

आयकर अपीलीय अधिकरण, 'बी' / SMC न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'B' /SMC BENCH, CHENNAI
श्री महावीर सिंह, उपाध्यक्ष के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE-PRESIDENT

आयकरअपीलसं./I.T.A.No.1094/Chny/2022

(निर्धारणवर्ष / Assessment Year: 2013-14)

Mrs. Selvam Seethalakshmi, 12A, Bharath Avenue, Pappakuruchi Main Road, North Kattur, Trichy-620 019.	Vs	The Income Tax Officer, Ward-3(3), Trichy.
PAN: DOKPS 7293A		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. Mr. N.Arjunraj, C.A for Mr.S.Sridhar, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. AR.V.Sreenivasan, Addl.CIT

सुनवाईकीतारीख/Date of hearing	:	27.02.2023
घोषणाकीतारीख /Date of Pronouncement	:	28.02.2023

आदेश / ORDER

This appeal filed by the assessee is arising out of order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi vide appeal No. ITBA/NFAC/S/250/2022-23 / 1047797656(1) dated 05.12.2022. The re-assessment was completed by the Income-tax Officer, Ward-3(3), Trichy for the assessment year 2013-14 u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter 'the Act') vide order dated 27.12.2018.

2. The first issue raised by the assessee in this appeal is against order of the CIT(A) confirming action of the Assessing Officer in reopening of assessment and assumption of

jurisdiction by the Assessing Officer u/s.143(3) r.w.s 148 of the Act, as there is no fresh or intangible material.

3. For this issue, the assessee has raised following grounds:-

“2. The NFAC erred in confirming the assumption of jurisdiction u/s 147 of the Act and ought to have appreciated that the order under consideration was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.

3. The NFAC failed to appreciate that the re-assessment completed without following the prescription of the law laid down by the Supreme Court in the case reported in 259 ITR 19 should be reckoned as nullity in law and further ought to have appreciated that having not shown any fresh/tangible material as well as having not alleged the failure on the part of the appellant in disclosing fully and truly all material facts at the original stage, the re-assessment consequently completed would defy the law consistently followed in terms of the proviso below section 147 of the Act.”

4. Brief facts relating to above assessee are that the assessee is engaged in milk trading. She has also declared income i.e. business income from real estate business. The original assessment was completed by the Income Tax Officer, Ward-3(3), Trichy u/s.143(3) of the Act, vide order dated 28.03.2016. Subsequently, the Assessing Officer recorded reasons for reopening of assessment on the issue of violation of provisions of section 40A(3) in regard to cash payment of

Rs.18.00 lakhs. The Assessing Officer completed re-assessment u/s.143(3) r.w.s 147 of the Act by disallowing a sum of Rs.18,00,000/- u/s.40A(3) of the Act and also made addition of Rs.22,86,232/- on account of difference in value of closing stock.

5. Aggrieved against reopening, the assessee filed objections before the Assessing Officer, but the Assessing Officer confirmed reopening by stating that as there was reason to believe that income chargeable to tax for assessment year 2013-14, in this case, had escaped assessment, reopening was made u/s.147 of the Act after obtaining approval from the Additional CIT, Range-3, Trichy. According to him, reopening is valid and therefore, he proceeded to frame assessment on merits.

6. The Assessing Officer made addition on account of amount paid by the assessee of Rs.18.00 lakhs towards release of lease tenancy to Mr.E.Manickavel, who confirmed that he has received Rs.18.00 lakhs from Mrs.Seethalakshmi, the assessee, in order to release lease-holdings on the above said property. The facts are that the assessee purchased a vacant site admeasuring 17,859.60 sq.ft for a sum of Rs.27

lakhs. The Assessing Officer noticed that in the profit & loss account as on 31.03.2013, the assessee has debited a sum of Rs.18.00 lakhs towards expenses on lease rights release on the above said property. According to the Assessing Officer, the assessee has filed copy of unregistered lease release deed dated 26.04.2013 entered into between seller and Mr. E.Manickavel stating that the assessee has received a sum of Rs.18.00 lakhs towards release of lease from the above said sellers. According to the Assessing Officer, this is contradictory between the unregistered document and confirmation letter, when the assessee has debited a sum of Rs.18.00 lakhs towards payment made to release of lease rights in the financial year 2012-13 relevant to the assessment year 2013-14 and claimed the same as deduction. According to the Assessing Officer, this has escaped assessment and for this, he recorded reasons as under:-

"The assessee's case was selected for scrutiny under CASS complete scrutiny for the reason sale consideration of the property in ITR is less than sale consideration of property as reported in AIR.

1. During this year, the assessee has purchased a vacant site ad-measuring 17,859.60 sq.ft for a sum of Rs,27,00,000, In the P & L account as on 31.3.2013, the assessee had debited a sum

of Rs.18,00,000 towards expenses of lease Rights Release on the above said property.

1.1 On perusal of the details filed by the assessee during the course of scrutiny assessment proceedings, it is seen that letter addressed by Smt. Uma Devi, M.Sathiskumar, M.Sakthivel, M.Lakshmi Priya (sellers) dated NIL that they had received a sum of Rs.27 lakhs as sale consideration from the assessee in respect of the above property and also filed unregistered sale receipt dated 14.3.2013 stating that assessee had paid a sum of Rs.27 lakhs to the sellers and taken over possession as per POA registered with SRO, Thiruverumbur dated 14.03.2013. No complete sale document was registered. The assessee had converted the above property into plots and sold them as a POA only. The assessee also filed a confirmation letter dt NIL from Sri E,Manickavel stating that he had received a sum of Rs.18,00,000 from Smt. SSeethalakshmi (assessee) in order to release the lease-holdings on the above said property. Later on, the assessee filed a copy of unregistered Lease Release Deed' dated 26.4.2013 (FY.2013-14) entered between the sellers and Sri F.Manickavel, S/o, V.Eraniyan that the lessee had received a sum of Rs-18 lakhs towards release of lease from the above said sellers. So it is contradictory between the unregistered document and confirmation letter but the assessee debited a sum of Rs. 18,00,000 towards the payment made to release the lease right in the financial year 2012-13 relevant to the asst year 2013-14 itself.

2. On perusal of sale documents received from O/o Sub-Registrar, Thiruverumbur it is seen that the assessee has purchased a house property at 12-A Bharath Avenue, Pappakurichi, Thiruverumbur Tk for a sum of Rs.11,00,000/ on 23.7.2012. In the balance sheet as on 31.3.2012, the assessee has shown a sum of Rs.74,992/- as cash in hand and bank In the balance sheet as on 31.3.2013 the assessee has shown a sum of Rs.16,38,500/- in fixed assets.

In view of the above. I have reason to believe that the income chargeable to tax for the assessment year 2013-14, in this case, has escaped assessment I. therefore, seek the approval of the Joint Commissioner of Income Tax. Range-3, Trichy, for reopening the assessment u/s.147 and to issue notice u/s 148 of

the Income Tax Act, 1961 to make assessment u/s/143(3) r.w.s.147.”

7. Against confirmation of re-opening by the Assessing Officer, the assessee preferred appeal before the CIT(A). The CIT(A) also confirmed action of the Assessing Officer by observing in para 5.2.3 as under:-

“5.23 I have carefully considered claim of the appellant. The appellant’s apprehension that the notice would have been issued after 31.3.2018 is without any basis. The Assessing Officer has got the proposal approved from the Additional Commissioner and the notice is dated 30.03.2018. There is no reason why the notice would have been issued after March 2018. So far as the claim regarding change of opinion by successor Assessing Officer is concerned, same is not apparent. The Assessing Officer has duly recorded the reason as to why she was satisfied that income had escaped assessment. Hence, the Assessing Officer is authorized to issue the notice before completion of 4 years from the end of the assessment year. Hence, the notice u/s 148 of I.T. Act issued by the appellant was valid. So far as the claim that addition had been made on some unconnected issue, the same is not material so long as addition had been made on the issue on which the assessment had been reopened. Hence, this ground is rejected.”

Aggrieved, now the assessee is in appeal before the Tribunal.

8. Before me, the learned counsel for the assessee first argued on the issue that there is no tangible material for reopening of assessment and according to him, fresh and

intangible material is required for reopening of assessment because original assessment was completed u/s.143(3) of the Act. The learned counsel for the assessee drew our attention to the original assessment order passed u/s.143(3) dated 28.03.2016, wherein the Assessing Officer has considered the issue in great detail and relevant findings by the Assessing Officer on original assessment at para 6 reads as under:-

“6. In the profit and loss account for the year ended 31/03/2013. the assessee has claimed deduction towards purchase of plots for Re. 27,10,000/- lease rights lease for Re. 18,00,000/-, filling of soil and sand JCB for Rs. 4,28,510/-, JCB charges for Rs.2,12,500/- commission paid for Rs.2,00000/-. The assessee was asked to produce the bills and vouchers, copy of sale deed in support of the expenses claimed by the assessee. ii support of the purchase of immoveable property and payment made in respect of lease right release, the assessee produced the purchase documents, lease right release document and confirmation letter , from the seller and lease right holder, confirming the receipt of Rs.27,00,000/- towards sales and Rs.18,00,000/- towards lease right lease.”

9. The learned counsel for the assessee took us through records and he drew our attention to para 1.1 which reads as under:-

“1.1 On perusal of the details filed by the assessee during the course of scrutiny assessment proceedings, it is seen that letter addressed by Smt. Uma Devi, M.Sathiskumar, M.Sakthivel, M.Lakshmi Priya (sellers) dated NIL that they had received a sum of Rs.27 lakhs as sale consideration from the assessee in respect of the above property and also filed unregistered sale receipt dated 14.3.2013 stating that assessee had paid a sum of Rs.27 lakhs to the sellers and taken over possession as per POA registered with SRO, Thiruverumbur dated 14.03.2013.”

10. Even the Assessing Officer from the details filed by the assessee during the course of scrutiny assessment proceedings, which was examined by the Assessing Officer during the course of original assessment proceedings and recorded this fact in the assessment order, it means that the Assessing Officer while issuing notice u/s.148 of the Act has no fresh or intangible material for reopening of assessment. The learned counsel for the assessee in view of the above stated that this issue has been considered by the Hon'ble Madras High Court in the case of TANMAC India vs. DCIT. Circle-I, Pondicherry reported in (2017) 78 Taxmann.com 155 (Mad) in Tax Case Appeal No.1426 of 2007, considering decision of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India (2010) 320 ITR 561. The learned

counsel also relied on the decision of co-ordinate Bench of this Tribunal in the case of M/s. Sabari Foundations Pvt Ltd vs. ITO in ITA No.2744/Chny/2017, wherein the Tribunal exactly on identical facts has held as under:-

“7. We have heard the rival contentions and have gone through the facts and circumstances of the case. We noted that in the very reasons recorded by the Assessing Officer for issuance of the notice, we noted that the Assessee has not completed any project as per the Profit and Loss Account but had claimed the Directors’ remuneration of Rs.25,20,000/- as current year’s revenue expenditure. According to the Assessing Officer, this forms part of the indirect expenses of the project only and hence is not allowable. For this reason, the assessment was reopened by the Assessing Officer. We noted that the Hon’ble Madras High Court in the case of TANMAC India Vs. Deputy Commissioner of Income Tax, Circle – I, Pondicherry (supra) has considered an identical situation by following the decision of the Hon’ble Supreme Court in the case of Commissioner of Income Tax Vs. Kelvinator of India reported in [2010] 320 ITR 561 and held that “What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material. The Hon’ble Madras High Court has considered this issue in paragraph nos.10, 11 & 12, as under:

“10. Let us now see the sequence of events that have transpired in this case. The Assessee filed a return of income pursuant to which, an intimation dated 01.12.1998 under section 143(1) (a) of the Act was issued. The provisions of Section 143(2) require that if the Assessing Officer considered it necessary or expedient to ensure that the Assessee has not understated income, claimed excessive loss or underpaid tax in any manner, the assessment is to be subject to further scrutiny, a notice under section 143(2) is liable to be issued and the assessment completed on or before 31.03.2001. This was not done in the present case. Subsequently, a notice under section 148 has been issued on 09.12.2002 under section 148 of the Income Tax Act taking advantage of the now extended limitation of four years to re-

assess income on the basis of the same materials that were available with the authority as part of the record.

11. The phrase 'reason to believe' in Section 147 relates to such other new or tangible material as may have come to the knowledge of the Assessing Officer pursuant to the original proceedings for assessment. The Supreme Court in the case of Commissioner of Income Tax Vs. Kelvinator of India [2010] 320 ITR 561 / 1867 Taxmann 312 states thus in the context of the 'belief' that should form the basis for a re-assessment.

'We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review, he has the power to reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.' 12. *If the Assessing Officer, after issuing intimation u/s. section 143(1) does not to issue a notice u/s.143(2) of the Act to initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the Assessing Officer, to re-assess income on the basis of stale material, already on record. If, we thus keep in the mind, the above fundamental requirement of Section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of the re-assessment, but of review. The reasons make it abundantly clearly that the reassessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the Assessing Officer since 02.11.2018 andf which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier,*

the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.03.2001, prior to issue of notice u/s.148. The notice under section 148 dated 09.12.2002 is thus an arbitrary exercise of power and a review of proceedings impermissible in law.”

8. We find from the facts of the present case and the reasons recorded by the Assessing Officer that similar situation is before us, as was before the Hon'ble Madras High Court in the case of TANMAC India Vs. Deputy Commissioner of Income Tax, Circle –I, Pondicherry (supra), and hence we quash the re-assessment and allow appeal of the assessee.”

11. When these facts were controverted to learned Senior DR, he stated that the Revenue has reopened the assessment on the basis of audit objection and once Revenue audit objection has categorically stated that the assessee has incurred cash payment expenses in regard to payment of lease rights release amounting to Rs.18.00 lakhs which is to be disallowed u/s.40A(3) of the Act and added to the returned income, the same constitute new information. He relied on decision of the Hon'ble Supreme Court in the case of CIT Vs. P.V.S.Beedies Pvt.Ltd. reported in (237 ITR 13) (SC). The learned Senior DR also filed audit objection raised by the Revenue.

12. I have heard rival contentions and gone through facts and circumstances of the case. I noted that from the very reasons

recorded, it is clear that the Assessing Officer has simplicitor gone into assessment records and whatever information filed during assessment proceedings, the Assessing Officer has made basis for reopening of assessment. Admittedly original assessment was completed u/s.143(3) of the Act and the Assessing Officer has examined issue of lease rights release of Rs.18.00 lakhs. I find that this issue has been considered by the Assessing Officer in the original assessment and relevant para 6 of assessment order is already re-produced above in para 8 of this order. I find that the Hon'ble Madras High Court in the case of TANMAC India Vs. DCIT (supra) has considered this issue in detail and noted that reassessment can be done only on the fresh and tangible material. The Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India (supra) has also considered an identical issue and held that Department cannot be permitted to avail of extended time limit, in absence of any new or tangible material. No counter judgement was cited by the Department before me, except case law of the Hon'ble Supreme Court in the case of CIT Vs. P.V.S.Beedies Pvt.Ltd. (supra), wherein the issue of audit objection how to be dealt with and whether that forms opinion

or not is to be considered. Since, the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India (supra) has considered this issue, I am of the view that reopening on the same set of facts, which were available in the original assessment proceedings which were examined by the Assessing Officer, is bad in law and hence, quashed .

13. The learned counsel for the assessee also argued two more facets of reopening, but since, I have quashed the reassessment on the issue of fresh and tangible material, I need not go into the same, as the same became academic now. Similarly, as regards merits of the case, since I have quashed assessment on reopening, I need not go into merits.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28th February, 2023

Sd/-
(महावीर सिंह)
(Mahavir Singh)
उपाध्यक्ष/ Vice-President

चेन्नई/Chennai,
दिनांक/Dated 28.02.2023
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.