IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
MS.KAVITHA RAJAGOPAL, JUDICIAL MEMBER

ITA NO.4292/MUM/2023
ASSESSMENT YEAR : 2009-10

M/s. Krishna Developers Pvt. Ltd.
508, Gundecha Chambers,
Nagindas Master Road,
Fort, Mumbai – 400 023.
PAN: AABCK-5678-G ---- Appellant

Vs.
Assistant Commissioner of Income Tax,
Circle – 10(1)(2), Mumbai
Room No.651, 6th Floor,
Aaykar Bhavan, M.K. Road,
Mumbai – 400 020. --- Respondent

Appellant by : Shri Rakesh Joshi
Respondent by : Shri P.D. Chougule, Sr. DR

Date of Hearing : 09/05/2024
Date of Pronouncement : 30/05/2024

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER :

The assessee has filed this appeal challenging the order dated 20/10/2023 passed by Ld CIT(A), NFAC, Delhi and it relates to the assessment year 2009-10. The assessee is challenging the order passed by Ld CIT(A):

(a) in confirming the validity of reopening of assessment and

(b) in confirming the addition of Rs.7.65 crores made by the AO u/s 68 of the Act.

2. The facts relating to the case are stated in brief. The assessee is engaged in the business of construction and real estate development.

3. We shall first take up the legal issue relating to validity of reopening of assessment The facts relevant there to are stated in brief. The assessee filed its return of income for the year under consideration on 26th September, 2009 declaring a total income of Rs.48,722/- under normal provisions of the Act and book profit of Rs.12.19 crores u/s 115JB of the Act. The original assessment u/s 143(3) was completed by the AO on 19-11-2011 by making certain additions. The assessee challenged the same by filing appeal before Ld CIT(A) and got partial relief. Consequent thereto the total income was determined at Rs.4,03,058/- and book profit of Rs.12.20 crores.

4. During the year relevant to the assessment year under consideration, the assessee has issued share capital to various parties at a share premium and collected aggregate amount of Rs.7.65 crores. Hence, the AO reopened the assessment by issuing notice u/s 148 of the Act on 31.3.2014 for examining large amount of share premium collected on the shares so issued by the assessee. The AO, thereafter, completed the said reassessment on 17.03.2015 after verifying the details of share premium collected by the assessee and did not make any addition, i.e., he accepted the transactions of issue of shares at a premium.

5. In the meantime, the investigation wing of the department conducted a survey operation u/s 133A of the Act on 29-09-2014 in connection with the share capital/share premium received by the assessee. It was the allegation of the revenue that the assessee has availed accommodation entries only in the form of share capital& share premium from Kolkata based companies. During the course of survey operations, a statement u/s 133A of the Act was taken from a director of the assessee, wherein he agreed to surrender the share

premium of Rs.7.49 crores received by the assessee company as income of the assessee. We noticed earlier that the AO had completed the first reassessment on 17.3.2015, i.e., subsequent to the survey operations. However, in the said reassessment order, the AO did not make any reference to survey proceedings.

6. Consequent to the survey operations, the AO again reopened the assessment for the second time by issuing notice u/s 148 of the Act on 16.09.2016. The reasons recorded for reopening are extracted below:-

> *"In this case, the return of income declaring total income of Rs.48722/- was filed on 26-09-2009 after claiming the deduction of Rs.12,63,30,610/-.The said return was processed u/s 143(1) on accepting the income returned. Subsequently 143(3) order was passed determining the total income 11,94,82,710/-.*
>
> *2. A survey u/s 133A of the Income tax Act 1961 was carried out after taking approval from the Addl.DIT (Inv), Unit VIII (know known as unit-4) Mumbai on 29-09-2014 at 2 premises of M/s Krishna Developers Pvt Ltd (PAN-AABCK5678G) & Krishna Venture Ltd (PAN – AAACM3160E) having address at 7th floor, corporate centre, opp VITS hotel Andheri Kurla Road, Andheri (E), Mumbai and Krishna Residency next to M/s Bajsons Industrial Estate, Cardinal Gracious Road, Andheri (East), Mumbai. The survey report was received vide intimation letter no ADIT (Inv)/Unit-4(2)/Survey Report/Krishna/2015-16 dated 27/10/2015 has been received in this office on 11.02.2015 from the Dy. Director of Income tax (Investigation), Unit-(4)(2), Mumbai. Copies of the statements recorded during the survey and post survey inquiries are also enclosed along with the said letter dated 27.10.2015.*
>
> *3. During the course of survey action, it was revealed that M/s Krishna Developers Pvt. Ltd has introduced share capital at higher share premium by way of accommodation entries from the Kolkatta based companies. A list of Kolkatta based companies who have made investment through share premium entries is enclosed with the survey report. On further verification it was found that all these shares which were allotted to these companies at high premium were subsequently transferred back to directors of M/s Krishna Developers Pvt Ltd and their HUFs at face value of Rs.10 and these Kolkatta based companies have booked losses in their books, which no prudent company will do on account of commercial expediency.*

4. Further, during the survey proceedings statements of the director and other persons were recorded. They were confronted with various anomalies in documentation as share certificates. Further, directors could not give the details of intermediaries thorough which assessee was able to meet these investors. Also directors were not able to explain why suddenly very next year the share capital issued at very high premium was bought back at face value of Rs.10/-. Also no valuation report was submitted about the valuation of shares at such a high premium. When all these were confronted to director Shree Vijay Khetan accepted the anomalies and disclosed the sum of Rs.7,49,70,000/- as an additional income over and above normal income for A Y 2009-10.

5. Under these circumstances, I have reason to believe that income to the tune of Rs.7,49,70,000/- has escaped assessment in terms of section 147 of the I T Act, 1961. Accordingly, the assessment for A Y 2009-10 is hereby reopened for re-assessment u/s 147 of the I T Act.

6. Notice u/s 148 is issued after obtaining prior approval from the Pr.CIT-10,Mumbai vide his letter No.Pr.CIT-10/148/ Approval/1613/2015-16 …"

The assessee objected to the reopening of assessment by filing its objections on 25-10-2016. The AO, however, rejected the objections raised by the assessee, by his order dated 02-11-2016. The Ld A.R stated that the assessee did not surrender the share capital as its income in the return of income filed in response to the notice issued u/s 148 of the Act for the second time. Thereafter, the AO completed the second reassessment on 30-12-2016 by making addition of share capital amount of Rs.7.65 crores as unexplained cash credit u/s 68 of the Act.

7. Before Ld CIT(A), the assessee challenged the validity of reopening of assessment and it was rejected by the first appellate authority. On merits also, the ld CIT(A) confirmed the addition and accordingly dismissed the appeal of the assessee. Aggrieved, the assessee has filed this appeal.

8. The arguments advanced by Ld A.R on the validity of reopening of assessment for the second time is summarized below:-

(a) The original assessment was completed u/s 143(3) of the Act and the present reopening is done after expiry of four years from the end of the assessment year. Hence, as per the first proviso to sec.147 of the Act, it is mandatory for the AO to show that there was failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. Further, the said allegation should be explicitly mentioned in the reasons recorded for reopening of assessment. However, the AO has not recorded so in the reasons and he did not also demonstrate that there was failure on the part of the assessee to disclose fully and truly all material facts.

(b) After the completion of original assessment u/s 143(3), the AO had earlier reopened the assessment once u/s 147 of the Act specifically for the purpose of examining the share capital raised by the assessee. In that first reopening of assessment, the assessee furnished all the details relating to share capital received by it. The AO accepted the documents and explanations furnished by the assessee and completed the first reassessment without making any addition. It is pertinent to note that the said reassessment was completed after completion of survey action. Hence the second reopening of assessment is on account of change of opinion, which is not permitted.

(c) In the reasons recorded for reopening for second time, the AO did not even refer to the first reopening at all. Further, no new tangible material has come to the notice of the assessing officer except the report of the survey officials. He further submitted that the director of the assessee company had agreed to surrender the share

capital as the income of the assessee in the statement recorded u/s 133A of the Act. However, the statement given in the survey proceedings by the director does not have evidentiary value as held by Hon'ble Supreme Court in the case of CIT vs. S Khader Khan (2013)(352 ITR480)(SC). Further, the assessee did not offer the share capital as its income in the return filed in response to the notice issued u/s 148 of the Act in the second reopening of assessment, meaning thereby, the assessee did not accept the share capital received by it as its income.

(d) The Share capital is a capital receipt. In the reasons for reopening of assessment, the assessing officer has not mentioned as to how it would turn into revenue receipt resulting in escapement of income. Thus, the AO has not demonstrated how he entertained the belief that there was escapement of income.

(e) The Excess share premium amount in excess of the fair value has been made taxable from AY 2013-14 onwards only. Hence the share premium amount collected by the assessee cannot constitute income of the year under consideration.

(f) The AO has referred to the fact in the reasons that share subscribers have later sold the shares to the directors of the assessee company at par value. However, the assessee company was not in any way concerned with the transactions that happened between the share subscribers and the directors. Hence, the above said transactions would not impact the assessee company.

In support of above said contentions, the Ld A.R placed his reliance on the following case laws:-

(a) Everest Kanto Cylinder Ltd vs. Union of India (2024)(159 taxmann.com 51)(Bom)

(b) Shendra Advisory Services (P) Ltd vs. DCIT (2024)(159 taxmann.com 557)(Bom)

On merits, the Ld A.R submitted that the assessee has received the share application money in the immediately preceding year and the shares have been allotted in the current year. Hence the AO could not have made addition u/s 68 of the Act during the year under consideration. The Ld A.R fairly submitted that the AO did not verify this fact and hence, if the bench is not agreeing his contentions on the validity of reopening of assessment, it may restore the matter to the file of the AO for examining the year of receipt of money for share capital.

9. The Ld D.R placed reliance on the decision rendered by Ld CIT(A). He submitted that the assessee has failed to disclose the details of survey operations and also the surrender made by the director to the assessing officer during the course of first reassessment proceedings. Hence there is failure on the part of the assessee on this count. He submitted that the survey report constitutes fresh tangible material and hence it is not a case of change of opinion.

10. We heard rival contentions and perused the record. We have gone through the reasons recorded by the AO before initiating the reopening of assessment for the second time. The assessment year under consideration is AY 2009-10 and the original assessment was completed u/s 143(3) of the Act on 19-11-2011. The notice u/s 148 of the Act was issued on 16.9.2016 for the present reassessment proceedings, i.e., after expiry of four years from the end of the

assessment year. Hence, it is required for the AO to comply with the conditions prescribed in the first proviso to sec.147 of the Act. The said proviso reads as under:-

> ***"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".*

Since the assessee had filed return of income, the conditions relating to failure on the part of the assessee to make a return u/s 139 or in response to a notice issued u/s 142(1) or 148 of the Act will not apply to the facts of the present case. The remaining condition is that, it is necessary for the AO to demonstrate that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

11. We notice that, in the reasons recorded by the AO for reopening of assessment, he did not mention that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It has been held by the Honorable High Courts that non-mentioning of the failure of the assessee in the reasons recorded for reopening would make the reopening invalid. In this regard, we may refer to the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of Everest Kanto Cylinder Ltd (supra), wherein the Hon'ble jurisdictional High Court held as under in this regard:-

> *"5. Since the notice under Section 148 of the Act has been issued more than four years after the expiry of the relevant Assessment Year, proviso to Section 147 of the Act shall apply inasmuch as reassessment is not permissible unless there has been failure to truly and fully*

disclose necessary facts required for the assessment. A bare perusal of the reasons recorded would indicate that there is not even allegation in the notice that there was failure to fully and truly disclose material facts….."

……

11. It will be useful to re-produce paragraph 5 of the DIL Ltd. v. Assistant Commissioner of Income Tax, Circle 6(2) 5, which reads as under:

> *"5. Admittedly the position is that the reopening in the present case, by a notice dated 8 March 2011 for Assessment Year 2004-05 is beyond the period of four years from the end of the assessment year.* ***The reasons for reopening contain absolutely no reference to there being any failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. We, therefore, find merit in the contention of Counsel appearing on behalf of the Assessee that the primary requirement set out in the proviso to Section 147 has not been fulfilled.*** *That apart, it is evident that in so far as the diminution in the value of investment of Rs. 1.28 crores is concerned, Explanation (1)(i) was inserted into the provisions of Section 115JB by the Finance (No. 2) Act, 2009 with retrospective effect from 1 April 2001. Clause (i) of 5 [2012] 18 taxmann.com 290 (Bom) Shivgan 10/ 10 412-oswp-243-2022.doc Explanation (1) was introduced to include the amount or amounts set aside as provision for diminution in the value of investment.* ***In view of the retrospective amendment of law by Parliament, the Assessing Officer may have reason to believe that income has escaped assessment. But that in itself is not sufficient for reopening an assessment beyond the period of four years. Beyond the period of four years when an assessment is sought to be reopened, there must be a failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment.*** *In fact, the retrospective amendment of law by Parliament would negate the inference which is sought to be drawn of the failure to disclose material facts. In so far as the business development expenditure of Rs. 10.79 lakhs is concerned, here again it is evident from the order of assessment that the claim of the assessee was disallowed by the Assessing Officer and the amount was added back to the income. Similarly, in regard to the gratuity and superannuation as well, there is merit in the*

contention of Learned Counsel that there is ex facie no failure on the part of the assessee to disclose the material facts. The reasons disclosed to the assessee on 11 July 2011, in fact, merely indicate a reason to believe that income has escaped assessment. There is no reference whatsoever to the formation of an opinion that there was a failure on the part of the assessee to fully and truly disclose all material facts. In these circumstances, the basis on which the reopening is sought to be effected is contrary to law. Rule is accordingly made absolute by quashing and setting aside the impugned notice dated 8 March 2011. There shall be no order as to costs."

(emphasis supplied)

12. In yet another case, viz., Titanor Components Ltd. (343 ITR 183), the Hon'ble Bombay High Court held that the AO cannot proceed with reassessment u/s 147 of the Act unless he records in the reasons that there was failure on the part of the assessee to disclose fully and truly all material facts. The relevant portion of the judgment is extracted below:-

"Having regard to the purpose of s. 147, the power conferred by s. 147 does not provide a fresh opportunity to the AO to correct an incorrect assessment made earlier unless the mistake in the assessment so made is the result of a failure of the assessee to fully and truly disclose all material facts necessary for assessment. Indeed, where the assessee has fully disclosed all the material facts, it is not open for the AO to reopen the assessment on the ground that there is a mistake in assessment. Moreover, it is necessary for the AO to first observe whether there is a failure to disclose fully and truly all material facts necessary for assessment and having observed that there is such a failure to proceed under s. 147. ***It must follow that where the AO does not record such a failure he would not be entitled to proceed under s. 147. The AO has not recorded the failure on the part of the petitioner to fully and truly disclose all material facts necessary for the asst. yr. 1997-98.*** *What is recorded is that the petitioner has wrongly claimed certain deductions which he was not entitled to. There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material*

facts fully and truly. It is only in the latter case that the AO would be entitled to proceed under s. 147."

13. We may also gainfully refer to the decision rendered by Hon'ble Madras High Court in the case of M/s Durr India Pvt Ltd vs. ACIT (W A No.1081 and 1083 of 2021 dated 29-08-2022), wherein host of decisions were considered by Hon'ble Madras High Court on the very same issue. The relevant observations made by Hon'ble Madras high Court are extracted below:-

"11.3. In the present case, admittedly the extended period of six years is being invoked not under (a) or (b) set out above but only in view of (c) i.e., failure to disclose fully and truly all material facts necessary for assessment. It is submitted by the learned counsel for the appellant that while furnishing the reasons for reassessment vide its communication dated 05.11.2018, there is no finding that there was failure on the part of the appellant to fully and truly disclose all material facts necessary for assessment. It is submitted that in the absence of any finding on the above jurisdictional fact, the entire proceeding would be void and a nullity. We find there is merit in the above submission inasmuch as the normal period of limitation for exercising the power of reassessment under Section 147 of the Act is four years. The extended period of six years could be invoked only under three circumstances set-out/ mentioned above. Admittedly, the only circumstance which could have enabled the respondents to invoke the extended period of 6 years in the present case is to bring the proceedings under clause (c). To invoke the extended period of six years for reassessment, the reasons furnished for reassessment ought to contain a finding that the appellant herein had failed to disclose fully and truly all material facts necessary for assessment. We say this since it appears to us that the whole idea of furnishing reasons before embarking on a full fledged exercise of reassessment was to ensure that the powers of reassessment are exercised only in circumstances which the statute permit. The above limitation/restriction on the power of reassessment was intended to ensure transparency in the proceeding and to avoid abuse of power. It is trite law that power of reassessment must be exercised with a degree of caution and an element of circumspection and must be strictly in compliance with the procedure and only in circumstances which warrants exercise of that power. In the present case, though admittedly the power to reassess has been exercised by invoking the extended period of limitation in terms of the proviso to Section 147 of the Act,

there is no recording of the existence of the circumstances, viz., failure to disclose fully and truly all material particulars which would confer jurisdiction to proceed / initiate reassessment proceeding beyond four years and within six years. In this regard, it may be relevant to refer to the following judgments to appreciate the relevance and importance of existence of jurisdictional facts and an application of mind as to its existence by the authority concerned before assuming jurisdiction. It is relevant to extract the judgment of the Hon'ble Supreme Court in the case of Arun Kumar v. Union of India reported in (2007) 1 SCC 732, which reads as under:

> *"74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess."*
>
> *75. In Halsbury's Laws of England, it has been stated:*
>
> *"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."*
>
> *76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction."*

14. Since the assessing officer has not recorded in the reasons that there was failure on the part of the assessee to disclose fully and truly all material facts, the impugned reopening is bad in law and accordingly the impugned assessment order is liable to be quashed.

15. Apart from the above, we notice that the impugned reopening of assessment is bad in law on some other reasons also. We shall discuss about the same. We noticed earlier that the original assessment was completed on 19.11.2011, wherein the assessing officer had issued a notice dated 04/08/2011 u/s 142(1) of the Act calling for various details. In question no.17 of the said notice, the AO has called for the following details:-

> "17) Please give details of the increase in the promoter's share capital in case of a public company. In case of private limited company, give details of shareholding giving name and address of the shareholder, PAN, no. of shares held and percentage of holding. Also submit the details of change in shareholding during the year and confirmation from new shareholders."

Thereafter, the AO reopened the assessment by issuing notice u/s 148 of the Act on 31.3.2014 in order to verify the issue of large share premium received by the assessee company. The first reopening was completed by the AO by passing assessment order on 17-03-2015, wherein the AO accepted the receipt of share capital along with share premium and did not make any addition. Thereafter, on the basis of information from investigation wing and survey report, the AO again reopened the assessment in order to assess share capital/share premium. In view of the fact that the share capital/share premium received by the assessee was examined and accepted twice by the AO, the second reopening is on account of change in opinion only, which is not permitted. Our view is supported by the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of Everest Kanto Cylinder Ltd vs. Union of India (supra), wherein it was held as under:-

> *"10. A Division Bench of this Court in Aroni Commercials Limited v. Deputy Commissioner of Income-tax - 2(1)4 has held that once a query is raised during the assessment proceedings and the assessee 3 ITO [1961] 41 ITR 191 4 [2014] 44 taxmann.com 304 (Bombay) Shivgan 9/10 412-oswp-243-2022.doc has replied to it, it follows that*

the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. The Court held that only requirement is that AO ought to have considered the objections now raised in the grounds for issuing notice under Section 148 of the Act during the original assessment proceedings. If that has been done, it would follow that the reopening of assessment by impugned notice will merely be on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings and that change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."

16. The survey operation was conducted in the hands of the assessee on the apprehension of the investigation wing that the assessee has availed accommodation entries. Even though the director of the assessee company had agreed to surrender the share capital/share premium as the income of the assessee, yet the same was not done. It is well settled proposition of law that the statement taken during the course of survey operations conducted u/s 133A of the Act does not have evidentiary value. It was stated that the assessee did not make any surrender in the return of income filed in response to the notice issued u/s 148 of the Act, meaning thereby, the assessee did not accept the version of the investigation wing of the department. Since share capital/share premium are capital receipts, the AO should have in his possession some tangible material to show that the said receipts constituted income in the hands of the assessee. The AO did not have any tangible material except the report of the investigation wing, which was only allegation of the investigation wing. In the absence of any new tangible material, the impugned reopening of assessment is bad in law.

17. We notice that the Ld CIT(A) has expressed the view that the failure of the assessee to disclose the details of survey operations in the first round of reopening of assessment results in the failure

contemplated in the first proviso to sec.147 of the Act. In our view, the above said interpretation of the Ld CIT(A) is not correct. The failure should occur during the original assessment proceedings completed u/s 143(3) of the Act, which is not the case here. The Ld CIT(A) also referred to the surrender made in the survey statement and this issue was addressed by us in the earlier paragraph.

18. In view of the foregoing discussions, we hold that the impugned reopening of assessment is bad in law and accordingly the orders passed by the tax authorities are quashed.

19. Since we have decided the appeal on legal issue, we do not find it necessary to deal with issues urged on merits.

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

Order pronounced in the open court on 30th May , 2024.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(B.R. BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Date : 30th May, 2024

Vm

Copy to :

1) The Applicant
2) The Respondent
3) The PCIT/CIT concerned
4) The D.R, "E" Bench, Mumbai
5) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai