

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'C' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./I.T.A. No.317/Chny/2019
निर्धारण वर्ष/Assessment Year: 2013-14

M/s. Shriram Construction Finance,
Mookambika Complex, No. 4,
Lady Desika Road, Mylapore,
Chennai 600 004.
[PAN:AAAFS2597N]

Vs. The Assistant Commissioner of
Income Tax,
Non Corporate Circle 2,
Chennai.

आयकर अपील सं./I.T.A. No.343/Chny/2019
निर्धारण वर्ष/Assessment Year: 2014-15

The Deputy Commissioner of
Income Tax,
Non Corporate Circle 2(1),
Chennai.

Vs. M/s. Shriram Construction
Finance, Mookambika Complex,
No. 4, Lady Desika Road,
Mylapore, Chennai 600 004.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by : Shri R. Sivaraman, Advocate
Department by : Shri P. Sajit Kumar, JCIT
सुनवाई की तारीख/ Date of hearing : 30.03.2022
घोषणा की तारीख /Date of Pronouncement : 13.04.2022

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

Both the cross appeals filed by the assessee and the Revenue are directed against the order of the Id. Commissioner of Income Tax (Appeals) 2, Chennai dated 26.11.2018 relevant to the assessment year 2013-14. The grounds raised by the assessee are reproduced as

under:

- “1. *The order of the CIT(A)-2 in ITA No. 118/2017-18 dated 26.11.2018 is against law and facts of the case.*
2. *The CIT(A) erred in confirming the proceedings initiated u/s.147.*
3. *The CIT(A) erred in not appreciating the fact that the issue of interest payment has been considered in the course of original assessment proceedings u/s.143(3) and interest of Rs.39,29,531/- has been disallowed under rule 8D(2)(ii) in the assessment completed u/s.143(3) on 10.12.2015 and, therefore, the initiation of proceedings u/s.147 is due to change of opinion. In this connection the appellant rely on the Supreme Court decision in the case of CIT Vs Kelvinator Indian Ltd (320 ITR 561) and Delhi High Court decision the case of CIT Vs Jagson International Ltd (321 ITR 544).*
4. *The CIT(A) erred in not appreciating the fact that there was no fresh materials before the Assessing Officer to initiate the proceedings u/s.147 and that the reopening of the assessment was due to reappraisal of the facts already on record.*
5. *The CIT(A) erred in partly confirming the disallowance made u/s.36(1)(iii).*
6. *The CIT(A) erred in not appreciating the fact that the interest paid related to capital borrowed for the purpose of business.*
7. *The Assessing Officer erred in not appreciating the fact that making investments in shares is part of the appellant's business activity.*
8. *The Assessing Officer erred in disallowing interest u/s.36(1)(iii) under a different computation in the order u/s.143(3) r.w.s.147 dated 29.12.2017 in respect of investments in shares and share application money, as the Assessing Officer has already disallowed interest u/s.14A r.w. Rule 8D in the order u/s.143(3) dated 10.12.2015 in respect of investments in shares and share application money.*
9. *For these and other grounds that may be adduced before or at the time of hearing the ITAT may be pleased to*
 - i. *Cancel the assessment*
 - ii. *Delete the disallowance u/s.36(1)(iii).”*

2. Facts are, in brief, that the assessee firm is engaged in the

business of advancing loans to group concerns. The assessee filed its return of income for the assessment year 2013-14 on 17.09.2013 returning a total income of ₹. NIL. The return was processed under section 143(1) of the Income Tax Act, 1961 ["Act" in short]. Subsequently, the case was selected for scrutiny and notice under section 143(2) of the Act dated 02.09.2014 has been served on the assessee and after following due procedure, the assessment was completed under section 143(3) of the Act dated 10.12.2015. In the assessment order, the Assessing Officer has noted that the assessee firm has investments in shares to the tune of ₹.21,88,33,557/- as on 31.03.2013, the income from which is exempt. The Assessing Officer further noted that the assessee has made disallowance under section 14A of the Act only to the tune of ₹.12,60,886/- while computing the total taxable income. From the computation for the disallowance under section 14A of the Act furnished by the assessee, the Assessing Officer has noted that the assessee has not included the value of investment in share application money made during the year. When the Assessing Officer pointed out, the AR of the assessee filed objections for making disallowance of proportionate interest with regard to investment in share application money on the following grounds:

(a) The investments in share application money will not yield an income till it is converted into shares, whether exempt or not. As there is neither any possibility of earning income nor any right to a benefit is vested till shares are allotted, the provisions of Sec. 14A r.w. Rule 8D will not be attracted.

(b) The ITAT 'D' Bench, Chennai considered similar points in our group cases and in their common order in ITA No. 1523/Mds/2012 and ITA No. 1524/Mds/2012 dated 17/12/2012 allowed the appeals in favour of our group cases.

(c) The decision of Hon'ble ITAT, Mumbai Bench in the case of Rainy Investments P. Ltd. 30 taxmann.com 169 (2013) is also applicable to our case.

2.1 After considering the submissions of the assessee, the Assessing Officer has noted that the assessee has classified its investments in shares under 'Investments' in Business and in this factual matrix, the assessee's investment in shares, the income from which is exempt, certainly calls for disallowance under section 14A of the Act of the expenditure incurred relating to such investments. Accordingly, the Assessing Officer determined the disallowance under section 14A r.w. Rule 8D of ₹.48,16,523/- and after reducing the disallowance made by the assessee, the balance amount of ₹.35,55,637/- was disallowed and brought to tax.

2.2 Subsequently, the Assessing Officer has issued a notice under section 148 of the Act dated 06.05.2016 for reopening of assessment.

The reasons recorded for reopening of assessment are as under:

“The reasons recorded for reopening of assessment in your case for the A.Y 201-14 is as under:

“On perusal of the Balance Sheet, it is found that the own capital is available only to an extent of Rs.2,09,33,691/-. The excess value of loan received over and above loans advances is Rs.24,21,45,860/- (Rs.1,20,77,93,140 - Rs.96,56,47,280/-) and investment in shares/share application money is Rs.23,32,22,157/-. Thus, it is found that investments in shares have been made out of loans received and the computation of disallowance u/s 36(1)(iii) of I.T. Act should have been undertaken and restrict the eligible interest cost to be set off against income for the year to the extent that relates to the loans which fetches interest income. In respect of the balance, the same should be treated as cost of improvement to the fixed asset held in form of investments. The disallowance u/s 14A r.w. Rule 8D(2)(ii) & (iii) made while completing the assessment u/s 143(3) is improper since the same has allowed excessive cost of interest including portion that relates to investments. Since the arithmetic of own money used for investments is not established, it construes that the invested funds have direct nexus to the borrowed fund.”

In view of the above, there is reason to believe that income chargeable to tax has escaped assessment for the assessment year 2013-14.”

2.3 Against the reasons for reopening of assessment, the assessee filed its objections vide its letters dated 23.06.2016, 16.01.2017 and 25.04.2017. By issuing a rebuttal to the above objections by the Assessing Officer vide his letter dated 08.03.2017, the Assessing Officer completed the assessment under section 143(3) r.w.s. 147 of the Act after making addition.

3. The assessee carried the matter in appeal before the Id. CIT(A)

and challenged the reopening of assessment under section 147 of the Act. After considering the submissions of the assessee and by following the decision in the case of K. Somasundaram & Bros v. CIT 238 ITR 939 (Mad), the Id. CIT(A) decided the reopening of assessment under section 147 of the Act against the assessee and directed the Assessing Officer to recompute the disallowance under section 36(1)(iii) of the Act at 17.58% of the actual interest received and after reducing the disallowance, if any, made under section 14A r.w. Rule 8D.

4. On being aggrieved, the assessee is in appeal before the Tribunal challenging the reopening of assessment under section 147 of the Act and submitted that during the course of original assessment proceedings under section 143(3) of the Act, the Assessing Officer has examined all the details and made disallowance under section 14A r.w. Rule 8D. Again, reopening of the assessment under section 147 of the Act for the same reasoning is not valid. He has further pointed out from the rebuttal of the Assessing Officer communicated to the assessee vide his letter dated 08.03.2017 and argued that there is no new tangible material available with the Assessing Officer and complete details such as balance sheet, profit and loss account, etc. were filed

by the assessee and were available in the file of the Assessing Officer himself. Since there is no tangible material came to the notice of the Assessing Officer, subsequent re-assessment under section 147 of the Act is invalid.

5. On the other hand, the Id. DR has submitted that there is incorrect arithmetic applied by the Assessing Officer in the original order of assessment under section 143(3) of the Act and in order to correct the mistake crept in the original assessment order, the assessment under section 143(3) of the Act was reopened under section 147 of the Act. Therefore, the Assessing Officer has rightly passed the reassessment under section 143(3) r.w.s. 147 of the Act.

6. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, on perusal of the assessment orders, we find that the return filed by the assessee was processed under section 143(1) of the Act. The assessee has made voluntary disallowance under section 14A of the Act of ₹.12,60,886/- while computing the total taxable income. Thereafter, the return filed by the assessee was selected for scrutiny and after thoroughly examining all the details furnished by the

assessee, the Assessing Officer enhanced the disallowance under section 14A r.w. Rule 8D to the tune of ₹.48,16,523/- after reducing the disallowance made by the assessee, the balance amount of ₹.35,55,637/- was disallowed under section 14A r.w. Rule 8D and brought to tax.

6.1 We find that already the Assessing Officer has examined this issue and formed an opinion that the voluntary disallowance made under section 14A of the Act by the assessee was not correct and the Assessing Officer made additional disallowance of ₹.35,55,637/- under section 14A of the Act in the original assessment. We are of the opinion that again to take a decision on the same material available on record to reopen the assessment under section 147 of the Act is not permissible in accordance with law. It is only a change of opinion. That part, there is no tangible material available on record with the Assessing Officer after passing original assessment order under section 143(3) of the Act dated 10.12.2015. Moreover, on perusal of the rebuttal communicated by the Assessing Officer in his letter dated 08.03.2017, we find that the Assessing Officer assumed the power of review of the assessment already completed under section 143(3) of

the Act, which is not permissible under the Act.

6.2 In the case of CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC), the Hon'ble Supreme Court has observed and held as under:

6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfilment 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 1st April, 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 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 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 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 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."

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

6.3 Similarly, by following the decision in the case of CIT v. Kelvinator of India Ltd. (supra), the Hon'ble Bombay High Court in a Writ Petition No. 1917 of 2019 dated 21.08.2019 in the case of Marico Ltd. v. ACIT, the Hon'ble Bombay High Court has observed and held as under:

"4. Mr. Pardiwala, learned Senior Advocate appearing in support of the Petition submits as under :-

(a) Although the impugned notice for reopening has been issued within a period of four years from the end of Assessment Year i.e. 2014-15, yet the jurisdiction to reopen an assessment cannot be exercised on account of change of opinion. It is submitted that jurisdiction to re-open an assessment is not a jurisdiction to review an order as held by the Apex Court in CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561;"

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"6. We have considered the rival submissions. It is a settled position in law that the power to reopen an assessment within a period of four years from the end of the relevant assessment year, even when the assessment has been made under Section 143(3) of the Act, is not curtailed by the proviso to Section 147 of the Act. Therefore, even where an assessee has disclosed all material facts truly and fully for assessment and assessment is completed under Section 143(3) of the Act, the reopening is permissible within a period of four years from the end of the relevant assessment year. The only condition precedent for exercising the jurisdiction to reopen an assessment, is the Assessing Officer should have reasonable belief that income chargeable to

tax has escaped assessment. This reason to believe that income chargeable to tax has escaped assessment should not be on the basis of change of opinion, as otherwise the power of reassessment would become a power of review, which it is not.

6.4 Against the above decision of the Hon'ble Bombay High Court in the case of Marico Ltd. v. ACIT, the Department preferred SLP (Civil) before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed the SLP vide order dated 01.06.2020 in Diary No. 7367/2020 and confirmed the Hon'ble Bombay High Court decision in which it was held that once the opinion is formed during the regular assessment proceedings, bars the Assessing Officer to reopen the same only on account of a different view.

6.5 The case law relied on by the Id. CIT(A) as well as the Assessing Officer in his rebuttal dated 08.03.2017 has no application to the facts of the case in hand for the reason that the assessment was reopened for making disallowance in as much as the disallowance under section 14A of the Act has already come across under section 143(1) of the Act as well as under section 143(3) of the Act without any new tangible material on record.

6.6 In view of the above facts and circumstances and by considering the judgement of Hon'ble Supreme Court in the case of CIT v.

Kelvinator of India Ltd. (supra) as well as the decision of the Hon'ble Bombay High Court in the case of Marico Ltd. v. ACIT (supra), we held that the reopening is invalid and the assessment order passed under section 143(3) r.w.s. 147 of the Act is quashed.

6.7 Once we have quashed the assessment order under section 143(3) r.w.s. 147 of the Act, the appeal preferred by the Revenue against the order passed by the Id. CIT(A) remains academic, no adjudication is required and liable to be dismissed and accordingly dismissed the appeal of the Revenue.

7. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

Order pronounced on 13th April, 2022 at Chennai.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Chennai, Dated, 13.04.2022

Vm/-

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.