

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE KULDIP SINGH, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 2608/Mum/2023
(Assessment Year: 2009-10)**

Karamshi Jethabhai Somaiya Trust 45/47, Somaiya Bhavan, M.G.Road, Fort, Mumbai- 400001 PAN : AAATK0474C	Vs.	ITO Exemption- (1)(1) MTNL Tel. Ex. Building, Cumballa Hill, Peddar Road, Mumbai- 400026
Appellant)	:	Respondent)

Appellant/Assessee by : Shri. K. Gopal a/w Ms. Neha
Paranjpe

Revenue/Respondent by : Shri P.D. Chougule , Sr. DR

Date of Hearing : 04.01.2024

Date of Pronouncement : 08.01.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax, Appeals, / National Faceless Appeal Centre [in short ‘CIT(A)’] dated 30.05.2023 for the AY 2009-10. The assessee raised the following grounds:-

1) *The learned CIT (Appeals) erred in confirming the action of the Assessing Officer of re-opening the assessment u/s 147 of the Income Tax Act, 1961. Your appellant submits that the reopening is based on mere change of opinion and thus is illegal, bad in law and void as the Assessing Officer has not come into possession of any new tangible material or any new information. Your*

appellant submit that the Order passed u/s 143(3) r.w.s. 147 is illegal, bad in law & void ought to be deleted.

2) *Your appellant submit that the time for making re-assessment u/s 147 is already expired and thus the reopening of assessment proceedings u/s 147 is illegal, void and bad in law. Your appellant submit that the order passed u/s 143(3) r.w.s 147 is illegal, bad in law & void ought to be deleted.*

3) *Your appellant further reserve the rights to add, amend or alter the aforesaid grounds of appeal as they may think fit by themselves or by their representatives.*

2. The assessee is charitable trust registered u/s 12A of the Income Tax Act, 1961 [the Act]. The assessee filed the return of income for assessment year 2009-10 on 30.09.2009 declaring total income of Rs. Nil. The original assessment u/s 143(3) of the Act was completed vide order dated 23.03.2011 wherein the assessing officer has accepted the income returned by the assessee. Subsequently, the assessing officer issued the notice u/s 148 of the Act dated 17.03.2016 stating that the escapement of assessment within the meaning of section 147 the assessee filed the return of income in response to notice u/s 148 of the Act. The assessing officer was completed the assessment u/s 143(3) r.w.s 147 of the Act assessing the income of the assessee at Rs. 46,12,97,440/- as income from capital gains. Aggrieved, the assessee filed further appeal before the CIT(A). The CIT(A) held that:-

As per the appellant, the addition of the impugned sum of Rs. 46,12,97,440/- as capital gains income is unwarranted since the same was earned in the earlier years. This claim of the appellant is prima facie acceptable. The AO cannot make an addition when the transaction does not pertain to the asst. year 2009-10. The AO shall verify the claim and delete the addition thereafter if the claim is found to be correct. This ground is partly allowed.

The assessee is appeal before the Tribunal contending the issue of re-opening u/s 147 of the Act on legal grounds.

3. The Ld. AR submitted that the assessee filed the return of income on 30.09.2009 and the original assessment u/s 143(3) was completed on 23.12.2011. Accordingly, the re-opening u/s 147 of the Act vide notice dated 17.03.2016 is beyond four years. The Ld. AR further submitted that in assessee's case therefore the proviso to section 147 which reads as under is applicable :-

Income escaping assessment.

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

*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:***

(emphasis supplied)

4. The Ld. AR also submitted that as per the above proviso the reassessment can be initiated only when failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The Ld. AR submitted that the impugned issue for which the reopening was done by the assessing officer was already verified by the assessing officer during the original assessment proceedings u/s 143(3) and in this regard the Ld. AR draw our attention to notice u/s 142(1) of

the Act and details furnished before the assessing officer (Page No. 26 to 34 of the Paper Book). The Ld. AR accordingly argued that the information basis which the assessing officer has initiated the reassessment proceedings is from the records which was already available with the assessing officer and therefore it cannot be said that the assessee has not disclosed the information fully and truly. Therefore, the Ld. AR submitted that the reopening of assessment beyond four years in assessee's case is not valid and liable to be quashed.

5. The Ld. DR on the other hand relevant on the order of lower authorities.

6. We have heard parties and perused the material on record. In assessee's case it is a given fact that the assessment proceedings are completed under section 143(3) (refer assessment order in page 1&2 of PB-I) and that the reopening of assessment is done beyond four years from the end of the relevant assessment years (refer notice under section 148 in page 3 of PB-I). Therefore there is merit in the contention of ld AR that the Proviso to section 147 is applicable in assessee's case. The said proviso as extracted in the earlier part of this order states there in cases where the assessment is completed under section 143(3), the assessing officer cannot reopening the assessment 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 disclose fully and truly all material facts necessary for his assessment, for that assessment year. Keeping in mind this position of law, we will now look at the facts in assessee's case. The assessing officer has recorded the following as the reason for reopening the assessment -

2. In this regard reasons recorded for re-opening in your case is reproduced hereunder: "On verification of records it is seen that during the Financial year relevant to A.Y.2009-10 the assessee has transferred certain development rights to three parties vis. M/s. Saral Enterprises, M/s. Neelkanth Mansions P. Ltd. and

New Look Developers Private Ltd. for a consideration of Rs. 5.46 crore, Rs.42.47 crore and Rs.7 crore respectively and payment was received prior to assessment year 2006-07. In Notes to Accounts for the assessment year 2009.10, the trust disclosed that "the trust had entered into an agreement for transfer of right of development in favour of developer after obtaining necessary approvals and permission including the permission from Charity Commissioner, Mumbai. The Surplus amounting to Rs.4,612.97 lakh in terms of agreements with developer and consideration received was utilized for the charitable, activities including the acquisition of capital assets in the preceding accounting periods. The surplus is accounted as reduction of the accumulated balance of deficit in Income and Expenditure Account". It is seen that the trust has not acquired any capital-asset against the asset sold and set off the gain against deficits brought forward from earlier years. The provisions of section 11(1A) provides that in case of transfer of a capital asset the net consideration should be invested in another capital asset and if only a part thereof is invested the corresponding part of the net consideration shall only be considered as utilized towards the objectives of the trust. As no new asset was acquired, the trust was liable to be taxed on the capital gains arising out of transfer of capital assets. Non taxing the gain resulted in underassessment of Rs. 46.13 crore with consequential tax effect of Rs. 10.45 crore. Moreover the Act does not specifically allow carry forward of deficit in case of exempt entities. There shall not be deficit in case of charitable entity as it is supposed to incur expenditure limited to the receipt as trusts are not running on expectation of future profits/income. In view of the same the claim of set off of carry forward deficit against the capital gain is also incorrect. The assessee has failed to disclosed fully and truly all the material facts relevant to the said transaction consequent to which income chargeable to tax has escaped assessment.

In view of the above facts, I have reason to believe that income of Rs 46.13 crores has escaped assessment within the meaning of section 147 of the I.T Act 1961."

3. This is for your kind information as per the request made.

7. From the above it is clear that the assessment is reopened entirely based on the material available on records in the form of notes to accounts for the financial year relevant to AY 2009-10. From the perusal of the assessment order passed under section 143(3) and the details submitted before the assessing officer during the original assessment proceedings we notice that the assessee has submitted the

details on capital assets, depreciation etc., before the assessing officer during the proceedings under section 143(3) of the Act, and that the assessing officer has also verified the same while completing the assessment. It is settled law that where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the proviso to section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary. In the given case, the assessment is sought to be reopened after a period of four years and the proviso to section 147 is applicable. The Hon'ble Supreme Court in the case of Kelvinator of India Ltd [2010] 320 ITR 561 (SC) has laid down that the AO has no power to review but only to reassess based on any new material that has come to his possession. Further the Hon'ble Bombay High Court in the case of Ananta Landmark (P.) Ltd. vs DCIT ([2021] 131 taxmann.com 52 (Bombay)) has considered a similar issue and held that -

17. We are satisfied that petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment. Not only material facts were disclosed by petitioner truly and fully but they were carefully scrutinized and figures of income as well as deduction were reworked carefully by the Assessing Officer. In the reasons for reopening, the Assessing Officer has in fact relied upon the audited accounts to say that the claim of deduction under section 57 of the Act was not correct, the figures mentioned in the reason for reopening of assessment are also found in the audited accounts of petitioner. In the reasons for reopening, there is not even a whisper as to what was not disclosed. In the order rejecting the objections, the Assessing Officer admits that all details were fully disclosed. In our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of the assessee to disclose truly and fully all material facts that were necessary for computation of income but this is a case wherein the assessment is sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation of the deduction under section 57 of the Act. In a similar case where the notice to reopen the assessment was founded entirely on the assessment records and the entire basis for reopening the assessment was the disclosure which has been made by the assessee in the course of the assessment proceedings and where no material to which a reference was to be found, a Division Bench of this

Court in 3i Infotech Ltd. v. Asstt. CIT [2010] 192 Taxman 137, relied upon by Mr. Pardiwalla, in paragraph 12 held :

"12. The record before the Court, to which a reference has been made earlier, is clearly reflective of the position that during the course of the assessment proceedings the assessee had made a full and true disclosure of all material facts in relation to the assessment. As a matter of fact, it would be necessary to note that the notice to reopen the assessment on the first issue is founded entirely on the assessment records. There is no new material to which a reference is to be found and the entire basis for reopening the assessment is the disclosure which has been made by the assessee in the course of the assessment proceedings. In Cartini India Limited v. Additional Commissioner of Income-tax [(2009) 314 ITR 275 (Bom.)], a Division Bench of this Court has observed that where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to the Assessing Officer to reopen the assessment based on the very same material with a view to take another view. The principal which has been enunciated in Cartini must apply to the facts of a case such as the present. The assessee had during the course of the assessment proceedings made a complete disclosure of material facts. The Assessing Officer had called for a disclosure on which a specific disclosure on the issue in question was made. In such a case, it cannot be postulated that the condition precedent to the reopening of an assessment beyond a period of four years has been fulfilled."

18. *It will be proper in the circumstances to quote a paragraph from the judgment of the Apex Court in Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1, (cited by Mr. Pardiwalla), and it reads as under :*

"It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as income-tax assessment orders are concerned, they cannot be reopened on the scope of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year

unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, 'this cannot be said in the present case. The appeal is consequently allowed; the judgment of the High Court is set aside and the impugned notices are quashed. The parties in the circumstances shall bear their own costs throughout."

19. As already mentioned, it cannot be said in the present case that there was an omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. It cannot be stated that the condition precedent to the reopening of an assessment beyond a period of four years has been fulfilled. The statement in the reasons for reopening "I have reasons to believe that income of Rs. 7,66,66,663/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all facts necessary" is clearly made only as an attempt to take the case out of the restrictions imposed by the proviso to section 147 of the Act. As observed in Parashuram Pottery Works Co. Ltd.'s case (supra), it would be in the interest of citizens of India or we should say, civilization that those who are entrusted with the task of calculating and realising the price that we pay for the civilization should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue.

20. Consequently, the petition is allowed. The notice dated 26th March 2019 issued by respondent no. 1 under section 148 of the Act seeking to reopen the assessment for the Assessment Year 2012-2013 and the order dated 30th September 2019 are quashed and set aside.

8. In assessee's case, from the perusal of records it is clear that the assessing officer has made the additions during reassessment based on the materials which are part of assessment records which have already been verified during the original assessment u/s.143(3). It is also noticed that the assessing officer has not brought on record any new material basis which the reopening is done and that the assessing officer has used the same material as has been considered during the original assessment under section 143(3). Considering the facts of the present case and the ratio laid down by the Hon'ble Supreme Court and the Jurisdictional High

Court, we set aside the order of CIT(A) and direct the AO to delete the additions made in the reassessment. It is ordered accordingly.

9. In result the appeal of the assessee is allowed.

Order pronounced in the open court on 08-01-2024.

Sd/-
(KULDIP SINGH)
Judicial Member

**Shubham lohar*

Sd/-
(MS. PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai