r.w.s. 143(3) of the Act. The assessee had claimed incorrect deduction u/s. 80IB of the Act during the relevant period. The Assessing Officer had reasons to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. Therefore, notice u/s. 148 of the Act was issued after obtaining the approval of JCIT/Addl.CIT and the Range Head. The assessee's incorrect claim of deduction u/s. 80IB in A.Y.2010-11 was detected by the Department and corrective measures were being taken to stop pilferage of tax. The Revenue Audit subsequently detected that the claim of the assessee requires remedial measures to protect revenue loss. The ld. Departmental Representative prayed for reversing the findings of CIT(A) qua validity of reopening of assessment.

7. We have heard the submissions made by rival sides, examined the orders of Authorities below and the case laws on which reliance has been placed by the respective sides. The assessment for assessment year 2010-11 was reopened vide notice dated 27/03/2017 issued u/s. 148 of the Act. From the date of notice it is evident that in the instant case assessment has been reopened after expiry of four years from the end of the relevant assessment year. Beyond the period of four years assessment cannot be reopened solely on the belief of the Assessing Officer that any income chargeable to tax has escaped assessment. The first proviso to section 147 of the Act further cast onus on the Assessing Officer to show that the 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. To ascertain whether the additional burden cast upon the Assessing Officer by first proviso to section 147 of the Act has been discharged, let us first see the reasons recorded for reopening. The assessee has furnished reasons recorded for reopening at page-2 of the Paper Book. A perusal of the reasons for reopening reveal that

assessment has been reopened as the assessee allegedly made inaccurate claim of deduction u/s. 80IA of the Act. The assessee has furnished a copy of original scrutiny assessment order dated 30/03/2013 passed u/s. 143(3) of the Act at page 43 of the Act paper book. While framing the assessment u/s. 143(3) of the Act, the Assessing Officer had examined assessee's claim of deduction u/s. 80IA (4)(iii) of the Act. The Assessing Officer after examining the claim threadbare, restricted the deduction to Rs.58,73,29,724/- as against Rs.157,57,61,492/- claimed by the assessee in its return of income. In the reasons for reopening there is not even a single averment by the Assessing Officer that the assessee has failed to disclose truly and fully all material facts necessary for the assessment. Similarly, in the entire reassessment order there is no finding/observation by the Assessing Officer that assessment has been reopened beyond the period of four years because of assessee's failure to disclose fully and truly all material facts necessary for the assessment. Therefore, in our considered view the validity of reassessment proceedings are liable to fail on this account itself.

7.1 The Hon'ble Bombay High Court in the case of PCIT vs. L&T Ltd., 113 taxmann.com 47 affirming the order of Tribunal held, that in absence of any failure on part of assessee to disclose fully and truly all material facts at time of assessment, reassessment proceedings could not be initiated after expiry of four years from end of the relevant year. The Hon'ble High Court held:

> ***"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."*
>
> ***[Emphasized by us]***

The aforesaid judgment was upheld by the Hon'ble Supreme Court of India in a SLP filed by the Department (113 taxamann.com 48).

7.2 Thus, in the facts of the case and in the light of aforesaid judgment the appeal of the Department is liable to be dismissed on this ground alone, we hold and direct accordingly.

8. The next objection of the assessee is that the assessment has been reopened on the basis of audit objection. A perusal of the reasons for reopening reveal that the Assessing Officer while recording reasons has time and again referred to 'Audit scrutiny'. In other words, what can be inferred from the manner in which reasons for reopening have been recorded is that the objections raised by the audit team triggered reopening of assessment. The requirement of the law is that it should be Assessing Officer's own reasons and not borrowed reasons which should form basis of reopening the assessment. Therefore, in the absence of Assessing Officer's own reason to believe that the income chargeable to tax has escaped assessment, the reassessment proceedings are bad in law.

8.1 The Hon'ble Bombay High Court in PCIT vs. Yes Bank Ltd., 135 taxamann.com 161, following the ratio laid down in Indian & Eastern Newspaper Society vs. CIT (supra) has held reopening of assessment on the opinion of internal audit party as bad in law. The relevant extract of the judgment reads as under:-

> *"3. If one considers the orders passed by the Assessing Officer as well as CIT(A), reopening of assessment has been decided only because of audit objections.* ***Of course the Assessing Officer, in his order has mentioned that compulsory scrutiny of the record has revealed, there was a statement of income but reopening has been because of audit objection. We have also noted that Assessing Officer had taken a stand contrary to the view expressed in the audit objection and had even addressed a letter to the Director of Audit intimating that objections raised by audit authority were not acceptable. Nevertheless the Assessing Officer reopened and issued notice under section 148 of the Act.***
>
> *4.* ***It is settled law that the opinion of the Internal Audit party of the Income Tax Department cannot be recorded as information within the meaning of section 147(b) of the Act for the purpose of opening the assessment.*** *The courts have also*

held that notice of reassessment cannot be issued based on information received from audit objection. The Apex Court in Indian & Eastern Newspaper Society v. CIT [1979] 2 Taxman 197 in paragraph 20 has held as under:—

> *"20. Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income-tax Department are co-extensive with that of receipt audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual Vol. 2, we hold that the opinion of an internal audit party of the Income-tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income-tax Act, 1961"*

5. In Indian Eastern Newspaper Society's case (supra), the court further held that in every case, the Income-tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has not become aware. The opinion rendered by the audit party to the law cannot, for the purpose of such belief, add to or colour the significance of such law."

In the aforesaid case, the Assessing Officer had opposed the objections raised by the Audit party. However, the assessment was reopened by the Assessing Officer. The Hon'ble High Court held that reopening of assessment based on observations of Audit party is bad in law.

8.2 In the instant case as is evident from reasons for reopening, provisions of section 147 of the Act have been invoked consequent to objections raised by internal audit party. Thus, reopening of assessment is based on borrowed reasons. The requirement of section 147 of the Act is, *"Assessing Officer has reason to believe*". The statutory requirement is the belief of Assessing Officer that income chargeable to tax has escaped assessment which should transform into reopening of assessment. A perusal of reasons in the present case clearly indicate that it is not the belief of the Assessing Officer which has ignited the process of reopening but the observations in 'Audit scrutiny' that has formed basis of reopening. Thus, in the facts of the case and the law laid down by Hon'ble Jurisdictional High Court with reference to reopening on audit objection, we find merit in second contention of the assessee as well.

9. The third argument of the ld. Authorized Representative for the assessee is that the assessment has been reopened on the basis of 'change of opinion'. A perusal of the reply filed by the Assessing Officer dated 20/07/2016 in response to the audit objection (at page 12 & 13 of Paper Book) shows that the Assessing Officer has recommended for dropping audit objection. After having recommended dropping of audit objection the Assessing Officer subsequently on 20/03/2017 records reason for reopening and on 27/03/2017 issued notice u/s. 148 of the Act. It is highly improbable that after recommending dropping of audit objection on the one hand, the Assessing Officer would be convinced and have **own reasons to believe** that the income chargeable to tax has escaped assessment. Though, a perusal of reasons reveal that while recording reasons the audit objections were weighing heavy on the mind of Assessing Officer, therefore, time and again the Assessing Officer has used the expression '*Audit scrutiny*', thus, it was not Assessing Officer's own conviction or belief that income chargeable to tax has escaped assessment. Even if it is assumed that the reasons for reopening were recorded by the Assessing Officer out of his own belief even then the reopening is not sustainable as it is the result of 'change of opinion'. While giving reply to the audit objection the Assessing Officer was convinced that the assessment made u/s. 143(3) of the Act was justified. The Assessing Officer in his reply to audit objections has defended the view taken in assessment order. The Assessing Officer changed his opinion and recorded reasons for reopening on re-appreciation of the documents already record. There is nothing on record to suggest that there was any new incrimination material that had come to the knowledge of the Assessing Officer after scrutiny assessment. Thus, reopening of assessment is unsustainable on account of 'change of opinion'. There are catena of judgments wherein it has been held that re-opening of assessment on the basis of 'change of opinion' is unsustainable. It amounts to review by the Assessing Officer which is not permissible under the Act.

9.1 The Hon'ble Supreme Court of India in the case of CIT vs. Kelvinator of India Ltd. has held that the Assessing Officer does not have unfettered powers to reopen the assessment. Reassessment has to be based on fulfillment of certain pre-conditions and if the concept of 'change of opinion' is removed, then in the garb of reopening of assessment, review take place. The concept of 'change of opinion' is an inbuilt test to check abuse of power by the Assessing Officer. 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. Reason must have live link with the formation of belief.

9.2 The Hon'ble Bombay High Court in the case of Trent Ltd. vs. DCIT (supra) held that the Assessing Officer had in his possession all primary information when original assessment order u/s. 143(3) was framed. The assessment is reopened on the basis of very same material, therefore, it is a case of change of opinion, hence, reopening is not justified. In the present case as well assessment has been reopened without there being any new tangible material in possession of Assessing Officer. It is a clear case of 'change of opinion'. Ergo, reassessment is bad in law.

10. In the case of CIT vs. Reliance Industries Ltd. (supra) the Assessing Officer reopened the assessment in respect of deduction u/s. 80IA claimed by the assessee, on the ground that the assessee has shown excess profit to avail higher deduction u/s. 80IA. The Assessing Officer in original assessment had already examined this issue. The CIT(A) held reopening to be without jurisdiction on the ground the Assessing Officer himself resisted the Revenue's audit objection. The Assessing Officer had applied his mind on the issue of deduction claimed u/s. 80IA in regular assessment proceedings. On appeal, the Tribunal upheld the order of CIT(A). The Department further carried the issue in appeal before the Hon'ble High Court. The Hon'ble High Court dismissed the appeal of Revenue by observing as under:

"8. We are unable to understand how the mandate of the Act requiring the Assessing Officer to have reason to believe that income chargeable to tax has escaped assessment can be ignored on the altar of revenue collection. If such a submission is to be accepted, it would, be the beginning of the end of the Rule of Law. In fact, a Division Bench of this Court in IL & FS Investment Managers Ltd. v. ITO [2008] 298 ITR 32 (Bom.) has concluded the issue by pointing out that ***where the Assessing Officer in response to the query from the Revenue audit has opposed the reopening, it cannot be said that the Assessing Officer has formed his opinion that income has escaped assessment for the purpose of the reopening notice.*** *In the above view, the question as framed does not give rise to any substantial question of law."*

[Emphasised by us]

11. The Revenue has countered the argument that the recommendation of the Assessing Officer to drop audit objection has no sanctity as it is the PCIT who has to take a call to drop audit objections. The aforesaid arguments by the Revenue may hold good in so far as Departmental procedures, for the purpose of section 147 of the Act it is the belief of the Assessing Officer that material. The requirement of section 147 of the Act is the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The **Assessing Officer's reason to believe** is *sine-qua-non* for reopening assessment. It is not the reason to believe of PCIT or any other authority which matters when it comes to the provisions of section 147 of the Act.

12. The ld.Departmental Representative has placed reliance on various decisions to buttress his arguments. We have examined the same. We find that either those decisions are distinguishable on facts or the ratio laid down in the said judgments does not support the case of Revenue.

13. In facts of the case and decisions discussed above, we are in agreement with the findings of CIT(A) in holding reassessment proceedings u/s.147 of the Act as bad in law. Consequently, the impugned order is upheld and the appeal by the Revenue is dismissed.

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14. Both sides are unanimous in stating that facts germane to the issue of reopening for Assessment Year 2011-12 and 2012-13 are identical to the facts in Assessment Year 2010-11. Therefore, the submissions made for Assessment Year 2010-11 would equally hold good for Assessment Year 2011-12 and 2012-13.

15. We find that the Revenue has assailed the findings of CIT(A) with respect to validity of reopening of assessment by raising identical grounds in all the three Assessment Years. The reasons recorded for reopening assessment in all the three Assessment Years are verbatim. There is no distinction in the manner of reopening assessment in all the three Assessment Years. Therefore, the findings given by us while adjudicating appeal of the Revenue in Assessment Year 2010-11 would *mutatis mutandis* apply to the appeals of the Revenue for Assessment Year 2011-12 and 2012-13. For parity of reasons, appeal by the Revenue for Assessment Year 2011-12 and 2012-13, respectively are dismissed.

16. **To sum up, appeals by the Revenue for Assessment Years 2010-11, 2011-12 and 2012-13 are dismissed.**

Order pronounced in the open court on Friday the 25th day of March, 2022.

Sd/-

Sd.-

(PRASHANT MAHARISHI) (VIKAS AWASTHY)

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 25/03/2022

Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai