

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER

I.T.A. No. 757 & 758/Kol/2023
Assessment Year: 2012-13 & 2013-14

Himalaya Distilleries Ltd. Majitar Rangpo - 737136 [East Sikkim] [PAN : AACCH6217P]	Vs	Income Tax Officer, Ward - 3(1), Gangtok
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Somanth Ghosh, A/R
Revenue by :	Shri P. P. Barman, Addl. CIT, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 21/03/2024
घोषणा की तारीख /Date of Pronouncement: 05/06/2024

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The instant appeals are directed at the instance of the assessee against the separate orders of the National Faceless Appeal Centre, Delhi, (hereinafter the "Id. CIT(A)") evenly dt. 29/05/2023, passed u/s 250 of the Income Tax Act, 1961 (hereinafter 'the Act') for Assessment Years 2012-13 & 2013-14.

2. As the issues raised in both these appeals of the assessee are common, they have been heard together and are being disposed off by way of this common order.

3. Perusal of the grounds of appeal indicate that apart from the grounds raised on merit, a common legal ground has been raised challenging the validity of the re-assessment proceedings on account of wrong assumption of jurisdiction u/s 147 of the Act and that the re-

assessment proceedings are *ab initio void, ultra vires* and null and void. Since the legal issue goes to the root cause, we first adjudicate the same.

4. Facts in brief are that the assessee is a company incorporated on 11/10/1982 under the Registration of Companies Act, Sikkim, 1961, with the main object of carrying on the business of manufacturing and dealing in liquor and breweries. A PAN No. has been allotted to the company but no return of income was filed for Assessment Years 2012-13 and 2013-14. The ld. Assessing Officer, based on the information that the assessee company is engaged in manufacturing of liquor and having PAN but not filed any return of income, issued notice u/s 148 of the Act dated 29/07/2016. Since the content of the reasons recorded are similar for both the impugned Assessment Years, we reproduce below the notice u/s 148 of the Act which also contains the reasons recorded for Assessment Year 2012-13:-

"Sir/Madam.

Sub: recorded reason for issuing notice u/s 148.

Ref: your letter dated 13.07.2016

Please refer to your letter mentioned above where you requested the undersigned to kindly furnish the recorded reason based on which notice has been issued u/s 148 in your case.

In this regard, it is to inform you that the assessee M/s Himalaya Distillery (P) Ltd. is an entity engaged in the manufacture of liquor. The entity being a company is not exempt from tax u/s 10(26 AAA) of the I.T. Act, 1961. So, despite being liable to file return of income, the entity has not complied with the filing of return voluntarily till date.

In view of the above the undersigned has a reason to believe that taxable income in the hands of the assessee has escaped assessment within the meaning of section 147 of the I.T. Act, 1961 for the A.Y, 2012-13.

This is for your kind information and perusal."

5. Subsequent to the issue of notice u/s 148 of the Act during the course of reassessment proceedings was commonly stated that the assessee company falls under the category of Association of Persons (AOP) and since there is no positive income for the year, no return of income was required to be filed. Reference before Id. Assessing Officer was also made to the decision of this Tribunal in the case of *Signotrom (Sikkim) Pvt. Ltd., Sikkim vs. Dy. Commissioner of Income Tax in ITA No. 154/Kol/2007; Assessment Year 2004-05, dt. 21/09/2007*, where it was held that companies registered under the Companies Act of Sikkim, 1961, are to be treated as AOPs. However, the Id. Assessing Officer taking note that the PAN No. applied by the assessee is for the category of company and not AOP and the assessee was required to file income tax return and went ahead to make various additions for the years under dispute. When the assessee carried the matter before the Id. CIT(A), it failed to succeed as the Id. CIT(A) dismissed the appeal of the assessee *ex-parte* for non-appearance.

6. Now, the assessee is in appeal before this Tribunal.

7. The Id. Counsel for the assessee took us through the paper books for both the impugned Assessment Years 2012-13 and 2013-14 containing 66 and 63 pages respectively and also made reference to the decision of this Tribunal in the case of *Signotrom (Sikkim) Pvt. Ltd. (supra)* as well as another decision of this Tribunal in the case of *Himal Enterprise Pvt. Ltd. vs. ITO in ITA No. 103/Kol/2018, Assessment Year 2013-14, order dt. 20/07/2018* and submitted that under the Indian Companies Act, 1956, the companies registered under the Companies Act of Sikkim, 1961, were not included and it was only during Financial Year 2013-14 (29/08/2013) when the new Companies Act, 2013, was notified, then

the companies registered under Registration Act, Sikkim, 1961, were also included in the category of Indian companies. He, therefore, submitted that the assessee has to be treated as Indian company only from Assessment Year 2015-16 and onwards and for the impugned years, falls under the category of AOP and, therefore, reopening proceedings carried out are bad in law as the ld. Assessing Officer has wrongly assumed jurisdiction.

On the other hand, the ld. D/R vehemently argued supporting the order of the ld. CIT(A) and stated that the assessee was well aware of the fact that it is a company and while applying for PAN, it was treated as a company and, therefore, it cannot plead that it falls under the category of AOP.

8. We have heard rival contentions and perused the material placed before us. In the instant case, the ld. Assessing Officer has assumed jurisdiction to issue notice u/s 148 of the Act and carried out the re-assessment proceedings for Assessment Year 2012-13 and 2013-14 on the basis of the reason that the assessee being a company is not exempt from tax u/s 10(26AAA) of the Act and despite being liable to file return of income the entity has not complied with the filing of return voluntarily till date. Based on this reason, the ld. Assessing Officer had a reason to believe that taxable income in the hands of the assessee has escaped assessment. We observe that undisputedly the assessee company is registered under the Registration of Companies (Sikkim) Act, 1961, and was granted the registration certificate on 12/10/1982. The 36th Amendment (1975) to the Constitution of India, was passed by the Parliament of India by inserting Article 371F, under the heading “special provision with respect to the State of Sikkim”. Though the areas

of State of Sikkim became part and parcel of the Union of India, however it is provided that laws in force in the State of Sikkim could only be made applicable by any order or notification by the President of India. Since no order for modification has been issued in respect of the Registration of Companies (Sikkim) Act, 1961, in terms of Article 371F(k)(i) of the Constitution of India. The Registration of Companies (Sikkim) Act, 1961, continued to be in force. The Companies Act, 1956, was also not made applicable to the State of Sikkim by way of any notification and, therefore, the provisions of Companies Act, 1956 were not applicable on such companies incorporated under the Registration of Companies (Sikkim) Act, 1961. This aspect has been dealt with by this Tribunal in the case of *Himal Enterprises Pvt. Ltd. (supra)*, wherein it was held that the definition of 'Company' under the Income Tax Act, 1961 given u/s 2(22A) of the Act does not include a company registered under the Companies Act of Sikkim, 1961. The relevant portion of the decision of this Tribunal in the case of *Himal Enterprises Pvt. Ltd. (supra)*, is reproduced below:-

"3. The issue before me is whether the assessee has to be assessed in the status of a 'Company' or in the status of "An association of Persons".

We have heard rival contentions. The undisputed facts of the case is that the assessee company is registered as a Private Limited Company under the Registration of Companies Act Sikkim 1961. The definition of 'Company' under the Income Tax Act, 1961 is given u/s 2(22A) of the Act. This definition does not include a company registered under the Companies Act of Sikkim, 1961.

The Kolkata 'D' Bench of the Tribunal in the case of *Signotrom (Sikkim) Pvt. Ltd., Sikkim vs. Dy. Commissioner of Income Tax in ITA No. 154/Kol/2007; Assessment Year 2004-05, order dt. 21/09/2007, at para 15 held as follows:-*

"15. On the other hand, the Ld. D.R. strongly supported the order of the A.O. and that of the CIT(A) while defending the Revenue. As it is evident from the aforesaid argument and counter-argument from the rival parties along with the case record perused, the only issue in this case relates to the issue of status. According to the assessee, the status claimed is AOP whereas the A.O. & CIT(A) treated it as a company on the basis that the Indian Companies Act is also equally applicable to Sikkim. But in view of the position of the Constitution, any company incorporated in Sikkim has its separate status and the same is not equivalent to a company under the Indian Companies Act. Unless and until notification is issued by the Hon'ble President of India, Indian Companies Act cannot extend to Sikkim. At the same time,

companies incorporated under the Companies Act (Sikkim), 1961. The specific provision of Article 371F of the Constitution grants a special status to the State of Sikkim. Clause (n) of the said Article provides that any enactment which is force in India may be extended to the Sikkim by the President by public notification. In absence of any such notification extending to the present Act to Sikkim, the State continues to be governed by its own Registration of Companies Act (Sikkim), 1961. Therefore, in view of the peculiar Constitutional barrier to the status of Sikkim, we are to accept the contentions of the Ld. A.R. on behalf of the assessee and accordingly we allow the status as AOP as there was no proper rebuttal from the side of the revenue to the contention taken by the assessee through its Ld. A.R. Accordingly, the appeal of the assessee is allowed."

3.1. *Reliance placed by the ld. D/R, on the 145th Report of the Parliament of India (Rajya Sabha) Petition praying for Protection of interest of Bona Fide Indian National Residing in Sikkim Prior to its merger with India in 1975, presented on 6th August, 2013, has no relevance as far as this issue is concerned. The Indian Income Tax Act, 1961, has been extended to the State of Sikkim w.e.f.01/04/1989. The revenue has not brought on record any evidence of merger of the Companies Act of Sikkim with the Indian Companies Act, 1956. Hence, the propositions of law laid down by the Tribunal extracted above still holds the field. Hence, we uphold the contention of the assessee that it has to be assessed as an 'Association of persons' and not as a 'Company'.*

4. *In the result, appeal of the assessee is allowed."*

9. Now, considering the ratio laid down by this Tribunal (*supra*), we find that prior to Companies Act, 2013, the Indian Company as referred u/s 2(22A) of the Act is defined as a domestic company means an Indian company and further Indian company has been defined u/s 2(22) of the Companies Act, which means a company formed and registered under the Companies Act, 1956 which has been subsequently amended by the Companies Act, 2013, incorporated on 30/08/2013. We also observe that in the new Companies Act, 2013, while including various types of companies registered in India also includes Registration of Companies (Sikkim) Act, 1961, in the category of previous company laws. Therefore, it was only after enactment of Companies Act, 2013, that the Registration of Companies (Sikkim) Act, 1961, fell under the category of domestic companies and all the provisions of Income tax Act applicable to Indian domestic companies started applying thereon.

10. Now, before us the assumption of jurisdiction for both the Assessment Years 2012-13 and 2013-14 has been challenged and the reason to believe for assuming jurisdiction is that the assessee is a company which is liable to file its return of income. However, as discussed above since the assessee was not falling under the category of Companies Act, 1956, as it was not registered under the said Act and it fell under the category of domestic company only from Assessment Year 2014-15 onwards, the Id. Assessing Officer failed to have valid reason to believe that assessee is a company liable to file the income tax return. Further since prior to Assessment Year 2014-15, assessee company is AOP, it was required to file the return of income only if the income exceeds the threshold limits. The reasons recorded u/s 148 of the Act should have a live link or nexus with the belief that there is escapement of income. In the instant case, both the conditions are not fulfilled because in the reasons recorded, there is no reference to any specific income having escaped nor there is any reason to believe that income has escaped assessment. It is imperative that the significant word in the enactment relating to re-assessment is 'belief' and not 'suspicion' These essential elements are obviously and glaringly missing in the instant case which renders the reassessment proceedings as well as the order passed ex-facie null in law. It is settled that before an Assessing Officer can be said to have had reasons to believe that some income has escaped assessment, he should have relevant material before him from which he could have drawn such conclusion. His vague imagination that there might have been some escapement of income from assessment is not sufficient [*Chhuganimal Rajpal -vs- S. P. Chaliha* (1971) 79 ITR 603 (SC)]. It is emphatically settled in this regard

that there can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Assessing Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumor. The Assessing Officer would be acting without jurisdiction, if the reason for the belief that the conditions required to be satisfied do not exist or is not material or relevant to the belief required by the section [*Sheo Nath Singh -Vs- A.A.C. (1971) 82 ITR 147 (SC)*]. It is further settled that the powers of the Income-tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are 'reason to believe' and not Reason to suspect'. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus should be there between the material before the Assessing Officer in the given case so as to provide a legally sound basis for reopening the assessment [*I.T.O. -VS- Lakhmani Mewal Das (1976) 103 ITR 437 (SC)*]. There can be no doubt that the belief, contemplated in this section, must be that of an honest and rational person, based upon reasonable grounds. It is settled that the expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith, It cannot be merely pretence [*S. Narayanappa -VS- C.I.T. (1967) 63 ITR 219 (SC)*]. It is also not in dispute that the Ld. Assessing Officer has failed to prove that the income of the appellant has escaped assessment for the assessment year under dispute. The specious action conceived by the Ld. Assessing Officer to anyhow

justify the assumption of jurisdiction u/s. 147 of the Act is wholly contrary to the statutory position in this respect. It is the requirement under the law that the Ld. Assessing Officer should apply his mind and speak through his reasons to form a basis for initiating re-assessment proceedings, which is also palpably missing in this case. Therefore, the alleged reasons recorded by the Ld. Assessing Officer for initiating proceeding u/s. 147 of the Act were patently wrong for the purposes of assuming jurisdiction for issuance of notice u/s. 148 of the Act and the impugned finding of the Ld. Commissioner (Appeals) in upholding the validity of such notice issued is absolutely contrary to the settled position in law. The ld. D/R also failed to controvert the contentions of ld. Counsel for the assessee that no proper approval was taken u/s 151 of the Act from the specific authority.

11. We, therefore, hold that re-opening proceeding from Assessment Year 2012-13 and Assessment Year 2013-14, in the instant case u/s 147 of the Act are *void ab initio* bad in law and thus are hereby quashed and impugned addition stands deleted. Appeals of the assessee for impugned Assessment Years are allowed on legal grounds. Dealing with the quantum additions would be merely academic in nature.

12. In the result, appeals of the assessee are allowed.

Order pronounced in the Court on 5th June, 2024 at Kolkata.

Sd/-

**(SANJAY GARG)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 05/06/2024

**S.S.P.*



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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata