

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM

(ITA No.241/RPR/2023)
(Assessment Year: 2015-16)

Deputy Commissioner of Income Tax 1(1), Bhilai, Durg	V s	Bhilai Jaypee Cement Ltd, BSP Premises, Slag Yard Road (Opp Sector 4 NMOH), Bhilai
PAN: AADCB1675Q		

(अपीलार्थी /Applicant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri. R.B. Doshi, CA
राजस्व की ओर से /Revenue by	:	Shri. Satya Prakash Sharma, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	25-10-2023
घोषणा की तारीख / Date of Pronouncement	:	30-10-2023

आदेश / ORDER

Per Arun Khodpia, AM:

The captioned appeal is filed by the revenue against the order of Ld. CIT(A), NFAC, Delhi, dated 08/05/2023 for the AY 2015-16, in the appeal instituted against the order of Ld. AO u/s 147 r.w.s. 144 & 144B of the Income Tax Act, 1961, dated 29/03/2022. The grounds of appeal raised by the assessee are as under:

Grounds of Appeal-

1. On the facts and in the circumstances of the case, the Id. CIT(A) NFAC is justified in quashing the order passed u/s 147 r.w.s 144 r.w.s.144B of the Act on the ground that it was a mere change of opinion of the Assessing Officer.

2. On the facts and in the circumstances of the case, the Id CIT(A), NFAC is justified in quashing the order passed u/s 147 r.w.s 144 r.w.s of the Act on the ground that it was a mere change of opinion of the Assessing Officer whereas the case of Yuvraj v/s Union of India of Hon'ble Bombay High Court vide 315 ITR 84 (Bombay) (2009) 225 CTR 283 (Bombay) has held that "points not decided while passing assessment order under section 143(3) is not a case of change of opinion & assessment was reopened validly" and in the case of Chetan Sabharwal v/s ACIT of Hon'ble Delhi High Court (2019) 110 taxman. com 57 (Delhi) has held that where original assessment orders were silent on aspect on which reopening had been ordered, it could not be said that reason to believe constituted a change of opinion.
 3. On the facts and in the circumstances of the case, the Id. CIT(A), NFAC has erred in allowing the appeal of the assessee as the Hon'ble Supreme Court of India in its latest decision in the case of Checkmate Service (P) Ltd v/s CIT (2022) 143 taxmann.com 178(SC) has held that deduction of PF and ESIC shall be allowed only if they have been paid within the due date of PF 86 ESIC Act and not even if they have been paid before the due date of filing of ITR. The decision of Apex Court is Law of the land.
 4. The order of the Ld. CIT(A), NFAC is erroneous both in law and on facts.
 5. Any other ground which may be adduced at the time of hearing.
2. Brief facts of the case, drawn from the records, are as under:
- 2.1 The appellant is a public limited co. Incorporated on 11/04/2007. The main activity of the appellant is cement manufacturing. The appellant filed its return vide acknowledgement no.895361481301115, declaring loss of Rs.51,81,15,681. The

appellant had also filed copy of balance sheet, Tax audit report & 3CEB report.

The case was selected for scrutiny and order dated 21/12/17 was passed u/s 143(3) & certain disallowances /additions were made as under: -

- (i) u/s 40A(2)(b) - 4,37,02,768/-
- (ii) u/s 68 (addition)- 7,52,66,271/-
- (iii) u/s 68 (addition)- 11,24,87,988/-

2.2 Accordingly, the returned loss reduced, and loss assessed was Rs. 28,66,58,654/- The appellant has already filed an appeal before the first appellant authority vide Ack. No. 370410961220118. The said appeal was yet to be decided. Later on, the case was reopened u/s 148 by issue of notice on 28/3/2021 i.e., beyond 4 years from the end of assessment year i.e., 31/03/2016.

2.3 The appellant made compliance from time to time. However, while passing the order dated 29/3/2022 u/s 147 r.w.s144&144B under faceless scheme the learned A.O. disregarded submission made on 23/3/2022 & also ignored the fact that the issue of late payment of employee's contribution was already dealt with in original return and made disallowance of Rs.0,59,232/- u/s 2(24)(x) r.w.s 36(1)(Va).

2.4 The assessee aggrieved with the disallowance made by the Ld. AO has preferred an appeal before the Ld. CIT(A), wherein assessee's legal ground that the disallowance made by Ld. AO is nothing but based on change of opinion only, was deliberated upon by the Ld. CIT(A)'s and has decided that the re-assessment proceedings on a mere change of opinion are quashed.

2.5 Aggrieved with the aforesaid finding of the Ld. CIT(A) now the department is in appeal before us challenging the decision of first appellant authority.

3. At the beginning of the hearing, Ld. SR DR on behalf of the department has submitted that since the Ld. AO have reason to believe that the assessee company had violated the provisions of section 269SS & 269D of the Act and also deposited the employee's contribution to EPF beyond the due date, therefore, the same has to be disallowed u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. It was the argument of the revenue that Ld. CIT(A), NFSC is not justified in quashing the order of Ld. AO on account of the reason that it was on the basis of mere change of opinion of the AO, whereas in the case of Yuvraj vs. UNION of India, reported in 315 ITR 84(Bombay), Hon'ble Bombay High Court has held that "points not decided while passing assessment order under section 143(3) is not a

case of change of opinion & assessment was reopened validly" and in the case of Chetan Sabharwal v/s ACIT of Hon'ble Delhi High Court (2019) 110 taxman. com 57 (Delhi) has held that where original assessment orders were silent on aspect on which reopening had been ordered, it could not be said that reason to believe constituted a change of opinion. It is further submitted that, since the issue pertaining to the late payment of PF and ESI is covered by order of Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. vs. CIT(2022) 143 Taxmann.com 178(SC), and the decision of Hon'ble Apex Court is law of land, therefore, the order of Ld. CIT(A) is erroneous and, thus, deserves to be set aside.

4. Ld. AR of the assessee in rebuttal has submitted that the issue pertaining to initiating the reopening assessment has been duly and at length deliberated by the Ld. CIT(A) and has observed in light of various decisions by Hon'ble Apex Court as well as Hon'ble High Courts in deciding the issue in favor of the assessee. Ld. AR drew our attention in the findings of the Ld. CIT(A), the same is extracted as under:

5.2. Ground No.2

In the ground No.2 of appeal, the appellant has challenged the legality of the re-opening of the assessment proceedings on the ground that it was based on change of opinion and all the facts were available at the time of original assessment u/s 143(3). The appellant has claimed that during the course of original assessment proceedings, specific query in point No, 7 of notice issued u/s 142(1) on 10,11.2017 was given regarding delay in payment of EFF amount of Rs.10,59,232/-. The copy of notice u/s 142(1) is as under:

Office of the Assistant Commissioner of Income Tax -1(1),
32/32 Bungalows,
Notice Ws 142111 of the Income Tax Act, 1961.

PAN AADCH 167 • Q

Bhilai, dated 10.11.2017

To

13hilitiJitypea Cement Ltd, Bhilai
Tovrriship,13hilai.

Sir,

Sub: Assessment proceedings for the AY 2015-16 - Issue of notice u/s 142(1) of the
Act - Complete Beratissy - Regarding

.....

-V...V-2-AM at All 1*** IE

Please refer to the onses-sinent proccodings in your case for the a_y 2015-16 and Mao refer earlier notice issued u/c 142(1) of the Act for the AY 2015-16 along with detailed questionnaire. The written submissions filed by you have been examined. In this connection you are further requested to explain/furnish following information, papers/documents so as to enable me to proceed further in the proceedings:

1. On large amount of turnover amounting to 12g.t3106-CE76 Webs, the net profit was decided in a negative figure. Explain the reasons in detail;
2. Sundry creditors - To file list of sundry creditors balances as on 31.3.2015, 31.3.2014 and 31.3.2013. Also furnish detailed copies of statements of those parties where balances are shown same in two years with complete postal address.
3. Justify the payments made to persons specified in section 40A(2)(b) that the same are not excessive or unreasonable looking to the legitimate business needs.
4. Additions in fixed assets - To file copies of bills and justify your claim of depreciation;
5. Advances shown 'with others' at Rs. 133.38 lakhs. Please explain the purpose of these loans and advances. File copies of a/c as on 31.3.2014 and 31.3.2015. Please explain as to whether any interest was charged on these advances if not why proportionate interest expenses be not disallowed u/s 36(1)(iii).
6. Please furnish list of Loans with Creditors or creditors and also explain, whether any interest was paid. If so give details of interest with rate at which it was paid.
7. PF amounting to Rs. 1059232/- was found deposited beyond the due date. Please explain as to why the same be not disallowed u/s 36(1)(va).

ii. To produce complete books of a/c and documents related to AY 2015-16 on the date of Morning.

For this purpose, your case is listed for hearing in my office on 22.11.2017 at 3.00 PM.

Yours faithfully,

(R.T. Pali)
Assistant Commissioner of
Income Tax-1(1), Bhilai

5.2.1 It is seen that the issue in respect of late deposit of EPF was enquired into by the then Assessing Officer. There is a specific query listed at Point 7 in the above query letter by the Assessing Officer wherein the assessee has been put to question that as to why the PF amounting to Rs.10,59,232/- deposited beyond the due date be not disallowed u/s 36(1)(va). After examining the issue, the assessing officer did not disallow the late deposit of PF. In the light of the above facts, it is to be decided in the facts of the case whether the re-opening of the already concluded assessment u/s 143(3) beyond the period of 4 years is valid or not.

5.2.2 It has been submitted that the disallowance is nothing but based on change of opinion only. It has further been stated that all the facts were available at the time of original assessment and the assessee appellant having furnished all the details called for and considering the total stock of the issue no disallowance was made in the assessment order, it is nothing but a change of opinion.

5.2.3 I am in agreement with the submissions of the assessee appellant. The issue in respect late deposit of PF has been duly examined during the course of original assessment proceedings. It is only after considering the reply of the assessee, no disallowance was made. The present reassessment proceeding is nothing but based on a change of opinion. Mere change of opinion of Assessing officer cannot be a ground for re-assessment and that even the amendment of section 147 w.e.f. 1.4.89 has not altered the position.

- (i) the Assessing Officer must have reason to believe that income has escaped assessment,
- (ii) a mere change of opinion does not justify a re-assessment and
- (iii) the Assessing Officer does not have the power of review on the same set of facts and

5.2.4 I am fortified by the following' decisions. the Apex Court as well as various High Courts which are listed below.

- a). CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1(FB)(Delhi)(HC) Approved by Supreme Court in (2010) 320 ITR 561 (SC) ITO v. Techspan India (P) Ltd. (2018) 404 ITR 10 (SC) wherein the Apex court has held that re-examining the assessee's claim which has already been examined during original scrutiny assessment and with no new material is not permissible.
- b) In ACIT v. Maria Ltd. (2020) 272 Taxman 179 (SC)

The reasons in support of the s. 148 notice is the very issue in respect of which the AO had raised a query during the assessment proceedings and the Petitioner had responded justifying its stand. The non-rejection of the explanation in the Assessment Order amounts to the AO accepting the view of the assessee, thus taking a view/forming an opinion.

In the circumstances, the reasons in support of the notice proceed on a mere change of opinion and would be completely without jurisdiction

- c) In Rubix Trading (P) Ltd. v. ITO (2019) 174 DTR 1 (Born.) (HC) [SLP of revenue is dismissed, CIT v. Rubix Trading (P.) Ltd. (2019) 265 Taxman 423 (SC) / 416 ITR 136 (St.) (SC)]

Where the Assessing Officer had questioned the assessee with respect to a particular income but not dealt with it in the order, reopening on the ground of taxability of the same income would amount to a change of opinion.

d) *P CIT v. Hanil Era Textiles Ltd. (ITA No. 203 of 2017 dt 15/04/2019 (Bom.) (HC)*

During the original scrutiny assessment, the assessee's claim of deduction u/s 10B of the Act was scrutinized, any attempt on part of Assessing Officer to reexamine the said claim, without any material would be based on change of opinion. Reopening of assessment was therefore clearly impermissible.:

e) *In PCIT v. Mahindra & Mahindra, Financial Services Ltd. (1TA NO. 288 of 2017 dt.021412019 (Bom.) (HO):*

During the original scrutiny assessment, the Assessing Officer had examined the Assessee's claim of computer software expenses. Through the reopening process, Assessing Officer desired to re-exam in the same. Without there being new tangible material available with him, the Tribunal correctly held that the same was impermissible.

f) *In YashomandirSahakariPatpedhi Ltd. FITA No.112 of 2017, dt 12 32019 (Bom.) (HC)*

Deduction under section 80(P)(2) of the Act was examined by the Assessing Officer during original scrutiny Assessment. When the claim was examined during the original scrutiny assessment, the assessment could not have been reopened, on the basis of an amendment which was already in existence when the assessment was framed, Income Tax Appeal is dismissed.

g) *In PCIT v. Shreya Life Sciences Pvt. Ltd. (ITA No. 1854 of 2016 dt 6-3-2019, (Bom.) (HC)*

During the original assessment, the Assessing Officer had examined the claim of the assessee of the expenditure in question being revenue in nature. Without any additional material, the Assessing Officer exercised power of re-assessment and held that the expenditure was capital in nature which was fully impermissible.

Re-assessment on same issue is change of opinion hence not valid — Assessment completed after enquiry and replies furnished by assessee could not be reopened. Capri Global Advisory Services Pvt. Ltd. v. DCIT (1 TA No, 170/Mum/2017, dt. 10/04/2019 (Mum) (Trib.)

h) *Bharti Infratel Ltd. v. DCIT (2019) 411 ITR 403 (Delhi) (HC)*

i) *Allowing the petition, the Court held that, Explanation 1 to section 147 would not apply as all the primary facts were disclosed, stated and were known and in the knowledge of the Assessing Officer. This would be a case of "change of opinion" as the assessee had disclosed and had brought on record all facts relating to transfer of the passive infrastructure assets, their book*

value and fair market value were mentioned in the scheme of arrangement as also that the transferred passive assets including the dates of transfer and the factual that one-step subsidiary BIV was created for the purpose. These facts were within the knowledge of the Assessing Officer when he passed the original assessment order for the Assessment - Year 2008-09. The notice of reassessment was not valid.

j) CIT v. Sahara India Mutual Benefit Co. Ltd. (2019) 261 Taxman 83 (Cal.) (HC)

Assessment was completed assessment under section 143(3) making certain additions to income declared. After expiry of four years from end of relevant year, Assessing Officer initiated reassessment proceedings on ground that assessee had accepted loan, deposits etc. of 20,000/- or more in cash in violation of provisions of section 26955. Tribunal finding that there was no omission or failure on part of assessee to disclose fully and truly all material facts at time of original assessment and allegation that deposits were unexplained, were not based on any cogent material evidence on record. Dismissing the appeal of the revenue the Court held that since initiation of re-assessment proceedings was merely based on change of opinion of AO, impugned order passed by Tribunal did not require any interference.

5.2.4 In view of the facts of the case, aforementioned judicial interpretation of the Apex Court and various High Courts, the re-assessment proceedings based on a mere change of opinion are hereby quashed and the appellant succeed on the grounds of appeal.

5. Having heard and considered the rival submissions, perused the material available on record and the judicial pronouncements relied upon. In the present case it is the admitted fact that the issues raised under the reopening assessment proceedings were specifically quarried by the AO in the original assessment proceedings u/s 143(3). Such fact is apparent and has been duly observed by the Ld. CIT(A). It is also observed that the query of the AO was duly responded by the assessee and after examination of

such submissions of the assessee, Ld. AO has framed the assessment order, and no disallowance was made. Since the issue already examined during the original assessment proceedings was again taken up for initiating the proceedings u/s 147, such action of AO tantamount to be a mere change of opinion also section 147 does not allow the AO to review the same set of facts which have already been examined at the time of original assessment.

6. The decision of Ld. CIT(A) was duly supported by the settled principal of law accorded by Hon'ble Apex Court in the case of Kelvinator of India Ltd. (supra), Marico Ltd.(supra) and many of other case laws referred to in the said decision, revenues reliance on the case of Yuvraj vs. UOI (supra) cannot support their contention as the decision of Ld. CIT(A) is guided by the judgments of Hon'ble Apex Court, accordingly, following the discipline of judicial hierarchy, the principals of law laid down by Hon'ble Apex Court have a binding precedence to be adopted over the decisions of any other court.

7. Apropos, revenues contentions on merit that the issue of delayed deposit of EPF is covered by the judgment of Hon'ble Apex Court in the case of Checkmate services Pvt. Ltd., therefore, the reopening assessment and the addition made was valid, cannot be

acceded to, for the reason that the assessee has succeeded before the Ld. CIT(A) on account of assumption of valid jurisdiction by the Ld. AO on the basis of mere change of opinion. Ld. CIT(A) has appropriately appreciated the facts and circumstances of the case and has justifiably deleted the addition by accepting the legal contention of the assessee, under such facts and circumstances the order of Ld. CIT(A) cannot be held as suffering from infirmities, accordingly, we are unable to apprehend with any substance in the contentions raised by the revenue in the present appeal, so as to warrant any interference in the decision of the first appellate authority. Resultantly, the grounds of appeal of the revenue in present appeal found to be devoid of merit, thus, the same are rejected.

8. In the result, appeal filed by the revenue stands dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 30/10/2023.

Sd/-
(RAVISH SOOD)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ARUN KHODPIA)

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 30/10/2023

Vaibhav**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

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

// सत्यापित प्रति True Copy//**आदेशानुसार/ BY ORDER,****(Assistant Registrar)****आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur**