

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.2359 & 2360/Bang/2019
Assessment Year : 2006-07 & 2007-08

M/s. Gokaldas Images Pvt. Ltd. No.7 & 12, Industrial Suburb Tumkur Road Yeshwantpur Bengaluru 560 022 PAN NO : AAACG 6637 Q	Vs.	Deputy Commissioner of Income-tax Circle 11(3) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri Ashok Kulkarni, Advocate
Respondent by	:	Shri Sunil Kumar Singh, D.R.

Date of Hearing	:	09.06.2022
Date of Pronouncement	:	10.06.2022

ORDER

Per Laxmi Prasad Sahu, Accountant Member :-

These appeals filed by the assessee are directed against the order of the CIT(A)-2 dated 19.8.2019 for the assessment years 2006-07 & 2007-08. The issues involved in both these appeals are identical and arise under identical facts and circumstances. These appeals were heard together. We deem it convenient to pass a common order.

2. The facts in the assessment year 2007-08 are identical with the facts in assessment year 2006-07. Therefore, the view taken for assessment year 2006-07 will apply *mutatis mutandis* to assessment year 2007-08.

3. The grounds raised in these appeals are common except for the figures. Hence, the grounds raised in ITA No.2359/Bang/2018 is reproduced as under:-

1. *The order of the Hon'ble CIT(A)-2 is opposed to law and facts of the case.*
2. *The Hon'ble CIT (A)-2 ought to have held that the assumption of jurisdiction u/s 147 and issue of Notice u/s 148 are without jurisdiction contrary to law and opposed to the facts on record.*
3. *The Hon'ble CIT(A)-2 ought to have held that in the absence of material in the recorded reasons, the AO could not have come to a prima facie belief that there was diversion of borrowed capital.*
4. *The Hon'ble CIT(A)-2 erred in holding that the AO has jurisdiction in reopening the assessment.*
5. *The Hon'ble CIT(A)-2 erred in upholding the issue of Notice u/s 148 of the Act.*
6. *The Hon'ble CIT(A)-2 erred in upholding disallowance of interest. The Hon'ble CIT(A)-2 failed to appreciate the fact that the advance/loans to its directors involved commercial expediency. Tax relating to ground No.1 to 5 are Rs.2,68,40,666/- and for Ground No.6 – Rs.51,48,601/-“*

4. The brief facts of the case are that the assessee has filed its return of income on 30/11/2006 declaring a loss of Rs.8,13,35,23,000/- after claiming deduction u/s 10B of the Act. The case was selected for scrutiny and assessment order u/s 143(3) of the Act was concluded on 31/12/2008. Later on, the case was reopened by issuing notice u/s 148 of the Act on 27/3/2012 after recording the reasons. Accordingly, the assessee filed a letter on 25/4/2013 stating that the original return filed u/s 139(1) may be treated as a return filed in response to the notice u/s 148 of the Act. Later on, the reasons were provided to the assessee. On 17/7/2013, he filed objections before the AO which has been incorporated by the AO in para No.5 of his order.

5. The ld.AR submitted that the AO has not followed the mandatory guidelines with regard to disposing off the objections filed by the assessee during the course of reassessment proceedings, therefore re-assessment order framed by the AO is non est in the eye of law as per the judicial precedence. The AO has filed two sets of paper books containing page nos.1 to 34 and 1 to 166 respectively. He also filed written synopsis which is as under.:-

“A. (I) The appellant has filed detailed written submissions before the Hon'ble Commissioner of Income Tax (Appeals), Bengaluru. The Paper Compilation filed before the Commissioner of Income Tax (Appeals) is enclosed. For the sake of brevity same are not repeated and the appellant seeks leave of the Hon'ble Tribunal to rely on the same.

(ii) *In addition to appreciate the contention raised by the appellant, reference may be made to the following facts:*

31.12.2008 :Date of the Original assessment order u/s 143(3) of the Act.

27.03.2013 :Date of Notice issued u/s 148 of the Act.

25.04.2013 : Appellant requested the assessing officer to treat the return originally filed as in response to the Notice u/s 148 and requested for supply of reasons recorded u/s 148(2) consistent with the Apex Court decision in

17.07.2013 : The appellant filed objections to assumption of jurisdiction.

(iii) It is very important to note that the mandatory procedure of disposal of the objections raised by the appellant are not followed by the assessing officer. A failure to do so will result in the invalidation of the assessment us! 147 of the Act. Kind reference is invited to the decisions in 259 ITR 19 (SC), 326 ITR 553 (Del), 323 ITR 331 (Guj) and the decision of the jurisdictional High Court in WA No.1725/2017 (IT) dated 15.03.2017 (copy enclosed). Para 11 of the Judgment reads as under:

"If the facts of the present case are examined in the light of aforesaid legal position, it is an admitted position that the reasons for re-opening of the assessment by issuing of the notice under Section 148 of the Act were supplied to the appellant assessee. It is also admitted position that the appellant assessee after receipt of such reasons raised objections. It is also undisputed position that the Assessing Officer did not dispose of the objections prior to proceeding with the assessment further and proceeded to pass the order for assessment. Under the circumstances, it can be said that the mandatory procedure of disposal of the objection by Assessing Officer before proceeding with the assessment has not been followed and exercise of power can be said as not only vitiated, but the order of assessment cannot be sustained."
(emphasis supplied)

(iv) *It is to be stated that the appellant had filed before the Commissioner of Income Tax (Appeals) detailed Written Submissions in support of its contention that the assessing officer had no jurisdiction to invoke the provisions of Section 148 of the Act. Without referring to any of the appellants submissions the Hon'ble Commissioner of Income Tax (Appeals) in Para 5.1 held as under:*

"I am of the considered opinion that the Assessing Officer has got jurisdiction in reopening the assessment by issuing notice u/s 148 of the Act and therefore the grounds of appeal is hereby dismissed."

It is submitted with respect that the Commissioner of Income Tax (Appeals) 's reliance on the decision of the Apex Court in Kalyanji Mavji & Co. Vs. CIT 102 ITR 287 is wholly misplaced.

(v) *In these circumstances, it is submitted that the assessment order is void ab initio. Therefore, the said order deserved to be annulled.*

B.(i) Adverting to the merits, it is submitted that the assessing officer under misconception proceeded on the basis that the appellant after availing loan from the financial institutions has diverted the funds to sister concerns free of interest. Para 8 of the assessment order reads as under:

"It is seen that the assessee company has availed loan amounting to Rs. 105,49,99,887 from financial institutions and claimed expenditure of Rs. 8,94,49,740 as interest on such borrowings. It is also seen that the assessee company has not utilized the borrowed loans wholly and exclusively for the business and has given a loan of Rs. 18,40,13,075/- to its sister concerns without charging any interest."

(emphasis supplied)

(ii) *It may please be appreciated that the only reference is to a sum of Rs.18,40,13,075/- whose particulars are filed as Annexure-"A" (Page 44 of the Paper Book). The annexure contains an analysis of the various sums comprised with in Rs.18,40,13,075/-. It will be seen that there is no lending at all to*

any sister concerns much less interest free lending as alleged by the assessing officer.

(iii) Though not necessary but by way of clarification, the appellant would like to deal with one particular item therein under the caption loan to Directors amounting to Rs.12.50 Crores roundly. This comprises of two item namely:

(I) Shri Jagadish Hinduja - Rs.6.85 Crores

(ii) Shri Sumir Hinduja - Rs.5.65 Crores

Admittedly no interest was charged on this loan. The circumstances under which the loans were given and how they are for the business purposes and out of sheer commercial expediency is well brought out by the order of the Commissioner of Income Tax (Appeals)-1, Bengaluru, in ITA No. 166 & 167/DC-11(3)/A-1/1011 dated 16.07.2012. A copy of the order is attached. The order holds the field even today though under appeal. The assessing officers case appears to be that because there was a lending to the Directors, it is inferred that there is diversion of borrowed funds. Here it is important to note that M/s. Gokaldas Images Pvt. Ltd., was contemplating a public issue to enlarge the capital base which would result in the expansion of the business of the company. The appellant had large dealings with its affiliates of various nature. To ensure the achieving of the objectives aforesaid, the appellant wanted to disassociate to the extent possible from its various affiliates. Accordingly, a cheque for Rs.5 Crores was issued in the name of M/s. Personality Ltd., an affiliate concern. It is to be stated that Personality Ltd., which had borrowing from a bank, and appellant had given a corporate guarantee. Pursuant to these funds, Personality Ltd., was able to obtain a no due certificate from the bank and the appellant was also freed from the guarantee. The letters received from the bank are enclosed herewith (Page 191 and 192 of the Paper Book).

(iv) The appellant wanted to expand the domestic market. Personality Ltd., owned and enjoyed two brands namely "CHIERSKING" and "BESSELLER" for readymade garment

products. The appellant had proposed to buy the brands vide agreement dated 01.04.2005 for its use for a total consideration of Rs.5.5 Crores. (Copy of the agreement enclosed. Page 160 of the Paper Book). Later, with an intention to concentrate on export business and to delink itself from its group companies and to get out of this liability it was decided to utilise the medium of M/s. Hinduja Investments Pvt. Ltd., among other things, was to buy these two brands from Personality Limited. The sum of Rs.5.5 Crores already given to Personality Ltd., for the purpose of purchase of brand names stood transferred in the books of appellant as loan to Directors and the debit to Personality Limited ceased to that extent.

(v) It is very important to note that in support of its case the appellant had filed before the Hon'ble Commissioner of Income Tax (Appeals) detailed Written Submissions and a Paper Book. Unfortunately, the Hon'ble Commissioner of Income Tax (Appeals) without dealing with the appellants contentions merely dismissed the appeal.

In view of these circumstances, it is prayed that the order of assessment be annulled or in the alternative and without prejudice the interest as claimed by the appellant be allowed.

6. In addition to the above, the Id.AR relied on the judgment of M/s Deepak Extrusions Pvt. Ltd., in W.A No.1725/2017 (T – IT) and he argued only on legal issue.

7. On the other hand, the Id.DR relied on the order of the lower authorities and he submitted that the assessee's objections has been disposed off by the AO as per para no.6 of the assessment order. The AO has duly followed all the procedures for reopening of the case as per sec. 147/148 of the Act. Therefore, all the allegations made by the Id.AR are not tenable. The AO has duly framed the assessment order

and the case law relied on by the Id.AR is not applicable in the present case on hand.

8. We have heard the rival submissions and carefully considered the same along with the order of the authorities below as well as the documents referred to and relied on before us, we observe that as per the detailed objections filed by the assessee, the Id.AR is of the contention that the AO's order is not in conformity with the objections of the assessee. On perusal of the assessment order, we observe that the AO has disposed of the objections raised by the assessee as per para no.6 of his order, for the sake of convenience we are reproducing the same here under:-

6. "The above submissions of the assessee have been examined and found to be unacceptable for the following reasons:-

a) Where an assessment under sub-section (3) of section 143 has been made for the relevant assessment year, no action shall be taken under this section after 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 un/s 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 material facts necessary for his assessment, for that assessment year.

It is clearly spelt out in the reasons recorded, which was provided to the assessee company, that the assessee company has not disclosed truly and fully all the material facts for necessary for its assessment.

b) The notice u/s 148 of the I.T. Act dated 27.03.20 13 was well within the time prescribed as the notice was issued within 6 years from the end of the relevant assessment year as the escaped income is more than Rs.1 lakh.

C) In the reasons recorded, the Assessing Officer has clearly stated lie has reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the I.T. Act, 1961. It is not based on any rumour or conjecture as the reopening of the assessment is based on the assessment concluded in assessee's own case for the A.Y. 2008-09, wherein it was found that the assessee has not correctly apportioned the common expenses between the EOU units and Non-EOU units, has advanced loan to its sister concerns without charging interest whereas the assessee company has claimed expenditure as interest on loan availed, etc. and on verification of the assessment records for the A.Y. 2006-07 ;showed the same anomaly.

9. After going through the objections filed by the assessee and as per para no.6 as quoted (supra), the assessee's contention is not acceptable that the entire AO's order is non- est in the eye of law because the objections has not disposed of by the AO. In the impugned case, we observed at para No.6 quoted (Supra), the AO has disposed of assessee's objection but we note that it is not entirely in conformity with the objections. There is a procedural lapse on the part of the AO. Therefore, the order of the AO would not make order void or non est, which could be cured. We rely on the order of the Hon'ble Supreme Court in the case of Home Finders Housing Ltd. v. ITO reported in 256 Taxman 59 (SC), the SLP filed by the assessee has been dismissed, which has been reported in the taxmann which is as under:-

“Section 148, read with section 147, of the Income-tax Act, 1961 - Income escaping assessment - Issue of notice for (General) - Assessing Officer noticed that income chargeable to tax had escaped assessment and he initiated reassessment under section 147 - Assessee raised objections - However, Assessing Officer without giving disposal to objections of assessee, passed reassessment order - Assessee challenged reassessment order before High Court on ground that by not passing a specific order after receiving objections, Assessing Officer violated law declared by Supreme Court in GKN Driveshafts (India) Ltd. v. ITO [125 Taxman 963 that Assessing Officer should pass a speaking order taking into account objections for re-opening assessment under section 147, and resultantly, order was bad in law - High Court held that non-compliance of procedure indicated by Supreme Court would not make order void or non est and such a violation was a procedural irregularity which could be cured by remitting matter to authority - Whether SLP against impugned order was to be dismissed - Held, yes [Para 2] [In favour of revenue.”

10. Respectfully following the above judgment of the Hon'ble Supreme Court, the order passed by the AO is not non-est in the eye of law and it is a valid order, only the procedural mistake committed by the AO that not dealing to each and every objections raised by the assessee. Hence, we direct the AO for passing a speaking order to dispose off the objections raised by the assessee and decide the issue afresh in accordance with law after giving due opportunity of hearing to the assessee and the assessee is directed to produce necessary documents in substantiating his claim with the necessary evidences to decide the case on merits. The assessee is also directed not to seek unnecessary adjournments for early disposal of the case. In the result the appeal of the assessee is allowed for statistical purposes.

11. In the result, the appeals of the assessee for both the assessment years i.e 2006-07 and 2007-08 are allowed for statistical purposes and a copy of common order passed is to be placed on the respective case files.

Order pronounced in court on 10th day of June, 2022

Sd/-

(BEENA PILLAI)

Judicial Member

Bangalore,

Dated, 10th June, 2022

/ vms /

Sd/-

(LAXMI PRASAD SAHU)

Accountant Member

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

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1. Date of Dictation
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2. Date on which the typed draft is placed
before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
.....
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the Sr.
P.S.
6. Date of uploading the order on
website.....
7. If not uploaded, furnish the reason for doing so
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8. Date on which the file goes to the Bench Clerk
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9. Date on which order goes for Xerox &
endorsement.....
10. Date on which the file goes to the Head Clerk
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11. The date on which the file goes to the Assistant
Registrar for signature on the order
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12. The date on which the file goes to dispatch section
for dispatch of the Tribunal Order
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13. Date of Despatch of Order.
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