IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI YOGESH KUMAR U.S, JUDICIAL MEMBER

ITA No. 4239/DEL/2017 [A.Y 2008-09]

M/s Showtime Events [I] Pvt Ltd 9/1, Kalkaji Extn. New Delhi	Vs.	The Dy C.I.T Circle - 23(1) New Delhi

PAN : AABCS 7892 N

(Applicant) (Respondent)

Appellant by : Shri Raghvendra Singh, Adv

Department By : Shri Anuj Garg, Sr. DR

Date of Hearing : 17.08.2023

Date of Pronouncement : 22.08.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the ld. CIT(A) – 22, New Delhi dated 05.04.2017 pertaining to Assessment Year 2008-09.

2. The grievance of the assessee is two fold – firstly, the assessee has challenged the assumption of jurisdiction by the Assessing Officer u/s 147 of the Income-tax Act, 1961 [the Act, for short] and secondly, the assessee is aggrieved by the disallowance of Rs. 2,78,75,055/-.

3. Since the challenge to the reopening of the assessment goes to the root of the matter, we will address it first.

4. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

5. The chronological sequence of events needs to be understood for the proper appreciation of the facts of the case in hand.

6. On 27.09.2008, the assessee filed its return of income declaring total income of Rs. 1,33,95,720/-. Returned income included a sum of Rs. 2,78,75,055/-, which was part of the fees received from TATA Steel Limited on account of an event to be organized by the assessee for TATA Steel Limited.

7. Vide letter dated 20.08.2007, the company informed the assessee that due to some unavoidable circumstances, the centenary celebrations event is cancelled and asked the assessee for refund of the amount so paid. The assessee returned Rs. 2,78,75,055/- and on 21.04.2009, revised its return of income by reducing Rs. 2,78,75,055/- from the originally returned income and declared a loss of Rs. 1,44,79,334/-.

8. On 24.11.2009, the assessee informed the Assessing Officer about the revised return of income and the reasons for the same. On 07.1.2010, the Assessing Officer completed assessment u/s 143(3) of the Act on the basis of the revised return and assessed the total income at a loss of Rs. 1,42,65,253/-. On 14.10.2011, the Assessing Officer assumed jurisdiction u/s 154 of the Act and rectified the order dated 07.12.2010 and recomputed the income at Rs. 1,36,09,802/-.

09. The assessee preferred an appeal before the ld. CIT(A), who allowed the appeal of the assessee vide order dated 14.10.2011.

10. On 29.03.2014, the Assessing Officer assumed jurisdiction u/s 147 of the Act by issuing notice u/s 148 of the Act. Reasons for the belief that income has escaped assessment are as under:

Reasons for belief that income has escaped assessment:

The assessment was completed u/s 143(3) on 07.12.2010 at a loss of Rs. 1,44,79,334/-.

1) It has come to the notice that the assessee company has filed original return of income at Rs. 1,33,95,720/- declaring turnover of Rs. 36,87,52,253/- as shown in the e filing of return of income filed by the assessee. Later on assessee company revised its return of income, and after this revision, declared a returned loss at Rs. 1,44,79,334. As per the revised return the turnover of the company is Rs. 34,08,77,743 instead of Rs 36,87,52,798 as shown in the original return.

2) In the original return as well as revised return, (Col No. 1 of the Part A – P&L) Sales/Gross receipts of business or profession is shown Rs. 36,87,52,798/-. Thus in both the returns (original as well as revised) the gross receipt remains the same. In the Audit Report also the 'Gross Income from Operation' remains the same. Thus by virtue of revised return assessee has reduced his income from income of Rs. 1,33,95,720 to a loss of Rs. 1,44,79,334.

3) This fact of under disclosure of turnover by Rs. 2,78,75,055 (36,87,52,789-34,08,77,743) was pointed out by Audit scrutiny vide their half margin No. 7 dated 16.09.2011. It was further pointed out that this has resulted in over assessment of loss of Rs. 1,42,65,253 and under statement of income by Rs. 1,36,09,802 involving tax effect of Rs. 94,74,731. Notice u/s 154 was subsequently issued to the assessee on 26.09.2011 fixing the case for 10.10.2011. The assessee neither responded to this nor filed written reply. Hence, order u/s 154 was passed on 14.10.2011 revising the total income to Rs. 2,78,75,055. The assessee appealed to the Ld. CIT(A) against the order passed u/s 154. The Ld. CIT(A) vide order dated 21.05.2013 partly allowed the assessee appeal with the following remarks :-

"As per section 139(5), return can be revised only if any omission or wrong statement is discovered in the original return. In this case, the appellant did not discover an omission or wrong statement in the original return. The revision of return was prompted by an event which occurred subsequent to filing of the original return and was not on account of an omission a wrong statement.

The return, therefore, could not be revised. The AO is directed to take action under appropriate provisions of the Act in view of this fact and examine the allowability of expenditure claimed during the relevant year."

In view of the discussion in paras above it is clear that the return filed u/s 139(5) deserves to be rejected. However, since the assessee has himself revised his turnover from Rs. 36,87,52,523/- to Rs. 34,08,77,743/- without any change in the gross receipt credited to the P&L a/c, he himself has reduced his income of Rs. 1,33,95,720/- to loss of Rs. 1,44,79,334/-.

Therefore, I have reason to believe that an income of Rs. 2,78,75,055/- (1,44,79,334+1,33,95,720) has escaped assessment within the meaning of section 147 of the I. T. Act 1961. In view of the above, as per provisions of section 151, it is requested to kindly accord approval for issuance of notice u/s 148 for the AY 2008-09.

23/10/2013

(Arkendra Singh)
Dy. Commissioner of Income Tax
Circle-8(1), New Delhi

11. This assumption of jurisdiction is under challenge as the notice u/s 148 of the Act has been issued after four years. Therefore, the first proviso to section 147 of the Act is clearly applicable.

12. A perusal of the reasons mentioned hereinabove show that there is no finding by the Assessing Officer that there was failure on the part of the assessee to disclose fully and truly all material facts during the original assessment proceedings. Therefore, the provisions of the 1st

proviso to section 147 of the Act squarely apply wherein it has been provided that there has to be a failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and reasons recorded by the Assessing Officer should specifically record such failure based on a tangible material and non recording of the same would render the entire reassessment null and void.

13. Our view is fortified by the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Haryana Acrylic Manufacturing Company 308 ITR 38 wherein the Hon'ble High Court has held as under:

> ***"20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147***

could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade (P.) Ltd.'s we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above."

14. In light of the decision of the Hon'ble High Court of Delhi [supra], we are of the considered view that the Assessing Officer has grossly erred in not pointing out the failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment framed vide order dated 31.12.2008 u/s 143(3) of the Act. This, in itself, is sufficient to quash the reopening of the assessment.

15. In light of the aforementioned reasons, facts on record show that after revising the return of income, the assessee himself brought to the notice of the Assessing Officer the reasons for revising the return of income and assessment was completed on the revised return of income. Therefore, it was well within the knowledge of the Assessing Officer the refund of Rs. 2,78,75,055/-, which means that while assuming jurisdiction u/s 147 of the Act, there was no new tangible material evidence and, therefore, the ratio laid down by the Hon'ble Supreme Court in the case of Kelvinator of India Limited 320 ITR 561 squarely apply.

16. We find that while dismissing the challenge of the assessee, the ld. CIT(A) has followed the decision of the Hon'ble Delhi High Court in the case of Consolidated Photo & Finvest Ltd 281 ITR 394 which decision as held to be not expounding a good law as held by the Hon'ble High Court of Delhi in the case of KLM Royal Dutch Airlines 292 ITR 49. The relevant part reads as under:

> "The Full Bench of this Court in Commissioner of Income-Tax v. Kelvinator of India Ltd. [2002] 256 ITR 1 had opined that the amendments introduced into Section 147 with effect from 1.4.1989 have not altered the position that a mere change of opinion of the AO was not

sufficient ground for embarking on a reassessment. Calcutta Discount was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the AO concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax , inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section of Section 143, but under the third Sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view in this case that of the Gujarat High Court as in Gruh Finance Ltd. v. Joint Commissioner of Income-Tax (Assessment) , Praful Chunilal Patel v. M.J. Makwana, Assistant CIT and Garden Silk Mills Ltd. v. Deputy CIT (No. 1), . The Full Bench of this Court has taken into consideration both Praful Chunilal Patel as well as Garden Silk Mills. In Kelvinator the Full Bench had also analysed the earlier Division Bench decisions, namely, Jindal Photo Films Ltd. v. Deputy Commissioner of Income-Tax presided over by R.C. Lahoti J. (as learned Chief Justice of India then was) and Bawa Abhai Singh v. Deputy Commissioner of Income-Tax [2002] 253 ITR 83 comprising Arijit Pasayat and D.K. Jain Page 0602 (as their Lordships then were). It is quite possible that had the Court in Consolidated Photo been made aware of the consistent opinion of this Court in Jindal Photo and Bawa Abhai

Singh, their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court.

17. Similarly, the Hon'ble High Court of Delhi [Full Bench] in the case of Usha International Ltd 348 ITR 485 has held as under:

"11. Accordingly, we hold that the following observations in Consolidated Photo and Finvest Limited (supra) do not reflect the correct legal position:

> "In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it

must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is

important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

12. The said observations have been rightly held to be contrary to the Full Bench decision of the Delhi High Court in Kelvinator of India Limited (supra) in Eicher Limited (supra). The said decision in Eicher Limited (supra) makes reference to the decision of KLM Royal Dutch Airlines vs. Assistant Commissioner of Income Tax [2007] 292 ITR 49 (Delhi). KLM Royal case (supra) deals with some other issues on which we do not express or make any observation approving or disapproving. Some of these aspects have been considered and explained in other decisions in light of the judgment of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 500".

18. In the same judgment, the Hon'ble Delhi High Court further held:

"(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing

Officer had formed an opinion in the original assessment, though he had not recorded his reasons."

19. Considering the totality of the facts in light of the aforementioned decisions, we are of the considered view that the assumption of jurisdiction for reopening the assessment by the Assessing Officer is bad in law and notice u/s 148 of the Act deserves to be quashed and consequent assessment order also deserves to be quashed.

20. Since we have quashed the assessment order, we do not find it necessary to dwell into the merits of the case.

21. In the result, the appeal of the assessee in ITA No. 4239/DEL/2017 is allowed.

The order is pronounced in the open court on 22.08.2023.

Sd/-	**Sd/-**
[YOGESH KUMAR U.S**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 22nd August, 2023.

VL/

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	