

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI

श्री वी. दुर्गा राव, माननीय न्यायिक सदस्य एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.961/Chny/2020
निर्धारण वर्ष /Assessment Year: 2011-12

Mr.Anthony Muthu Cyril Joseph,
No.709, SBOA School,
East Gate Road,
Annanagar West Extn.,
Chennai-600 101.
[PAN: AAAPC 4525 G]
(अपीलार्थी/Appellant)

v. The Income Tax Officer,
Corporate Ward-2(3),
Chennai.

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr.D.Anand, Adv.
प्रत्यर्थी की ओर से /Respondent by : Mr.P.Sajit Kumar, JCIT
सुनवाई की तारीख/Date of Hearing : 12.05.2022
घोषणा की तारीख /Date of Pronouncement : 22.06.2022

आदेश / ORDER

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-6, Chennai, dated 11.03.2020 and pertains to assessment year 2011-12.

2. At the outset, we find that there is a delay of 207 days in appeal filed by the assessee. During the course of hearing, when defect was brought to the notice of the learned AR present, he has submitted that delay in filing of appeal is mainly due to lockdown imposed by the Govt. on account of spread of Covid-19 infections and in view of the Hon'ble Supreme Court

:: 2 ::

suo motu Writ Petition No.3 of 2020, if the period of delay is covered within the period specified in the order of the Apex Court, then same needs to be condoned in view of specific problem faced by the public on account of Covid-19 pandemic.

3. The learned DR, on the other hand, fairly agreed that delay may be condoned in the interest of justice.

4. Having heard both sides and considered reasons given by the learned AR, we find that the Hon'ble Supreme Court in ***suo motu*** Writ Petition No.3 of 2020, has extended limitation applicable to all proceedings in respect of Courts and Tribunals across the country on account of spread of Covid-19 infections w.e.f. 15.03.2020, till further orders and said general exemption has been extended from time to time. We further noted that delay noticed by the Registry pertains to the period of general exemption provided by the Hon'ble Supreme Court extending limitation period applicable for all proceedings before Courts and Tribunals and thus, considering facts and circumstances of the case and also in the interest of natural justice, we condone delay in filing appeal filed by the assessee.

5. The assessee has raised the following grounds of appeal:

1. *The order of the learned Commissioner of Income (Appeals)-6, is wrong, illegal and is opposed to law.*

2. *The learned CIT(A)-6 erred in sustaining an addition of Rs.13,11,000/- made by the Assessing officer under section 69 of the Income Tax Act under the head unexplained investment. The learned AO failed to see that these are amounts that were recorded in the books of accounts warranting no addition under section 69 of the Income Tax Act.*

:: 3 ::

3. *The learned CIT(A) erred in sustaining an addition of Rs.1,97,72,333/- being the difference between the turnover reported and cash deposited in the bank as the income of the appellant. The learned CIT(A) while making the aforesaid addition failed to appreciate the fact that some of the bills and voucher were washed away during the 2015 floods.*

4. *The learned CIT(A) erred in sustaining the aforesaid addition for the reason that the appellant was unable to produce the original bill book for cash received from the clients.*

5. *The learned CIT(A) erred in sustaining the levy of interest made by the AO under section 234A, B and C of the Income Tax Act.*

For these and other grounds that may be rendered at the time of hearing it is most humbly prayed that the Hon'ble Tribunal may be pleased to allow the appellants appeal and thus render justice.

6. The assessee had also filed additional grounds, which reads as under:

1. *The order of the learned Assessing officer in re-opening the assessment which was completed under scrutiny is wrong, illegal and is opposed to law and facts of the case.*

2. *The learned assessing officer erred in re-opening the assessment beyond 4 years without any additional tangible material to show that income has escaped assessment. The Notice under section 148 was issued on 29.03.2018 which is beyond 4 years from the end of the assessment year viz .31.03.2012.*

3. *The learned Assessing officer erred in law in re-opening the assessment which was subjected to scrutiny and completed under section 143(3) without any fresh tangible material evidence. The learned CIT (A) ought to have seen that it is a settled proposition of law that the assessments cannot be re-opened merely based on change of opinion.*

4. *The learned Assessing Officer ought to have seen that the assessee has furnished full and true particulars of its income at the time of original assessment with reference to income alleged to have escaped assessment and that the assessment cannot be validly reopened under Section 147 of the Act, within four year or beyond 4 years, merely on the basis of change of opinion.*

5. *The petitioner states that the omission to raise these specific grounds is neither deliberate nor willful. These grounds go to the root of the matter and would not require any additional investigation.*

6. *In these circumstances, it is just and necessary that the petitioner be permitted to raise and argue the aforesaid grounds in the appeal before this Honorable Tribunal.*

7) *The petitioner hence prays that this Honorable Tribunal be pleased to:*

(a) permit the petitioner to raise the aforesaid additional grounds before this Honorable Tribunal which goes to the root of the matter;

(b) pass such further or other order or orders as this Honorable Tribunal may deem fit and necessary in the circumstances of the case to advance the cause of justice.

7. At the time of hearing, the Ld.Counsel for the assessee referring to petition filed by the assessee for admission of additional grounds submitted that the assessee has filed a petition rising legal grounds challenging re-

:: 4 ::

opening of assessment u/s.147 of the Act. The Ld.AR for the assessee further submitted that grounds taken by the assessee are purely legal grounds, which goes to the root of the matter in questioning the jurisdiction of the AO and thus, these grounds may be taken at any time of the proceedings, including proceedings before the Tribunal, because, facts necessary to above legal grounds were already on record. Therefore, requested to admit additional grounds filed by the assessee to advance substantial justice. In this regard, he relied upon the decision of ITAT Chennai Benches in the case of Hemal Knitting Industries v. ACIT reported in [2010] 127 ITD 0160. The assessee had also relied upon the decision of the ITAT Mumbai Benches in the case of Tata Sons Ltd. v. ACIT reported in [2017] 162 ITD 0450 (Mum.)

8. The Ld.DR, on the other hand, strongly opposing petition filed by the assessee challenging re-opening of assessment, submitted that the additional grounds taken by the assessee, at this stage of proceedings, cannot be admitted, because, the assessee has not raised this issue either before the AO or before the First Appellate Authority. Further, the assessee could not make out a case that fact with regard to additional grounds filed by the assessee were already on record and further, there is no necessity to gather fresh facts to decide the issue and therefore, submitted that the petition filed by the assessee for admission of additional grounds, cannot be admitted.

:: 5 ::

9. We have heard both the parties and considered petition filed by the assessee for admission of additional grounds. We find that the assessee had taken certain additional grounds challenging validity of re-opening of assessment u/s.147 of the Act, in light of notice issued by the AO u/s.148 of the Act, beyond four years from the end of the relevant assessment year and argued that when the original assessment has been completed u/s.143(3) of the Act, then, re-opening of assessment beyond a period of four years from the relevant assessment year, amounts to change of opinion, unless the assessment has been re-opened on the basis of fresh tangible material come to the knowledge of the AO subsequent to original assessment proceedings. We find that legal ground taken by the assessee through its petition for admission of additional grounds is purely a question of law which goes to root of the matter and further, facts with regard to legal ground taken by the assessee were already on record, including the reasons recorded by the AO for re-opening of assessment, notice issued u/s.148 of the Act, and original assessment order u/s.143(3) of the Act. Further, there is no requirement of gathering further evidences to adjudicate the legal ground raised by the assessee.

10. Further, it is a well settled principle of law by the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT reported in [1998] 229 ITR 383 (SC), where, it has been clearly held that the legal ground can be raised for the first time before the appellate authorities, including the Tribunal. We further noted that the ITAT Chennai

:: 6 ::

Benches in the case of Hemal Knitting Industries v. ACIT (supra) had admitted additional grounds filed by the assessee in the second round of litigation. The ITAT Mumbai Benches in the case of Tata Sons Ltd. v. ACIT had admitted additional grounds filed by the assessee on the ground that the Tribunal being a fact finding authority can admit additional grounds on any legal issue, because the requested documents required for establishing legal authority of the AO who had passed the assessment order are expected to be available in the assessment records. In this case, the assessee has challenged legality of re-assessment order passed by the AO in light of provisions of Sec.147 of the Act, and further, required documents with regard to legality of the issue, were already on record with the AO. Therefore, we are of the considered view that the additional grounds filed by the assessee challenging re-opening of assessment, is purely a legal ground, which can be admitted at any time, including proceedings before the Tribunal and thus, we admit additional grounds filed by the assessee.

11. The Ld.AR for the assessee referring to additional grounds filed by the assessee submitted that the AO erred in re-opening of assessment beyond four years from the end of the relevant assessment year without any tangible material to show that income has escaped assessment. The Ld.AR for the assessee further submitted that the assessment for the impugned assessment, has been completed u/s.143(3) of the Act, on 31.03.2020. The assessment has been re-opened by issuance of notice u/s.148 of the Act, on 29.03.2018, which is beyond four years from the end

:: 7 ::

of the relevant assessment year. It is a well settled principle of law by the decision of various Courts that when the original assessment has been completed u/s.143(3) of the Act, and further, the assessment has been re-opened beyond a period of four years from the end of the relevant assessment year, then, the AO should form reasonable belief of escapement of income on the basis of fresh tangible material which came to his possession subsequent to completion of original assessment proceedings. In this case, if you go through the assessment order, the AO has re-opened assessment on the basis of financial statement filed by the assessee, which was available with the AO, when the original assessment proceedings were completed. Therefore, from the above, it is very clear that there is no fresh tangible material in the possession of the AO and thus, re-opening of assessment on very same set of materials amounts to change of opinion, which is not permissible under law. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd. reported in [2010] 320 ITR 0561. The Ld.AR had also relied upon the decision of the Hon'ble Madras High Court in the case of Tractors and Farm Equipment Ltd. v. ACIT reported in [2018] 409 ITR 0369 (Mad) and also the decision of the Hon'ble Madras High Court in the case of M/s.Cognizant Technology Solutions India Pvt. Ltd., in W.A.No.2521 of 2021 dated 05.10.2021.

12. The Ld.DR, on the other hand, strongly opposing the additional grounds filed by the assessee submitted that re-opening of assessment is

:: 8 ::

valid in the given facts and circumstances of the case, because, the AO has formed reasonable belief of escapement of income on the basis of tangible materials. In this case, the basis for re-opening of assessment and escapement of income, is amenable from the records of the AO and thus, there is no merit in legal ground taken by the assessee challenging re-opening of assessment.

13. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The provisions of Sec.147 of the Act, deals with re-opening of assessment and as per the said provisions, the assessment can be re-opened if income chargeable to tax, had been escaped assessment. The AO has to form a reasonable belief of escapement of income and such reasonable belief should be based on fresh tangible material. In other words, there should be a live link between reasons recorded for re-opening of assessment and escapement of income and such escapement of income should be based on fresh tangible material come to the knowledge of the AO subsequent to completion of assessment proceedings, more particularly when the assessment has been completed u/s.143(3) of the Act. In this case, original assessment has been completed u/s.143(3) of the Act, on 31.03.2013. Admittedly, notice u/s.148 of the Act, issued on 29.03.2018, which is beyond four years from the end of the relevant assessment years. Therefore, from the above facts, it is very clear that the assessment has been re-opened after a period of four years from

:: 9 ::

the end of the relevant assessment year and in such situation, the AO should form reasonable belief of escapement of income on the basis of fresh tangible material. In this case, on perusal of re-assessment order passed by the AO and additions made in re-assessment proceedings, what we could notice is that the AO has made additions towards cash deposits to the bank account u/s.69 of the Act, and also additions towards difference in cash deposits to bank account and gross receipts offered for tax. Further, those two issues are taken from the financial statement filed by the assessee, including bank statement during the course of original assessment proceedings. The reasons recorded by the AO neither refers to any fresh tangible material nor basis for re-opening of assessment on the basis of new material come to the knowledge of the AO subsequent to completion of original assessment proceedings. The AO has re-opened the assessment on the basis of very same set of documents which was available with him, when he had completed original assessment proceedings u/s.143(3) of the Act. It is a well settled principle of law by the decision of various Courts, including the decision of the Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd.(supra) that the AO has power to re-open the assessment u/s.147 of the Act, provided the AO has reason to belief that income has escaped assessment and there is a tangible material to come to the conclusion that there is an escapement of income. However, mere change of opinion, cannot **per se** the reason to re-open. The Hon'ble jurisdictional Madras High Court in the case of Tractors and Farm

:: 10 ::

Equipment Ltd. v. ACIT (supra) had considered re-opening of assessment in light of provisions of Sec.147 of the Act, and held that when the assessee has disclosed necessary facts for completion of assessment and there is no allegation on the part of the assessee, failure to disclose fully and truly all materials necessary for assessment, then, re-opening of assessment beyond a period of four years is bad in law. A similar view had been taken by the Hon'ble jurisdictional High Court of Madras in the case of M/s.Cognizant Technology Solutions India Pvt. Ltd. (supra), and held that in the absence of new facts coming to the knowledge of the AO subsequent to the original assessment proceedings, the re-opening, could not have been done on the same material.

14. In this case, on perusal of facts availability on record, we find that the assessment has been re-opened on the basis of financial statement and bank statement filed by the assessee during the course of assessment proceedings, which is evident from the fact that the AO refers to bank statement and financial statement to make additions towards cash deposits and difference in turnover. The AO does not have any fresh tangible material come to his knowledge subsequent to original assessment proceedings to form a reasonable belief of escapement of income. The AO had also not brought on record any failure on the part of the assessee to disclose fully and truly all facts necessary for completion of assessment. Therefore, we are of the considered view that in the absence of fresh

:: II ::

tangible material and also failure on the part of the assessee to disclose all material facts necessary for assessment, re-opening of assessment beyond a period of four years from the end of the relevant assessment year amounts to change of opinion. In our considered view, which is not permissible under law. Therefore, we are of the considered view that re-opening of assessment in the given facts and circumstances of the case, is bad in law. Thus, we quashed notice issued u/s.147 of the Act, and subsequent re-assessment order passed by the AO u/s.143(3) r.w.s.147 of the Act.

15. In the result, the appeal filed by the assessee is allowed.

Order pronounced on the 22nd day of June, 2022, in Chennai.

Sd/-

(वी. दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 22nd June, 2022.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)

Sd/-

(जी. मंजूनाथा)

(G. MANJUNATHA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF