IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "A", MUMBAI

BEFORE SHRI BR BASKARAN, ACCOUNTANT MEMBER &

SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER

ITA No. 2381/Mum/2021 (A.Y. 2012-13)

The ACIT, CC-6(4), Room No. 1925, 19th Floor, Air India Building, Nariman Point, Mumbai-400021. **Appellant**	**Vs**	**Airmid Developers Ltd.** M-62 & 63, 1st Floor, Connought Place, New Delhi-110001. **PAN: AAGCA5601G** **Respondent**

Appellant/Revenue by : Sh. Manoj Kumar Sinha, Sr. DR
Respondent/Assessee by : Sh. K. Gopal, AR

Date of hearing : 04/05/2023
Date of pronouncement : 31/05/2023

ORDER

PER NARENDER KUMAR CHOUDHRY, J.M:

The Revenue/Appellant herein has preferred this appeal against the order dated 27.09.2021 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)-54, Mumbai {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act, 1961 (in short 'the Act') for AY 2012-13.

2. In this case, the Assessee/Respondent herein, declared Net loss at Rs. 4,11,62,557/-, by filing its original return of income on dated 25.09.2012, which was scrutinized, processed and resulted into passing of order dated 17.02.2015 under section 143(3) of the Act, by which the loss was computed at Rs. 3,80,61,295/- as against loss of Rs. 4,11,62,557/- as declared by the assessee.

3. Subsequently, a search and seizure operation was carried out in the case of Indiabulls Group on dated 13.07.2016 and the Assessee's case was re-opened under section 147 of the Act on dated 28.03.2019 and consequently notice under section 148 of the Act was issued to the Respondent on dated 29.03.2019 and ultimately assessment was completed by passing an order under section 143(3) r.w.s. 147 of the Act on dated 19.12.2019 whereby the income of the Respondent was assessed at a total loss of Rs. 1,48,77,550/- by the Assessing Officer (AO) by disallowing the claim of the Respondent to the tune of Rs. 2,62,85,004/- on account of "Finance Cost" which was added to its cost of Real Estate Project under development.

4. The Respondent being aggrieved not only challenged the disallowing the Finance Cost of Rs. 2,62,85,004/- and adding

the same to the cost of inventory, but also challenged the re-opening of the case under section 148 of the Act by raising the additional ground. The Ld. Commissioner though dismissed the additional ground raised by the assessee which pertains to the challenge of the re-opening proceedings under section 147/148 of the Act, however deleted the disallowance of Rs. 2,62,85,004/- by allowing the 'Finance Cost' as deduction u/s 36(1)(iii) on account of business expenditure by directing the AO not to add the finance cost to WIP by holding that during the year under consideration, the assessee has incurred finance cost of Rs. 2,62,85,004/- in respect of loan taken for business purposes. Concluding part of order is reproduced herein below for ready reference:

> *"The only reason for making disallowance of finance cost is that no income has been earned by the assessee during the year. The findings of the AO are based on wrong interpretation of the facts of the case and any expenditure which is incurred for the business purposes is allowable as business expenditure u/s 37 of the Act. The AO has not doubted the genuineness of the expenditure incurred, even though no income is earned from the business during the year. The business expenditure otherwise has to be allowed."*

"It is a settled legal view that that the only condition for claiming deduction under section 36(1)(iii) is 'commercial expediency' of the expenditure incurred. The judgment of the Hon'ble Apex Court in the case of ***S.A. Builders Ltd. vs. CIT 288 ITR 1 (SC)*** *support this contention in which it was held that if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would ordinarily be entitled to deduction of interest on its borrowed loans. The Ld. Commissioner also relied the judgment of the High Court of Madras in the case of* ***CIT vs. Century Flour Mills Ltd 334 ITR 377 (Mad)*** *wherein it was held that where assessee having borrowed money, utilized it as advance to its managing director for purchase of land for business purpose, interest paid on said borrowing was to be allowed as deduction. The Ld. Commissioner ultimately held that assessee has taken a loan for business purposes, therefore interest paid on such loan is business expenditure"*

5. The Revenue/Department being aggrieved has preferred this appeal against the deletion of the disallowance under consideration.

6. On the contrary, the Assessee/Respondent by filing petition under Rule 27 of the Income Tax (Appellate Tribunal)

Rules, 1963 (in short 'the Rules') also raised the following grounds:

> *"1. The Ld. CIT(A) erred in upholding the reopening of the assessment without appreciating the fact that the proviso to section 147 of the Act is attracted to the notice dated 29.03.2019 issued under section 148(1) of the Act and the same is barred by limitation.*
>
> *2. The Ld. CIT(A) failed to appreciate that the reasons recorded are based on the facts already placed on record. Thus, there is no failure on the part of the Applicant to make full and true disclosure. Hence, the notice dated 29.03.2019 issued under section 148(1) of the Act is barred by limitation and the assessment order dated 19.12.2019 is void ab initio and bad in law.*
>
> *3. Thus, the Applicant prays that this Hon'ble Bench may be pleased to consider the applicant's objection under Rule 27 of the ITAT Rules, 1963."*

6.1 The Respondent claimed that though it has not preferred any appeal, however, as per Rule 27 of the Rules, the Respondent is entitled to support the order appealed against any of the grounds decided against it. As the ground qua legality of reopening of proceedings u/s 147 of the Act was raised before the Ld. Commissioner and the same was decided

against the Respondent, hence, aforesaid grounds may be allowed to be raised as per Rule 27 of the Rules.

7. We have given thoughtful consideration to the peculiar facts and circumstances and the grounds raised by the Respondent u/r 27 of the Rules. It is not in dispute that the assessee has also challenged the re-opening proceeding before the Ld. Commissioner by raising additional ground, which has also been decided by the Ld. Commissioner. For brevity and ready reference, the conclusion drawn by the Ld. Commissioner qua additional ground is as under:

> *"7. During the course of appellate proceedings, the appellant has raised an additional ground regarding the reopening of assessment The appellant has submitted that the Assessment Order u/s 143(3) was completed by the AO without taking any adverse view in respect of finance cost. Thus, the reopening of the assessment on the issue of finance cost was on account of change of opinion. For this, the appellant has relied upon the decision of the Hon'ble Supreme Court in the case of ACIT vs. Marico Limited [(2020)] 117 taxmann.com 244 and CIT New Delhi vs.*

Kelvinator of India Limited [Civil Appeal No.2520 of 2008]

7.1 The reasons recorded by the AO and the submissions made by the AO have been considered It is seen that in the Assessment Order u/s 143(3), the AO has not discussed anything about the allowability of finance cost. Therefore, no opinion was formed by the AO at the time of passing order u/s 143(3) of the Act. Therefore, there is no change of opinion in respect of allowability of finance cost, on the basis of which the assessment is reopened.

Accordingly the additional ground raised by the appellant is dismissed."

7.1 As the assessee has raised the legal ground, which goes to the root of the case hence the same is admitted and before proceeding to the Revenue's Appeal under consideration, we deem it appropriate to decide the legal ground raised by the Respondent, first.

8. The Assessee/ Respondent claimed that previous AO thoroughly examined the issue under consideration/addition

made by the subsequent AO, therefore the decision of the subsequent AO is based on change of opinion, which is not at all permissible in the eyes of law. Even otherwise reasons recorded are hit by 1st proviso to section 147 of the Act and consequently the assessment order is un-sustainable being void–ab-initio.

9. The Ld. DR refuted the claim of the assessee by relying upon the judgmentd passed by the Hon'ble Courts in the case of **Eleganza Jewellery Ltd. vs. CIT (2014) 52 taxmann.com 46 (Bom), Empee Holdings ltd. vs. DCIT (2019) 112 taxmann.com 319 (Chennai-Trib) and Export Credit Guarantee Corporation of India Ltd. vs. ACIT (2013) 30 taxmann.com 211 (Bom)**, and submitted that since the issue under consideration was not considered by the AO while passing the original Assessment Order, therefore it is not a case of change of opinion and reopening of assessment is justifiable. Further, Ld. DR submitted that the original AO neither made any inquiry qua transaction between the assessee and its subsidiary company nor the Assessee placed any material/ details of such loan before the AO during the course of original scrutiny of assessment proceedings, therefore the subsequent AO was justified invoking the jurisdiction u/s 148 of the Act.

10. Heard the parties and perused the material available on record. In this case, the Assessment Year involved is 2012-13 and the AO recorded the reasons u/s 147 of the Act on dated 28.03.2019 for re-opening of the assessment, which admittedly after the four years from the end of the relevant AY and therefore, first proviso to section 147 of the Act is applicable which reads as under:

> *"Where the assessment has been completed u/s 143(3) or u/s 147 no action can be taken u/s 147 after the expiry of 4 years from the end of relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."*

10.1 After 4 years four years from the end of the relevant AY, the re-opening of the assessment is permissible only on the conditions as enumerated in 1st Proviso to section 147 of

the Act. The first condition is that, where any income chargeable to tax has escaped assessment for such AY by reason to failure of the part of the assessee to make a return under section 139 or in response to a notice issued under section 142(1) or section 148 of the Act. Second condition is that, where the assessee failed to disclose fully and truly all material facts necessary for his assessment for that AY.

10.2 In the reasons recorded u/s 147 of the Act, the AO noted as under:

> **"Though the assessment had taken place in the instant case but the assessee had failed to disclose true and full particulars of income for the year under consideration."**

10.3 On the aforesaid facts, the foremost question emerges as to whether the assessee had failed to disclose true and full particulars of income for the year under consideration as observed in the reasons recorded.

10.4 Admittedly, in the original return of income, as on 31.03.2012 an amount of Rs. 126.04 Crores was shown as

outstanding by the Assessee, qua cost of Real Estate Project under development as mentioned in Note 14 of the audited balance-sheet and the assessee has claimed Rs. 2,62,85,004/- as business expenditure under section 36(1)(iii) of the Act, qua loan taken for the business purpose, and therefore duly shown the said expenditure as 'Finance Cost' and the accounts of the assessee are duly audited.

10.5 Undisputedly, during the course of original assessment proceedings, a notice u/s 142(1) of the Act was issued to the assessee on 22nd July 2014 wherein the specific query with regard to creditors, depositors and the liabilities, unsecured loans/deposits, secured loans, capital work in progress, details of deposits, loans and advances given, break up of expenses in excess to Rs. 10,00,000/-, etc. was raised, against which the assessee by filing its reply on 6th January 2015 before the then AO submitted all the details as asked for by the AO, who after considering the audited books of account and reply and details etc. submitted by the assessee in response to the notice issued u/s 142(1) of the Act, duly accepted the claim of the assessee and determined the loss of the assessee at Rs. 3,80,61,295/- as against loss of Rs. 4,11,62,557/- as declared by the assessee, however did not

make any addition on account of interest expenditure under the head 'Finance Cost'.

10.6 The subsequent AO nowhere mentioned as to what kind of particulars of income/documents, the assessee had failed to disclose truly and fully. It is the mandate of law that after 4 years from the end of the relevant assessment year, simply on the assumption, the case cannot be reopened u/s 147/148 of the Act without any cogent and clear indication in the reasons recorded. Further from the reasons, if no case of failure to disclose is made out then certainly the assessment of jurisdiction u/s 147 and 148 of the Act would be in excess of the jurisdiction and restraint imposed by the first proviso of section 147 of the Act. Further a general statement that the escapement of income is by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for escapement of assessment, is not enough to reopen the completed Assessment. The AO should indicate what was the material fact(s) otherwise not truly and fully disclosed by the Assessee. It is not permissible to the AO to reopen the assessment based on the same material with a view to take another view without consideration of the material on record. One view if is consciously taken by the AO as done by the AO in this case, then it is also not permissible

to reopen purely on change of opinion. Hence, in view of the dictum laid down by the Hon'ble Jurisdictional High Court in the case of **Godrej and Boyce Manufacturing Co. Ltd. vs. ACIT (2022) 140 taxmann.com 345 (Bom)** and by the Hon'ble Apex Court in the case of **ACIT vs. Kalpataru Land Pvt. Ltd. (2022) 447 ITR 364 (SC)** as relied upon by the Assessee, we are of the considered view that in the instant case, there is nothing to show that the assessee has not disclosed fully and truly all material facts necessary for his assessment or the income chargeable to tax has escaped assessment for such assessment year by the reason of failure on the part of the assessee to make a return u/s 139 or in response to a notice issued in sub section 1 of section 142 or section 148 of the Act. Therefore, the reasons recorded and initiation of re-assessment proceedings are hit by the first proviso of section 147 of the Act which put up a restriction for initiating an action under section 147 of the Act after the expiry of four years from the end of the relevant AY.

10.8 The judgment cited by the Ld. DR in the case of **Eleganza Jewellery Ltd. vs. CIT (supra)** is factually dissimilar. Further during the course of original scrutiny of assessment proceedings, the AO admittedly made the inquiry with regard to the interest income, hence the judgment of

Empee Holdings ltd. (supra) is also having no support to the contention of Ld. DR. Admittedly in the case of **Credit Guarantee Corporation of India Ltd. (supra)** challenge is the order of the AO for disposing of the objections raised by the assessee to reopening of the assessee, but not the initiation of re-assessment proceedings u/s 147 of the Act. Hence, this judgment is also not much help of the revenue department.

10.9 On the aforesaid analyazations and consideration, we are inclined to allow the grounds raised by the Assessee/Respondent as per Rule 27 of the Rules. Consequently the Assessment Order on the basis of reasons recorded is quashed, on legal aspect under consideration as well.

11. Now coming to the appeal of the Revenue Department/Appellant, since we have quashed the re-assessment order dated 19.12.2019 passed under section 143(3) r.w.s. 147 of the Act, itself, consequently the impugned order *ipso facto* also lost its existence. Resultantly the appeal of the Revenue Department has also become infructuous.

12. In the result, appeal filed by the Revenue/Department stands dismissed as infructuous.

Order pronounced in the open court on 31st day of May, 2023.

Sd/-	Sd/-
(BR BASKARAN)	(N K CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

SK, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

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(Dy. /Asstt.Registrar)
ITAT, Mumbai