

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No.789/Bang/2023
Assessment Year: 2010-11

ITO Ward-2(2)(1) Bangalore	Vs.	G. Tex Inc No.19, Lakshmi Sadan 2 nd cross, Nehru Nagar Sheshadripuram Bangaluru 560 020 PAN NO : AABFG3420D
APPELLANT		RESPONDENT

Assessee by	:	Ms. Hita M., A.R.
Revenue by	:	Dr. Nischal, D.R.

Date of Hearing	:	12.12.2023
Date of Pronouncement	:	12.12.2023

O R D E R

PER MADHUMITA ROY, JUDICIAL MEMBER:

This appeal by revenue is directed against order of NFAC for the assessment year 2010-11 dated 29.8.2023 passed u/s 250 of the Income-tax Act,1961 [‘the Act’ for short]. The revenue has raised following grounds:

1. *“On the facts and circumstances of the case, the ld. CIT(A) erred in allowing the appeal of the assessee without adjudicating the case on merits by questioning the initiation of the proceedings u/s 148 of the Income Tax Act, 1961, the initiation of the proceedings u/s 148 in the case of the assessee cannot be treated as bad in law based on the Explanation 1 to Section 147 of the Income Tax Act 1961 which read as under:*

“Explanation 1 – Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.”

2. *On the facts and circumstances of the case, decision of the ld. CIT(A) stating that “reopening beyond the period of four years of completion of assessment*

u/s 143(3) without allegation regarding non-disclosure of fully and true material facts is bad in law.”

The initiation of the proceeding of u/s 147 of the Act is within the law as per the provision of clause (b) of the section 149(1) “if four year, but not more than six years, have elapsed for the end of the relevant assessment year unless the income chargeable to the tax which has escaped assessment amounts to or is likely to amount to 1 lakh rupee or more for that year.”

As the proceeding u/s 147 of the Act has been initiated in this case vide issue of notice u/s 148 dated 03.06.2015 which is beyond the period of 4 years but less than 6 years from the end of relevant assessment year i.e. AY 2010-11.

3. *On the facts and circumstances of the case, the ld. CIT(A) erred in allowing the appeal of assessee, as the assessee never contested the reopening of the case during the initiation of the proceedings by issue of notice u/s 148 in his case even though opportunity was given to the assessee.”*

2. The crux of the above grounds of the department is that NFAC quashed the assessment order passed u/s 143(3) r.w.s. 148 of the Act holding that the reopening is bad in law, which has been passed after 4 years from the end of assessment year in which the original assessment order has been passed u/ 143(3) of the Act.

3. Facts of the issue are that the assessee has filed a return of income for the assessment year 2010-11 on 30.9.2010 declaring total income of Rs.Nil. The assessment was completed u/s 143(3) of the Act on 13.3.2022. On further verification of the profit & loss account as on 31.3.2010, which is already on record found that a sum of Rs.5,80,52,487/- was debited as overseas commission on which TDS as per section 195(1) of the Act was not made by the assessee. Therefore, to disallow this expenditure u/s 40(a)(i) of the Act assessment was reopened u/s 148 of the Act vide notice dated 3.6.2015 by recording the reasons for reopening as below:

OFFICE OF THE INCOME TAX OFFICER WARD-2(2)(1)
सं. 1/1, जीवन सैम्पिगे बेंगलूर वरम्लेशमल, मार्ग सैम्पिगे, भवन सी आई एल,
No.1/1, Jeevan Sampige, LIC Building, Sampige Road, Malleshwaram, Bangalore-560003
F.No.ITO,Ward-2(2)(1)/AABFG3020D/2015-16. Date:23-6-2015.

To,

M/s.G Tex Inc.
No.19 & 29, Lakshmi Sadan
2nd Cross, Nehru Nagar
Seshadripuram
Bangalore 560 020.

Sir,

Sub: Furnishing of reasons for reopening of assessment
u/s.147 of the Income-Tax Act 1961 – Asst.Year 2010-11
- Your own – Reg.

Ref: 1) Notice u/s.148 dated 3-6-2015.
2)Your letter filed on 22-6-2015.

Please refer to the above.

The satisfaction recorded for issue of notice u/s.148 in your case for AY 2010-11 is furnished as under:


The assessee firm is carrying on business in export of silk fabric, cotton fabrics to UAE, filed its return of income for AY 2010-11 declaring nil income. The assessment for the Assi. Year 2010-11 was completed on 13-2-2013 on returned income.

On verification of the profit and loss account as on 31-3-2010, it is noticed that sum of Rs.5,80,52,487/- was debited as overseas commission on which TDS as per sec.195(1) for payments to non residents was not effected by the assessee. In view of the non-compliance to the provisions of sec.195(1) on overseas commission payment, expenditure of Rs.5,80,52,487/- debited requires to be disallowed u/s.40(a)(i) for the above assessment years and hence, I have reason to believe that income to the extent of Rs.5,80,52,487/- has escaped assessment within the meaning of sec.147 of the Incometax Act 1961 and the case is fit for issue of notice u/s.148 for AY 2010-11.

This is for necessary information.

Yours faithfully,

Sunitha K
(सुनीता किशोर)
Sunitha Kishor
आयकर अधिकारी Income-tax Officer
वार्ड -2(2) (1)/ बेंगलूर, Ward-2(2)(1),Bangalore



3.1 Consequently, the assessment has been made by ld. AO by disallowing the above payment of Rs.5,80,52,487/- while framing above impugned reassessment order. Against this assessee went in appeal before NFAC by raising below mentioned grounds:

1. *“For that the order of the ld. ITO in reopening of the Assessment u/s 148 & disallowing overseas commission amounting to Rs.5,80,52,487/- u/s 40(a)(i).*
2. *For such other grounds that may be urged at the time of hearing and it is prayed that kindly may allow the appeal in the interest of justice and equity.”*

3.2 NFAC while adjudicating the appeal before it on the issue of reopening quashed the assessment by observing as follows:

“6. I have gone through the statement of facts, ground of appeal, Remand report of the AO and submissions and comments on remand report of the appellant.

In its submission the appellant has challenged the validity of initiation of proceeding u/s 148 of the Act on the ground that during course of assessment proceedings u/s 143(3) the assessing officer after perusing the records and books of accounts maintained by the appellant, had found the claim of appellant genuine and accordingly granted the deduction as claimed by the appellant. Since all the details are available to the AO while finalizing the assessment proceedings u/s 143(3) and he has accepted the claim made by the appellant after due verification. Now initiation of proceedings u/s 148 of the Act without having any new facts/evidence is nothing but change of opinion from the audit objection and hence liable to be quashed. The appellant has relied on several case laws in support of its case.

The brief fact of the case that the return of income for AY 2010-11 on 30.9.2010 declaring total income at Rs.Nil. Assessment proceeding u/s 143(3) of the Act finalized in this case on 13.2.2013 accepting return income as assessed income. Subsequently case was reopened and notice u/s 148 of the Act was issued on 3.6.2015 after recording the reason, meaning thereby it was issued after expiry of four years from the end of relevant assessment year.

As per the section 149(1) of the Act, no notice u/s 148 shall be issued for the relevant assessment year,-----

- (a) If four years have elapsed from the end of the relevant AY, unless the case falls under clause b or c.*
- (b) If four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to 1 lakh rupees or more for that year.*

Further, first proviso to section 147 of the Act says that where an assessment under subsection 3 of subsection 143 of this section has made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment years by the reason of the failure on the part of the assessee to make a return u/s 139 or in response to notice u/s 142(1)

or under section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

On perusal of satisfaction recorded to reopen the case there was no mention of the fact that there was failure on the part of appellant to disclose fully and truly all material facts necessary for his assessment despite the fact that the case was reopened after expiry of four years from the end of the relevant assessment year i.e. 2010-11 and as per first proviso to section 147 no action shall be taken under this section after the expiry of four years from the end of relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment years by the reason of the failure on the part of the assessee to make a return u/s 139 or in response to notice u/s 142(1) or under section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Further, it is noticed that the basic material based on which the satisfaction was drawn is profit and loss account as on 31.3.2010 which was very much available to the assessing officer while finalizing assessment order u/s 143(3) and which was duly verified by the AO. Therefore, it cannot be said that there is any failure on the part of the appellant to disclose fully and truly all material facts necessary for his assessment. Accordingly, it is concluded that reopening of assessment is bad in law in as much as it is merely based on change in opinion. Similar view has been taken Shi C.M. Mahadeva Vs. CIT in ITA No.795 of 2009 High Court of Karnataka. In recent judgement in the case of Gokaldas Exports Vs. DCIT ITA No.1062/BANG/2004 dated 31.3.2023, Hon'ble ITAT Bangalore has held that reopening beyond the period of four years of completion of assessment u/s 143(3) without allegation regarding non disclosure of fully and true material facts is bad in law.

In view of the fact and legal position the reopening of the assessment in this case is treated as invalid and void-ab-initio. Since, the proceeding has been held as invalid the case is not adjudicated on merit.

7. In results, the appeal is allowed."

Against this revenue is in appeal before us.

4. The ld. D.R. submitted that the NFAC has exceeded the jurisdiction by adjudicating the issues which are not before it. Hence, the issue may be remitted back to the file of NFAC to redetermine the issue after calling remand report from the ld. AO.

4.1 He submitted that this ground was not before the NFAC, as such, they exceeded the jurisdiction.

5. The Id. A.R. submitted that the notice issued under section 148 of the Act dated 03.06.2015 for the AY 2010-11. The notice for reopening the assessment under section 147 rws 148 of the Act was issued for reopening the assessment after a period of four years from the end of the Assessment Year 2010-11 and the first proviso to section 147 of the Act will be applicable on the facts and circumstances of the case and the said proviso is extracted here for ease of reference:

“Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year”.

5.1 She submitted that the reasons recorded for issue of notice under section 148 of the Act as stated by the learned Income Tax Officer, has no allegation in the reasons recorded that the assessee has failed to disclose fully and truly all material facts or any allegations of failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148. Consequently, when the necessary conditions for invoking the provisions of section 147 of the Act have not been met, the assumption of jurisdiction under section 147 of the Act is bad in law on the facts and circumstances of the case.

- a) She placed reliance on the decision of this Tribunal in the case of M/s. Gokaldas Exports v. DCIT, Circle-11(2), Bengaluru in ITA No. 1062/Bang/2004 dated 31.03.2023

- b) She also placed reliance on the decision of the Hon'ble Madras High Court in Fenner (India) Ltd. v. DCIT (2000) 241 ITR 672 (Madras).
- c) She also placed reliance on the following decisions
- i. CIT, Bangalore v. Chaitanya Properties Pvt. Ltd. (2016) 67 taxmann.com 201 (Karn)
 - ii. CIT v. Motor Industries Co. Ltd. in ITA No. 220 of 2009 dated 15.12.2014 (Karn.)
 - iii. CIT v. Fibres and Fabrics International Pvt. Ltd. in ITA NO. 310 fo 2015 dated 22.09.2015 (Karn.)
 - iv. Sitara Diamond Pvt. Ltd. v. DCIT (2012) 345 ITR 91 (Bom)
 - v. CIT v. Ankit C Maheshwari (2014) 366 ITR 146 (Gujarat)
 - vi. Dr. Wilmar Schwabe India Pvt. Ltd. v. ACIT (2023) 152 taxmann.com 428 (Delhi)

5.2 In view of the above submissions, the ld. A.R. submitted that the learned Assessing Officer has erred in assuming jurisdiction under section 147 r.w.s. 148 of the Act and consequently all subsequent proceedings including the assessment order passed are bad in law on the facts and circumstances of the case.

6. We have heard the rival submissions and perused the materials available on record. We have carefully gone through the reasons recorded by ld. AO u/s 147 of the Act, which has been reproduced in the earlier para of this order. In this case, originally assessment has been completed u/s 143(3) of the Act on 13.2.2013 and thereafter notice u/s 148 of the Act has been issued to the assessee on 3.6.2015. The first proviso to section 147 of the Act, which is very relevant is reproduced herein below:

“Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action

shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

6.1 The contention of the ld. A.R. is that when the original assessment was completed u/s 143(3) of the Act, thereafter notice u/s 148 of the Act for reopening of assessment cannot be given after expiry of 4 years from the end of relevant assessment years unless any income chargeable to tax has escaped assessment for this assessment year and the reason of the failure on the part of the assessee to make a return u/s 139 of the Act or in response to notice u/s 142(1) or 148 of the Act or to disclose fully and truly all material facts necessary for its assessment, for this assessment year.

6.2 We have carefully gone through the reason recorded for reopening of assessment as reproduced above. We do not find that there is any finding recorded to the effect that assessee failed to disclose fully and truly all material facts necessary for relevant assessment year. There is no allegation by ld. AO while recording the reason that there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, which result in reopening of assessment. The only allegation by the ld. AO is that the assessee not deducted TDS u/s 195(1) of the Act as such there should be disallowance u/s 40(a)(i) of the Act. The ld. A.R. submitted before us that all these details were made available to the ld. AO at the time of completion of original assessment u/s 143(3) of the Act on 13.2.2013 and after considering all information furnished at the time of original assessment, the ld. AO passed the said original assessment order on 13.2.2013. Now he is relooking the same records with him to issue a notice u/s 148 of the Act. If there is a failure on the part of ld. AO to consider the

various documents filed by the assessee at the time of original assessment u/s 143(3) of the Act, he cannot revisit these documents after the expiry of 4 years from the end of relevant assessment years as there was no failure on the part of assessee to disclose all material facts necessary for the purpose of assessment, since there was no allegation by the ld. AO while recording the reasons for reopening of assessment to the effect that the assessee has failed to disclose fully and truly all material facts necessary for its assessment for this assessment year. In such circumstances, we are not in agreement with the ld. D.R. that the assessment is validly reopened vide notice dated 3.6.2015. This view of ours is supported by various case laws cited by the assessee, which was reproduced in earlier paras. Accordingly, we quash the reassessment order framed in this case on this primary issue. As such, there should be disallowance u/s 40(a)(i) of the Act.

6.3 Further, there was a ground by assessee before ld. CIT(A) with regard to validity of reopening of assessment u/s 148 of the Act. The ld. NFAC considered the entire facts and circumstances of the case and observed that reopening of the assessment in this case is after 4 years from the end of the relevant assessment year without any allegation that there is a failure on the part of the assessee to disclose all material facts truly and correctly before ld. AO. Hence, ld. NFAC has quashed the assessment order. We do not find any infirmity in the order of the ld. NFAC and the same is confirmed.

7. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 12th Dec, 2023

Sd/-
(Chandra Poojari)
Accountant Member

Sd/-
(Madhumita Roy)
Judicial Member

Bangalore,
Dated 12th Dec, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**