

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
(Conducted through E-Court at Ahmedabad)**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. Nos. 201 to 204/Rjt/2018
(Assessment Years: 2007-08 to 2010-11)

Kandla Port Trust Superannuation Scheme, C/o. DPT Administrative Building Post Box No.50, Gandhidham	Vs.	Income Tax Officer, Ward-1, Gandhidham
[PAN No.AABTK5376N]		
(Appellant)	..	(Respondent)

Appellant by :	Shri Manish Shah, A.R.
Respondent by:	Shri Shramdeep Sinha, CIT DR

Date of Hearing	19.07.2023
Date of Pronouncement	26.07.2023

ORDER

PER BENCH:

These bunch of appeals have been filed by the assessee against the order passed by the Ld. CIT(Appeals)-3, Rajkot in Appeal No. CIT(A)-3/A3/1008to1011/14-15 vide order dated 27.02.2018 & 16.02.2018 passed for Assessment Years 2007-08 to 2010-11.

2. The assessee has taken the following grounds of appeal:-

“1. The Commissioner of Income Tax (Appeals) (hereinafter ‘CIT(A)’) erred in upholding the validity of reopening notice and reassessment order.

2. *The CIT(A) erred in holding that interest of Rs 84,00,000/- earned from the approved fund on the contributions from Kandla Port Trust as per actuarial valuation is not entitled to exemption as per law.*

3. *The CIT(A) failed to appreciate that in this year Rs 84,00,000/- was earned from approved fund as defined in section 2(6) and under section 10(25)(iii) all income received by such fund is exempt, and therefore, assessment order taxing the interest of Rs 84,00,000/- is bad in law.*

4. *The CIT(A) failed to appreciate that Schedule IV Part B, Rule 11(1)(c) gives power to Board to limit even other contributions (i.e. other than ordinary annual contribution) but the Board has not framed the rule limiting this other contributions, and therefore also the order of the AO taxing Rs.84,00,000/- is bad.*

5. *The CIT(A) failed to appreciate that order dated 31.03.2014 of CIT (Rajkot) cannot and does not apply to this year.*

6. *The CIT(A) erred in not following the ratio of Mumbai Tribunal decision in ACIT vs. Glaxosmithline Pharmaceuticals in ITA No 644/Mum/2007.*

7. *The CIT(A), if he wanted to go by the order of the Commissioner, ought to have waited for the order of Central Board of Direct Taxes, which would decide whether the order of CIT-1, Rajkot dated 31.03 2014 is valid or not.*

8. *The CIT(A) failed to appreciate that taxing the above interest in hands of Assessee will result into double taxation because in future the retired employee will be taxed on monthly payments of the annuity.*

The appellant reserves its right to add, amend, alter or modify any of the grounds stated hereinabove either before or at the time of hearing.”

3. At the outset, the counsel for the assessee challenged the validity of reopening notice issued by the Department and the reassessment order. In the instant case, the assessing officer issued reassessment notices dated 24-03-2014 for assessment years 2007-08 to 2010-11. The counsel for the assessee drew our attention to the “reasons for the opening of assessment” and submitted that the assessment of the assessee was reopened on the basis that the excess funds do not form part of “approved fund”, and hence is not exempt from taxation. Accordingly, as per the “reasons for the opening of the assessment”, it is evident that the case of the assessee was reopened on the basis that as on the date of issuance of aforesaid notice, the assessing officer was of the belief that the fund is “not approved”. However, a perusal of order passed under Rule 3 of Part B of Schedule-IV of the Income Tax Act, 1961 dated 31-03-2014 shows that the approval of the fund was only withdrawn with effect from the date of passing of the aforesaid order, which was on 31-03-2014. Therefore, evidently, as on the date of issuance of notice of reopening of assessment on 24-03-2014, the fund was an “approved fund” and

therefore, the case of the assessee was reopened on the basis of incorrect assumption of fact that as on the date of issuance of reassessment notice the assessee fund was “not approved”. Accordingly, since the reasons for the opening of assessment itself were based on an incorrect assumption of facts, the reassessment notice and consequential assessment proceedings are liable to be set aside. The counsel for the assessee further submitted that order dated 31-03-2014 withdrawing the approval of the fund does not mention any specific date from which the aforesaid approval is valid. Accordingly, in absence of any specific date, the order for withdrawal of approval cannot take retrospective effect.

4. In response, the Ld. DR submitted that the approval was granted to the assessee Trust, subject to certain conditions. Therefore, effectively the approval which was granted to the assessee trust was a conditional approval. It is evident from the order under Rule 3 dated 31-03-2014 that the approval was withdrawn since the assessee failed to comply with the conditions on the basis of which approval was granted to the assessee trust. Further, the Ld. DR drew attention to Rule 4 of Part B of Schedule-IV of the Income Tax Act, 1961, which states that in case there is any alteration to the rules or conditions of the fund, the approval of the fund shall be deemed to have been withdrawn from the date from which the alteration took effect. In the instant facts, the assessee violated the conditions on the basis of which approval had been granted and the AO observed that assessee had not filed copies of accounts and returns of income of the fund within the prescribed timelines and had also received annual contribution from the employer in excess of the prescribed limits

under Rule 87 of the IT Rules. Accordingly, since the conditions of approval had been violated by the assessee trust, the approval of the assessee trust is deemed to have been withdrawn from such date of violation by the assessee. Therefore, re-assessment proceedings have been validly initiated.

5. We have heard the rival contentions and perused the material on record. While we are in agreement with the reasoning given by the Ld. DR that the non-satisfaction of conditions of approval can lead to deemed withdrawal of approval from the date on which the violation was committed by the assessee trust, however, the aforesaid reason must also find mention in the “reasons for reopening of assessment” notice issued to the assessee. We observe that on perusal of the reasons for reopening of assessment, the case of the assessee has been reopened on the basis that excess fund amounting to ₹ 84 lakhs does not form part of the “approved fund” and hence is not exempt from taxation. Therefore, the aforesaid amount of ₹ 84 lakhs needs to be brought to tax. However, the notice for reasons for reopening of assessment does not make any indication of violation of conditions of approval of Superannuation Trust, thereby leading to the “deemed withdrawal” of approval as on the date of violation. Instead, the notice for reopening of assessment has been issued on the assumption that as on the date of issuance of notice, the assessee trust is “not” an approved fund. However, the aforesaid fact is incorrect for the reason that order for withdrawal of approval dated 31-03-2014 does not mention the date from which the aforesaid order will take effect.

It would be useful to reproduce Rule 2 of Part B of Schedule-IV of the Income Tax Act, 1961 for reference:-

“Approval and withdrawal of approval

2. (1) The Commissioner may accord approval to any superannuation fund or any part of a superannuation fund which, in his opinion, complies with the requirements of rule 3, and may at any time withdraw such approval, if in his opinion, the circumstances of the fund or part cease to warrant the continuance of the approval.

(2) The Commissioner shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect, and, where the approval is granted subject to conditions, those conditions.

(3) The Commissioner shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The Commissioner shall neither refuse nor withdraw approval to any superannuation fund or any part of a superannuation fund unless he has given the trustees of that fund a reasonable opportunity of being heard in the matter.”

6. From a perusal of the relevant extracts of Rule 2 of Part B of Schedule-IV of the Income Tax Act, 1961, it is evident that the order for withdrawal of approval of the superannuation fund must mention the date

from which withdrawal is to take effect. Accordingly, since in the instant facts, the order for withdrawal of approval dated 31-03-2014 did not make any specific mention of the date from which the order for withdrawal of approval shall take effect, the same shall take only effect from the date on which such order has been passed i.e. 31.03.2014. We cannot read any retrospectivity as to the date of operation of the aforesaid order dated 31-03-2014. This is coupled with the fact that the notice for reopening of assessment has been based on an incorrect factual assumption that as on the date of issuance of notice for re-opening of assessment on 24-03-2014, the approval of the assessee stands withdrawn. However, as noted above, the approval of the assessee trust was withdrawn from 31-03-2014. Therefore, clearly, from the facts placed on record, the approval of the fund had not been withdrawn as on the date of issuance of notice for reopening of assessment.

7. It is a well-settled law that reopening of reassessment on an incorrect assumption of facts is invalid. In the case of **Mumtaz Haji Mohamad Menon v. ITO [2018] 408 ITR 268 (Guj)**, the jurisdictional Gujarat High Court struck down the notice issued reopening the assessment on the basis of incorrect set of facts, with the following observations:

“12. The Assessing Officer may be correct in pointing out that when the sale consideration as per the sale deed is Rs.50 lakhs but the registering authority has valued the property on the date of sale at Rs.1,18,95,000/for stamp duty calculation, section 50C of the Act

would apply, of course, subject to the riders contained therein. However, this is not the cited reason for reopening the assessment. The reasons cited are that the assessee filed no return and that 1/3rd share of the assessee from the actual sale consideration of Rs.1,18,95,000/therefore, was not brought to tax. These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually incorrect, Revenue simply cannot hope to salvage the impugned notice.

Through the affidavit-in-reply a faint attempt has been made to entirely shift the center of the reasons to a completely new theory viz. the possible applicability of section 50C of the Act. The reasons recorded nowhere mentioned this possibility.

Reasons recorded, in fact, ignored the fact that the sale consideration as per the sale deed was Rs.50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gain.

13. In the result, impugned notice is quashed. Petition is disposed of.”

8. In the case of **Champaklal Mathurbhai Mehta[2023] 150 taxmann.com 92 (Mumbai - Trib.)**, the ITAT held that where Assessing Officer on basis of information from Income-tax department that during year under consideration assessee had purchased immovable

property, reopened assessment, on ground that assessee had not filed his return for relevant year, since factually return of income was already filed by assessee, reopening made on mistaken assumption was to be quashed.

9. Accordingly, in the instant set of facts, we observe that the notice dated 24-03-2014 has been issued on an incorrect presumption of facts. Accordingly, the aforesaid notice is liable to be quashed and the reassessment order is directed to be set aside.

10. Since we have allowed the appeal of the assessee on the ground of jurisdiction alone, we are not adjudicating on the merits of the case.

11. In the result, all the appeals of the assessee are allowed for all the assessment year under consideration.

This Order pronounced in Open Court on	26/07/2023
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Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 26/07/2023

TANMAY, Sr. PS

TRUE COPY

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, राजकोट / DR, ITAT, Rajkot
6. गार्ड फाईल / Guard file.

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot