

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

BEFORE

**SHRI R.K. PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER**

आ.अपी.सं / **ITA No.1718/Hyd/2018**
(निर्धारण वर्ष / Assessment Year: 2008-09)

The Deputy Commissioner of Income Tax, Circle – 17(1), Hyderabad.	Vs.	M/s. DRS Logistics Private Limited, Secunderabad. PAN : AAACD7182R
अपीलार्थी / Assessee		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri KC Devdas.
राजस्व द्वारा/Revenue by: Shri K. Madhusudan. Sr. AR

सुनवाई की तारीख/Date of hearing: 26.09.2023
घोषणा की तारीख/Pronouncement on: 17.10.2023

ORDER

PER LALIET KUMAR, J.M.

This appeal is filed by the assessee, feeling aggrieved by the order of Commissioner of Income Tax (Appeals) – 5, dt.12.06.2018 invoking proceedings under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short, “the Act”).

2. The grounds raised by the assessee read as under :

“1. The learned CIT(A) has erred both in law and on facts of the case.

2. The learned CIT(A) erred in holding that the reopening u/s. 147 is bad in law and out of jurisdiction as there is no tangible material available with the Assessing Officer and it had merely reviewed the details filed before it during the course of original assessment proceedings and not even bothered to form a reason to believe but only desired further verification of the documents so filed.

3. The learned CIT(A) erred in holding that the reopening u/s. 147 is bad in law and out of jurisdiction relying on the judgement of Hon'ble Apex Court in the case of Kelvinator India vs. CIT ignoring the fact that since, the assessing officer in the original assessment order did not form any view or any opinion with regard to the items of income which escaped its notice, it will not amount, to review of the order or change of opinion.

4. The learned CIT(A) erred in holding that the reopening u/s. 147 is bad in law ignoring the decision of Supreme Court in the case of A.L.A. Firm vs. CIT reported in 102 ITR 622 wherein it was held that where the Assessing Officer had not considered the material and subsequently come by the material from the record itself, then such a case would fall within the scope of section 147 of the Act.

5. The learned CIT(A) erred in partly allowing the appeal of the assessee holding that the reopening u/s. 147 is bad in law without adjudicating the case on merits.”

3. The brief facts of the case are that the assessee was in the business of providing transport solutions and logistics. A survey operation u/s. 133A was conducted on 06-10-2008 as on date no return for A.Y. 2008-09 was filed by the assessee company. The return of income was filed on 25.08.2009 declaring income of Rs. 27,16,63,830/-. The notice u/s. 143(2) was issued and the assessment was completed on 31.12.2010 declaring income of Rs.27,22,17,654/-. The case was re-opened u/s. 147 by way of issue of notice u/s. 148 of the Act on 02.11.2012 i.e., within four years of the end of the assessment year. In response to the notice, assessee stated to consider the return originally filed as a return in compliance to notice u/s. 148 of the Act. The assessee was provided reasons for reopening on 27.11.2013,

however the assessee only filed objections on 26.03.2014 vide its letter dated 25.03.2014. The assessment u/s. 143(3) was completed on 29.03.2014 declaring income of Rs. 56,12,97,159/- including the addition on account of Short. Term Capital gain of Rs.22,12,74,800/- and reconciliation of loans of Rs. 3,99,96,124/-. Thus, the Assessing Officer completed the assessment and passed order on 23.03.2014.

4. Feeling aggrieved with the order passed by the Assessing Officer, assessee filed appeal before the Id.CIT(A), who allowed the appeal of assessee.

5. Aggrieved with the order of Id.CIT(A), Revenue is now in appeal before us.

6. Before us, at the outset, Id. DR had drawn our attention to the reasons recorded for reopening of the assessment which reads as under :

REASONS FOR RE-OPENING OF ASSESSMENT U/s 147 OF THE INCOME TAX ACT, 1961

B) On verification of the computation of total income, P & L account and Balance Sheet, it is observed that the assessee company has debited an amount of Rs.66,15,891/- towards loss on sale of assets. However, the assessee had added back the same as inadmissible in the computation of total income.

The details of purchase and sale of lands were submitted by the assessee company, and it is placed on record. As per their submissions the details of purchases are as under :

Location	Purchase amount	Stamp duty	Purchase of trees & katcha house etc.	Cost of construction made by DRS	Total cost
Khajuri Lands	43887500	2616280	68639450	48827710	163970940
Jamalapur Lands	32912500	1956800	37234376	32434413	104538089
Palwai Lands	40021250	2045400	29805000	595000	72466650

<i>Ambala Lands</i>	4408000	88000	9000000	1480000	14976000
Total	121229750	6706480	144678826	833337123	355951679

The lands discussed as above along with certain other lands held by the assessee company were sold during the year, the details of which are as under :

<i>Location</i>	<i>Sale deed amount</i>	<i>Stamp duty</i>	<i>RC Charges</i>	<i>Total cost</i>
<i>Khajuri Lands</i>	154674500	9280520	75000	164030020
<i>Jamalapur Lands</i>	98600000	5915200	60000	104575200
<i>Palwai Lands</i>	68300000	4149000	45000	72494000
<i>Ambala Lands</i>	14080000	844800	70015	14994815
Total	335654500	20189520	250015	356094035

After having verification of several documents in the form of sale deed furnished by the assessee, it is observed that while computing the profits from sale of lands, the cost of acquisition has to be taken at Rs.12,12,29,250/- being purchase consideration and the corresponding stamp duty of Rs.67,06,480/- totaling to Rs.2,79,35,730/- for which evidence by way of purchase deeds were furnished. The excess claim of the assessee company that the cost of acquisition includes purchase of Trees & Katcha House etc. worth Rs.14,46,78,826/- and cost of construction of Rs.8,33,37,123/- cannot be considered for want of necessary corroborative evidence. Hence, it is evident that the transactions relating to purchase and sale of above mentioned lands results in Short Term Capital Gains and not loss on sale of assets as computed by the assessee company. As per the observation made above the computation of Capital Gains is as under:

'Sale consideration received from Sale of Khajuri Lands, Jamalpur lands, Palwai Lands & Ambala Lands :Rs.33,56,540/-

Less : Cost of acquisition of above lands along with Stamp duty. :Rs. 12,79,35,730/-
.....
Rs.20,77,18,770/-

Add: Capital Gains from New Bombay project and Narshingpur Rs. 1,35,56,030/-

Total Short Term Capital Gains Rs.22,12,74,800/-

This has resulted into short computation of total income of Rs.22,12,74,800/- with a tax effect of Rs.10,00,31,035/-.

After verification of the facts from the assessment record this aspect needs thorough verification.

B) Besides the above it is also observed that deficiencies in the interest calculation u/s 234A and belated payments of employee's contribution to PF amounting to Rs.2,90,551/- needs to be disallowed aggregating short computation of tax to the tune of Rs.23,43,411/- (Rs.22,12,063/- u/s 234A + Rs.1,31,348/- U/s. 43B).

C) Observations :

v) It is observed that from the tax audit report, the assessee has granted loan to 21 parties and the max. amount involved during the year and the balance such loans aggregates to Rs.73,75,67,314/- and Rs.51,10,10,735/-. However on verification of financial statements, it is noticed from the balance sheet that the loans and advances shown under the head amounted to Rs.35,82,99,073/- only. Difference of Rs.15,27,11,662/- worked out which needs thorough examination. Besides which even if the advances recoverable in cash or in kind of Rs.11,27,15,532/- shown under the same head is taken into account, then also there will be difference of Rs.3,99,96,124/-. Which needs reconciliation.

vi) It is seen from the P&L A/c, Balance sheet with reference to the return and observed that, the assessee company given loans of Rs.91,96,825/- and Rs.18,64,745/- to group concerns M/s Paramount Steels and M/s DRS Packers and Transporters (P) Ltd.,. Theses concerns are nothing but share holders of the assessee company and arc holding Rs. 1,89,00,000/- and Rs.98,00,000/- worth shares which is 32.44% and 16.82% of the total share holding of the assessee company. During the year .under relevance the assessee is having accumulated profits to the extent of Rs.41,29,13,143/- Hence the provisions of deemed dividend as per section 2(22)(e) clearly attracted in the said concerns. Which needs through examination.

vii) On perusal of information submitted, it is observed that the directors of Sri Dayanand Agarwal and Rajender Agarwal are holding 132765 & 58590 shares worth Rs. 1,32,76,500/- and Rs.58,95,000/- which is 22.79% and 10.12% of the total share holding of the assessee. On perusal of information filed by the assessee on 30.11.2010 it was came to notice that it was stated that there was a mistake in statement of details of enquiry share holders as on 31.03.2008 submitted earlier due to reason that the said balance sheet was ended on 23.07.2009 and filed revised list of equity, shareholders as per which shares held by Sri Dayanand Agarwal and Sri Rajender Agarwal came down the value of Rs.22,82,500/- and Rs.24,85,400/- which is 3.92% and 4.27% of the total share holding of the assessee. The genuineness of the transaction needs to be verified. Other wise, the provisions of deemed dividend u/s

2(22)(e) of Income Tax Act, 1961 will attracts. Therefore, this aspect needs thorough examination.

viii) Further it is noticed from the tax audit report that certain discrepancies pointed out in para no.5(a), to (i) of the Auditor's report, Para Nos (iii)(a) & (b) and ix(a) of annexure to Auditor's report and also of the fact that the accounts have been audited beyond the specified date. This aspect needs thorough verification and feasibility of launching penalty provisions u/s 271 B and reference can be made 142(2A) for the special audit may be looked into."

6.1. On the basis of the above, it was submitted by the ld.DR that the Assessing Officer has formed prima facie reason to believe on the basis of material available on record that there was an under assessment or escapement of income after completion of scrutiny assessment. Further, the ld.DR has submitted that there is no change of opinion and that reasons for reopening of assessment were recorded on the basis of the material available on record. Lastly, it was submitted by the ld.DR that the reasons for reopening of assessment and the documents available on record shows nexus between the escapement of income and reopening of assessment and therefore, he submitted that the reopening of assessment was made in accordance with the law.

6.2. To substantiate its case, the Revenue has relied on the following decisions :s

1. Decision of the Hon'ble High Court in the case of CIT Vs. Usha International Limited - (2012) 348 ITR 485.
2. Decision of Hon'ble Madras High Court in the case of A.L.A. Firm Vs. CIT, Madras – (1976) 102 ITR 622.
3. Decision of Hon'ble Supreme Court in the case of A.L.A. Firm Vs. CIT, Madras – (1991) SCR(1) 624.
4. DCIT Vs. M/s. Nikhil Refineries Pvt. Limited – (ITA No.2217/Hyd/2018 dt.29.08.2022)

7. Per contra, the ld.AR has submitted that the reading of the reasons placed on record clearly shows that the re-opening was done on the basis of available material and not on the basis of new material which came to the notice of the Assessing Officer. He submitted that this is clear from the reasons for reopening of the assessment as reasons clearly shows that reopening had been done for (“thorough verification”). It was submitted that the details were called for by the Assessing Officer in the original assessment proceedings and he has drawn our attention to the questions and answers given by the assessee in response to the scrutiny assessment. Our attention was drawn to page 1 of the paper book wherein the assessee has provided the details of land purchased and sold to the Assessing Officer along with copies of sale deeds etc (Annexure VII & VIII). It was submitted that once the documents were available on record with the Assessing Officer while passing the original assessment order and the Assessing Officer has formed an opinion based on such document, thereby accepting the income declared by the assessee. Hence, no fresh addition can be made in the garb of reopening of the assessment as the material was already available with the Assessing Officer, as it amounts to change of opinion.

8. The ld.AR has drawn our attention to the original assessment order passed in the case of assessee and our attention was drawn to pages 4 and 5 of the assessment order wherein the Assessing Officer has mentioned to have examined the record furnished by the assessee. It was submitted that the Assessing Officer in the reasons has mentioned that details of purchase and sale of land were submitted by the assessee and it was placed on record during the scrutiny assessment. It was submitted by the ld. AR that the order passed by the Assessing Officer is in accordance with the law and the ld.CIT(A) has

correctly held that there was no tangible material available with the Assessing Officer to reopen the assessment. He has also drawn our attention to Page 28 onwards of the order of Id.CIT(A). Lastly, it was submitted by the Id.AR that on the basis of the audit report, the reopening cannot be made. It was submitted by the Id.AR that the law is fairly settled that no reopening can be made based on the audit objections and for that purpose, he has drawn our attention to the following decisions :

1. *PCIT Vs. Gujarat Narmada Valley Fertilizer and Chemicals Limited - 422 ITR 164 (Gujarat High Court).*
2. *Sassoon J. David & Co., (P) Ltd Vs. CIT - 118 ITR 261 (Hon'ble Supreme Court)*
3. *CIT Vs. Walchand and Co., (P) Ltd., - 65 ITR 381 (Hon'ble Supreme Court).*

9. We have heard the rival submissions and perused the material on record. The assessee company submitted a return of income on 25/08/2009, declaring an income of Rs.27,16,63,830/-. The assessment was taken for scrutiny assessment and accordingly notices were issued calling for details. The assessee vide its letter dated 03/12/2010 replied to all the queries raised by the assessing officer and provided copy of the entire purchase and sale of land documents which was subject matter of capital gains to the Assessing Officer. The assessee also filed a tax audit report in form 3CA/3CD giving all the necessary details which acted as an "aide memoire" to the assessing officer (page 3 of the paper book). The Assessing officer after taking into account all the details filed by the assessee, completed the assessment under section 143(3) of the I.T Act on a total assessed income of Rs.27,22,17,654/- after verification of the information submitted by the assessee company from time to time. The passing of the assessment order pursuant to the receipt of the information from the assessee clearly shows the application of

mind on the issues involved and thereafter computing the income of the assessee to Rs. Rs.27,16,63, 830/- by the Assessing Officer.

10. In the present case, the proceedings under section 147/148 and the reasons recorded for the opening of assessment were provided to the assessee which are reproduced hereinabove.

10.1. The reasons recorded shows that the assessing officer wanted **verification of the computation of total income**, profit and loss, account and balance sheet and observed that the assessee company has debited an amount of Rs.66,15,891/- towards loss on sale of assets which was added by the assessee as it not deductible in the computation of its total income filed.

10.2. The second paragraph of the reasons recorded clearly shows that the details of purchase and sale of lands were submitted by the company, and it was placed on record. In fact, the said details were captured by the Assessing Officer in the reasons only from the assessment record and from the reply submitted by the assessee. Thus, the entire details for purchase and sale of land were submitted originally and this finds a place very clearly in the reasons recorded and thus the submission of the assessee company that full details in relation to the purchase and sale of land etc were completely disclosed during the course of the original proceedings.

10.3. In the reasons, Assessing Officer has opined that reopening is essential for 'thorough verification'.

10.4 The assessee in response to the objection to the reopening had mentioned at page 9 of the paper book that the reopening was done based on the Audit Objection raised by the Additional CIT (Audit) vide his order dated 15/11/2011 and the reopening was not made based on any finding by the assessing officer that it has escaped assessment.

10.5 The question whether the reopening can be made on the basis of audit objection, is no more res integra as the Hon'ble Supreme Court in the case of Indian & News Paper Society Vs. CIT (1979) 119 ITR 996 (SC), CIT Vs. Sat Ram Mangat Ram (2009) 312 ITR 100 held that the reopening based on audit objections is unsustainable. The Hon'ble Delhi High Court in the case of Xerox Modicorp Ltd. Vs. DCIT (2013) 350 ITR 308 has also decided the issue in similar lines.

10.6 The ld.CIT(A) had elaborately dealt with the reasons for reopening in the order and after referring to the reasons recorded which itself clearly stated the purchase of trees, Kacha houses and cost of construction which was duly indexed and the capital loss was computed by the assessee. The reasons recorded according to the CIT (A) stated that the assessing officer in reassessment proceedings was trying **to re-verify the computations** made, and also submitted that the direction of assessing officer in accepting the claims of the appellant was after verification of several documents accepted the claim of the appellant and that there was no income escaping assessment as the reasons recorded only stated that it needed verification and further verification which cannot be the basis for the opening of an assessee.

11. In our view, the reasons for reopening recorded that the entire reopening has been made on the basis of reappraisal of evidence already filed during the course of the assessment proceedings and also to verify and also thoroughly re-verify the facts originally filed. Undoubtedly, the entire material / documents on the basis of which the reasons for reopening were recorded were already available in the assessment record as mentioned in the reasons to reopen itself and no fresh and tangible material was with the Assessing Officer to reopen the concluded assessment. In our view, there has to be some fresh and tangible material available for the purposes of reopening with the Assessing Officer to reopen the assessment.

11.1. In the present case, all the sale and purchase documents were duly provided by the assessee in the scrutiny assessment and thereafter, the Assessing Officer has passed the assessment order. No fresh material evidence was available with the Assessing Officer to reopen the already concluded assessment. The judgement of the Supreme Court in *Kelvinator India versus CIT* reported in 320 ITR 561 clearly states that there should be some tangible material to re-open an assessment and an assessment cannot be re-opened to reappraise or verify or to reverify concluded assessment when the assessing officer has applied his mind to all the details in relation to the computation of capital gains and which were accepted in the original assessment proceedings after due verification and as seen from the preamble to the assessment order passed under section 143 (3) on 31/12/2010 which clearly states that the company submitted all the information called for and explained the return of income and after due verification of the information submitted the assessment was completed on 31/12/2010 under 143(3) of the I.T Act, 1961.

12. Further, we are also of the opinion that reopening cannot be made for the purpose of thorough verification. Before initiating extreme step of reopening, there has to be some tangible and concrete material with the Assessing Officer in the form of fresh evidence on the basis of which reopening can be made. Based on such material the Assessing Officer should form an opinion with respect to escapement of income. The Hon'ble Supreme Court in the case of ACIT vs. ICICI Securities dealership reported in 348 ITR 299 held that where accounts were furnished by assessee when called upon and thereafter the assessment was completed u/s. 143(3), subsequently on a mere re-look of the said account earlier furnished by the assessee it is not permissible u/s.147 to reopen the assessment. Similarly, the Hon'ble Bombay High Court in Hindustan Lever Ltd vs. R.B. Wadker reported in 268 ITR 332 held that the Assessing Officer must disclose in the reasons as to which fact or material was not disclosed by the assessee to establish the vital link between the reasons and evidence. Thus, the initiation of reassessment proceedings by the AO is not in accordance with law. Similar views were also expressed by the Hon'ble Bombay High Court in the case of Digil Electronics (P.) Ltd. Vs. Assistant Commissioner of Income-Tax reported in [2023] 148 taxmann.com 184 (Bombay) wherein it was held as under :

"9. We have heard the learned Counsel at length. We are in agreement with the contention of the Petitioner and we find that the contentions raised in the affidavit in reply are completely different from the reasons which states:

*"High risk transaction to be verified have been updated under the new system. In this case high risk transaction has been reported.";
and*

"Finding of the AO: There is credible information received on the Insights portal that high risk transactions have taken place in the case of the assessee which needs to be verified"

and the paragraph 5 of the affidavit in reply states as under:

"... the Cash credits and subsequent debits in the current account of the assessee."

We could not find any mention about the "cash credits and subsequent debits" in the reasons recorded. Moreover, as per the reasons itself the said transactions were to be verified. Hence there was a clear departure from the stand. There is no averment in the reply that would suggest that the information was verified and thereafter approval was taken. We are in agreement with the petitioner's counsel who placed reliance on the following Judgments:

(i) Hindustan Lever Ltd. (supra) Wadkar.

(ii) Aroni Commercials Ltd. v. Dy. CIT [2014] 44 taxmann.com 304/224 Taxman 13/362 ITR 403 (Bom.).

(iii) Peninsula Land Ltd. v. Asstt. CIT [2022] 134 taxmann.com 33/284 Taxman 556/439 ITR 582 (Bom.).

(iv) First Source Solutions Ltd. v. Asstt. CIT [2021] 132 taxmann.com 121/438 ITR 139 (Bom.).

10. Having perused the reasons and the information, we find no new tangible material as contended by the respondents. Debits and Credits can in no way disclose the nature of transactions or lead to an inference of income escaped assessment. **The respondents have not taken any ground of extrapolation. The debits and credits cannot be a ground for further enquiry and verification and the same is impermissible.**

(Emphasis supplied by us).

We find no live link or nexus between the information received and the income escaping assessment. The Petitioner is carrying on a retail business of electronic appliances. Usually, appliances would be supplied to clients wherever required and payment would be received in cash upon delivery. Therefore, the cash deposits from various places cannot be doubted be considered suspicious transactions. In our view, there is no prima facie case made out that income has escaped assessment. The Petitioner has fully and truly disclosed all the material facts and there is no specific averment to show what material fact was required to be disclosed by the Petitioner that is not disclosed. The ratio of the Judgment in the case of Lakhmani Mewal Das (supra) that the reasons for formation of the belief must have rational connection with or relevant barring on formation of belief is squarely applicable to the present case. The Petitioner in the present case has filed Tax Audit reports and has shown total turnover in the sum of Rs. 189 Crores. The cash deposits which find mention in the affidavit in reply is a sum of Rs. 11 Crores. Being in the retail

business of trading in electronic items, this is not a large sum that would lead to a belief that the income has escaped assessment. The respondent No. 1 ought to have made prior enquiries about the nature of business before considering reopening of the assessment, which they have failed to do. We also find that the respondent No. 2 has not applied his mind before granting approval under section 151 of the Act. We have seen the details mentioned in the rejoinder by the Petitioner which shows that out of 8 accounts mentioned, only 3 accounts belong to the Petitioner and the other 5 accounts did not belong to the Petitioner. It appears that from the table at page 181 that there was no application of mind. It can also be seen from the averments in the rejoinder that although total cash deposits mentioned at page 151 is only Rs. 11.52 Crores as against the figure of Rs. 103 Crores mentioned in the reasons recorded, it also appears that the cash deposit was for a period of 21st November, 2014 till 20th November, 2015 and consequently, did not fall in the year under consideration. The respondent has also not disputed that the Petitioner is operating from approximately 25 different shops of varied sizes at different locations and not only from a rented commercial premises of area between 500 to 1000 sq.ft.

11. In the impugned order it has been stated that sufficiency of material is not required to be gone into at that stage. The decision of the Apex Court in the case of Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 is vaguely relied upon. It is further vaguely stated information about the account balance is provided. There is no reason provided as to why the debit and credit transaction had no mention in the recorded reasons nor was there meaningful averment with regard to the nature of transaction. It is pertinent to note that whilst the order has been passed by NFAC the reasons are recorded by respondent No. 1 to which there is no explanation in the affidavit in reply. In our view the response in the impugned order as to the nature of transaction, and as to how it makes it suspicious are missing. We also find that the decision of the Apex Court in the case of GKN Driveshafts (I) Ltd. (supra) and the decision of this Court in the case of Asian Paint Ltd. (supra) are also not followed.”

13. The facts of the present case are similar to that of the case before the Hon'ble Bombay High Court in the case of Digil Electronics (P.) Ltd (supra). Therefore, respectfully following the decision of Hon'ble Bombay High Court and the Hon'ble Supreme Court in the case of ACIT vs. ICICI Securities Dealership (supra), we do not find any merit in the appeal of Revenue. Accordingly, the order of Id.CIT(A) is upheld and the appeal of the Revenue is dismissed.

14. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 17th October, 2023.

Sd/-

Sd/-

(R.K. PANDA) VICE PRESIDENT	(LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 17th October, 2023.

TYNM/sps

Copy to:

S.No	Addresses
1	M/s. DRS Logistics Private Limited, 321, 3 rd Floor, Kabra, Complex, 61, Mahatma Gandhi Road, Secunderabad.
2	The Dy.Commissioner of Income Tax, Circle – 17(1), Hyderabad.
3	Pr.CIT - 5, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order