आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जगदीश, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI JAGADISH, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 75/CHNY/2024**

निर्धारण वर्ष/Assessment Year: 2012-13

The Assistant Commissioner of Income Tax, Circle -1, Tirunelveli	Vs.	**M/s. Aarthi Scans,** No.60, Santhaipettai Street, Kovilpatti, Tuticorin – 628 501. **PAN: AASFA 4245K**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri P. Sajit Kumar, JCIT
प्रत्यर्थी की ओर से/Respondent by : Shri Vijay Kumar, CA

सुनवाई की तारीख/Date of Hearing : 28.05.2024
घोषणा की तारीख/Date of Pronouncement : 30.05.2024

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the Revenue is arising out of the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi in Order No.ITBA/NFAC/S/250/2023-24/1058311757(1) dated 29.11.2023. The assessment was framed by the Deputy Commissioner of Income Tax, Circle 1, Tuticorin for

the assessment year 2012-13 u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 27.12.2019.

2. The only issue in this appeal of Revenue is as regards to the order of CIT(A)-NFAC in holding that the AO has failed to point out the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year and therefore, quashed the reopening assessment in view of proviso to section 147 of the Act. For this, Revenue has raised the following effectives ground Nos. 2 to 4:-

> *(2) The Ld.CIT(A) has erred in holding that the Assessing Officer has failed to point out failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment when the relevant columns in Form 3CD have been filled in NIL' or left blank.*
> *(3) The ld.CIT(A) has failed to appreciate the fact that the reopening of assessment beyond four years is permissible under law on the basis of factual error or omission pointed out by the audit party as held by the Hon'ble Apex Court in the case of P.V.S.Beedies Pvt Ltd (1999) 237 ITR 13 (SC).*
> *(4) The decision of Ld. CIT(A) is in contravention to explanation 2(c)(i) & (iv) of Section 147 of the IT Act in the assessee's case. The said proviso prescribes that it shall be deemed to be cases of income chargeable to tax has escaped assessment for the purpose of Section 147, where an assessment has been made but income chargeable to tax has been under assessed and excessive loss or depreciation allowance or any other allowance has been computed under the IT Act.*

3. Brief facts are that the assessee firm filed its return of income for the relevant assessment year 2012-13 electronically on

22.09.2012. Original assessment was completed u/s.143(3) of the Act on 30.03.2015. Subsequently, notice u/s.148 of the Act was issued on 25.03.2019 and according to AO, as there was reason to believe that income chargeable to tax has escaped assessment. The AO in lieu of that issued notice u/s.143(2) of the Act dated 10.12.2019 and reassessment was completed u/s.143(3) r.w.s. 147 of the Act dated 27.12.2019. The AO framed reassessment and made additions to the tune of Rs.1,43,83,139/- under various heads. Aggrieved, assessee preferred appeal before CIT(A).

4. The assessee before CIT(A) raised the issue of assumption of jurisdiction and challenged the reopening of assessment as bad in law and without jurisdiction. The CIT(A)-NFAC adjudicated the ground of reopening and held that reopening is bad in law by observing in para 5.3.4 as under:-

> *"5.3.4 I have carefully perused the recording a reason to believe by the AO which is part of the submissions made by the assessee. There are 5 grounds on the basis of which the reason to believe has been formed. All these grounds have its origin in the documents filed by the assessee along with the return of income or at the time of making replies to the notices issued to the assessee during the original proceedings of regular assessments. In the recorded reason there is no mention of the return having being assessed earlier nor there is any mention that the assessee had with held any information which he ought to have filed along with return of income or in response to notices issued u/s 142(1) at the time of original assessment proceedings which the AO came to know from any other source. In other words there was no fresh material before the AO at*

the time of formation of reason to believe. Rather all the information on the basis of which the reason to believe has been formed appears to have been taken from the record which was available with the AO at the time passing the original order of assessment or 27.12.2019. This clearly indicates that the reason to believe recorded by the AO is nothing but change of opinion on the part of the AO on a date subsequent to 27.12.2019 [correct date is 30.12.2019] when a particular decision was taken by the AO on same set of facts known to him. This change of opinion certainly does not confer the jurisdiction on the AO to commence the proceedings of re-assessment u/s 147. While deciding so, I rely upon the decision of Hon'ble Supreme Court in the case of CIT Vs Kelvinator of India Ltd (2010) 320 ITR 561 (SC), wherein it was decided that distinction has to be made between the power to review and power to reassess. Conferring power on the AO to initiate the process of reassessment on the basis of change of opinion will amount to giving the power of review to the AO which is contrary to the scheme of the IT Act. Accordingly it was decided that AO cannot assume jurisdiction to re-assess on the basis of change of opinion on same set of facts. As there is complete absence of any new information in the hands of the AO the assumption of jurisdiction to re-assess is decided to not to be as per law. Secondly, the AO has also failed to point out the failure on the part of the assessee in making full disclosure of primary facts as it is held to be mandatory as per the first provisio to section 147 of IT Act. This issue inter-alia came for adjudication of Hon'ble Supreme Court recently in the case of NDTV vs DCIT CA no.1008 of 2020. Wherein approving the earlier decision of Hon'ble Supreme Court in the case of Calcutta Discount Company Ltd that once the primary facts which are material for assessment was disclosed by the assessee the process of re- assessment beyond four years cannot be initiated. Even on this count the assumption of jurisdiction to re-assess the return of income after lapse of four year from end of the AY is decided to be bad in law as the return of income was already assessed u/s 143(3)."

Aggrieved, now Revenue is in appeal before the Tribunal.

5. Before us, the ld.Senior DR relied on the assessment order and also relied on reasons recorded for reopening of assessment. The ld.

Senior DR filed copy of audit objection that audit has raised objections for non-deduction of TDS, payment of loan was claimed as business expenditure, claimed excess advertisement expenses also debited consulting charges, interpretation charges, lab testing charges and reporting charges to the profit & loss account in addition to other expenses. In view of this audit objection, the AO recorded the reasons and hence according to ld. Senior DR, the reopening is within the framework of law.

6. On the other hand, the ld.AR for the assessee argued that from the very reason recorded it is clear that the AO has inferred the information from profit & loss account and balance sheet i.e., audited accounts of the assessee filed along with return of income for the year ended 31.03.2012. The ld.AR stated that there is no allegation in the reasons recorded that there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year 2012-13. The ld.AR stated that once there is no reason recorded in term of proviso to section 147 of the Act, the CIT(A)-NFAC has rightly quashed the reopening and he urged the Bench to confirm the order of CIT(A)-NFAC.

7. We have heard rival contentions and gone through facts and circumstances of the case. Admitted facts are that the original assessment was completed by the AO u/s.143(3) of the Act on 30.03.2015. The assessment year involved is AY 2012-13 and notice u/s.148 of the Act was issued on 25.03.2019 and admittedly, it is beyond 4 years. Once the notice is beyond 4 years, we have to see whether there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year 2012-13. We noted the reasons recorded, copy of which was placed before us and the relevant reasons reads as under:-

(a) It was noticed from the Profit and Loss account of the assessee for the year ended 31-03-2012 that the assessee had debited Rs.6,30,000/- as house rent paid. The house rent was paid to one Shri Nagesh and the assessee had deducted TDS for the amount of Rs.5,40,000/- only and TDS was not deducted for the amount of Rs.90,000/- and it required to be disallowed u/s.40(a) (ia) of IT Act.

(b) The assessee had debited Rs.9, 79,125/- as building maintenance to the Profit and Loss account which includes Rs.7,50,000f- paid to Shri Nagesh as loan amount. As the payment was paid by way of loan it was not an allowable business expenditure and requires to be disallowed.

(c) The assessee had paid Rs.2,87,189/- to NM/s. Flame Advertisement and claimed it as advertisement expenditure. However, the assessee had not deducted TDS for the above payment and it requires to be disallowed.
(d) The assessee had debited consulting chares, interpretation charges, lab testing charges and reporting charges to the Profit and Loss account. In addition to the above expenditure the assesssee had debited Rs.48,44,023/- as referral charges to the P & L account. The referral charges are nothing but the payment made by the assessee for doctors/hospitals those refer the

patients for various tests and scanning in the assessee scan centre. As per the decision reported in the case of CIT VS KAP Scan and Diagnostic centre Itd (2012) 344 ITR 477 it was held that under the Indian Medical Council (professional conduct, etiquette and ethics) Regulation 2002 demanding commission / referral charges was bad and paying it was also bad. Such commission charges paid to doctors was opposed to public policy. The payment of commission/referral charges by the assessee for referring patients to it could not be accepted to be legal or in accordance with the public policy and it requires to be disallowed and brought to tax.

(e) The assessee had claimed depreciation allowed of Rs.3,36,47,707/- to the P& L account which includes Rs. 1,50, 78,201/- for the CT machinery @ 40% on the WDV of Rs.3,76,95,503/-. The CT machinery used by the assessee to conduct various tests in the scan centre and not a life saving device moreover it had not been classified in (xia) life saving medical equipment under the head III machinery and plant in the New Appendix-I, Table of rates at which depreciation was admissible w.e.f AY 2006-07 onwards under the IT Rules. The allowable depreciation was @ 15% and the excess depreciation of Rs.84, 11,927/- claimed by the assessee required to be disallowed and brought to tax.

Hence, I have the reasons to believe that the income of chargeable to tax has escaped assessment for the assessment year 2012-13. In view of the above, the approval for the reopening of the Assessment for the A.Y 2012-13 is solicited from the Principal Commissioner of Income Tax, Madurai-1, Madurai.

From the above reason, it cannot be inferred or there is no iota or word about the escapement of income, how the income has escaped due to the failure on the part of the assessee to file fully and truly all material facts necessary for its assessment. Once this is a fact, this issue is fully covered by the decision of Hon'ble Supreme Court in the case of CIT vs. Foramer France, reported in (2003) 264 ITR 566, wherein the Hon'ble Supreme Court has affirmed the decision of

Hon'ble Allahabad High Court in the case of Foramer France vs. CIT, reported in (2001) 247 ITR 436 by observing as under:-

14. Having heard learned counsel for the parties, we are of the view that these petitions deserve to be allowed.

15. It may be mentioned that a new Section substituted Section 147 of the Income-tax Act by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989. The relevant part of the new Section 147 is as follows :

> "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."

16. This new Section has made a radical departure from the original Section 147 inasmuch as clauses (a) and (b) of the original Section 147 have been deleted and a new proviso added to Section 147.

17. In Rakesh Aggarwal v. Asst. CIT (1997] 225 ITR 496, the Delhi High Court held that in view of the proviso to Section 147 notice for reassessment under Section 147/148 should only be issued in accordance with the new Section 147, and where the original assessment had been made under Section 143(3) then in view of the proviso to Section 147, the notice under section 148 would be illegal if issued more than four years after the end of the relevant assessment year. The same view was taken by the Gujarat High Court in Shree Tharad Jain Yuvak Mandal v. ITO [2000] 242 ITR 612.

18. In our opinion, we have to see the law prevailing on the date of issue of the notice under Section 148, i.e., November 20, 1998. Admittedly, by that

date, the new Section 147 has come into force and, hence, in our opinion, it is the new Section 147 which will apply to the facts of the present case. In the present case, there was admittedly no failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment. Hence, the proviso to the new Section 147 squarely applies, and the impugned notices were barred by limitation mentioned in the proviso."

7.1 In the absence of any failure on the part of the assessee to disclose fully and truly all material facts and assessment framed u/s.143(3) of the Act and reopening is beyond 4 years, the issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of CIT vs. Foramer France, *supra*. In view of the above, we find no infirmity in the order of CIT(A)-NFAC and hence, we confirm the order of CIT(A)-NFAC quashing the reassessment.

8. In the result, the appeal filed by the Revenue is dismissed.

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

Sd/-	Sd/-
(जगदीश)	(महावीर सिंह)
(JAGADISH)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 30th May, 2024

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT, Madurai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.