

**Income Tax Appellate Tribunal
Delhi Bench "G": New Delhi
Before Shri M. Balaganesh, Accountant Member
and
Shri Anubhav Sharma, Judicial Member**

ITA No. 3246/Del/2019
(Assessment Year: 2008-09)

ACIT(OSD),
Ward-22(1),
New Delhi

Vs. S. S. Gas Lab Asia P. Ltd,
A-6/3, Jhilmil Industrial Area,
Shahdara, Delhi

(Appellant)

(Respondent)

PAN: AAKCS1928C

CO No. 54/Del/2023
(In ITA No. 3246/Del/2019)
(Assessment Year: 2008-09)

ACIT(OSD),
Ward-22(1),
New Delhi

Vs. S. S. Gas Lab Asia P. Ltd,
A-6/3, Jhilmil Industrial Area,
Shahdara, Delhi

(Appellant)

(Respondent)

PAN: AAKCS1928C

Assessee by :
Revenue by :

Shri Sanjay Kumar Bindal, CA
Shri Anuj Garg, Sr. DR

Date of Hearing

03/10/2023

Date of pronouncement

05/10/2023

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No. 3246/Del/2019 filed by the Revenue and CO No. 54/Del/2023 387/Del/2021 filed by the assessee for AY 2008-09, arises out of the order of the Commissioner of Income Tax (Appeals)-8, New Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. 10208/16-17 dated 08.02.2019 against the order of assessment passed u/s 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 09.03.2016 by the Assessing Officer, ITO, Ward-22(1), New Delhi (hereinafter referred to as 'Id. AO').

2. The revenue has raised the following grounds of appeal :-

"1. Whether on the facts and circumstances of the case and in law, the Id CIT(A) erred in allowing exemption u/s 10B to the assessee although the assessee has not carried out any manufacturing activity."

3. The assessee has raised the following grounds in cross objection:-

"1. The CIT (Appeal) erred in law and on facts in not adjudicating the grounds taken regarding reopening of the assessment by issuing notice u/s 148 of the Act ignoring that –

a) the conditions laid down by law for issuance of notice u/s 148 have not been complied with;

b) the notice u/s 148 was issued solely on the basis of audit objection without application of mind by the AO and even when he was in disagreement;

c) the notice u/s 148 was issued merely on change of opinion on the same set of facts without any fresh tangible material to show any escapement of income; and

d) the original assessment was completed u/s 143(3) of the Act and the case was reopened after more than four years without recording any reason regarding failure of the assessee to disclose fully and truly all material facts necessary for its assessment."

4. At the outset, we find that the cross objection preferred by the assessee is delayed by 1168 days. The Id AR submitted that Form 36 filed by the Revenue was not served on the assessee. In the first round of proceedings before this Tribunal, the revenue's appeal was dismissed by applying CBDT Circular No.17/2019 dated 08.08.2019 stating that the tax effect involved in the appeal was less than the monetary limit prescribed by the CBDT Circular for preferring appeal before this tribunal. Later revenue preferred miscellaneous application before this tribunal on the ground that the case falls under the exception to the aforesaid CBDT Circular. At this juncture, the assessee was provided the entire sets of original Form 36 filed by the revenue, grounds of appeal of the revenue, Tribunal Order disposing of the appeal of the revenue and miscellaneous application filed by the revenue. Since the main appeal of the revenue was already disposed by this tribunal, the assessee could not file any cross objection before this tribunal. The miscellaneous application preferred by the revenue was ultimately heard on 03.05.2023 and disposed of on the same date by recalling the order passed by this tribunal. Immediately the

assessee has preferred cross objection before this tribunal on 09.05.2023. Hence, we hold that there is no delay at all on the part of the assessee in preferring cross objection before us. Accordingly, the cross objection filed by the assessee is hereby admitted and taken up for adjudication.

5. We have heard the rival submissions and perused the materials available on record. We find that the assessee in its cross objection has challenged the validity of assumption of jurisdiction u/s 147 of the Act by the Id AO on various facets. The original return of income was filed by the assessee u/s 139(1) of the Act for AY 2008-09 on 29.09.2008 declared Nil income. This return was revised u/s 139(5) of the Act on 10.10.2009. The assessment was completed considering the revised return by the Id AO in the original scrutiny assessment proceedings u/s 143(3) of the Act on 02.02.2011 determining the total income of the assessee at Rs. 5,10,780/-. Later, this assessment was sought to be reopened by the Id AO u/s 147 of the Act by recording the following reasons:-

"Income Tax Officer, Ward 22(1), New Delhi

Name of assessee: M/S S.S.Gas Lab Asia PVT. LTD PAN AAKCS1928C - A.Y. 2008-09

Sub: Proposal for re-opening u/s 147 of Income Tax Act 1961 in case of M/S S.S.Gas Lab Asia PVT. LTD., A-6/3, Jhilmil Indl. Area. Shahdara, Delhi-110092 for A.Y. 2008-09-PAN AAKCS1928C-

The assessee filed original return of income on 29.09.2008 and revised on 10.10.2009 declaring income at Rs. Nil after claiming 100% deduction u/s 10B of the Act. The company is engaged in manufacture of Gas Plant used in manufacturing of gases like CO₂, Hydrogen. Nitrous Oxide etc. The manufacturing activity of the company was started in the year relevant to the assessment year under consideration. It claimed 100% deduction equivalent to the profit earned during the year u/s 10B at Rs.1,30,19,910/- being 100% export oriented unit. However, during the assessment u/s 143(3) dated 02/02/2011 deduction of Rs.1.29,82,355/ was allowed and

income of Rs. 37,615/- from other sources was excluded from the purview of deduction

Subsequently, it has been observed that out of the total purchases of Rs.4,68,47,462/-, purchases amounting to Rs.3,08,67,880/- were made on 'H' form of Central Sales Tax which is called penultimate sale. It is a pre-condition for issue of H form to the seller that same goods which are sold in penultimate sale should be exported ie the goods sold by the exporter must be the same as have been acquired by him from his penultimate supplier. Thus, the purchaser cannot perform manufacturing process on the goods so purchased it it is issuing form 'H' to the seller Whereas for claiming deduction u/s 10B of the Act, the undertaking must have produce or manufacture article or things aongwith other conditions in order to claim the deduction u/s 10B. Thus, the very condition for claiming the deduction u/s 10B was not satisfied.

The mistake resulted in incorrect consideration of purchases amounting to Rs.2,34,04,972/- 13,08,67,880 closing stock Rs.74,62,9081; the corresponding sales of these purchases comes to Rs.3,48,73,408/- (1.49 times of purchases] and profit on this sales worked out Rs.72,04,846/- (20.66% of Gross T.O.)

Thus, the exemption u/s 10B has been allowed in excess by Rs 77,04,846/- which resulted in under assessment of income of Rs.72,04,846/. The same needs to be brought to tax."

6. From the perusal of the aforesaid reasons, it is very clear that there is absolutely no whisper about the failure on the part of the assessee to make full and true disclosure of all material facts relevant for the purpose of assessment in the original assessment proceedings before the Id. AO. Admittedly, the notice u/s 148 of the Act was issued to the assessee on 03.03.2015 which is beyond the period of 4 years from the end of the relevant assessment year. Hence, the proviso to section 147 of the Act would come into operation. As per the said proviso, the Id AO is bound to duly mention the failure on the part of the assessee to make full and true disclosure of all material facts relevant for the purpose of assessment. We find that this issue is no longer res integra in view of the decision of the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd Vs. R. B. Wadkar reported in 268 ITR 332 (Bom). The relevant operative part of the said order is reproduced herein:-

"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."

7. In view of the above observations and respectfully following the aforesaid decision of Hon'ble Bombay High Court, we hold that the Id AO had invalidly assumed the jurisdiction u/s 147 of the Act as is evident from the aforesaid reasons reproduced. Hence, the reopening deserves to be quashed and is hereby quashed. Since, the reassessment itself is quashed, the ground raised by the revenue on merits of the addition need not be gone into and they are left open.

8. In the result, cross objection of the assessee is allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on 05/10/2023.

-Sd/-
(Anubhav Sharma)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 05/10/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi