

आयकर अपीलीय अधिकरण
मंबई पीठ“एफ”.मंबईपीठ
श्री विकास अवस्थी, न्यायिक सदस्यएवं
श्री भगीरथ माल बियानी, लेखाकार सदस्यकेसमक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “F”, MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER
आअसं. 1485/मुं/2018 (नि.व. 2010-11)
ITA NO.1485/MUM/2018(A.Y.2010-11)

Income Tax Officer -8(3)(3),
Room No.616, 6th Floor,
AaykarBhavan, M.K.Road,
Mumbai 400 020

..... अपीलार्थी/Appellant

बनाम Vs.

M/s. VibgyorTexotechPvt. Ltd.
309, Navyug, T.J.Road, Sewree,
Mumbai 400 015.
PAN: AACCV 0752 D

..... प्रतिवादी/Respondent

आअसं. 488/मुं/2019 (नि.व. 2010-11)
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..... प्रतिवादी/Respondent

Assessee by : Shri Pavan Ved
Revenue by : Ms. Amrita Singh &Ms. Vranda U Matkarni
सुनवाई की तिथि/ Date of hearing :13/02/2023
घोषणा की तिथि/ Date of pronouncement : 17/02/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

These cross appeals by the Revenue and the assessee are directed against the order of Commissioner of Income Tax (Appeals)-14, Mumbai [in short 'the CIT(A)'] dated 14/12/2017 for the Assessment Year 2010-11.

2. The Revenue in its appeal has assailed the order of CIT(A) on following ground only:

i. *"Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A), is justified in directing the AO to rework the estimation of profit @ 2.5% instead of 5% of turnover holding that the AO has not based his estimation on any comparable cases, without appreciating the fact that the AO has considered the audited accounts for A.Y 2007-08, in the absence of audited accounts for the year under consideration."*

3. The assessee in its appeal has raised multiple grounds *inter alia* assailing validity of notice issued u/s. 148 of the Income tax Act 1961 [in short 'the Act'] and also additions on merit. The assessee has raised additional grounds of appeal challenging jurisdiction of the Assessing Officer in passing assessment order u/s. 147 of the Act. Before deciding the grounds assailing addition on merits, it would be imperative to first decide jurisdictional issue raised in the appeal by the assessee.

4. Shri PavanVed appearing on behalf of the assessee submitted that the assessee was engaged in manufacturing of textile. The assessee suffered huge losses, hence, no return of income was filed by the assessee for the impugned assessment year. The notice u/s. 148 of the Act dated 18/02/2014 was issued to the assessee. In response to the said notice the assessee filed return of income through electronic mode for the Assessment Year 2010-11 on

04/10/2014 declaring current year's loss of Rs.20,27,709/-. A perusal of the reasons for reopening would show that the solitary reason recorded by the Assessing Officer for reopening is that the assessee has received bank interest other than interest on securities amounting to Rs. 28,55,684/-, which seems to be taxable and the same has escaped assessment for non-filing of return of income for the Assessment Year under appeal. The Id. Authorized Representative for the assessee submits that the Assessing Officer completed the assessment u/s. 143(3) r.w.s. 147 of the Act vide order dated 26/03/2015. No addition was made by the Assessing Officer with respect to bank interest i.e. the sole criteria recorded in the reasons for reopening the assessment. The Assessing Officer while making assessment rejected books of account of the assessee and made following additions:

(i) Estimation of Income	: Rs. 10,16,09,674/-
(ii) Disallowance u/s. 43B of the Act	: Rs. 4,79,90,509/-
(iii) Disallowance u/s.40(a)(ia) of the Act	: <u>Rs. 21,63,46,107/-</u>
Total	: <u>Rs. 36,59,46,290/-</u>

The Id. Authorized Representative for the assessee submits that it is a well settled law that no other addition can be made if, no addition is made on a reason for which assessment was reopened u/s. 148 r.w.s. 147 of the Act. In support of his submissions the Id. Authorized Representative for the assessee placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd., 331 ITR 236.

5. Per contra, Ms.Amrita Singh representing the Department vehemently defended the impugned order. The Id. Departmental Representative submits that the assessee had made similar arguments before the First Appellate Authority. The CIT(A) dismissed this ground of appeal by observing that the

Assessing Officer has made a separate addition of non-operating income amounting to Rs.1,19,16,325/-. This non-operating income includes bank interest. Therefore, the Assessing Officer has made addition of the bank interest that had escaped assessment. The Id. Departmental Representative prayed for dismissing this legal ground raised by the assessee.

6. Rebutting the arguments advanced on behalf of the Revenue, the Id. Authorized Representative for the assessee submitted that non-operating income as referred to by the CIT(A) is reflected in Schedule-11 to the P&L Account for the period ending 31/03/2010. Schedule -11 is at page -51 of the Paper Book. The Id. Authorized Representative for the assessee has drawn our attention to the schedule to emphasize the point that bank interest is not part of non-operating income.

7. We have heard the submissions made by rival sides and have examined the orders of authorities below and the documents already on record. From the submissions advanced by rival sides the short issue that emerges for adjudication is; Whetherin assessment proceedings u/s147 of the Act, addition has been made on the reasons recorded for reopening the assessment?

8. Before we proceed to answer the above question, it is necessary to see the reasons recorded for reopening. The relevant extract of the reasons for reopening are reproduced herein below:

“The assessee company, M/s. Vibgyor Texotech Limited, is assessed with this charge under PAN AACCV0752D. On verification of the ITD System, it is noticed that the assessee has not filed its return of income for F.Y. 2009-10 relevant to A.Y.2010-11.

2. It is also noticed from ITS details generated from the System that during the financial year 2009-10 relevant to A.Y.2010-11, the assessee has received Rank interest other than interest on securities cumulative amounting to Rs.28,55,684/-. As the assessee has received interest income cumulatively amounting to Rs.28,55,684/-

which seems to be taxable and has escaped assessment, as the assessee company has not filed any Return of income for the said period offering the said income to tax.

3. In totality of the facts of the case, I am therefore satisfied that the income has escaped assessment by the reasons of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment coming within the meaning of section 147 of the Income-tax Act, 1961.

4. I have therefore reason to believe that income to the extent mentioned above and chargeable to tax has escaped assessment due to the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment within the meaning of section 147 of the I.T. Act, 1961 and accordingly, notice u/s.148 of the Income-tax Act, is issued in the aforesaid assessee company's case for A.Y.2010-11."

A perusal of the above reasons show that the solitary ground for reopening the assessment is non-disclosure of bank interest Rs.28,55,684/-. In the assessment order, no addition has been made on the ground of bank interest. The Assessing Officer made estimated addition of business income of the assessee at 5% of the total turnover. The Assessing Officer has further made addition of non-operating income under the head business income.

9. The contention of the Revenue is that non-operating income added by the Assessing Officer includes interest income. We have examined the accounts of the assessee. The details of non-operating income are given in Schedule-11 at page -51 of the Paper Book. Schedule-11 to the Profit and Loss Account for the period ending 31/03/2010 is extracted herein below:

"Schedule 11:

Non-Operating Income:

Telephone expenses recovered	:	49,505
Commission Received	:	13,34,707.44
Discount Received	:	51,047
Other Income (Receipt)	:	22,87,954
Export Incentives	:	81,93,111
Round Off	:	<u>1</u>
		<u>1,19,16,325"</u>

Examination of details of Schedule 11 reveals that bank interest does not form part of non-operating income of the assessee. Thus, it is evident from records that no addition has been made by the Assessing Officer in respect of an issue for which reopening was initiated. On perusal of documents on record, we answer the question in negative.

10. Now, as a consequence to the above findings, the assessment order passed in proceedings u/s. 147 of the Act would be unsustainable. The Hon'ble Jurisdictional High Court in the case of CIT vs. Jet Airways (I) Ltd. (supra) has held:

“11. The rival submissions which have been urged on behalf of the revenue and the assessee can be dealt with, both as a matter of first principle, interpreting the section as it stands and on the basis of precedents on the subject. Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has the power to assess or reassess the income, which he has reason to believe had escaped assessment and also any other income chargeable to tax. The words "and also" cannot be ignored. The interpretation which the Court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word "and". The words "and", as well as "also" have been used together and in conjunction.

*The Shorter Oxford Dictionary defines the expression "also" to mean 'further, in addition, besides, too'. The word has been treated as being relative and conjunctive. Evidently, therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess: (i) 'such income'; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. **If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice***

subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from 1-4-1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.”

[Emphasised by us]

Thus, in the facts of the case and the law expounded by Hon'ble Jurisdictional High Court, we find merit in the jurisdictional ground raised by assessee, hence, the same is allowed. Consequently, the impugned order is set aside and the appeal of assessee is allowed. Since, the assessee succeeds on jurisdictional issue, the grounds raised on merits of the addition have become academic and thus, not deliberated upon. Sequitur to the above findings, the appeal by Revenue is dismissed.

11. To sum up, appeal by assessee is allowed and appeal by the Revenue is dismissed.

Order pronounced in the open court on Friday the 17th day of February, 2023.

Sd/-

(BHAGIRATH MAL BIYANI)

लेखाकार सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 17/02/2023

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्तCIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt.Registrar),ITAT, Mumbai