

**IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI**

**SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 859/MUM/2023
(Assessment Year: 2008-09)**

Shah Construction Company Ltd.,

11, Shah Industrial Estate,
Opp. Anna Temple, New Link Road,
Andheri (West)- Mumbai - 400053
[PAN: AAACS5207N]

..... **Appellant**

**Deputy Commissioner of Income Tax,
Central Circle 1(3), Mumbai,**

Income Tax Offices, Central Circle 1(3),
Room No. 905 (9th Floor),
Pratishtha Bhavan, Old CGO Annexe,
M.K. Road, Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri M. Subramanian
For the Respondent/Department : Dr. Kishor Dhule

Date

Conclusion of hearing : 10.04.2024
Pronouncement of order : 22.04.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 18/01/2023, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2008-09, whereby the Ld. CIT(A) partly allowed the appeal of the Assessee against the Assessment Order, dated 31/03/2016, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Appellant has raised following grounds of appeal:
 - "1. On the facts and in the circumstances of the case and in law,

the learned CIT(A) erred in upholding the validity of the proceedings initiated by issuance of notice under Section 148 of the Act.

2. *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in upholding the action of the learned A.O. in disallowing an amount of Rs. 7,94,69,285/- u/s 36(1)(iii) of the Act.*
3. *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in upholding the action of the learned A.O. in disallowing business expenditure amounting to Rs. 2,12,12,206/-.*
4. *On the facts and in the circumstances of the case and in law, the learned A.O. erred in charging interest of Rs. 5,20,032/- u/s 234B of the Act."*

3. The relevant facts in brief are that the Appellant is engaged in the business of Construction, Real Estate Development, Builders and Contractors. The Appellant has filed return of income for the Assessment Year 2008-09 on 29/09/2008 declaring total loss at INR 9,89,28,343/-. The return was processed under Section 143(1) of the Act. Subsequently, on the basis of the information was received from the Director General Income Tax (Investigation), Unit-5(4), Mumbai (through the Principal Commissioner of Income Tax-11, Mumbai) re-assessment proceedings were initiated under Section 147 of the Act by issuance of notice, dated 25/03/2015, issued under Section 148 of the Act. Vide Assessment Order, dated 31/03/2018, the Assessing Officer completed the assessment under Section 143(3) read with Section 147 of the Act at assessed income of INR 10,06,81,491/- after making disallowance of interest of INR 7,94,69,285/- under Section 36(1)(iii) of the Act and disallowance of expenditure of INR 2,12,12,206/- on the ground that the business of the Appellant has been discontinued.
4. Being aggrieved, the Appellant preferred appeal before CIT(A)

against the order, dated 31/03/2016, passed under Section 147 read with Section 143(3) of the Act challenging the initiation of reassessment proceedings as well as the addition made on merits. However, the CIT(A) upheld the action of the Assessing Officer of initiating reassessment proceedings under Section 147 of the Act and declined to grant any relief on merits. Thus, confirming the disallowance of interest of INR 7,94,69,285/- under Section 36(1)(iii) of the Act and disallowance of expenditure of INR 2,12,12,206/- made by the Assessing Officer vide common order, dated 18/01/2023.

5. Being aggrieved, the Appellant has now carried the issue in appeal before the Tribunal. Ground No. 1 is challenge the validity of the reassessment proceedings. Ground Nos. 2 & 3 are directed against the disallowances made on merits. Ground No. 4 pertains to interest charged under Section 234B of the Act.
6. When the appeal was taken up for hearing, at the outset, the Ld. Authorised Representative for the Appellant took us through the reasons recorded for reopening the assessment and the Assessment Order, dated 31/03/2016, passed under Section 143(3) read with Section 147 of the Act, and submitted that the disallowances made by the Assessing Officer were on grounds completely different from the grounds on which the reassessment proceedings were initiated which is contrary to the judgment of the Hon'ble Bombay High Court in the case of CIT – 5 Vs. Jet Airways (India) Private Limited: 331 ITR 236. The additions made in the reassessment order were contrary to the provisions contained in Section 147 of the Act and therefore, should be deleted. It was further submitted that the reasons recorded for reopening of assessment were vague and factually incorrect.
7. In response the Ld. Departmental Representative made

oral/written submissions. It was contended that the Assessing Officer has made addition on the issue on which the reassessment proceedings were initiated. As per reasons recorded reassessment proceedings were initiated for verification and determination of taxability of waiver of interest pursuant to the One-Time Settlement Scheme. During the reassessment proceedings, the Appellant failed to furnish the documentary evidence to substantiate the claim with respect to waiver of interest. Therefore, deduction for interest claimed was disallowed. Reliance in this regard was placed on paragraph 2 and 3 of the reasons recorded for reopening the assessment, and paragraph 6.2 to 6.21 of the order passed by the CIT(A). It was vehemently contended that there was no infirmity in the assessment order vis-a-vis reasons recorded by the Assessing Officer. The relevant extract of the written submissions, dated 16/04/2024, submitted by the Ld. Departmental Representative read as under:

"2. In this case the assessment was passed under section 143(3) read with section 147 of the Income Tax Act, 1961 vide order dated 31st March, 2016. During the course of assessment proceeding the assessing officer had made an addition of INR 7.94 crores on account of extraordinary item of waiver of interest pursuant to one time settlement scheme. Also, an addition of INR 2.12 crores was made on account of the disallowance of expenditure for non-business purpose.

Aggrieved, the assessee has preferred an appeal before the CIT (A)-47. The CIT (A)-47 vide its order dated 18.01.2023 dismissed the appeal of the assessee.

Aggrieved, the assessee has preferred an appeal Before the Hon'ble Tribunal.

3. It is found that the assessing officer has recorded the reasons for reopening and provided to the assessee vide letter dated 19th August, 2015.

The reasons recorded by the assessing officer are as under:

"xx xx"

4. It is non-rebuttable fact that the assessee has claimed deduction of interest of 7.94 crores as an extraordinary item. The assessing officer has recorded the reason that it was necessary to verify whether the assessee has written back the interest which was claimed in earlier years again and whether double deduction is caused. Also, the assessing officer sought to verify and determine whether loan waived by the bank is to be added to the total income of the assessee within the meaning of the decision of Hon'ble Bombay High Court in the case of *Solid Containers Ltd versus DCIT (308 ITR 417)*. Therefore, it can be seen that the assessing officer sought to verify and determine to issues as under-

- a) Verification and determination taxability of interest claimed by the assessee
- b) Verification and determination taxability of principal amount waived off

4.1 It may be appreciated that the assessing officer has initiated the reassessment proceedings on the basis of information received from the Investigation Wing of the Department. It is held that the reopening proceedings are valid if reopened on the basis of information received from investigation wing by Catena of judgements. The Reliance is placed on the following case laws in support of the dividend-

1. *AGR Investments Ltd. Vs AddI.CIT & Anr. (Del) 333 ITR 146*
2. *Shalimar Buildcon (P) Ltd Vs ITO (ITAT, Jaipur) 136 TTJ 701*
3. *ITO Vs Gurinder Kaur (ITAT, Del) 102 ITD 189*

4.2 Further, it may be appreciated that while reopening the case for reassessment under section 147 of the act the Assessing Officer need not prove the escapement of income at the stage. The reasons recorded may be prime - facie reasons and therefore at the stage of initiation of reopening proceedings only a prime facie reason is to be recorded by the Assessing Officer. It is settled position of law that to judge the validity of reassessment on the basis of final outcome of reassessment proceedings on that item will not be proper. At the time of reopening, assessing officer is not required to establish escapement of income. The reliance is placed on the following judicial pronouncements -

1. Sri Krishna (P) Ltd. Vs CIT (SC) 221 ITR 538
2. Central Provinces Manganese Ore Co. Ltd. Vs ITO (SC) 191 ITR 662
3. ACIT Vs Tube Investments of India Ltd. (ITAT, Chennai-TM) 133 ITD 79
4. Rajat Export Import India Pvt. Ltd. Vs ITO (Del) 341 ITR 135

5. In the impugned case, the Assessing Officer has recorded its prime facie reason Stating that it was not known whether the assessee had written back the interest which was claimed in earlier years. Subsequently, such interest was added to the total income of the assessee as the assessee could not substantiate with documentary evidences its claim with respect to the interest claimed by the assessee under OTS.

6. It is found that the Assessing Officer, after due diligence, came to a conclusion that the assessee could not substantiate the claim of waiver of interest with documentary evidence, the very same reason for which the assessment was reopened and made an addition of such amount to the total income of the assessee. Therefore, the Assessing Officer has made an addition on the issue on which the impugned assessment order was reopened as mentioned in the reasons recorded by the assessing officer at paragraph 2 and 3 of such reasons. As such, there is no infirmity in the assessment order vis-a-vis reasons recorded by the assessing officer.

7. It may be appreciated that the Ld. CIT(A) was also confirm the view of the assessing officer stating as under:

"6.2 - 6.21 xx xx"

8. Therefore, it is most respectfully submitted that the assessing officer has recorded reasons for verification and determination of taxability of waiver of interest pursuant to the one-time settlement scheme, reopened the assessment proceedings and as the assessee could not substantiate with documentary evidence with claim with respect to the such waves of interest, made an addition of equal amount. The assessee also could not substantiate its claim before the 1st Appellate Authority. As such, considering the facts and circumstances of the case and judicial pronouncements relied upon by the Ld. CIT (A) and as mentioned in this written submission, the case may be decided as per the

legal and factual matrix of the case."

8. In rejoinder, the Ld. Authorized Representative for the Appellant submitted that the Assessing Officer had initiated reassessment proceedings citing that loan waived by the bank under the One Time Settlement Scheme as well as the interest on such loan waived during the relevant previous year resulted in income liable to tax in the hands of the Appellant during the relevant previous year in terms of Section 41(1) of the Act. Whereas, disallowance of interest was made by the Assessing Officer under Section 36(1)(iii) of the Act on the ground that the business of the Appellant had been discontinued. Therefore, the case of the Appellant was squarely covered in favour of the Appellant by the judgment of the Hon'ble Bombay High Court in the case of Jet Airways (India) Private Limited (supra).
9. We have considered the rival submission and perused the material on record. We note that the Assessing Officer has recorded following reasons for reopening the assessment for the Assessment Year 2008-09 under Section 147 of the Act:

"In this case, the return of income for A.Y. 2008-09 was filed by the Assessee on 29.09.2008 declaring return income of Rs. Nil. The return was processed u/s 143(1) on 25.07.2009.

2. Subsequently the information was received from DDIT (Inv.) Unit 5(4), Mumbai vide letter No. DDIT/(Inv.) Unit - 5(4)/OTS/2014-15 dated 13.03.2015 received in this office on 18/03/15 that M/s Shah Construction Co Ltd, has gone one time settlement (OTS) With State Bank of India, by paying 97,84,00,651/-. By doing so, the bank has written off interest and other liabilities by the single payment.

3. Whether, the assessee has written bank the interest which was claimed in the earlier years but not viewed of by the bank in its profit and loss account for AY 2008-09, is not known. Further, the loan waived by the bank is to be added to the total income of the assessee in Bombay High Court view of the decision of the Hon'ble Solid Containers Ltd versus DCIT (308 ITR 417). The haze the interest on loan viewed of during the AY under

consideration is the deemed income by virtue of the provision of section 41 (1) of the I.T. Act which has not been offered by the assessee company for taxation.

4. The facts/event of the OTS with the bank has not been disclosed by the assessee in Its Return of Income filed by it for A. Y. 2008-09. Hence, it is inferred that there is a failure on part of the assessee to disclose truly and fully all material facts necessary for A.Y.2008-09 leading to the escapement of income. I have reason to believe that income in excess of 21 lakh has escaped assessment for A.Y. 2008-09, and also any of the income chargeable to tax which is escaped assessment which comes to the light in the course of reassessment proceedings for A.Y.2008-09. Hence, it is a case for initiation of proceedings u/s. 147 of the Income Tax Act, 1961 by issuing notice u/s. 148 of the Income Tax Act, 1961".

10. On perusal of the above it emerges that the Assessing Officer took note of the fact that the Appellant had entered into One Time Settlement Scheme with the banks in terms of which outstanding loan amount and interest was waived by the banks. The Assessing Officer noted that as per Section 41(1) of the Act where any allowance or deduction has been allowed to the Appellant in any assessment year in respect of expenditure or trading liability incurred by the Appellant; and subsequently during the relevant previous year the Appellant has obtained any amount in respect of such expenditure or some benefit in respect of such trading liability by way of remission or cessation, the amount so obtained or the value of the benefit accruing to the Appellant is deemed to be income of the Appellant for the relevant previous year. The Assessing Officer was not sure whether interest claimed by the Appellant as deduction in the earlier years, which was allegedly waived by the bank, had been written back by the Appellant in the Profit & Loss Account for the previous year relevant to the Assessment Year 2008-09. Therefore, the Assessing Officer had formed a belief that the loan waived as well as interest on loan waived by the bank, being deemed income of the Appellant in

terms of Section 41(1) of the Act, had escaped assessment. Admittedly, no addition/disallowance was made by the Assessing Officer in respect of amount of loan waived. The disallowance of INR 7.94 Crores made by the Assessing Officer pertains to disallowance of interest debited by the Appellant to the Profit & Loss Account during the relevant previous year that was not debited to the Profit & Loss Account in the preceding assessment years and had been claimed as deduction during the relevant previous year after making payment to the bank under One Time Settlement Scheme. In this regard, it would be pertinent to refer to paragraph 5(iv) of 'Notes to Accounts' forming part of 'Notes of Balance Sheet and Profit & Loss Account for the year ended 31st March 2008' (placed at page 45 of the paper-book) it has been stated as under:

"5.(iv) (a) During the Year the Company has settled the amount of Rs. 1,21,88,99,616/- claimed by Bank of India, State Bank of India, Exim bank and Indian Overseas Bank as per the 'One-Time Settlement' with them by paying them Rs. 48,43,26,000/- Thus the Company has paid a sum of Rs. 7,94,69,284/- more than the dues of Rs. 40,48,56,715/- (including unsecured loan of Rs. 35,78,42,212/- interest incurred of Rs. 4,70,14,503/-) as per the books of A/c. the Difference of Rs. 7,94,69,284/- has been debited to Profit & Loss Account as "Extra-Ordinary Item-Prior Year Bank Interest. The Company Property at Andheri which was under Mortgage with the Banks now stand released from the mortgage."

11. On perusal of above, it is clear that the subject matter of disallowance made by the Assessing Officer is 'not' the interest debited to the Profit & Loss Account in the preceding assessment year which has been allowed as deduction and had now been waived of under One Time Settlement Scheme. Therefore, no addition has been made under Section 41(1) of the Act. The subject matter of the disallowance made by the Assessing Officer was the prior year bank interest which was debited to the Profit & Loss Account for the first time during the relevant previous year. Further, the reason for disallowance was not the waiver of

interest. The interest debited to the Profit & Loss Account was disallowed under Section 36(1)(iii) of the Act on the ground that the business of the Appellant had discontinued. Thus, clearly, the reasons recorded for reopening the assessment and income that was believed to have escaped assessment are different from with the disallowances made by the Assessing Officer and the reasons thereof. In our view, the judgment in the case of Jet Airways (India) Private Limited (supra) would apply to the facts of the present case wherein it was held by the Hon'ble Bombay High Court as under:

"15. Parliament, when it enacted the Explanation (3) to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd.'s case (supra) and of the Punjab & Haryana High Court in Vipin Khanna's case (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh's case (supra), Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT v. Atlas Cycle Industries [1989] 180 ITR 3191. The decision in Atlas Cycle Industries' case (supra) held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries' case (supra) and of the Rajasthan High Court in Shri Ram Singh's case (supra) would

not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.-

16. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. **However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee**"(Emphasis Supplied).

12. In the above judgment the Hon'ble Bombay High Court has held that in case after issuing a notice under Section 148 of the Act, the Assessing Officer holds that the income in relation to which the Assessing Officer had formed reason to believe that income had escaped assessment has not escaped assessment and does not make addition in respect of the same, it was not open to the Assessing Officer to independently assess some other income. In the present case, the Assessing Officer was of the view that

the Appellant had failed to add back to the profits the interest claimed as deduction during the preceding assessment years which was waived of by the banks under the One Time Settlement Scheme. However, while making the reassessment no addition was made on this account under Section 41(1) of the Act. The Assessing Officer made a disallowance of interest debited to the Profit & Loss Account during the relevant previous year by invoking provisions contained in Section 36(1)(iii) of the Act on the ground that the business of the Appellant has discontinued. In the aforesaid facts and circumstances, we hold that as per the judgment of Hon'ble jurisdictional High Court in the case of Jet Airways (India) Pvt. Ltd. (supra), in absence of any addition/disallowance under Section 41(1) of the Act in respect of interest/loan waived of under the One Time Settlement Scheme, Assessing Officer could not have made disallowance of interest of INR 7,94,69,285/- and disallowance of expenditure of INR 2,12,12,206/-. Accordingly, the disallowances/additions made by the Assessing Officer cannot be sustained and therefore, Ground Nos. 2 & 3 raised by the Appellant are allowed. In view of the aforesaid, all the other grounds raised by the Appellant are disposed off as being infructuous.

13. In result, in terms of paragraph 12 above, the present appeal is allowed.

Order pronounced on 22.04.2024.

Sd/-
(B.R. Baskaran)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 22.04.2024
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai