

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE "A" BENCH : PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

I.T.A.No.923/PUN./2023
Assessment Years 2011-2012

Khed Economic Infrastructure Pvt. Ltd., Level-4, Amar Avinash Corporate Plaza, S.No.11, 11/1 to 11/4, Plot No.D/2, Bund Garden Road, Pune. PIN – 411 001 PAN AADCK2683F Maharashtra.	vs.	The DCIT, Circle-14, Aayakar Sadan, Bodhi Tower, 548/2B, Salisbury Park, Gultekdi, Atur Sangtani Park, Lane No.1, Pune – 411 037. Maharashtra.
(Appellant)		(Respondent)

I.T.A.No.924/PUN./2023
Assessment Year 2012-2013

Khed Economic Infrastructure Pvt. Ltd., Level-4, Amar Avinash Corporate Plaza, S.No.11, 11/1 to 11/4, Plot No.D/2, Bund Garden Road, Pune. PIN – 411 001 PAN AADCK2683F Maharashtra.	vs.	The Income Tax Officer, Ward-14 (1), Aayakar Sadan, Bodhi Tower, 548/2B, Salisbury Park, Gultekdi, Atur Sangtani Park, Lane No.1, Pune – 411 037. Maharashtra.
(Appellant)		(Respondent)

I.T.A.No.925/PUN./2023
Assessment Year 2013-2014

Khed Economic Infrastructure Pvt. Ltd., Level-4, Amar Avinash Corporate Plaza, S.No.11, 11/1 to 11/4, Plot No.D/2, Bund Garden Road, Pune. PIN – 411 001 PAN AADCK2683F Maharashtra.	vs.	The Income Tax Officer, Ward-14 (2), Aayakar Sadan, Bodhi Tower, 548/2B, Salisbury Park, Gultekdi, Atur Sangtani Park, Lane No.1, Pune – 411 037. Maharashtra.
(Appellant)		(Respondent)

For Assessee :	Shri Nikhil S. Pathak
For Revenue :	Shri Ramnath P. Murkunde

Date of Hearing :	14.09.2023
Date of Pronouncement :	23.10.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

These assessee's three appeals for assessment years 2011-2012 to 2013-2014, arise against the National Faceless Appeal Centre [in short "NFAC"] Delhi's as many Dins and Orders No.ITBA/NFAC/S/250/2023-24/1053863081(1); 1053864908(1) and 1053867367(1); all dated 22.06.2023, involving proceedings u/s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short "the Act"); respectively.

Heard both the parties at length. Case files perused.

2. Learned counsel representing assessee submits at the outset that his only challenge is to the validity of the impugned reopening(s) in all three assessment years involving sec.148 notice(s) dated 21.03.2018 and 30.03.2019 i.e., beyond a period of expiry of four years from the end of the relevant assessment years [in A.Ys 2011-2012 and 2012-2013] and dated 14.03.2017 i.e., within a period of four years from the end of the relevant assessment year 2013-2014. Learned counsel accordingly submits that the former twin reopenings suffer from the Assessing Officer's action having not

pinpointed the assessee's failure in disclosing all the relevant particulars "fully" and "truly" in his reasons recorded and the last assessment year 2013-2014 is clear-cut instance of "change of opinion" which is not sustainable in law.

3. The Revenue has chosen to place strong reliance on the Assessing Officer's corresponding reopening reasons recorded in all these assessment years forming part of the case records at pages 90 to 92; 54 to 56 and 58 to 59; respectively. Mr. Murkunde first of all took us to the Assessing Officer's identical reopening reasons in the former twin assessment years specifically alleging the assessee's failure in not disclosing the relevant particulars "fully" and "truly" as under:

ANNEXTURE A

Reasons recorded for Reopening of the assessment u/s. 147 of the Income Tax Act, 1961 for the A.Y. 2011-12

1	Name of the Assessee	M/s. Khed Economic Infrastructure Pvt. Ltd.st 1 st Floor, Pride Parmar Galaxy, Cannought Road, Behind Parmar Trade, Pune - 411 001
2	PAN of the Assessee	AADCK2683F
3	Assessment Year	2011-12

The assessee company has filed its return of income for A.Y.2011-12 on 25-09-2011, declaring total income at Rs.NIL. The return was taken up for scrutiny and an order u/s.143(3) was completed on 27-03-2014 accepting the total income as declared i.e. at Rs.NIL.

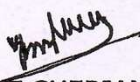
However, from records(return of income, Form No.26AS etc.), it is seen that during the Financial Year 2010-11 i.e. the relevant period for AY. 2011-12, the assessee had claimed TDS of Rs. 24,82,894/- on interest income from six entities viz. HDFC Bank, Axis Bank Ltd, M/s.Khed Developers Ltd., Bank of Maharashtra, Canara Bank and State Bank of India. The interest income earned from these entities which amounts to Rs.2,50,31,571/- should have been offered by the assessee as income from 'Other Source'. However, the assessee has not offered the said interest income for taxation as the income returned is NIL. It is also seen that though the interest earned has not been offered for taxation, yet the assessee claimed credit for TDS made on such interest income earned.

Similar issue was involved for AY.2013-14 also wherein the assessee had earned interest of Rs. 4,52,48,651/- and credit for TDS on the same has also been claimed by the assessee. However, it is seen that the assessee company has netted out the interest earned on the deposit against infra development & pre-operative expenditure incurred and capitalized during the year. Therefore, the case was taken up for scrutiny for A.Y.2013-14 and an order u/s.143(3) r.w.s. 147 was completed on 27-12-2017 wherein an amount of Rs. Rs. 4,52,48,651/- has been brought to tax as assessee's income from other sources.

It appears that for the year under consideration also(i.e.AY.2011-12), the assessee company has netted out the interest earned on the deposits against infra development & pre-operative expenditure and

thus the returned income is NIL. This action of the assessee is not as per law and therefore, not allowable.

Considering the above facts I have, reason to believe that income chargeable to tax for A.Y. 2011-12 has escaped assessment within the meaning of section 147 of the IT Act, 1961 r.w.s. Explanation 2(c) thereto. From the facts as discussed above, it is also seen that the income chargeable to tax for the year under consideration i.e. AY.2011-12 (i.e. income from other sources as discussed above) has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts for completion of the assessment for the year under consideration and the income which has escaped assessment is likely to be Rs.1 lakh or more i.e. Rs. 2,50,31,571/-


(T CHERIAN)
Income Tax Officer
Ward 14(2), Pune

3.1. Mr. Murkunde next took us to the Assessing Officer's reopening reasons in assessment year 2013-2014 setting into motion sec.148/147 mechanism alleging escapement of the assessee's income from being assessed as under :

M/s. Khed Economis Infrastructure Pvt. Ltd
A Y 2013-14

It is seen from the case records of the assessee for A.Y. 2013-14 that the assessee had claimed TDS of Rs. 45,24,897/- on investment interest income from five entities M/s. Axis Bank, M/s. Western Region Transmission Maharashtra, M/s. Bank of Maharashtra, M/s. Canara Bank and State Bank of India. The interest income earned from these five entities which amounts to Rs. 45,24,897/- should have been offered by the assessee as income from other sources instead of netting for Capitalization.

Thus there is an underassessment of income of Rs. 4,52,48,651/- and short levy of tax of Rs. 94,56,936/- (Rs. 1,39,81,833 tax + cess - Rs. 45,24,897 TDS).

Therefore, I have reason to believe that an income to the extent of Rs. 4,52,48,651/- for Assessment Year 2013-14, has escaped Assessment, which is proposed to be assessed/reassessed u/s 147 of the Act, 1961.

3.2. Mr. Murkunde vehemently argued in terms of the foregoing reopening reasons that the Assessing Officer had not only complied with the relevant rigor of law in sec.147, 1st proviso, but also he proceeded on the basis of the relevant tangible material pinpointing escapement of assessee's income from being taxed.

4. We have given our thoughtful consideration to the foregoing vehement rival stands and find no substance in Revenue's foregoing stand. This is for the precise reason that although the former twin assessment years 2011-2012 and 2012-2013 before us contain the Assessing Officer's reopening reasons alleging that the assessee had not disclosed "fully" and "truly" all the relevant particulars in sec.143(3) assessments; the same however fails to satisfy the test of validity thereof as there is no afresh tangible material which could rebut the correctness thereof. We wish to clarify here that all these three assessment years involve the Assessing Officer's first round regular assessments framed u/sec.143(3) of the Act dated 27.03.2014, 27.03.2015 and 31.03.2016; respectively. We further note from a perusal of all the corresponding paper books that the Assessing Officer had duly issued his sec.142(1) r.w.s.143(2) notices; as the case may be, to the assessee raising specific query's regarding the impugned interest income. The said notice(s) form part of record at pages 24 to 26 followed by the assessee's clarifications regarding the

impugned interest income in assessment year 2011-2012 on test check basis. This is indeed coupled with the fact that the assessee had duly placed on record its balance-sheets, tax audit reports and audited annual accounts, throwing sufficient light on the details of interest income followed by its response to sec.142(1) notice(s) issued during the course of former round of scrutiny assessment. Factual position is hardly any different in latter twin assessment years as well wherein similar response followed in furtherance to the Assessing Officer's show cause notice(s).

5. Faced with the situation, we find that these former twin assessment years 2011-2012 and 2012-2013's reopening do not satisfy the test of the Assessing Officer's having recorded any specific satisfaction; based on fresh tangible material; that the assessee had not disclosed "fully" and "truly" all the relevant particulars in the course of regular assessments. Hon'ble jurisdictional high court's recent decision in [2023] 148 taxmann.com 225 (Bom.) Framji Dinshaw Petit Parsee Sanatorium vs. ITO (Exemption) holds that such a reopening beyond four years from the end of relevant assessment year is not sustainable in law as under :

"Conclusion:

8. *We heard both the learned Counsel at length. We find merit in the Petition.*

9. It would be appropriate to mention about the case of *Institute of Banking Personnel Selection (IBPS) (supra)* which held that income derived from the trust property has also got to be computed on commercial principles and if the commercial principles are applied then the adjustment of expenses incurred by the Trust for charitable and religious purposes in the earlier years against income earned by the Trust in the subsequent year will have to be regarded as application of income of the Trust for charitable and religious purposes in the subsequent year in which adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the Trust under section 11(1)(a) of the Act.

10. It is further well settled in the case of *DIT (Exem) v. MIDE* [IT Appeal No. 2652 of 2011, dated 20-3-2013], where this Court had allowed the assessee's claim to carry forward the deficit relying on the decision of this Court in the matter of *Institute of Banking Personnel Selection (IBPS) (supra)*. The above proposition of law is now well settled by the Supreme Court in the case of *DIT v. Society for Applied Microwave Electronic Engineering & Research* [2019] 106 taxmann.com 204/264 Taxman 81 upholding the decision of the Bombay High Court which held that the Tribunal was justified in upholding the decision of the

CIT(A) to allow carry forward of deficit on account of excessive expenditure and directing the A.O. to carry forward deficit on account of excess expenditure without appreciating the fact that this would have the effect of granting double benefit to the assessee, first as "accumulation" of income under section 11(1)(a) or as corpus donation under section 11(1)(a) in the earlier years/current year and then as 'application' of income under section 11(1)(a) in the subsequent years.

11. In the present case, the AO had recorded in the assessment order u/s 143 (3) of the Act dated 28th December 2010 for AY 2008-09 that the petitioner was registered with the Director of Income-Tax exemption - Mumbai, under section 12A of the Act and that during the year the Petitioner had claimed exemption u/s 11 of the Act. The reasons recorded in the letter dated 30th April 2015 evince that the AO has come to the conclusion that income has escaped assessment 'on the perusal of the records'. Consequently, there is no question of any failure to disclose any material fact necessary for assessment as held in the case of ITO v. Lakhmani Mewal Das 119761 103 ITR 437 (SC). The impugned notice by the respondent no. 1 is clearly a case of change of opinion as held by this Court in the case of Aroni Commercials Ltd. v. DCIT [2014] 44 taxmann.com 304/224 Taxman 13 (Mag.)/362 ITR

403. Furthermore, AO's the reason to believe must be based on some new tangible material which was not available at the time of passing the original Assessment Order as held in the case of Lalitha Chem Industries (P.) Ltd. v. Dy. CIT [2014] 45 taxmann.com 451/225 Taxman 225 (Mag.)/364 ITR 213 (Bom.).”

5.1. Their lordships' recent decisions in Rajshree Realtors Pvt. Ltd., vs. Union of India and Others [2023] 457 ITR 354 (Bom.) and in Jetair (P.) Ltd. vs. DCIT [2023] 148 taxmann.com 185 (Bom.) also reiterate the very legal proposition.

6. The outcome would be hardly any different in the last assessment year 2013-2014's appeal ITA.No.925/PUN./2023 as well wherein the undisputed factual position remains the same that although the Assessing Officer had initiated sec.148/147 proceedings within four years from the end of the relevant assessment year, there was again no fresh tangible material in light of the fact that he had duly examined the issue during the course of scrutiny assessment framed herein. [2021] 131 taxmann.com 346 (Mad.) Cognizant Technology Solutions India (P.) Ltd., vs. ACIT as upheld in [2023] 146 taxmann.com 197 (SC) holds that such a reopening is not sustainable in law once the Assessing Officer had examined

the corresponding issue in the former round of assessment as under :

2. The said writ petition was filed, challenging the order passed by the 1st respondent, dated 29-3-2018, under section 148 of the Income-tax Act, 1961 ("the Act" for brevity), for the Assessment Year 2013-2014.

3. The assessment for the year under consideration was completed by order, dated 31-12-2016, under section 143(3) read with section 92CA of the Act. Notice under section 148 was issued on 29-3-2018, proposing to reopen the assessment. The assessee sought for the reasons for reopening, by letter dated 27-4-2018. The reasons were not furnished. However, notice under section 143(2) of the Act, dated 21-8-2018, was issued. Therefore, the assessee sent another letter, dated 27-8-2018, requesting for furnishing the reasons for reopening. Ultimately, the reasons were furnished on 30-8-2018. The assessee submitted their objections, dated 12-9-2018, which were disposed of by the Assessing Officer, by order dated 16-10-2018, which was impugned in the writ petition.

4. The learned Single Bench had dismissed the writ petition on the ground that the Assessing Officer, if he is able to trace out a new information, material or dimension in consonance with the provisions of the Act, which was omitted by the Original Assessing Authority, it is a good ground for reopening the assessment. Further, the learned Single Bench held that, mere comparison of subject or issues with reference to the original Assessment Order and disposal of objections cannot be a ground for the purpose of setting aside the reopening proceedings and if the reasons furnished for reopening of assessment provide any new information or material or based on different dimension under the provisions of the Act, which was not considered by the Original Authority, then the reopening of assessment is permissible.

5. This finding rendered by the learned Single Bench does not reflect correct legal position. In this regard, we may refer to the decision of the Hon'ble Supreme Court in the case of *CIT v. Kelvinator of India Ltd.* [2010] 187 Taxman 312/320 ITR 561 wherein, it has been held that, one needs to give a schematic interpretation to the words "reason to believe", failing which, section 147 of the Act would give arbitrary powers to the Assessing Officer to reopen the assessment on the basis of mere "change of opinion", which cannot be per se reason to reopen. Further, it was pointed out that the conceptual difference between the power to review and power to re-assess has to be kept in mind; the Assessing Officer has no power to review, he has power to re-assess, but reassessment is to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, then, in the garb of reopening the assessment, review would take place and one must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. In *ITO v. Techspan India (P.) Ltd.* [2018] 92 taxmann.com 361/255 Taxman 152/404 ITR 10 (SC) it was held that the reassessment proceedings cannot be initiated on the basis of same facts as was available during the regular assessment and in the absence of any new material coming to the light of the Assessing Authority.

6. There are several other decisions which lay down the legal principles with regard to reopening of assessment. The legal position that can be culled out from those decisions is that "reason to believe" shall be supported by new material facts, which come to the attention of the Assessing Officer, and shall not be a re-appreciation of the facts already available at the time of passing the original Assessment Order.

7. We need not labour much on the legal principle which has been well settled and therefore, the observations made in the impugned order by the learned Single Bench do not lay down the correct legal position.

8. We hold in light of the foregoing clinching *ratio decidendi* that the impugned last reopening in assessment year 2013-2014 ITA.No.925/PUN./2023 is also not sustainable in law. The assessee succeeds in its' instant sole legal ground in all these three assessment years therefore.

All other pleadings on merits stand rendered academic.

9. These three assessee's appeals are allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 23.10.2023.

Sd/-
[DR. DIPAK P. RIPOTE]
ACCOUNTANT MEMBER

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Pune, Dated 23rd October, 2023

VBP/-

Copy to

1.	The applicant
2.	The respondent
3.	The NFAC, Delhi.
4.	The CIT-4, Pune.
5.	D.R. ITAT – 'A' Bench, Pune.
6.	Guard File.

//By Order//

//True Copy //

Assistant Registrar, ITAT, Pune Benches,
Pune.