

THE INCOME TAX APPELLATE TRIBUNAL
“J” Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Aby T. Varkey (JM)

I.T.A. No. 427/Mum/2022 (A.Y. 2012-13)

Sai Shipping Company Pvt. Ltd. 1109, Embassy Centre Nariman Point Mumbai-400 021. PAN : AABCS1298J (Appellant)	Vs.	ITO, National Faceless Assessment Centre Delhi (Respondent)
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Assessee by	Shri Dhaval Shah & Shri Hare K. Panda
Department by	Shri Samuel Pitta
Date of Hearing	11.08.2022
Date of Pronouncement	20.09.2022

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the assessment order dated 29-01-2022 passed by the assessing officer for AY 2012-13 u/s 147 r.w.s. 144C(13) read with section 144B of the Act in pursuance of directions given by Ld Dispute Resolution Panel (DRP).

2. The facts relating to the case are that the assessee is engaged in the business of Shipping Charter Services, Shipping Agencies and Ship Management Services. The original assessment for the year under consideration was completed by the AO on 06-02-2015 u/s 143(3) of the Act accepting the return of income filed by the assessee. Subsequently, the AO reopened the assessment u/s 147 of the Act by issuing notice u/s 148 of the Act on 31.3.2019. In response to the above said notice, the assessee filed a letter dated 25.06.2019 requesting the AO to treat the return already filed u/s 139(1) of the Act as the return filed in response to the above said notice. The AO also supplied the reasons for reopening of the assessment to the

assessee, to which the assessee filed its objection. The AO rejected the objections filed by the assessee by passing an order on 24.10.2019. In the original assessment, the loss of Rs.1,31,222/- declared by the assessee under normal provisions of the Act had been accepted and the total income was determined u/s 115JB of the Act at Rs.3.16 crores. In the reassessment proceedings, the AO referred the matter relating to international transactions to the Transfer Pricing Officer. After passing of draft assessment order, the assessee filed its objections to Ld Dispute Resolution Panel. After receiving directions from Ld DRP, the AO determined the total income under the normal provisions of the Act at Rs.4.72 crores and book profit at Rs.3.16 crores. Since the total income computed under normal provisions of the Act was more than the book profit, the AO raised tax demand on the total income computed under normal provisions of the Act.

3. The assessee, inter alia, has challenged the validity of reopening of assessment before the Tribunal. We heard the parties first on this legal issue.

4. As noticed earlier, the original assessment in the hands of the assessee was completed u/s 143(3) of the Act on 06-12-2015. The assessing officer has reopened the assessment by issuing notice u/s 148 of the Act on 31.3.2019, i.e., the reopening has been done after expiry of four years from the end of the assessment year. At this juncture, we may refer to the provisions of sec.147 of the Act, particularly the proviso thereto, which gives a protection to the assessee in the cases of reopening of assessment after expiry of four years from the end of the assessment year. The said proviso reads as under:-

“Provided that where an assessment under sub- section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of 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 under section 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.**"

The Explanation 1 to Sec. 147 of the Act would also be relevant here, since the AO has taken support of the said Explanation, which reads as under:-

"Explanation 1-Production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

5. The contention of the assessee is that all the material facts, relevant to the matters for which the reopening was done, have been duly disclosed to the AO during the course of original assessment proceedings and hence there is no failure on the part of the assessee to disclose fully and truly all material facts. Accordingly it was contended that the re-opening of assessment is bad in law in view of the proviso to sec. 147 of the Act. He further submitted that the assessing officer has not brought any new material on record, which was not disclosed by the assessee to him during the course of assessment proceedings in order to show that there was escapement of income due to the failure of the assessee to disclose truly and fully. He contended that the AO has made allegations of escapement of income only upon verification of the records already available on record. Accordingly, the ld A.R contended that the AO has revisited the already available record and has reopened the assessment merely on change of opinion.

6. In order to appreciate the contentions of the assessee, it is necessary to extract the reasons recorded by the AO for reopening of assessment. It is extracted below:-

"The return of income for A.Y. 2012-13 was filed on 22.09.2016 declaring income at a loss of Rs 1,31,222/-. The book profit as per the provisions of section 115JB(2) was computed at Rs. 3,16,57,364/-. In this case, the assessment was completed under section 143(3)(ii) of the IT Act, 1961, on 08.02.2015 determining the taxable income at Rs. 3,16,57,360/- u/s 115JB(2). The assessee is in the business of shipping agency services and also derivatives trading.

2. **On verification of the records**, it was noticed that the assessee had received unsecured loans of Rs 4,35,70,000 from M/s. Sai Maritime & Management Pvt. Ltd (SMMPL) which was subsequently paid during the year. It was noticed from records that the assessee company holds 45.76 per cent shares in SAMPL which is not a company in which public is substantially interested. It was noticed from the Balance sheet of M/s SMMPL that there was accumulated profits of Rs. 10.23 crores in the lender company. As all the conditions laid down in sub-clause (e) of sub-section (22) of Section 2 of the Act is satisfied, loans received from M/s Sai Maritime & Management Pvt. Ltd to the extent of accumulated profits of the company required to be treated as deemed income under section 2(22)(e). Omission to do so resulted in under assessment of income of Rs. 4,35,70,000/- involving tax effect of Rs. 1,41,36,287/-.

2.1 **On further verification of the records** it was noticed that

(a) from Auditor's Report SI No. 3(xv) that the assessee had given corporate guarantee for term loans of US \$4.85 million (Rs. 24.25 crore assuming 1\$ = Rs. 50) to one of its foreign subsidiary namely Sunrise Maritime Pte. Ltd. Singapore for purchase of old ships. Moreover, as per assessee's submission dated 09.01.2015, the assessee company had given loan of Rs.7,62,89,795 (OB - Rs.3,69,76,885 + fresh loan of Rs. 3,93,12,910) to Sunrise Maritime Pte. Ltd. Singapore. As both the transactions of provision of corporate guarantee as well as lending of money to its foreign subsidiary (AE u/s 92A) are international transactions in terms of section 92B, **the same needs to be verified.**

On perusal of records, it was found that the assessee had determined arm's length price of above international transactions through submission of report in form 3CEB u/s 92E. As regards Corporate Guarantee of Rs. 24.25 crore given by the assessee is concerned, it has been given free of cost. Had this corporate guarantee been taken from an independent entity, it would have cost some charge.

(b) Interest-free Loan of Rs. 7,82,83,755 to its AE

Giving loan without charging an interest is certainly not a transaction at arm's length. If Arm's length this transaction is computed at the rate of 13 percent (SBI PLR of 10%+ 3% mark up), it would come to Rs. 99,17,673.

Both the above computation of arm's length prices are only illustrative having effect of under- assessment of Rs. 1,71,92,673 with consequent tax effect of Rs. 55,78,162/-.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s. 147 of the Act.

Thus I have reasons to believe that income to the extent of Rs. 6,07,62,673/- chargeable to tax has escaped assessment within the meaning of section 147 of the I.T. Act.

3. Applicability of the provisions of section 147/151 to the facts of the case:

In this case a return of income was filed for the year under consideration and regular assessment u/s 143(3) was made on 08.02.2015. Since, 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceeding u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration, it is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above. I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment reassessment proceedings and have noted that the assessee has not fully and truly disclosed the following material facts necessary for his assessment for the year under consideration.

It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceeding and the same may be embedded in annual report, audited P&L A/C, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For afore stated reasons, it is not a case of change of opinion by the AO.

5. In this case more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 146 has been obtained separately Principal Commissioner of income Tax as per the provisions of section 151 of the Act.”

7. A careful perusal of the above said reasons recorded by the assessee would show that the assessing officer has noticed alleged escapement of income only “on verification of records”. Hence there is merit in the contentions of Ld A.R that the AO did not bring any new material on record for forming belief that there is escapement of income. We noticed earlier that the reopening has been done after expiry of four years from the end of the assessment year and hence it is imperative for the AO to show that there was failure on the part of the assessee to disclose fully and truly all material facts, as stated in the proviso to sec.147 of the Act. The case of the assessee is that there was no failure on its part as alleged by the AO.

8. We notice that the case of the AO is that the escapement of income related to following transactions noticed by him "on verification of records":-

- (a) The assessee has received unsecured loans of Rs.4,35,70,000/- from M/s Sai Maritime & Management P Ltd. In the said company, the assessee has held 45.76% of shares. Hence the provisions of sec.2(22)(e) of the Act are attracted. Since the above said company held accumulated profits of Rs.10.23 crores, the entire loan amount of Rs.4,35,70,000/- is assessable as deemed income u/s 2(22)(e) of the Act involving tax effect of Rs.1,41,36,287/-.
- (b) The assessee has given corporate guarantee for term loans obtained by one of its foreign subsidiary companies named M/s Sunrise Maritime Pte Ltd, Singapore for purchase of old ships. The assessee has determined arms length price of the above transaction in its transfer pricing study. However, the assessee has provided the corporate guarantee at free of cost, whereas, if such guarantee was given to an unrelated entity, the assessee would have charged some cost. The AO estimated the guarantee commission @ 3%.
- (c) The assessee has given interest free loan of Rs.7,62,89,795/- to its foreign subsidiary company, but did not collect any interest. Under Arms length principle, the assessee should have charged interest of Rs.99,17,673/.

The case of the AO is that the details relating to the above said transactions may have been may be embedded in annual report, audited P&L A/C, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. Apparently, the AO has taken protection under Explanation 1 to sec.147 of the Act, which have been extracted above.

9. The Ld A.R strongly refuted the above said observations of the AO. He took us through the paper books in order to show that there was no failure on the part of the assessee as alleged by the AO.

(A) The first issue related to the loan taken by the assessee from M/s Sai Maritime & Management P Ltd. The Ld A.R submitted that the AO has examined the loan transactions during the course of assessment proceedings by raising specific query. In this regard, he invited our attention to the following documents:-

(a) Notice dated 26.12.2014 issued by the AO during the course of original assessment proceedings, wherein the AO has raised a specific query no. (i) requesting the assessee to furnish details of persons from interest bearing unsecured loans amounting to Rs.3,97,00,000/- was taken during the year. Further, the AO has asked in query no. (ii) to furnish confirmation letters and other details of the creditors. The AO has also asked in query no. (vi) to furnish complete details of the loans given/taken from related enterprises and also state as to how the enterprises are related.

(b) The assessee has furnished the details, vide its reply dated 09-01-2015, vide replies given in point no.1,2 and 6.

(c) The Ld A.R submitted that the Statutory auditor's report also mentions about the loan transactions with related parties vide, clauses (iii)(a) and (b) of the Companies (Auditors' Report) Order, 2003 forming part of the auditors' report.

(d) The Ld A.R further submitted that the financial transactions entered by the assessee with its related party are business transactions and hence the AO has formed belief on deemed dividend only on suspicion.

(B) The next issue related to the interest free loans given to the Associated Enterprises.

(a) Notice dated 26.12.2014 issued by the AO during the course of original assessment proceedings, wherein the AO has raised a specific query no. (iii) & (iv) requesting the assessee to furnish details of interest free unsecured loans given to the three parties.

(b) The assessee has furnished the details in clauses 3 & 4 of the letter dated 09-01-2015.

(c) The Auditors' report also states the related party transactions in clause (iii)(a) of the Companies (Auditors' Report) Order, 2003 forming part of the auditors' report.

(C) The next issue relates to the Corporate guarantee given to the AE.

(a) The Ld A.R submitted that the details of corporate guarantee have been reported under the head "Contingent and Claims against the Company not acknowledged as Debts", given under Notes to Accounts to forming part of the Accounts.

(b) The auditor has furnished the details of international transactions entered by the assessee in the report given in Form No.3CEB, which relate to the international transactions entered by the assessee. Clause 13(b) of the Annexure to Form 3CEB specifically furnished the details of Corporate Guarantee given by the assessee.

(c) Annexure D to Form 3CEB furnishes the details of all the international transactions entered with M/s Sai Trans Pte Ltd. The auditor has specifically mentioned the details of loan and Corporate Guarantee given to the above said AE.

(d) The Ld A.R submitted that all these documents have been filed in compliance with specific requirements of the Law and the transactions of giving corporate guarantee has been disclosed quite explicitly, which could have come to the knowledge of the AO on a cursory glance of these documents. Hence, it cannot be said that it is a case of requiring the AO to find out the transaction after examination with due diligence of the details embedded in the statements, as alleged by the AO.

10. The Ld D.R submitted that the assessee has raised this objection before Ld DRP also, but the Ld DRP has rejected the same. In this regard, the Ld D.R invited our attention to the orders passed by Ld DRP, wherein the Ld DRP had rejected the contentions of the assessee by following Explanation 1 to sec. 147 of the Act. He further submitted that the AO has re-opened the assessment in order to examine the issue of applicability of transfer pricing provisions to the transactions entered by the assessee with its AE, since he has not examined the same in the original assessment proceedings. Hence there was no change of opinion on the part of the AO and there is enough reason for the AO to re-open the assessment. The Ld D.R further submitted that the assessee has reported the international transactions in Form 3CEB by way of notes, which could be noticed by the AO only by due diligence. He further contended that the information about escapement of income may come from the record of the assessee also and it is not always necessary that there should be any fresh tangible material for forming belief of escapement of income. The Ld D.R further relied upon the decision rendered by Ld DRP on this issue.

11. We have noticed earlier that the assessing officer has asked specific questions with regard to the transactions relating to loan received from related parties and the loan given to the related parties. We also noticed that the assessee has furnished before the AO the details called for. In respect of corporate guarantees given, we notice that though there was not any specific query raised by the AO, yet the details of corporate guarantee was duly reported in Form No.3CEB.

12. We have noticed earlier that the assessment has been reopened in this case after the expiry of four years from the end of the assessment year. We also noticed that the proviso to sec. 147 of the Act puts certain conditions for reopening of assessment after the end of four years, when the original assessment was completed u/s 143(3) of the Act, i.e., there should be failure

on the part of the assessee to disclose fully and truly all material facts. From the discussions made supra, we find that there is merit in the contentions of the Ld A.R that there was no failure on the part of the assessee in disclosing all material facts relevant to the computation of income fully and truly to the assessing officer during the course of original assessment proceedings. When the assessee has duly furnished all the material facts relevant for computation of income before the AO, it is for the AO to decide the manner of examining those details. If there is failure on the part of the AO, in our view, the same cannot be a ground for reopening of assessment after the expiry of four years from the end of the assessment year, when the original assessment was completed u/s 143(3) of the Act.

13. The view of the AO and Ld DRP is that the Explanation 1 to sec.147 would permit the AO to reopen the assessment. They have so taken the view on the reasoning that the information furnished by the assessee could be discovered by the AO only with dur diligence. In our view, the view so expressed by the tax authorities is against the facts available on record. We have earlier noticed that the AO has raised specific query with regard to the first two items discussed above. With regard to the third item, we have noticed that the Form 3CEB reports the transactions in a transparent manner. Accordingly, we are of the view that the Explanation 1 to sec.147 cannot be invoked by the AO in the facts of the present case.

14. We have expressed the above said views following the decisions rendered by Hon'ble Bombay High Court, which were relied upon by Ld A.R before us. The first one is the decision rendered by Hon'ble Bombay High Court in the case of Kalpataru Limited vs. DCIT (2021)(439 ITR 284)(Bom). Following discussions made by Hon'ble Bombay High Court in the above said case are relevant to the facts of the present case:-

“11. It is settled law that where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the

proviso to [Section 147](#) stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary. Since in the case at hand, the assessment is sought to be reopened after a period of four years, the proviso to [Section 147](#) is applicable.

It is also settled law that the Assessing Officer has no power to review an assessment which has been concluded. If a period of four years has lapsed from the end of the relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee.

12. If one considers the reasons, the Assessing Officer only states that from the record it is noticed that petitioner has computed income from house property by claiming 1/5th of the construction interest on notional basis and which has resulted into irregular allowance of construction period notional interest of Rs.3,90,71,980/-. Secondly, it is stated that it is noticed that petitioner has claimed deduction under Section 80 IB of the Act in respect of income from other sources which is as judicially held not allowable. Thirdly, it is stated that it is noticed that petitioner has wrongly claimed deduction under Section 80 IB of the Act on total income instead of claiming on the business income and has wrongly claimed deduction under Section 80 IB of the Act on capital gain and income from other sources and thus petitioner has failed to disclose true and full material facts before Puri Parab 10/24 909-WP-2815-2019.doc Respondent No.1. There is nothing else in the reasons. A general statement that the escapement of income is by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is not enough. The Assessing Officer should indicate what was the material fact that was not truly and fully disclosed to him.

.....

Therefore, though it is correct that explanation 1 to [Section 147](#) of the Act says mere production of books of accounts or other documents are not enough, and the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee, this duty does not extend beyond the full and truthful disclosure of all primary facts. 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.

If, from primary facts, more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?

15. As held in *Ananta Landmark Pvt. Ltd.* (supra), Explanation 1 to [Section 147](#) of the Act has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose "inferences", to draw the proper inferences being the duty imposed on the Income Tax Officer. Therefore, the duty of the Assessee is to disclose fully and truly all primary relevant facts and it does not extend beyond this."

15. We have noticed earlier that the assessing officer has formed belief about escapement of income on "verification of records". This aspect has been commented by the Hon'ble Bombay High Court in the case of *State Bank of India vs. ACIT (2019)(418 ITR 485)(Bom)* as under:-

"7. In the context of these three grounds sought to be pressed in service by the Assessing Officer, the reasons recorded eloquently establish that the Assessing Officer was proceeding on the material already on record. Apart from there being no allegations even in the reasons recorded that there was any failure on the part of the assessee to disclose true and full material facts, in fact, at every important stage, the Assessing Officer has referred to and relied upon the material on record. There is not a single item, no document and no material which did not form part of the original assessment proceedings on the basis of which the Assessing Officer has formed a belief that the income chargeable to tax has escaped assessment. In clear terms, the mandatory requirement flow from first proviso to Section 147 of the Act is not established. The beginning portion of the reasons itself which is in the nature of preamble referred that, "In this case, on verification of the case record, it is noticed that". Thus, entire reasons proceed on verification of the case records. Even, with respect to each individual ground raised by the Assessing Officer, he has referred to the documents, material and information already on record during the assessment proceedings.

8. We have also perused the documents which form part of the original assessment proceedings and find that the assessee had made all necessary disclosures. We notice that in the computation of income along with return filed, the assessee had shown amount of outstanding debit/credit interest in inter-branch account transferred to Profit & Loss A/c as per R.B.I.

instructions a sum of Rs. 42.90 crores. Along with this entry, the assessee had referred to a note No. 32.

This note No. 32 reads as under:—

"32. An amount of Rs. 42.90 crores was credited to Profit and Loss Account in accordance with RBI Letter No. DBOD.BP. No. 5562/21.04.18/2010-11 dated 05.10.2010, being outstanding credit entries in draft payable account which were 10 years or more old as on 30th September, 2010. The same has not been offered to tax, in accordance with the Delhi ITAT decision in the case of Punjab National Bank Vs. Addl. CIT (ITA Nos. 2014 & 2873 / Del /2007)."

In clear terms, therefore, the assessee had furnished the necessarily details before the Assessing Officer of the said amount having been shown in Profit & Loss A/c but not offering it to tax. If during the original assessment proceedings, the Assessing Officer desired to inquire further into such claim of the assessee, nothing prevented him from doing so. At any rate, he cannot do so in the assessment proceedings which are sought to be commenced beyond the period of four years from the end of relevant assessment year.

16. It can be noticed that the ratio laid down by Hon'ble jurisdictional High Court in the above said two cases support the case of the assessee in this case. Accordingly, we are of the view that the reopening of assessment is bad in law and hence the order passed by the assessing officer is liable to be quashed. Accordingly, we quash the order passed by the AO.

17. Since we have quashed the assessment order on the legal issue, there is no necessity to adjudicate other grounds urged on merits.

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

Order pronounced in the open court on 20.09.2022.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 20/09/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent

3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai