IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.342/Kol/2022
Assessment Year: 2010-11

Pataka Industries Pvt. Ltd. 97, Park Street, Kolkata-700016. (PAN: AABCP5057C)	Vs.	Assistant Commissioner of Income Tax, Circle-8(2), Kolkata (presently circle-7(1), Kolkata.)
(Appellant)		**(Respondent)**

Present for:
Appellant by : Shri Anil Kochar, Advocate
Respondent by : Shri Prabhakar Prakash Ranjan, Addl. CIT

Date of Hearing : 11.01.2024
Date of Pronouncement : 21.03.2024

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order No. ITBA/NFAC/S/250/2022-23/1043061961(1) dated 18.05.2022 passed against the assessment order by ACIT, Circle-8(2), Kolkata u/s. 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") of the Act dated 08.12.2017 for AY 2010-11.

2. Grounds of appeal raised by the assessee are reproduced as under:

"1. For that the orders passed by the lower authorities are arbitrary, erroneous, without proper reasons, invalid and bad-in-law, to the extent to which they are prejudicial to the interests of the appellant.

2. For that Ld. CIT(A) ought to have held that proceedings initiated by the A.O. u/s 148 of the Act were invalid as there has been no default on the part of the appellant in disclosing all relevant and material facts in the course of assessment proceedings.

3. For that the A.O. had subsequent to the finalization of assessment proceeded to rectify mistakes U/S 154 relating to non-deduction of tax and proceedings now drawn u/s 147 on the same issue beyond lapse of 4 years were entirely uncalled for, invalid and erroneous.

4. For that there has been no failure on the part of the appellant in disclosing all the relevant material facts in the course of assessment proceedings and also duly complied with in the proceedings drawn u/s 154 by the A.O. and as such the assumption of jurisdiction u/s 147 beyond the period of four years was entirely illegal.

5. For that the Ld. CIT (A) failed to appreciate the fact that all the documents relating to the assessment were submitted before the A.O. and at the reopening U/S 147 of the Act was merely on the basis of information received from ACIT, Central-2 (TDS), Kolkata.

WITHOUT PREJUDICE

6. For that the Ld. CIT (A) ought to have disallowed only 30% of the addition on account of non-deduction of TDS keeping in view the amendment to Sec.40(a)(ia) of the Act.

7. For that the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds."

3. It is observed that ground nos. 1 to 5 are on the jurisdictional issue of reopening proceedings initiated by issuing notice u/s. 148 and making a reassessment u/s. 147 on the issue of non-deduction of tax at source on cretins expenses claimed as deduction which is beyond the lapse of four years and that there is no failure on the part of the assessee in disclosing all the relevant material facts in the course of assessment proceedings.

4. Brief facts of the case are that original return of income was filed on 11.10.2010 reporting total income of Rs.1,01,38,25,860/-. Assessment was completed u/s. 143(3) vide order dated 11.05.2012 on a total assessed income at Rs.1,01,45,13,520/-, determining tax payable by the assessee at Rs.2,95,400/-. Subsequent to this, it came to the notice of the Ld. AO that there was a mistake in allowing excess depreciation amounting to Rs.14,27,092/-. He also observed that assessee had paid rent for its hospital unit on which TDS was not done and, therefore, is liable to be disallowed u/s. 40(a)(ia) of the Act.

By holding these mistakes as mistakes apparent from record, which were rectified by passing an order u/s. 154 read with sec. 143(3) dated 27.09.2013 with a demand of Rs.6,91,050/-.

4.1. Later, a survey u/s. 133A(2A) of the Act was conducted at the office premises of the assessee on 18.02.2016. Notice u/s. 201(1)/206C(7) of the Act dated 22.02.2016 was issued on the assessee (the deductor) for FY 2009-10 for verification of documents and records relating to TDS/TCS. Certain defaults and discrepancies were observed in this proceedings and an order was passed u/s. 201(1)/206C(7) of the Act dated 22.03.2017 with a demand of tax and interest of Rs.3,03,003/- by holding the assessee as 'assessee in default' towards deduction of tax at source.

4.2. After the above stated proceedings, Ld. AO on receipt of information from ACIT, Central 2 (TDS), Kolkata who had treated the assessee is assessee in default for payment of certain expenditure without making TDS, proceeded to reopen the assessment u/s. 147 for which a notice u/s. 148 was issued on 31.03.2017.

4.3. In the reasons recorded for the purpose of reopening the assessment proceedings, it is noted that information was received from ACIT, Circle-2 (TDS), Kolkata with respect to non-deduction of tax. On the basis of these observations, Ld. AO noted that assessee had not deducted TDS on Rs.46,87,193/- which are various payments made by it towards its expenditure and, therefore, is to be added in the income of the assessee. Copy of the said reasons to believe is placed at page 11 of the paper book.

5. On these set of facts, Ld. Counsel for the assessee submitted that the action of Ld. AO to issue notice u/s. 148 is beyond the period of four years from the end of the relevant assessment year. In this case, the additional condition prescribed in the 1st proviso to section

147 needs to be satisfied i.e. the escapement of income is due to the failure on the part of the assessee to disclose truly and fully all material facts during the assessment.

5.1. According to him, in the reasons to believe recorded by the ld. AO, no where the Ld. AO has alleged any failure on the part of the assessee to disclose truly and fully all the material facts in the original assessment proceedings. According to him, since there is no whisper or mentioning about this important condition in the reasons to believe recorded by the Ld. AO before issuing notice u/s. 148 of the Act, it is fatal to the very assumption of jurisdiction by the AO to successfully reopen the case of the assessee. Thus, the impugned reassessment proceedings are vitiated and are bad in law i.e. *quoram non judice* i.e. without jurisdiction. Ld. Counsel thus strongly submitted that issue of notice u/s. 148 dated 31.03.2017 is without jurisdiction and, therefore, the subsequent reassessment proceedings and the impugned reassessment order passed is a nullity in the eyes of law.

5.2. To buttress his contentions, he placed reliance on the following judicial precedence:

(i) Hon'ble Delhi High Court in the case of Avtec Ltd. vs. DCIT reported in 395 ITR 434 wherein it was held that the reasons recorded by the A.O. should where the reopening u/s 147 of the Act is after expiry of four years from the end of the relevant assessment year, specifically state in what manner there was a failure by the assessee to make a full and true disclosure of material facts and that will have to be proceeded by spelling out the tangible material that led the A.O. to come to that conclusion.

(ii) Hon'ble Bombay High Court in the case of Bhavesh Developers vs. A.O. reported in 329 ITR 249 has held that "Significantly, the reasons that have been disclosed to the assessee do not contain a

finding to the effect that there was a failure to fully and truly disclose all necessary facts, necessary for the purpose of assessment, after a lapse of four years from the relevant assessment year, is absent in the present case. There is merit in the submission which has been urged on behalf of the assessee that an exceptional power has been conferred upon the revenue to reopen the assessment, after a lapse of four years. The conditions which are prescribed by the statute for the exercise of such a power must be strictly fulfilled and in their absence, the exercise of power would not be sustainable in law."

(iii) Hon'ble Calcutta High Court in the case of Usha Martin Ventures Ltd. vs. DCIT in W.P. No.468 of 2011 decided on 09.12.2011 has also upheld the same principles.

(iv) Hon'ble Gujarat High Court in the case of Gujarat Fluoro Chemicals Ltd. vs. DCIT reported in 319 ITR 282 at Para 7 the Court has upheld the same principles.

6. Per contra, Ld. Sr. DR submitted that the Ld. AO had new information which was based on TDS survey conducted subsequent to the original assessment made u/s. 143(3). The findings arrived at in the proceeding subsequent to the TDS survey had been ignored and, therefore, led to the reopening of the case of the assessee and the impugned reassessment order. Accordingly, the said proceedings are justifiable and to be upheld.

7. We have heard the rival contentions and perused the material on record. Admittedly, it is noted from the reasons to believe recorded by the AO for the purpose of issuing notice u/s. 148 that there is no whisper or mention about any failure on the part of the assessee for truly and fully disclosing material relevant to the assessment proceeding. Further, the claims relating to expenses towards watch and ward staff and legal expenses were already recorded in the books

of accounts which were placed before the Ld. AO in the course of original assessment proceeding which formed part of the record of the assessee. There was nothing new in respect of claim of these expenses which surfaced out.

7.1. We also take note of the fact that the proceedings have been undertaken in the case of the assessee in the impugned order on a piecemeal basis. First, an original assessment u/s. 143(3) was made. Subsequent to this, an order u/s. 154 was passed by the AO by suo moto invoking this provision for certain mistakes apparent from record which resulted in allowing an excess depreciation and no TDS done for rent payment by the assessee. Again on third occasion, subsequent to a survey u/s. 133A(2A), proceedings were taken u/s. 201(1)/206C(7) to hold the assessee as assessee in default for non-deduction of tax at source of watch and ward expenses, professional fees and legal charges claimed by the assessee.

7.2. The primarily jurisdictional contention of the Ld. Counsel is in respect of compliance to first proviso to section 147 which requires to record, at the end of the AO, about the failure on the part of the assessee to disclose truly and fully all material facts during the assessment where the notice is to be issued beyond the period of four years from the end of the relevant assessment year. In the present case, the notice u/s. 148 is issued beyond the period of four years i.e. on 31.03.2017, assessment year being 2010-11. Thus, this condition prescribed in first proviso to sec. 147 ought to be complied by the AO. It is noted that there is an omission on the part of the AO to record such failure in the reasons to believe recorded for the purpose of issuing notice u/s. 148.

7.3. Accordingly, respectfully following the judicial precedents referred above and in the given set of facts on record, we hold that the reopening in the present case by issuing a notice u/s. 148 is vitiated

and is bad in law and without jurisdiction. Accordingly, the reassessment made u/s. 147 is held to be bad in law and quashed. Thus, ground nos. 1 to 5 are allowed. Since the jurisdictional issue has been held in favour of the assessee in terms of above observations and findings, ground taken on merits of the case are rendered academic and are, therefore, not adjudicated upon.

8. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 21st March, 2024.

Sd/-	Sd/-
(Rajpal Yadav)	(Girish Agrawal)
Vice President	Accountant Member

Dated: 21st March, 2024

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A), NFAC, Delhi
4. CIT
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata