

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.1379/Kol/2019
Assessment Year: 2010-11**

GermindaPvt. Ltd. 37, Shakespeare Sarani, Kolkata-700017. (PAN: AABCG1291R)	Vs.	Income Tax Officer, Ward-7(1), Kolkata
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Rakesh Jain, FCA
Respondent by : Shri G. HukughaSema, CIT DR

Date of Hearing : 25.05.2023
Date of Pronouncement : 31.05.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assesseeis against the order of Ld. CIT(A)-3,Kolkata vide Order No. CIT(A), Kolkata-3/10599/2016-17 dated 26.03.2019 against the assessment order of ITO, Ward-7(1), Kolkata u/s. 143(3)/147 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 19.08.2016 for AY 2010-11.

2. Grounds raised by the assessee are reproduced as under:

“1. That in the facts and circumstances of the case the Ld. CIT(A) erred in confirming the action of Ld. Assessing Officer in issuing notice u/s. 148 of the I. T. Act, 1961.

2. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming the jurisdiction of the Ld. Assessing Officer in reopening the proceedings u/s. 147 of the I. T. Act, 1961.

3. That in the facts and circumstances of the case, the Ld. CIT(A) erred in confirming the addition made by the Ld. ITO for cessation of liability to the extent of Rs.35,73,027/-.

4. That in the facts and circumstances of the case, the Ld. CIT(A) erred in given finding about interest paid.

5. That in the facts and circumstances of the case, the appellant craves leave to add, alter modify and/or submit further or more ground(s) of appeal either before or at any time during the hearing of the appeal.”

3. Before delving on the issues raised by the assessee in the appeal, we note that in the petition filed by the assessee seeking adjournment in the earlier dates of hearing, it is mentioned therein that Bench had directed the assessee to obtain certified copy of order sheet of reasons recorded for reopening of the case. In this respect, we have perused all the order sheet entries forming part of the appeal folder and could not find any such direction given by the Bench. However, assessee has placed on record, certified true copy of the order sheet of the impugned assessment proceedings vide letter dated 27.12.2022, which we shall refer to as and when, adjudicate on the matter.

4. Brief facts of the case are that assessee is engaged in the business of leather bags and wallets. It filed its return of income on 31.10.2020 reporting a loss of Rs.1,32,26,694/-. Ld. AO recorded the reasons to believe for issuing notice u/s. 148 of the Act that “assessee has deducted Rs.35,73,027/- in Schedule BP of the ITR under the head “Income /receipt credited to P& L Account” considered under other heads of income. But under any other heads of income this was not offered for tax. Thus, Rs.35,73,027/- has escaped assessment.” Notice u/s. 148 of the Act was issued on 28.03.2016. Against the said notice, assessee intimated that original return filed on 30.09.2009 be treated as return filed in response to notice u/s. 148 of the Act. In the assessment order, Ld. AO noted that in the course of assessment, Ld. AR of the assessee was intimated about the reason for reopening of the case as desired.

Contrary to this, assessee has claimed and alleges that Ld. AO has not provided the copy of reason to believe recorded for the purpose of reassessment proceedings.

4.1. In the course of assessment, assessee furnished its explanation in respect of the income of Rs.35,73,027/- which the Ld. AO has alleged as escaping assessment by stating that mistake had occurred on the part of the assessee while submitting the data in the return form, which was clerical in nature. It was also submitted that the said amount is a capital receipt and not liable to tax as it relates to writing off a liability in respect of loan/advance taken from one party. However, Ld. AO not satisfied with the submissions made by the assessee, completed the assessment by making an addition of Rs.35,73,027/-. Aggrieved, assessee went in appeal before the Ld. CIT(A).

4.2. Before the Ld.CIT(A), above stated facts were reiterated. It was also submitted that assessee had credited its P&L Account with a sum of Rs.35,73,027/- towards writing off the loan liability in respect of loan taken by the assessee from Axion International Project Ltd. (AIPL). Since this amount was no more payable to the said party, it was written back in the P&L Account by way of a credit entry. However, in the return, this amount was not offered to tax, it being a capital receipt in the hands of the assessee, not liable to income-tax. In the course of first appellate proceeding, Ld. CIT(A) enquired about this loan transaction which was written back in the P&L Account but not offered to tax in the returned income vide office letter dated 13.03.2019 seeking various information from the assessee. The details sought by ld. CIT(A) vide this letter included:-

1. Complete details of transaction with Axion International Projects Ltd.
2. When was the transaction undertaken?

3. *Copy of ledger a/cs for the last 4-5 years for the period since the transaction was initiated.*
4. *As it has been claimed that it is loss transaction. Details of interest paid in the earlier years.*
5. *Name, Address and PAN of Axion International Projects Ltd.*
6. *Whether any amount relating to Axion International Projects Ltd. has been debited to P&L account, the details thereof.*

4.3. However, assessee did not furnish any such details. Ld. CIT(A) thus, sustained the addition made by the Ld. AO. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, ld. Counsel for the assessee has furnished a fresh paper book in proper form in compliance to the direction given by the Bench vide order sheet entry dated 19.01.2023 containing 44 pages including a written submission. There is another volume of paper book containing 11 pages which include assessment order and the order of Coordinate Bench of ITAT in assessee's own case for AY 2009-10.

5.1. In respect of grounds taken by the assessee challenging the legality of the proceedings initiated u/s. 148 read with sec. 147 of the Act, Ld. Counsel submitted that Ld. AO has failed to provide copy of reasons to believe, recorded for the purpose of issuing notice u/s. 148 which were ought to have been provided before the commencement of reopening proceedings. In the written submission placed at page 1 of the paper book, in point no. 1, assessee has submitted that reasons for reopening was furnished in the course of reassessment proceedings, the same were never provided before the commencement of reopening proceeding. Assessee was denied the opportunity to raise objection for reopening. To substantiate this claim, certified true copy of the order sheet entries of the assessment proceedings are placed on record vide letter dated 27.12.2022. From the perusal of the first entry dated 15.03.2016, it

mentions about the reason to believe recorded for which the impugned assessment proceedings were initiated. The same are reproduced as under:

“CPC Bangalore has informed that amount of Rs.35,73,027/- has not been brought to tax/has partially been brought to tax.

Therefore, I have reason to believe that the above mentioned amount has escaped assessment. Approval may be granted to reopen the case u/. 147 of the I. T. Act.”

5.2. Further,ld. Counsel submitted that there is no whisper in the reasons recorded by the ld. AO about failure on the part of the assessee to disclose truly and fully, all material facts necessary for the assessment and, therefore, absence of such an allegation renders the reassessment proceedings invalid. In the same written submission at point no. 5, it is submitted that originally, return of the assessee was processed u/s. 143(1) of the Act. It is also a fact on record that no scrutiny assessment was undertaken in terms of sec. 143(3) of the Act.

6. On the merits of the case, Ld. Counsel referred to page 41 of the paper book containing ledger for “liability written back” to demonstrate that an amount of Rs.35,73,027/- had been written back in respect of five different parties against which liability stood in the books of the assessee. Reference was also made to page 42 of the paper book containing ledger account of AIPL containing entries from 01.04.2001 to 05.03.2019. It is worth noting that impugned assessment order is dated 19.08.2016 and therefore this ledger upto 05.03.2019 could not have been before the ld. AO, though stated to be filed before the ld. AO as certified in the index to the paper book. From this ledger, it was pointed that there was an opening balance of Rs.35.50 lakh which was written back and credited to the P&L Account. In the computation of income for the year,placed at page 27, assessee has reduced the amount of Rs.35,73,027/- towards liabilities written back claiming it as exempt

being capital receipt, to arrive at taxable income from business or profession. In this respect, ld.Counsel referred to the income tax return form and pointed that this amount has been reported in Schedule BP Sl. No. A.5.(c) under the head, 'income credited to P&L Account which is exempt' and then the same amount has been reported in Schedule EI containing 'details of exempt income'.

6.1. According to the Ld. Counsel, assessee had taken loan/advance from AIPL and others which when became not payable, were written back by way of a credit in the P&L Account since it represents capital items in the form of loan/advance which is not an income in the hands of the assessee and, therefore, claim it as exempt in the computation of total income and reported accordingly. Ld. Counsel placed reliance on the decision of Coordinate Bench of ITAT, Kolkata in assessee's own case for the immediately preceding AY 2009-10 in ITA No. 1193/Kol/2019 dated 22.06.2022 wherein identical issue was dealt and appeal of the assessee was allowed on the legal issue of reassessment u/s. 147 read with section 148 of the Act. Merit of the case was not dealt by the Hon'ble Bench in this decision.

7. Per contra, Ld. CIT DR asserted that assessee never requested for supply of reasons to believe recorded by the Ld. AO. Assessee participated in the assessment proceedings. Ld. AO also has recorded in the assessment order itself that in the course of assessment, ld. AR of the assessee was intimated about the reasons of reopening of the case. According to Ld. CIT DR, there is nothing on record which demonstrates that assessee had made a request for the supply of reasons to believe was made by it. On the merits of the case, Ld. CIT DR submitted that the liability on account of loan/advance taken by the assessee from AIPL had been written back. Assessee has got enriched to the extent of liability which it is no more required to repay. According to Ld. CIT DR, it is

immaterial that such a liability is on account of capital or revenue transaction. Further, assessee has not furnished the details called for to ascertain the nature of these liabilities which have been written back and claimed as exempt. He thus placed reliance on the orders of the authorities below.

8. We have heard the rival contentions and perused the material on record. On the legal issue of supply of reasons to believe recorded by the Ld. AO, we refer to the decision of Hon'ble Supreme Court in the case of GKN Driveshaft (India) Ltd Vs. ITO (2023) 259ITR 19 (SC) which had laid down the procedure to be adopted in such situation. Hon'ble Supreme Court has clarified in this decision that when a notice u/s. 148 is issued, the proper course of action for the assessee is to file the return and if he so desires, to seek reasons for issuing notice. Thereafter, the AO is bound to furnish reasons within a reasonable time. The relevant part from the judgment is reproduced as under:

*"We see no justifiable reason to interfere with the order under challenge. However, we clarify that **when a notice under section 148 of the Income Tax At is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices.** The Assessing Officer is bound to furnish reason within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."*[emphasis supplied by us by bold and underline]

9. From the perusal of the records, it is evident that no where assessee has made a request before the Ld. AO for the supply of reasons to believe. We note that the same are recorded on the order sheet of the assessment proceedings and on the same order sheets, the authorised representative of the assessee is a signatory to various entries made therein. Further, Ld. AO in the impugned assessment order has recorded the fact of intimation about the reason of reopening to the AR of the

assessee in the course of assessment. Even in the written submission placed before us, what the assessee is challenging that reasons were not provided before the commencement of reopening proceeding though they were furnished in the course of reassessment proceeding because of which assessee was denied the opportunity to raise objection for reopening. We find that claim of the assessee is not in accordance with the procedural mandate given by the Hon'ble Supreme Court in the case of GKN. Driveshaft (supra) and, therefore, has no legs to stand.

9.1. It is a fact that original return was processed u/s. 143(1) of the Act. There was no scrutiny assessment u/s. 143(3) of the Act. In respect of claim of the assessee that there is no allegation recorded by the Ld. AO of failure on the part of the assessee about the full and true disclosure of all material facts necessary for assessment, we find that this condition is stipulated in first proviso to section 147 wherein requirement of assessment u/s. 143(3) is a pre-condition to record such an allegation by the Ld. AO, if an action is sought to be taken up under this section after the expiry of four years from the end of the relevant assessment year. Thus, even this contention of the ld. Counsel of the assessee fails.

9.2 Ld. Counsel has referred to the decision of Coordinate Bench of ITAT, Kolkata in assessee's own case in immediately preceding year. On its careful reading, we note that the decision on the legal issue is based on the finding that there is no new material with the revenue authorities which the assessee has not disclosed. Reliance has been placed in this decision on the judgment of Hon'ble Supreme Court in the case of CIT Vs. Kelvinator India Ltd. 320 ITR 561 which deals with the issue of "change of opinion". The said decision by Coordinate Bench is silent on the issue relating to reasons not supplied to the assessee which has been challenged by the assessee in the present case before us. Further, this decision has not dealt with the merits of the case since the reassessment

proceedings have been quashed based on the legal grounds. In the present case before us, when compared with the decision of the Coordinate Bench, we note that Ld. CIT(A) has enquired about the issue of loan/advance taken by the assessee from AIPL which the assessee has failed to respond. Further, in the order sheet of the reassessment proceedings, the reasons recorded by the Ld. AO are the very first entry dated 15.03.2016 and on the subsequent entries the Ld. AR of the assessee is a signatory. These facts are distinguishable from those dealt in by the Coordinate Bench while arriving at its decision in the immediately preceding assessment year, in assessee's own case. Accordingly, reliance placed by the ld. Counsel on the said decision is distinguishable.

10. On the merits of the case, it is a fact that there is a credit balance in the books of account of the assessee including that of AIPL which remained outstanding for past several years as is laid down in ledger account referred above. Assessee has written back these outstanding liabilities as no more payable by crediting its P&L Account. Ld. CIT(A) has enquired on the merits of the case by issuing a letter which was not complied by the assessee. Assessee has claimed it as an item of exemption by treating it as capital in nature and excluded it from the computation of its total income reported in the return form.

11. On the contention of the assessee as to write back of liabilities being capital in nature and hence not chargeable to income-tax, we looked into the judgment of Hon'ble Supreme Court in the case of CIT vs. Mahindra & Mahindra [2018] 404 ITR 1 (SC) which dealt with the issue of waiver of loan liability if it represents income under section 28(iv) or alternatively, under section 41(1) of the Act. Hon'ble Court summed up its judgment in Para 17 which is reproduced as under:

“17. To sum up, we are not inclined to interfere with the judgment and order passed by the High court in view of the following reasons:

- (a) Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs 57,74,064/- are in the nature of cash or money.*
- (b) Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability. It is a matter of record that the Respondent has not claimed any deduction under Section 36 (1) (iii) of the IT Act qua the payment of interest in any previous year.”*

11.1. Keeping the above judgment of the Hon’ble Supreme Court in the context of facts of the present case before us, it is not discernible from the records and details furnished by the assessee that the liabilities written back were receipts in the nature of cash or money or are towards trading liability for which deduction has been claimed in earlier years as well as status of deduction towards interest thereon. What the assessee has placed on record are the ledger accounts which is not adequate to ascertain their nature so as to bring them within the ambit of the judgment of Hon’ble Supreme Court referred above. Ld. CIT(A) had also called for the details but assessee did not respond to the same. However, in the interest of justice and fair play, we find it proper to afford an opportunity to the assessee to substantiate its claim of exemption in respect of write back of its liabilities by adducing all the relevant documentary evidence and explanation, for which we remit the matter back to the file of ld. AO in this respect. Ld. AO is directed to verify the evidence and explanation furnished by the assessee, keeping in perspective, the aforesaid judgment of the Hon’ble Supreme Court and allow the claim in accordance with the provisions of law. Assessee be given reasonable opportunity of being heard who is also directed to be diligent in complying with the requirements before the ld. AO for its effective disposal.

12. Considering the facts and circumstances of the case, the discussion made above and the judicial precedents referred, ground nos. 01 and 02 taken by the assessee on the legal issue of validity of reassessment proceedings and the impugned assessment order, are dismissed. On the merits of the case, for ground nos. 03 and 04, the matter is remitted back to the file of ld. AO in terms of our aforesaid observations and directions. These grounds are allowed for statistical purposes.

13. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 31st May, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 31st May, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent
 3. CIT(A), National Faceless Appeal Centre (NFAC), Delhi
 4. CIT ,
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata