

IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH : PANAJI, GOA

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA.No.336/PAN/2018
Assessment Year 2005-2006

M/s. Kamat Real Estate Developers, F/1 Indira Apartments Caetano Albuquerque Road, Panaji, Goa. PAN AABFK8817C	vs.	The ACIT, Circle-1(1), Aayakar Bhawan, Panaji – Goa.
(Appellant)		(Respondent)

For Assessee :	Sh Sandip Bhandare, C.A.
For Revenue :	Sh Mayur Kamble, Sr. D.R.

Date of Hearing :	15.06.2022
Date of Pronouncement :	17.08.2022

ORDER

PER CHANDRA MOHAN GARG, J.M.

This appeal has been filed by the assessee against the Order of the Ld. CIT(A) Panaji-1, Panaji, dated 28.05.2018, for the A.Y. 2005-2006.

2. Briefly stated facts of the case are that the assessee firm is engaged in construction and hotel business.

The return of income was filed by the assessee on 31.10.2005 showing total income of Rs.42,01,230/-. The said return was processed under section 143(1) of the I.T. Act, 1961 and the case was selected for scrutiny and statutory notices under sections 143(2) and 142(1) of the I.T. Act, 1961 were issued and served on the assessee on 31.07.2006. In response to notice under section 142(1) and 129 dated 18.07.2007, the Authorised Representative of the assessee-firm appeared before A.O. and produced books of account and other details from time to time. The A.O. completed the assessment under section 143(3) of the I.T. Act, 1961 and determined the total income of the assessee at Rs.97,88,110/- [rounded-off] vide order dated 26.12.2007.

2.1. Subsequently, the case of the assessee was reopened after recording the reasons and a notice under section 148 of the I.T. Act, 1961 dated 28.03.2011 was issued to the assessee. The reasons for reopening of the assessment by the A.O. was that in the capital account of it's partners viz., (a) Kamat Real Estate Developers

[Rs.17,36,994/- debit balance] and (b) Hotel Nova Goa [Rs.1,13,30,940/- debit balance] there was total debit balance of Rs.1,30,67,934/- [i.e., Rs.17,36,994/- + Rs.1,13,30,940/-] and no interest has been charged by the firm to the partners on the above debit balances. The assessee submitted before the A.O. during the course of re-assessment proceedings that in the partnership deed there is a provision by which an interest amount @ 12% is to be paid by the Firm to the partners on their capital. However, the submissions of the assessee were not accepted by the A.O. and made an addition of Rs.15,68,152/- @ 12% of the debit balance of Rs.1,30,67,934/- and passed the assessment order under section 143(3) r.w.s. 147 of the I.T. Act, 1961.

2.2. Aggrieved by the order of the A.O, the assessee carried the matter in appeal before the Ld. CIT(A), who vide order dated 28.05.2018 rejected the ground of the assessee.

3. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before the Tribunal and has raised the following grounds :

- 1. In the facts and circumstances of the case, the Commissioner of Income Tax (Appeals) erred in holding that the reopening of assessment of the Appellant Firm by the Assessing Officer u/s 147 of I.T. Act was valid, despite the fact that the said reopening had been done after the expiry of four years from the end of the assessment year under consideration without complying with the mandatory jurisdictional condition precedent as stipulated in first proviso to section 147 of I.T. Act.*
- 2. In the facts and circumstances of the case, the Commissioner of Income Tax (Appeals) erred in holding that the reassessment proceedings initiated u/s 147 of I.T. Act by the Assessing Officer were valid, although nothing had been recorded by the Assessing Officer in the reasons about any failure on the part of the Appellant Firm to disclose fully and truly all material facts necessary for the completion of*

original assessment of the Appellant Firm by the Assessing Officer u/s 143(3) of I.T. Act.

- 3. In the facts and circumstances of the case the Commissioner of Income Tax (Appeals) has erred in confirming the reopening of assessment proceedings u/s 147 of I.T. Act as valid proceedings inspite of change of opinion between the two Assessing Officers.*
- 4. In the facts and circumstances of the case the Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer of reopening of assessment of the Appellant Firm u/s 147 of I.T. Act, despite the fact that the Assessing Officer, while reopening assessment to make disallowance of interest of Rs.15,68,152/-, examined original assessment records only and no fresh material had come in his possession after completion of original assessment u/s 143(3) of I.T. Act.*

5. In the facts and circumstances of the case the Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer of reopening of assessment of the Appellant Firm on the basis of audit objection which is not permissible in law.

The appellant craves leave to add, Alter or amend any around of appeal at the time of hearing of appeal or before.”

4. At the time of last hearing of above appeal on 16.05.2018 the Tribunal instructed the Learned AR of the Assessee-Firm to produce evidence to establish that there was a change in the opinion of the A.O. in respect of charging of interest on debit balances in partners capital Accounts. The Learned AR, as per the directions of the Bench, has filed the following chronology of events in order to substantiate it's claim to prove beyond all doubts that there was not only change of opinion of the A.O. in the above matter, but also the A.O. reopened the assessment for

the impugned assessment year by totally ignoring the First proviso to Section 147 of the I.T. Act, 1961. The written submissions of the assessee are as under :

- (1)The firm filed its return of income for the year u/s 139 (1) of I.T. Act on 31.10.2005 based on the audited accounts of the firm.
- (2)The firm did not charge any interest on partners debit balances in the above accounts of the year as partnership deed executed among four partners did not have any provision for providing the aforesaid interest.
- (3)Later when the case of the firm was taken up for assessment by A.O. by issuing notice u/s 143(2) of I.T. Act the firm brought following papers on the records of A.O.
 - (a)The partnership deed executed among partners. -As per clause 6 of this deed there was provision only for charging interest at the rate of 12% on partners credit balances. There was no provision in the entire deed for charging of interest on partners debit balances.

(b) The Audited Profit & Loss A/c of the year. -As there was no provision in the partnership deed for charging interest on partners debit balances no such interest on said balances was credited to P/L A/c of the year.

(c) The Audited Balance Sheet of the year. -The debit balances in the partners capital account was properly disclosed in the schedules to above Balance Sheet.

4. On careful examination of the above documents i.e. the partnership deed and audited accounts the A.O. was convinced that the firm rightly did not charge interest on partners debit balances since there was no provision for the same in the; partnership deed. Thereafter the A.O. in his assessment order passed u/s 143(3) on 26.12.2007 rightly did not make addition to the returned income in respect of interest on partners debit balances.

5. As the above entire information was available on the records of the A.O. regarding non-charging of interest on partners debit balances it can be safely concluded that the firm disclosed fully and truly all material facts necessary for

the assessment of firm u/s 143(3) of I.T. Act as envisaged by First proviso to section 147 of I.T. Act, 1961.

6. The A.O. few months after the completion of original assessment u/s 143(3) informed the Firm that the audit party has raised the objection with regard to not taxing of interest on partners debit balances by A.O. in his original assessment order. The audit objection was raised by the audit party after examining the above mentioned partnership deed and audited accounts which were available on the records of the A.O.

7. The Firm vide its letter dtd.14.01.2010 informed the A.O. that no interest was charged on debit balances of partners capital account since there was no provision for the same in the partnership deed. After receiving this letter the A.O. in order to defend his correct action of not taxing of above interest in the assessment order informed the audit party that he did not rightly make any addition on above account to the returned income.

8. Subsequently the CIT Panaji issued notice u/s 263 of I.T. Act on 21.03.2011 seeking explanation from the firm as to why he should not invoke the provisions of said section for taxing interest on partners debit balances. The said notice was however *suo moto* withdrawn by CIT vide his letter dtd. 23.03.2011.

9. After withdrawal of notice u/s 263 by CIT, the A.O. issued notice u/s 148 of I.T. Act on 28.03.2011 for reopening the assessment completed earlier by him u/s 143(3) of I.T. Act. Later the A.O. communicated the reasons to the firm for reopening of its case for the year. According to these reasons the reopening was required since no interest was charged on partners debit balances.

10. It can be presumed from the recorded reasons (copy enclosed) that the A.O. reopened the assessment of the firm only on account of audit objections as no other information/material was received by him after the completion of the original assessment in order to form an opinion that some income has escaped assessment for the year. Further the firm has to specifically mention here that

the original assessment made by A.O. u/s 143(3), the audit objection raised by the audit party and reopening of assessment made u/s 147 by A.O. were entirely based on the partnership deed and audited accounts of the firm brought on the records of the A.O. by the firm. Further there was not even a whisper in the recorded reasons that the firm failed to disclose fully and truly all material facts necessary for completion of the original assessment of the firm for the year.

4.1. From the foregoing chronology of events, the Learned A.R. drew the attention of the Bench that the A.O. had no jurisdiction to reopen the assessment of the assessee firm in view of the applicability of the First proviso to section 147 of I.T. Act, 1961 regarding full and true disclosure of all material facts to the present case of the assessee firm. He submitted that since the A.O. who had formed an opinion at the time of completion of original assessment after perusing partnership deed and audited accounts that the assessee firm has correctly not charged interest on partners debit balances. In view of this opinion,

the A.O. initially did not accept audit objection regarding his not taxing of interest on partners debit balances. Incidentally the audit objection in the matter of not charging of interest on partners debit balances was also based on partnership deed and audited accounts available on the records of A.O. However, the A.O. at much later date probably due to insistence of audit party, changed his above original opinion and formed an another opinion that the interest on debit balances was required to be taxed in original assessment for the purpose of reopening assessment of the Assessee Firm under section 147 of I.T. Act, 1961. The Learned AR submitted that this different opinion was formed by him not because he received fresh information after date of his completing original information, but only to satisfy the audit objection. As such this reopening is clearly the case of borrowed satisfaction for the purpose of satisfying the Auditors. In this connection it is to be noted here that for reopening an assessment under section 147 of the I.T. Act, 1961, the A.O. has to record his

own satisfaction and not borrowed satisfaction as mentioned above.

4.2. The Learned A.R. further submitted that the assessee firm had done its duty at the original assessment stage itself and had disclosed fully and truly all material facts necessary for the said assessment. In support of his submissions, the Learned A.R. relied upon the Judgment of Hon'ble Supreme Court in the case of Calcutta Discount Co. Ltd. V. ITO 41 ITR 191 which aptly apply to the present case of the assessee firm. The relevant observations of the Hon'ble Supreme Court are as under :

"Does the duty, however, extend beyond the full and truthful disclosure of all primary facts. In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else-far less the assessee-to tell the

assessing authority what inferences, whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences-whether of facts or law-he would draw from the primary facts.

4.3. Further the ratios laid down by jurisdictional Bombay High Court in the below mentioned decisions squarely apply to the present case of the firm which is reopened by A.O. after expiry of four years from the end of the assessment year under consideration.

1. Hindustan Lever Ltd V. R.B. Wadkar 268 ITR 339
2. Grindwell Norton Ltd. V. Jagdish Prasad Jangid, Asst. CIT 267 ITR 673.
3. IPCA Laboratories Ltd. V. Gajanand Meena, Dy. CIT 251 ITR 416

4.4. The Learned A.R. thus, submitted that according to above judgments the reopening of the assessment beyond four years from the end of relevant assessment year was not sustainable where the reasons recorded by the A.O. nowhere stated that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Further, the impugned notices under section 148 were issued in the above cases merely on account of change of opinion as no fresh tangible materials were available with the AO to issue the impugned notices. Therefore, the Bombay High Court held that impugned notices were without jurisdiction and the impugned orders were also bad in law and accordingly, the impugned notices as well as the impugned orders were respectively quashed and set aside.

5. The Ld. D.R. on the other hand relied upon the orders of the lower authorities. He submitted that since the income chargeable to tax has escaped assessment, the A.O. reopened the assessment after recording reasons under section 148 of the I.T. Act, 1961 and brought to tax the

impugned interest amount of Rs.15,68,152/-. The Ld. D.R. further submitted that as per the Deed of Partnership Firm, it was required to pay interest on the credit balances of the partners. However, there was no provision for levying interest on the debit balances of the partners. Since absence of this clause in the Deed of Partnership is for diversion of funds for purposes other than for business purpose, the authorities below rightly brought to tax the impugned interest amount on the debit balances of the partners. He, therefore, prayed that the order of the Ld. CIT(A) be confirmed.

6. We have heard Learned Representatives of both the parties and carefully perused the relevant material placed on record of the Tribunal. The Ld. A.R. submitted that for the A.Y. 2005-06 notice under section 148 of the I.T. Act, 1961 was issued on 24.03.2011 after recording reasons by the A.O, which reads as under :

REASONS RECORDED FOR REOPENING INCOME TAX

ASSESSMENT U/S.148

Name of the assessee : M/s Kamat Real Estate Developers

F/2, Indira Apartments, Caetano

Albuquerque Road, Panaji - Goa

PAN AABFK8817C

A. Y. 2005-06

Date 24-03-2011

The assessee firm is engaged in Construction and Hotel business and filed the return of income on 31-10-2005 declaring a total income of Rs.42,01,230/-.

2. The capital accounts of the partners have debit balances. However no interest has been charged by the firm to the partners. The provision of total debit balances are as under:

a) Kamat Real Estate Developers- Rs. 17,36,994/-

b) Hotel Nova Goa Rs. 1,30,67,934/-

Since there is a provision in the partnership about the payment of interest at 12% to the partners on their capital. The firm is also liable to recover the interest on debit balances of the partners.

3. In view of the above, I have reasons to believe that in this case, the assessed income has escaped assessment since the income chargeable to tax has been under assessed within the meaning of Sec. 147 of the Income Tax Act”.

6.1. The Learned AR submitted that as per First proviso to Section 147 of the I.T. Act, 1961 no action shall be taken under said section after expiry of 04 years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by the reason of failure on the part of assessee to make a return under section 139 of the I.T. Act, 1961 or in response to notice under sub-section (1) of Section 142 of the I.T. Act, 1961 or under section 148 of the I.T. Act, 1961 or to disclose fully and truly all material facts necessary facts for assessment for that assessment year. The Learned A.R. also relied upon Judgments of Hon'ble jurisdictional Bombay High Court in the cases of Hindustan Lever Ltd V. R.B. Wadkar 268 ITR 339 (Bom.), Grindwell Norton Ltd. V. Jagdish Prasad Jangid, Asst. CIT 267 ITR 673 (Bom.) and IPCA Laboratories Ltd. V. Gajanand

Meena, Dy. CIT 251 ITR 416 (Bom.) (supra) and Order of ITAT, Mumbai Bench in the case of Lionbridge Technologies P. Ltd., Navi Mumbai vs., ACIT-15(2)(1), Mumbai vide ITA.No.610/Mum/2018 order dated 27.05.2020 and submitted that if the A.O. wish to invoke second limb of First Proviso to Section 147, then, he is duty bound to bring in the satisfaction note that income chargeable to tax has escaped assessment by the reason of failure on the part of assessee to disclose fully and truly all material facts necessary facts for assessment. The Learned AR drew the attention of the Bench towards Para Nos.19 and 20 of the Ld. CIT(A) order and submitted that the Ld. CIT(A) has erred and has ignored the Second limb of First proviso to Section 147 of the I.T. Act, 1961 and observed that there is no requirement in law that in the reasons, such failure should be expressly stated in the words of the proviso to Section 147 of the I.T. Act, 1961. Learned Counsel for the Assessee submitted that reasons recorded by the A.O. cannot be improvised by way of gathering meaning therefrom and Ld. CIT(A) was also not correct in observing that on the basis of

reasons recorded, it is apparent that failure to disclose is made-out, merely because the specific expression does not find place therein, it cannot be said that the A.O. has not recorded satisfaction in this regard. Therefore, the Learned AR vehemently submitted that the observations of the Ld. CIT(A) are not correct, justified in view of Judgment of Hon'ble jurisdictional Bombay High Court Judgments in the cases of Hindustan Lever Ltd V. R.B. Wadkar 268 ITR 339 (Bom.), Grindwell Norton Ltd. V. Jagdish Prasad Jangid, Asst. CIT 267 ITR 673 (Bom.) and IPCA Laboratories Ltd. V. Gajanand Meena, Dy. CIT 251 ITR 416 (Bom.) (supra) and Order of ITAT, Mumbai Bench in the case of Lionbridge Technologies P. Ltd., Navi Mumbai vs., ACIT-15(2)(1), Mumbai (supra).

7. Replying to the above, the Learned Sr. DR strongly supported the orders of the authorities below and submitted that there is no requirement in the reasons failure of assessee to disclose fully and truly all material facts necessary for assessment for that assessment year is not required and from the satisfaction itself it can be

gathered that the assessee failed to disclose all material facts before the A.O. during the course of original assessment proceedings.

7.1. On being asked by the Bench the Learned Sr. DR in all fairness admitted that there is no specific observation or allegation by the A.O. that there was a failure on the part of assessee to disclose fully and truly all material facts necessary facts for assessment for the A.Y. 2005-06.

8. We find undisputedly this case pertains to A.Y. 2005-06 and after recording the reasons notice under section 148 of the I.T. Act, 1961 was issued on 05.12.2011 after expiry of 04 years. In view of various Judgments of Hon'ble jurisdiction Bombay High Court including the Judgment in the case of Grindwell Norton Ltd. V. Jagdish Prasad Jangid, Asst. CIT 267 ITR 673 (Bom.) (supra), the A.O. must have reason to believe that income chargeable to tax has escaped assessment for the reason of failure on the part of assessee to disclose fully and truly all material facts necessary facts for assessment and in the absence of any failure on the part of assessee, the reopening of the

assessment beyond the period of 04 years cannot be sustained in the eye of law. The relevant observations of Hon'ble jurisdictional Bombay High Court in the case of Grindwell Norton Ltd. V. Jagdish Prasad Jangid, Asst. CIT (supra) reads as under :

“8. Now turning to the facts of the present case, from the reasons recorded for reopening of the assessment, it is clear that the sole reason for reopening of the assessment is the net profit at 17 per cent of the total costs adopted by the assessing officer for the assessment year 2000-01. Nowhere in the reasons recorded by the assessing officer, it is stated that there is a failure on the part of the assessee to disclose material facts in the return filed by the assessee. It is not in dispute that in the present case, reopening of the assessment is beyond the period of four years from the end of the relevant assessment year. This court in the case of IPCA Laboratories (supra) and Bhor Industries Ltd. (supra), has held that if one reads Explanation 2 to section 147 including the proviso thereto, then it is clear

that the cases where the department reopens assessment within a period of four years, it can do so on the ground of income having escaped assessment even if there is no failure on the part of the assessee to disclose fully and truly all material facts. However, in the cases of reopening after four years, the assessing officer must have reason to believe that the income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. It is held that" the Explanation 2 cannot be read without reading the proviso to section 147 of the said Act. Applying the ratio laid down in the aforesaid cases, it is clear that in the present case, in the absence of any failure on the part of the assessee to disclose fully and truly all material facts, the reopening of the assessment beyond the period of four years cannot be sustained."

8.1. Respectfully following the proposition rendered by Hon'ble jurisdictional Bombay High Court in the case of Grindwell Norton Ltd. V. Jagdish Prasad Jangid, Asst. CIT (supra), we hold that reopening of the assessment and

issuing notice under section 148 of the I.T. Act, 1961 is clearly hit by non-compliance of First proviso to Section 147 of the I.T. Act, 1961. Consequently, issuance of notice under section 147 of the I.T. Act, 1961, impugned re-assessment order dated 05.12.2011 passed under section 143(3) r.w.s. 147 of the I.T. Act, 1961 and all consequential proceedings and orders are hereby quashed. Since we have quashed the re-assessment order by allowing legal Ground Nos.1 and 2 of the assessee, therefore, the other grounds of assessee have become academic in nature and, therefore, the same are not being adjudicated upon. Accordingly, the appeal of the assessee is allowed.

9. In the result, appeal of the Assessee is allowed.

Order pronounced on this 17th day of August, 2022 under Rule 34(4) of IT (AT) Rules, 1963.

Sd/-

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Delhi, Dated 17th August, 2022

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT Panaji Bench, Panaji Goa
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Panaji Bench :
Panaji.