

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: **3394/CHNY/2019**

निर्धारण वर्ष/Assessment Year: 2014-15

The ACIT,
Non-Corporate Circle-22,
West Tambaram,
Chennai - 45.

Shri Kamal Chilaka,
vs. No.234, Chilaka House,
ECR, Shera Farms,
Kanathur-603 112.

(अपीलार्थी/Appellant)

PAN:AHJPK 6958K
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri AR.V. Sreenivasan, Addl.CIT
: Shri S. Sridhar, Advocate

सुनवाई की तारीख/Date of Hearing : 02.05.2023

घोषणा की तारीख/Date of Pronouncement : 10.05.2023

आदेश /ORDER

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the Revenue is arising out of the order of the Commissioner of Income Tax (Appeals)-10, Chennai in ITA No..73/CIT(A)-10/2019-20 dated 22.10.2019. The assessment was framed by the ACIT, Non Corporate Circle 22, Chennai for the assessment year 2014-15 u/s.147 of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 18.12.2018.

2. The only issue in this appeal of Revenue is as regards to the order of CIT(A) quashing the reassessment initiated by the AO u/s.147 r.w.s. 148 of the Act on the basis of change of opinion. For this, Revenue has raised following three grounds:-

1. The CIT-A (10) has erred in deleting the addition made in the assessee's case under section 28(va) of the I.T.Act, 1961 by holding that reopening is considered bad in law.

2. The assessment for the A.Y:2014-15 in the case of the assessee has been completed u/s.143(3) dt. 21.11.2016 wherein the income returned of Rs.13,59,90,618/- has been accepted. However it is noticed that in this case, the consideration received by the assessee towards the sale of shares in M/s. Kailash Shipping services private limited was not only towards the sale consideration of shares but also towards the Non-Compete Fee and hence reopened u/s.148 and completed u/s.147 on 18,12.2018.

2.1 The learned CIT(A) failed to appreciate the facts that contained in clause at page no. 32 and para 7 It was clearly mentioned that Non-Compete and Non-Solicitation which means that the amount paid to the assessee is not only towards the share value but also towards Non-Compete Fee as mentioned in said agreement. If nothing is towards Non-Compete Fee as argued by the assessee, there was no need to mention the specific clause for this purpose in the sale agreement.

3 The learned CIT(A) erred both in facts and on law in holding that the consideration paid is not for shares but also towards "Non Compete and Non Solicitation", by which the assessee was prevented from continuing or starting new business in the same line. Since the amounts are not bifurcated, imperative to ascertain which amount is given towards share value and what amounts are towards Compete and Non Solicitation. Hence, the non compete fee is taxable under section 28(va) of I.T.Act, 1961.

3. Brief facts are that original assessment was completed by ACIT, Non-Corporate Circle-11, Tambaram, Chennai for the relevant

assessment year 2014-15 u/s.143(3) of the Act vide order dated 21.11.2016. The assessee's case was selected for complete scrutiny under CASS for the reason "delayed payment of tax and return filed late, large long term capital gain & no entry in Schedule Asset and Liabilities". The assessee produced books of accounts, furnished details and written submissions and accordingly assessment was completed u/s.143(3) of the Act. Subsequently, the AO issued notice u/s.148 of the Act to reopen the completed assessment and for that the AO recorded reasons vide dated 12.03.2018 and the relevant reasons read as under:-

2 Reasons for the belief that income has escaped assessment

The assessee an individual, deriving income from Photography, filed his return of income electronically on 30.09.2014, declaring total income of Rs.13,59,90,618/-. The assessee has shown income under the heads 'Salaries, Long Term Capital Gain and Income from other sources'. On selection for scrutiny under CASS the assessment was completed vide order u/s.143(3) of the Act dated 21.11.2016 accepting the income returned.

2.The assessee has declared Rs.10,85,71,105/- under the head "Long Term Capital Gain" on account of sale of listed securities. On a perusal of the Share Purchase and Share holders agreement entered into amongst Kailash Shipping Services Private Limited/Apollo Logisolutions Limited/Karnal Chilaka/ Karthick Chilaka/Hymavathi Chilaka on 18th March, 2013 and the return of income for Asst.Year 2014-15, it is seen that the assessee had sold 15,00,000 shares (being 33% of equity shares) held in Kailash Shipping Services Private Limited to Apollo Logisolutions Limited for a consideration of Rs.11,43,33,334/-.

It is seen from the agreement that 100% of the Issued and Paid up Share Capital were transferred in 3 tranches. As per the agreement it is not only sale of shares but also the rights, warranties non-compete and non-

solicitation clause. Hence the sale consideration received relates not to sale of shares alone but also the rights and non-compete fee etc.

Hence, amount received in excess of FMV in related shares (Rule 11UA) is required to be treated as business income u/s.28 of the Income-tax Act, 1961. The FMV of the shares transferred is Rs.46.91. Hence, out of the total capital gain of Rs.11,43,33,334/- reported, Rs.4,39,68,334/- [Rs.11,43,33,334 - Rs.7,03,65,000 (Rs.46.91/- x 15 lakhs shares)] is required to be treated as business income.

3. As could be seen from the above, there is under valuation of tax liability on account of wrong reporting of income under the head capital gain instead of business income, in relation to the Asst.Year 2014-15. I, therefore, have reason to believe that there is escapement of income to the tune of Rs.4,39,68,334/-.

4. On the basis of above mentioned facts, I am proposing to reopen the assessment in the above case u/s.147 of the Income-tax Act, 1961 for the A.Y.2014-15.

The relevant assessment year is AY 2014-15 and notice u/s.148 of the Act was issued vide dated 27.03.2018 i.e., within 4 years. The AO completed the reassessment u/s.147 r.w.s 143(3) of the Act vide order dated 18.12.2018 wherein it was noted that the assessee has transferred certain shares for a total consideration of Rs.11,43,33,334/- and out of this after taking into account the valuation of the shares under Rule 11UA of the Rules r.w.s. 28(va) of the Act, the sale consideration considered by the AO for an amount of Rs.7,03,65,000/- and accordingly balance after deducting expenses was considered as Long Term Capital Gain of Rs.6,46,02,771/- and also added non-compete fee of

Rs.4,39,68,334/-. Aggrieved assessee preferred appeal before CIT(A).

4. Before CIT(A), the assessee challenged reopening on change of opinion and CIT(A) held that there is change of opinion and hence, he observed in para 5 as under:-

“5. It is hence clear from the basic facts of the case that reassessment made under section 148 of the IT act 1961 does not stand the test of law as the assessing officer was unable to bring forth any new information which has come to the possession of the Department subsequent completion of 1st assessment under section 143(3) of the act) It is apparent from record that the assessing officer has drawn up good reasons for reopening which have been duly approved by his joint Commissioners acting in his capacity as a range head. The only procedural flaw which seems to have occurred is that having discovered that one alternative view as to valuation of shares was possible which was indicative of a possibility that income has been taxed at a lower rate, the assessing officer and the JCIT should have immediately revised the assessment under section 263 of the IT act instead of which they have in their wisdom resorted to reopening assessment under section 148 of the act which however is does not pass the test of change of opinion. While strict interpretation of taxing statutes is called for it is also true that due procedure as laid down in the law has to be strictly followed this casts a duty on tax authorities to be seen as fair and just and to uphold natural justice and all the tax proceedings.”

Finally the CIT(A) quashed the assessment by observing in para 6 as under:-

“6. On perusal of the facts and circumstances as apparent from the assessment order, the grounds of appeal, the statement of facts and from guidance available from the above mentioned judgments of honourable Supreme Court it is clear that appeal of assessee against reassessment proceedings deserves to succeed. As a result appeal of assessee is allowed. The reassessment is hence considered bad in law and assessment consequently framed under section 143(3) of the act annulled.”

Aggrieved, now Revenue is in appeal before the Tribunal.

5. Before us the Id.Senior DR argued that the CIT(A) in his appellate order held that there was no new information with the AO for reopening of assessment and it is merely change of opinion. He argued that notice u/s.148 of the Act has been issued within four years and there is no requirement for the AO to demonstrate any failure to disclose on the part of the assessee and further from the records, it is seen that during the course of original assessment proceedings the AO has directed the assessee to file information as per Rule 11UA(2) of the Rules on various days. He also stated that the reopening is on the basis of audit objection but from the very reasons recorded as noted above, the AO has applied his mind while recording reason and formed a reasonable belief for reopening of assessment and this view is affirmed by Jurisdictional High Court in

the case of CIT vs. First Leasing Co. of India Ltd., 241 ITR 248 (2000), wherein Hon'ble High Court has held as under:

“However, if the audit party has merely drawn the attention of the ITO to the existence of the law, the opinion of the audit party would be regarded as information”.... If the statutory conditions prescribed under section 147(b) are satisfied, it is permissible for the department to invoke the reassessment proceedings, notwithstanding the fact that other remedies are available to the department under other provisions of the statute.”

5.1 The Id.Senior DR also argued that from the assessment order one cannot make that the AO has examined this issue of sale of shares and consequent valuation of shares carried out under Rule 11UA of the Rules and hence, the AO has not formed any opinion as observed by CIT(A) in the course of original assessment proceedings but it was only brought out by audit party to the attention of the AO, the relevant provisions of law. He argued that audit objection is to be considered as information or tangible material for reopening of assessment.

6. On the other hand, the Id.Counsel for the assessee argued that this reopening is merely on the basis of audit objection and the AO recorded the reasons which is just copying the audit objection and the AO has not applied independent mind while recording reasons or reopening of assessment. He stated that the department paper-

book clearly reveals the fact that reading of the audit query which triggered the reassessment proceedings confirms the fact. He argued that audit parties scope should be understood as restricted and they cannot act as an assessing authority in as much as getting into the shoes of the AO, which is completely prohibited and same would not constitute valid information for the purpose of reopening of assessment u/s.147 of the Act. The Id.counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of Indian & Eastern Newspaper Society vs. CIT, 119 ITR 996 (1979), wherein it is held that audit objection cannot be considered as valid information for the purpose of reassessment proceedings and the relevant portion of the judgment reads as under:-

“Therefore, whether considered on the basis that the. nature and scope of the functions of the internal audit organisation of the Income Tax Department are co-extensive with that of Receipt Audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual, we hold that the opinion of an internal audit party of the Income Tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income Tax Act, 1961.”

6.1 Another aspect argued by Id.Counsel for the assessee is that he drew our attention to page 6 of Revenue's paper-book, wherein the satisfaction recorded by JCIT for approval of the reasons recorded is noted as “Yes, I'm satisfied” and for this, the Id.counsel

for the assessee relied on the Co-ordinate Bench decision in the case of Rasi Seeds Pvt. Ltd., vs. DCIT in ITA No.2134/CHNY/2015, order dated 29.07.2022. He argued that the approval of JCIT is not a reason and it is a mechanical approval and therefore the reopening is bad in law on this count also. He accordingly supported the order of the CIT(A).

7. We have heard rival contentions and gone through facts and circumstances of the case. We noted from the order of CIT(A) that he has simply quashed the assessment by a cryptic order as his decision is noted in above para 4, wherein he has simply noted that the AO has not passed the test of change of opinion but he did not elaborate how there is opinion formed by the AO in the original assessment proceedings. Another aspect of approval by JCIT, the prima facie argument made by assessee seems to be correct but this needs to be verified because the records are not produced before us. As regards to change of opinion, the CIT(A) has not recorded the factual finding and hence, this issue needs reconsideration by the CIT(A) afresh, who will reconsider the issue of reopening as well as approval granted by JCIT whether satisfactory or not. In term of the above, we restore this issue back to the file of the CIT(A). Needless to say if the CIT(A) is not with

assessee on reopening, he has to deal with merits also. In term of the above, the appeal of the Revenue is allowed for statistical purposes.

8. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced in the open court on 10th May, 2023 at Chennai.

Sd/-

(जी. मंजुनाथ)

(G. MANJUNATHA)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 10th May, 2023

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|-------------------------|--------------------------|--------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकरआयुक्त /CIT |
| 4. विभागीय प्रतिनिधि/DR | 5. गार्ड फाईल/GF. | |