

आयकरअपीलीयअधिकरण,सुरतन्यायपीठ,सुरत

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr ARJUN LAL SAINI, ACCOUNTANT MEMBER

आ.अ.सं./ITA No.505/SRT/2019(AY 2008-09)

(Hearing in Physical Court)

Deputy Commissioner of Income Tax Officer, Circle-2(1)(2),Room No. 205, Aayakar Bhavan, Majura Gate, Surat-395001	Vs	M/s Surat CT Scan Private Ltd., 1 st Floor, Yash Plaza Complex, Dhatigara Street, Nanpura, Surat-395001 PAN No. AAICS 1581 K
अपीलार्थी/ Appellant		प्रत्यर्थी / Respondent

निर्धारितकीओरसे /Assessee by	Shri Rasesh Shah, C.A
राजस्वकीओरसे /Revenue by	ShriVinod Kumar, Sr-DR
सुनवाई की तारीख/Date of hearing	09.11.2022
उद्घोषणा की तारीख/Date of pronouncement	14.11.2022

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by Revenue is directed against the order of Id. Commissioner of Income-tax (Appeals)-2 Surat [for short to as “Ld. CIT(A)”] dated 21.08.2019 for the assessment year 2008-09, which in turn arises out of assessment order passed under section 143(3) of Income Tax Act, 1961 (hereinafter referred to as ‘the Act’ for the sake of brevity) by Assessing Officer dated

19.11.2010. The Revenue has raised the following grounds of appeals:-

“(i) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in quashing reopened assessment proceedings for AY 2008-09 relying upon the submission filed by the assessee that the assessee company has intimated the Department only on 03.01.2013 that the company was dissolved whereas the notice u/s 148 of the I.T Act was issued on 19.10.2012.

(ii) On the facts and circumstances of the case and law, the ld. CIT(A) has erred in deleting the addition made of Rs.1,86,00,000/- on account of lump-sum sale which was not offered for taxation.

(iii) On the facts and circumstances of the case and law, the ld. CIT(A) has erred in deleting the addition made of Rs.2,61,180/- on account of disallowance of depreciation claimed on building which was sold by the assessee.

*(iv) On the facts and circumstances of the case and in law, the Ld. CIT(A), Surat ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld. CIT(A)-2 Surat may be set-aside and that of the Assessing Officer’s order maybe **restored.**”*

2. Brief facts of the case are that assessee is a company filed its return of income for assessment year 2008-09 on 17.11.2008 declaring income of Rs.67,64,620/-. The case was selected for scrutiny and assessment was completed under section 143(3) on 19.11.2010 accepting the return of income. Subsequently,

the case of assessee was reopened under section 147 on 19.10.2012. Notice under section 148 dated 19.10.2012 was served on the assessee. The assessing officer recorded that despite service of notice under section 148 and 142(1), the assessee failed to comply the terms of such notices. The Assessing Officer after serving notice under section 143(2) proceeded to complete the assessment. During the assessment, the assessing officer recorded that assessee had sold its business to NPIL Laboratories & Diagnostics Private Limited (for short to as "NLDL"), a division of Nicholas Piramal Group. The Assessing Officer issued show cause notice dated 24.03.2014. In the show cause notice, the Assessing Officer noted that on perusal of return of income and books of account of assessee, it was noted that assessee-company sold its business to NPIL, a Division of Nicholes Pirmal Group as going concern on slump sale basis along with trading names and their goodwill, movable and immovable assets except business premises on 01.10.2007. The lump sum consideration was payable to assessee for transferring and acquisition of business of Rs.4.65 crores subject to the various

adjustments. The assessee offered sale consideration of Rs.2.79 crores as short term capital gains in its computation of income. The remaining amount was not offered by assessee for taxation. The Assessing Officer mentioned that remaining amount of Rs.1.86 crores received but not accounted and not added to the income of assessee. Further assessee claimed that depreciation of Rs.2,61,180/- for claiming such depreciation, such asset must be put to use for the purpose of business in the relevant accounting year. If the asset has not been used for the purposes of business, it cannot form part of block of asset for claiming depreciation. Since the business of assessee was sold for lump sum consideration and does not fall under the terms “**going concern**”, the depreciation of Rs.2,61,180/- claimed by assessee on the building is required to be disallowed. The Assessing Officer recorded that despite giving opportunities and serving notice by way of affixation, no response was made by assessee. The Assessing Officer completed the assessment under section 144 r.w.s. 147 and made addition of Rs.1.86 crores on account of unaccounted

income and disallowed the depreciation of Rs.2,61,180/- in the assessment order dated 31.03.2014.

3. Aggrieved by the reopening as well as additions in the assessment order, assessee filed an appeal before the Ld. CIT(A). Before Ld. CIT(A) the assessee filed its detailed written submission. The submission of assessee is recorded in **para-5** of the order of Ld. CIT(A). On the validity of reopening under section 147, the assessee stated that assessee was a domestic company and dissolved in the year 2011, it was managed by Board of Directors, consisting of 30 Directors, whose names, PANs and addresses are available in Form ITR-6 filed for respective assessment years, during the period when the assessee-company was in existence. All the Directors of assessee-company were reputed doctors of Surat, practicing in the field of Neurology, Cardiology, Radiology, Orthopaedic and General Physician. The original return was filed on 17.11.2008 declaring income of Rs.67,64,620/-. The case was selected for scrutiny and assessment was completed under section 143(3) of the Act on 19.11.2010 in accepting the return of income. The assessment was allegedly reopened under section 147 of

the Act by issuing notice under section 148 on 19.10.2012. The assessment proceeding was completed under section 144 r.w.s 147 of the Act. The assessee specifically stated that neither notice under section 148 was received nor any correspondence in relation to the impugned order was received. Somewhere in September, 2014, two of the erstwhile Directors Dr. Ashit J Desai and Dr. Sudhir Garg were issued summons and both the Directors appeared in response to such summons and explained the fact that vide letter dated 01.10.2014. In December, 2014, show cause notice under section 179 of the Act was issued to all the Directors and summons under section 131 of the Act, were also issued. The Directors attended the hearing in response to such notices and were informed about the outstanding demand of Rs.123.28 lakhs in the name of the assessee-company. In response to such notices, the Directors of erstwhile assessee-company informed that there were never served with the said notices or the certified copy of order determining the alleged demand. The Directors made correspondence to the higher authorities explaining the facts and with the supporting evidence. In response to

correspondence a certified copy of assessment order was received for the first time on 24.08.2017 and appeal was filed before first appellate authority.

4. The assessee explained that once the assessment was completed under section 143(3) of the Act after detailed inquiry and proper application of mind, it cannot be reopened or revisited while all the details / information were disclosed in the return of income as well as in the audit report. The complete details of slum sale and short term capital gains accrued thereon, was provided during the original assessment order. The assessee further stated that no new material or information came in possession of assessing officer, after post original assessment. The Assessing Officer wanted to revisit the same fact and the material which was part of the original assessment and was considered at the time of original assessment. Such fact is evident from the various paragraphs of the show cause notices. The assessee submitted that its case could not be reopened, on mere change of opinion. To support their submission, the assessee relied upon the various case law.

5. The assessee in other grounds of appeal contended that except building premises all the assets were sold to NLDL, a division of Nicholas Piramal Group. The assessee-company was dissolved vide order dated 06.07.2011 by the order of Ministry of Corporate Affairs, Government of India, the copy of said order was forwarded to Chief Commissioner of Income-tax, (CCIT) Surat and to Income Tax Officer, copies of those orders were enclosed. The assessee-company vide their letter dated 12.12.2012 also intimated the Assessing Officer, copy of such letter was furnished. The assessee-company submitted that once the assessee-company was dissolved by the Ministry of Corporate Affairs, Government of India, it lost its existence. When notice under section 148 dated 19.12.2012 was issued, the assessee-company was not in existence and the order made against the non-existing entity is *void ab initio*. To support such submission, the assessee also relied on various case law.

6. On merit of the addition of Rs.1.86 crores as unaccounted income, the assessee explained that as per clause-3 of agreement of sale Rs.2.79 crores was paid on signing the

agreement and balance consideration of Rs.1.86 crores was deferred and was to be paid upon the SSL division achieving operating profit in the range of Rs.1.18crores to 1.30 crores in First Commercial Year. Such conditions are clearly spelt out in clause-3 of the agreement. The desired operating profit could not be achieved by the SSL Division in the first Commercial Year and consequently the deferred consideration payable came to be nil and lapsed permanently and confirmation of such fact was also furnished by assessee. On the basis of such submissions, the assessee submitted that the Assessing Officer grossly erred in taxing of Rs.1.86 crores in the year under appeal which never accrued to the assessee and in fact was never received by the Directors, which was duly confirmed by Division of Nicholas Piramal Group vide their letter dated 27.05.2009. To support such contention that if the income is not accrued, it cannot be taxed, the assessee relied upon various case law.

7. On the disallowance of depreciation of Rs.2.61 lacks, the assessee claimed that depreciation is allowable on the building as it was depreciable business assets. The depreciation on

such assets was being claimed since its inception. The assessee never intent to earn profit from the assets, but pursuance to the business agreement, it was given on rent to NLDL, the assessee was looking after for goodbuyer and dispose of the same, when it was able to find buyer.

8. On the submission of assessee, the Ld. CIT(A) called for remand report from Assessing Officer. The Assessing Officer furnished his remand report, copy of remand report was provided to the assessee. The assessee filed its reply to the remand report (*the contents of remand report is not discussed in the impugned order*). In the reply to remand report, the assessee stated that Assessing Officer has admitted that original assessment was completed under section 143(3) and case was reopened on the basis of audit objection, the case was reopened on two counts: (i) the assessee sold its business on slum sale to NLDL, Division of Nicholas Piramal Group at Rs.4.65 crores, out of which Rs.2.79 crores was paid on signing the agreement and balance of Rs.1.86 crores was to be paid after computing the operating profit. The assessee further submitted that in the reasons recorded, the Assessing Officer

alleged that on verification of record for assessment years 2009-10 and 2010-11 that remaining consideration has not been offered to tax. (ii) the case was reopened to disallowance depreciation of Rs.2,62,180/- on building. The assessee reiterated that it is perquisite for Assessing Officer to have reason to believe on his own that any income chargeable to tax has escaped assessment, even if the impugned issue was brought to notice of Assessing Officer by audit party, it could not preclude the Assessing Officer from acting on such communication as long as final opinion to take appropriate action was that of Assessing Officer and not that of audit party. The Assessing Officer in the remand report dated 29.12.2017 admitted that case was reopened on the objection of audit party. In the remand report, there is no mention that Assessing Officer applied his mind, which *per se* suggests that Assessing Officer have no reason to believe as to why any income has escaped assessment but the Assessing Officer merely confined to audit objection. To support, the assessee stated that reopening is not sustainable on mere on audit objection unless the Assessing Officer on his own should have

formed the belief that income has escaped assessment. To support the assessee's view, the assessee relied on various case law. On the merit of addition, the assessee reiterated that business of assessee was acquired by NLDL, managed by division of Nicholas Piramal Group of Dr Ajay Piramal and Dr Swati Piramal. The details of slump sale and working of capital gains was also furnished during the original assessment proceedings. The Assessing Officer made a specific inquiry with regard to working of capital gains on slump sale as well as copy of business acquisition agreement vide show cause notice dated 11.10.2010 issued under section 142(1). Such show cause notice was replied by assessee vide reply dated 25.10.2010. The assessee further reiterated that balance consideration of Rs.1.86 crores was deferred and to be paid upon the SSL division achieving operating profit in the range of Rs.1.18 crores to Rs.1.30 crores in the First Commercial Year. No such target was received thus no further payment of such remaining amount was received by way of assessee.

9. The Ld. CIT(A) after considering the contents of Assessing Officer, submission of assessee, remand report submitted by

Assessing Officer and the rejoinder in respect of remand report filed by the assessee held that assessee has made two fold submission (i) on validity of reopening which is based on change of opinion which cannot be the basis of reopening and other that (ii) assessee-company was dissolved by order dated 06.07.2011 by Ministry of Corporate Affairs, Government of India and that the assessee was not in existence when notice issued under section 148 dated 19.10.2012. The Ld. CIT(A) after considering the submission of assessee held that reopening under section 147 is bad in law for two reasons: (i) the assessee has shown its documentary evidence that name of company was struck off from the Registrar of Company on 06.07.2011 and that such letter dated 03.01.2013 was sent to Assessing Officer informing the status and cancellation of PAN. Further Ministry of Corporate Affairs, Government of India's letter dated 26.04.2011 indicating the dissolution of the assessee-company was shown to have been forwarded to Chief Commissioner of Income-tax, Surat and Assessing Officer. Thus, the notice under section 148 dated 19.10.2012 become notice issued on non-existent entity and (ii) the

assessee has shown copy of notice under section 142(1) and reply in response thereto in original scrutiny assessment that issue of reopening was already enquired by Assessing Officer and order under section 143(3) was passed without any addition. In the remand report dated 29.12.2017, the Assessing Officer confirmed that reopening was on account of audit objection. The facts corroborated the assessee's submission of reopening on the basis of change of opinion, which is not permissible. The Ld. CIT(A) thus allowed the appeal of assessee on legal grounds. Aggrieved by the order of Ld. CIT(A) the Revenue has filed present appeal before the Tribunal.

10. We have heard the submissions of learned Senior Departmental Representative (Sr-DR) for the Revenue and the learned authorised representative (ld AR) for assessee and have gone through the orders of lower authorities carefully. The ld Sr DR for the revenue submits that Ld. CIT(A) quashed the assessment order by taking view that notice under section 148 was issued on non-existent entity, if the assessee was dissolved, such fact was never communicated to the Assessing

Officer. It was the duty of the assessee to intimate the Assessing Officer in writing as per under section 176(3) of the Act. Further as per under section 178 the person who has made the order of dissolution or liquidating the assessee-company has to inform the Income Tax Authority about such dissolution. No such intimation or information was sent to Assessing Officer. The Ld. CIT(A) without verifying such fact quashed re-assessment. The Ld. Sr-DR for the Revenue further submits that assessment order was passed by Assessing Officer on 31.03.2014 under section 144 r.w.s. 147 of the Act, however, the appeal was filed by assessee before Ld. CIT(A) after elapsed of three years, which was allowed without passing specific order for condoning delay. On the merit of the additions, the ld Sr DR for the revenue also supported the order of assessing officer.

11. On the other hand, Ld. AR for the assessee supported the order of Ld. CIT(A). The Ld. AR for the assessee submits that notice under section 148 was issued against non-existent entity. When notice under section 148 dated 19.10.2012 was sent, the assessee-company was not in existence as it was

dissolved and the name of assess-company was stuck of vide order dated 06.07.2011 from the register of Registrar of Company. The assessing officer and Chief Commissioner was informed by the official of Ministry of corporate affairs in writing. All such evidences were filed before ld CIT(A). the ld AR for the assessee submits that no notice either under section 148 or any other notice under section 142(1) was served on the directors of the assessee-company. The directors of the assessee came to know about the assessment order and demand when they were served notice under section 131 and 176 of income tax Act. On the basis of such submissions, the ld AR for the assessee submits that the assessing officer passed the order against the dead person which is nullity in the eyes of laws. The assessee furnished the evidence before Ld. CIT(A) that order of dissolution was sent to the office of Ld. Chief Commissioner of Income-tax, Surat vide letter dated 26.04.2011, copy of which was filed before the Assessing Officer. Thus, the sufficient compliance was made about the intimating the Assessing Officer about such dissolution of assessee-company.To support his view, Ld. AR for the

assessee relied upon the decision of Hon'ble Apex Court in the case of Pr. CIT Vs Maruti Suzuki India Ltd. (2019) 107 taxmann.com 375 (SC), Hon'ble jurisdictional High Court in the case of Rasid Lala Vs ITO Ward-1(3)(6) [SCA No.18987 of 2016] (Gujarat); Hon'ble Bombay High Court in the case of Rupa Shyamsundar Dhumatkar vs. ACIT [WP No. 404 of 2019 dated 05.04.2019, PCIT Vs Pukhraj S. Jain [104 CCH 0682] (Bom), Hon'ble Delhi High Court in the case of Savita Kapila vs. ACIT (2020) 118 taxmann.com 46 (Del).

12. In alternative submissions, the ld AR for the assessee submits that reopening was passed on mere change of opinion. The ld. AR for the assessee submits that reopening was based on audit objection. The reopening based on the objection of audit report is not valid. on the submission that reopening is not valid on audit objection. Ld. AR for the assessee relied upon the decision of Hon'ble jurisdictional High Court in the case of Adani Exports. vs. DCIT (1999) 240 ITR 224 (Guj); in the case of Adani Infrastructure and Developer Pvt. Ltd. vs. ACIT (2019) 101 taxmann.com 256 (Guj).

13. On the issue that all the facts were verified and examined and accepted by Assessing Officer while passing the assessment order and that no new material or information has come to the notice of Assessing Officer and all information were available on the record of the case that reopening was change of opinion, the ld. AR for the assessee relied upon the decision of Hon'ble Apex Court in the case of CIT Vs Kalvinator of India Ltd. (2010) 320 ITR 561 (SC),

14. The Ld. AR for the assessee submits finally submits that Ld. CIT(A) granted relief to the assessee on two counts (i) that notice under section 148 was issued against non-existing entity and that (ii) reopening was based on change of opinion. The ld. AR for the assessee points out that Revenue has not challenged the second part of the order wherein the Ld. CIT(A) also granted relief to the assessee that reopening was mere based on change of opinion. Thus, even if the ground No.1 though, which is in favour of assessee is allowed, the impugned order will still remain against the Revenue, which is not challenged by revenue while filing this appeal.

15. In the rejoinder submitted, Ld. Sr-DR for the Revenue submits that as per the stand of assessee, the assessee was dissolved vide order dated 06.07.2011 by Registrar of company, Ministry of Corporate Affairs, Government of India. However, in the month of September, 2011, the assessee-company filed its return of income for assessment year 2011-12 on 23.09.2011. Thus, the assessee cannot be allowed to take a plea that the assessment was made against the dead person.

16. On the validity of reopening as claimed by assessee, as mere change of opinion and that it was based on audit report, the Ld Sr DR for the revenue submits that Hon'ble Supreme Court in CIT Vs P.V. S. Beedies Private Limited (1999) 237 ITR 13 (SC) held that reopening on the basis of factual information given by the audit party is valid. The Ld. Sr-DR for the Revenue also relied on the decision of Delhi High Court in CIT Vs Usha International Limited (2012) 348 ITR 485 (Delhi). On the objection of Ld AR for the assessee that the revenue while challenging the order of Ld CIT(A), has not challenged the finding of Ld CIT(A) that reopening was mere 'change of opinion', the Ld SR DR for the revenue submits that as per the

Income Tax (Appellate Tribunal) Rules-1963, he may be allowed to make his submissions of such finding.

17. We have heard the rival submissions of both the parties and have gone through the order of lower authorities. We have also deliberated on various case law relied by both the parties. We find that the Assessing Officer issued notice under section 148 dated. 19.10.2013 and on his view that neither the return of income was filed by assessee-company in response to notice under section 148 nor responded to such notice. The Assessing Officer issued show cause notice dated 24.03.2014, wherein the Assessing Officer identified two issues i.e. (i) related to difference of sale price, which was not offered by the assessee in its return of income and the depreciation claimed of Rs.2,61,180/-. The Assessing Officer further in **para-5** on his order recorded that final show cause notice issued on 26.03.2014 was served to assessee-company by affixture and that none of the notice was replied by assessee and Assessing Officer brought the difference of sale consideration of business of assessee of Rs.1.86 crores (4.65-2.79 crores) as unaccounted income of assessee and disallowed the

depreciation of Rs.2,61,180/-. As recorded above, before Ld. CIT(A) the assessee filed detailed written submission, the contents of which are not repeated here for the sake of brevity. On the detailed written submissions of assessee, the Ld. CIT(A) called remand report from Assessing Officer. On the remand report, the assessee was asked to give its comments. The assessee filed his reply to the said remand report. The Ld. CIT(A) after considering the assessment order, submission of assessee, remand report filed by Assessing Officer and rejoinder of assessee held that reopening of case is bad in law on two issues. Firstly, the name of assessee was struck off from the Registrar of Company on 06.07.2011. And an intimation was sent to assessing officer vide letter dated 03.01.2013, informing the cancellation of PAN. Further, the Ld. CIT(A) specifically noted that vide order of Ministry of Corporate Affairs, Government of India dated 06.07.2011 informed the dissolution of assessee-company and that such letter was forwarded to Ld. Chief Commissioner of Income-tax, Surat and Income-tax Officer. On such observation, the Ld.

CIT(A) held that notice under section 148 issued on non-existing entity and quashed the assessment order.

18. Secondly, the Ld. CIT(A) also held that in the remand report dated 29.12.2017, the Assessing Officer confirmed the reopening was on account of audit objection and such fact corroborated the assessee's submission that reopening was mere change of opinion which is not permissible under law.
19. We find that second finding of Ld. CIT(A) is not challenged by Revenue while raising its grounds of appeal. The Ld. Sr-DR for the Revenue while making his submission, though raised the plea that appeal of assessee was filed after gap of three years from the date of assessment order and that Ld. CIT(A) allowed the condonation of delay in filing appeal before Ld. CIT(A). it was also argued that he may be allowed to made his submissions against the finding of ld CIT(A), which is against revenue. We find that no such ground was raised by Assessing Officer while filing appeal before Tribunal, in our view, the revenue in now precluded to raise such submission, on such pleas which has been accepted by assessing officer.

Thus, the submission of Ld. Sr-DR for the Revenue has no substance.

20. Considering the afforesaid factual and legal discussion, we find that the assessing officer passed the re-assessment order dated 31.03.2014 against the non-existent entity. Thus, the assessment order is *void-ab initio* and the same is set-aside. Hence, we affirm the order of ld CIT(A). In the result, ground No. 1 of the appeal is dismissed.

21. Ground No.2 and 3 relate to deleting the addition of Rs.1.86 crores for unaccounted income and depreciation. Considering the fact that we have affirm the order of Ld. CIT(A) on the legal ground with our additional observation, therefore, the adjudication of this ground of appeal have become academic in nature.

22. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 14/11/2022 and the result was also placed on the Notice Board.

Sd/-
(Dr ARJUN LAL SAINI)
[लेखा सदस्य/ACCOUNTANT MEMBER]
Surat, Dated: 14/11/2022
Dkp. Out Sourcing Sr.P.S

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य JUDICIAL MEMBER]

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

// True Copy //

By order

Sr.P.S./Assistant Registrar, ITAT, Surat