

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER,

AND

MS. MADHUMITA ROY, JUDICIAL MEMBER

	ITA NO. 1637/Del/2023		
	A.YR. : 2012-13		
BHARTIYA SAMRUDDHI INVESTMENTS AND CONSULTING SERVICES LIMITED, F-5, GROUND FLOOR, GREATER KAILASH, KAILASH COLONY, PART-I, NEW DELHI – 110 048 (PAN: AAACB5336R)	VS.	ACIT, CIRCLE 4(2), NEW DELHI	
(APPELLANT)		(RESPONDENT)	

Appellant by : Shri Arvind Kumar, Adv.
Respondent by : Shri Raghunath, Sr. DR.

Date of hearing : 30.09.2024
Date of pronouncement : 04.10.2024

ORDER

PER SHAMIM YAHYA, AM :

The Assessee has filed this Appeal against the Order of the Ld. CIT(A)/
National Faceless Appeal Centre (NFAC), Delhi dated 27.03.2023 relating to
assessment year 2012-13 on the following grounds:-

1. There is no tangible material, which is a pre-condition, available with the AO to allege the escapement of income, the reopening tantamount to only review of original assessment based on change of opinion which is not permissible u/s. 147/148.
 2. Neither there is any fresh fact that came to the light which was not previously disclosed by assessee nor there is any material came to the possession of AO which proves any untruthfulness of the facts submitted by the assessee.
 3. That on the facts and circumstances of the case, the Deputy Commissioner of Income Tax has erred in fact in adding back the amount of Rs. 91,47,928/- being Sundry Advances / Assets written off considering it as an inadmissible claim without giving any reason. The addition to Returned Income / (Loss) already assessed and is allowable business expenditure and should be deleted.
 4. The reopening of assessment is beyond the stipulated time limit of 4 years is not based on any additional material that has come to the notice of AO and merely due to change of opinion.
 5. The expenditure claimed by the assessee is as per the provision of the Act. The addition may be deleted.
2. Briefly stated facts, are that as per the records of A.Y. 2012-13, it was noted by the AO that expenditure of Rs. 91,47,928/- claimed as ‘sundry advances/ assets written off’ was debited to the Profit and Loss account. AO observed that the said expenditure being capital in nature should have been added back to the income of the assessee company. AO further noted that the assessee did not furnish details of expenditure of Rs. 91,47,928/- claimed on account of ‘Sundry advances / assets written off’ during assessment proceedings for AY 2012-13, which resulted in over assessment of loss of Rs. 91,47,928/- by reason of failure on part of the assessee. Notice u/s. 148 of

the Act was issued on 31.03.2019 after having recorded the reasons thereof u/s. 147 of the Act and after obtaining the sanction u/s. 151 of the Act from the competent authority.

2.1 Further, Assessing Officer issued notice u/s. 142(1) of the Act as under:-

i) During the year under consideration the assessee company has debited Rs. 91,47,928/- to profit and loss account on account of sundry advances / assets written off. This expenditure being capital in nature is not allowable in view of the provisions of Section 37 of the I.T. Act.

ii) Section 37 of the I.T. Act provides that any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business is allowable as deduction in computing income chargeable under the had profits and gains of business or profession. Thus, all expenditure, other than capital expenditure which is incurred in relation to the business is allowable.

iii) In view of the above you are required to show cause as to why the above claim of deduction on account of sundry advances / assets written off amounting to Rs. 91,47,928/- may not be disallowed and added back to your income. Please furnish your justification on or before the due date of failing which the addition shall be made to the total income for the year as mentioned above.

2.2 In response to the aforesaid notice, the assessee responded as under:-

“The regular assessment u/s. 143(3) in case of assessee had been conducted for the year and order was passed dated 12.01.2015 accepting the returned loss of Rs. 23,20,15,750/-. The scrutiny was made to confirm the genuineness and correctness of various claims, deductions, etc. made by the taxpayer in the return of income.

Now that Department has issued the Notice u/s. 148 of the I.T. Act in 31-Mar-2019 with the reason for reopening the case as “Expenditure of Rs. 91,47,928/- claimed as ‘Sundry advances/ assets written off’ was debited to Profit and Loss account” and issued captioned notice on 12.12.2019. These are sundry debtors written off and the issue was discussed in length on the time of regular assessment and written submission was also filed in this aspect on 13-Sept-2015.

Please refer to our detailed reply dated 04.10.2019, Rejoinder to order dated 23.9.2019 received by the assessee on 23.9.2019 disposing of the objections against the notice u/s. 148.

“The reasons which had been disclosed by the Assessing Officer as well as the rejection letter did not specifically refer to any material which the assessee failed to disclose nor was there any allegation of suppression on the part of the assessee.

Approval of competent authority u/s 151 for the issue of notice is neither made available to the assessee nor forming part of reasons recorded or the rejection letter.

There is no tangible material, which is a pre-condition, available with the AO to allege the escapement of income, the reopening tantamount to only review the original assessment based on change of opinion which is not permissible u/s. 147/148.

There is no specific, reliable or relevant information which came to the possession of the AO for which there is failure on the part of assessee to make a true and fid! disclosure. The assessee has debited the amount in Profit & Loss account which is visible on the face and forming part of department records. There is neither failure on the part of assessee to make true and full disclosure nor there is any new tangible material unearthed by AO other than the

documents submitted by the assessee.

Neither there is any fresh fact that came to the light which was not previously disclosed by assessee nor there is any material came to the possession of AO which proves any untruthfulness of the facts submitted by the assessee. Therefore, even the case law relied upon by the AO supports the contentions of the assessee. The claim of the assessee is allowed in the original assessment proceedings, now alleging the same as wrong claim based on the same material available on the record, is merely change of opinion.

There is no failure on the part of assessee. Assessee has disclosed all the facts which are replied and accepted by the AO himself and now also on the same facts only, the AO is relying upon to reopen the assessment.

Our rejoinder refers to following case laws –

*Karam Chand Appliances Pvt. Ltd. & Another vs. DC IT (2017)
399 ITR 323(Delhi)*

Donald Son India Filters System Pvt. Ltd. v. CIT (2015) 371 ITR 87

Madhukar Khosla vs. ACIT (2014)367 ITR 165 (Delhi)

CIT vs. Kelvinator of India 320 ITR 561

ITO vs. Lakhmani Mewal Das (1976) 103 ITR 437 (SC)

In view of the above submission, legally as well as factually, 148 action of the AO deserve to be cancelled and filed, as there is no jurisdiction for taking action u/s. 148/147 as explained above. The reasons recorded are not germane to the reassessment proceedings and does not assist the AO in drawing any adverse inference for

invoking 147/148 proceedings and hence are to be cancelled and filed.

Therefore, the reassessment proceedings initiated are to be cancelled and filed as there is no income that has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961”

2.3 However, the AO was not convinced with the aforesaid submissions of the assessee and held as under:-

“The submission of the assessee has been considered. The reply of the assessee cannot be accepted as the expenditure of capital in nature and it cannot be claimed as allowable expenditure within the meaning of clear provisions of section 37(1) of the I.T. Act. On perusal of the submission made by the assessee, it is evident that the assessee has not provided satisfactory justification regarding claim of deduction on account of sundry advances/assets written off amounting to RS. 91,47,928/-. The absence of any proper response from the assessee, the amount of Rs. 91,47,928/- is being disallowed and added to the income of the assessee.”

3. Against the aforesaid action of the AO, assessee preferred the appeal before the Ld. CIT(A) by raising the issues on jurisdictional as well as on merits. Ld. Upon assessee's appeal, Ld. CIT(A) confirmed the AO's action by passing the following order:-

“I have considered the statement of facts, grounds of appeal of the appellant and the Assessment Order passed u/s.143(3) r.w.s 147.

The Assessing Officer in the assessment order has stated that it was noticed from the records of A.Y.:2012-13 the appellant had claimed an expenditure of Rs,91,47,928/-claimed on account of “Sundry advances/assets written off” during assessment

proceedings for A.Y.:2012-13. This resulted in over assessment of loss of Rs.91,47,928/- by reason of failure on part of the assessee. Hence, the case was re-opened u/ 147.

During the proceedings notice u/s. 142(1) was issued to the appellant raising the following questions:

i) *During the year under consideration the appellant company has debited Rs.91,47,928/- to profit and loss a/c on account of sundry advances/assets written off. This expenditure being capital in nature, is not allowable in view of the provision of Sec.37 of the IT Act, 1961.*

ii) *Sec.37 of the IT Act provides that any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business is allowable as deduction in computing income chargeable under the head profits and gains of business or profession. Thus, all expenditure, other than capital expenditure which is incurred in relation to the business is allowable.*

iii) *In view of the above you are required to showcause as to why the above claim of deduction on account of sundry advances/assets written off amounting to Rs.91,47,928/- may not be disallowed and added back to your income. Please furnish your justification on or before the due date failing which the addition shall be made to the total income for the year as mentioned above.*

The appellant's filed reply to the above questionnaire before the Assessing Officer, which was considered but not accepted by the Assessing Officer, as the expenditure incurred was capital in nature and cannot be claimed as allowable expenditure within the meaning of clear provisions of section 37(1) of the I.T.Act.

Hence, in the absence of satisfactory justification regarding claim of deduction on account of sundry advances/assets written off amounting to Rs.91,47,928/- the same was disallowed and added to the income of the appellant.

Further, in the absence of any proof to justify the contention of the appellant that the expenditure claimed as sundry advances/assets written off are genuine and revenue in nature the grounds of the appellant are rejected and the appeal is dismissed."

4. Aggrieved with the aforesaid action of the Ld. CIT(A)/NFAC, Delhi, Assessee is in appeal before us.

5. At the time of hearing, Ld. AR has reiterated the grounds of appeal and also the submissions made before the authorities below, more particularly that the issue on the reopening of assessment is beyond the stipulated time limit of 4 years, which is not based on any additional material that has come to the notice of the AO and merely due to change of opinion.

5.1 Per contra, Ld. DR relied upon the order of the Ld. CIT(A)/NFAC and submitted that the same does not require any interference, hence, the same may be confirmed.

6. We have heard rival contentions and perused the relevant records.

6.1 It transpires from records that the Assessee Company has filed its Income Tax Return for AY 2012-13 on 27/09/2012 with Returned Loss of Rs. 23,20,15,750/- and the regular assessment u/s 143(3) of the Act has been completed vide order dated 12-01-2015 accepting the returned Loss of Rs. 23,20,15,750/-. Later, the scrutiny was made to confirm the genuineness and correctness of various claims, deductions etc. made by the taxpayer in the return of income by examining the books of accounts and the audited financials. Further, the Department has issued the Notice u/s 148 of Act on 31-03-2019 with the reason for reopening the case as “Expenditure of Rs. 91,47,928/- claimed as ‘Sundry advances/assets written off was debited to Profit and Loss Account’”. The Assessing Officer has made the addition of Rs. 91,47,928/- vide order u/s 147/143(3) of IT Act dated 15/12/2019. We further note that these are Sundry debtors written off and the issue was discussed at the time of regular assessment. It is noted that there is no tangible material, which is a pre-condition, available with the AO to allege the escapement of income, the reopening tantamount to only review of original assessment based on change of opinion which is not permissible u/s 147/148, as per settled law. Also, the reopening being beyond 4 years from the end of the assessment year in terms of

proviso to section 147 in case of completed assessment u/s 143(3) of the Act, the jurisdictional precondition is that there should be failure on the part of the assessee to disclose fully and truly all material facts necessary for their assessment. In the reasons recorded, there is no specific, reliable or relevant information which came to the possession of the AO resulting in any failure on the part of assessee to make a true and full disclosure. The assessee has debited the amount in Profit & Loss account which is visible on the face and forming part of department records. There is neither failure on the part of assessee to make true and full disclosure nor there is any new tangible material unearthed by AO other than the documents submitted by the assessee. Neither there is any fresh fact that came to the light which was not previously disclosed by assessee nor there is any material came to the possession of AO which proves any untruthfulness of the facts submitted by the assessee. In our view, there is no failure on the part of assessee. However, Assessee has disclosed all the facts which are replied and accepted by the AO himself at the time of assessment proceedings u/s 143(3) of Income Tax Act. It amounts to change of opinion which does not confer jurisdiction u/s147/148 for reopening completed assessment. The submission filed by the Assessee Company in regular Assessment Proceedings has been duly considered and allowed. According to the proviso to section 147 where an assessment is made u/s 143(3), no action shall be taken u/s 147 after expiry of the 4 years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for that assessment year by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. If, there is failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment in the year under consideration, then proceedings u/s 147 cannot be initiated after the expiry of the 4 years from the end of the relevant assessment year. The relevant assessment year in the present year will end on 31.3.2013 and 4 years therefrom

will expire on 31.3.2017. The notice u/s 148 is issued on 31.3.2019. Thus, the notice is issued much beyond 4 years from the end of the relevant assessment. Therefore, the proceedings in the present case is clearly barred by proviso of 147 of the Act and reassessment was done merely due to change of opinion.

6.2 We find that Full Bench of the Hon'ble Jurisdictional High Court in the case of C.I.T. vs. Kelvinator India Ltd. 256 ITR 1, has held that mere change of opinion would not confer jurisdiction upon the Assessing Officer to reopen proceedings without anything further. It was held that if the Assessing Officer is allowed to do so, the same would amount to giving a premium to an authority exercising quasi judicial function to take benefit of its wrong. Hence, it is clear that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. The above said decision was duly affirmed by the Hon'ble Apex Court in the case of C.I.T. vs. Kelvinator of India Ltd.. In this case the Hon'ble Apex Court has held that after 1st April, 1989 Assessing Officer has power to reopen the assessment u/s. 147 provided that Assessing Officer has reason to believe that income has escaped assessment and there is tangible material to come to the conclusion that there is escapement of income; mere change of opinion may not per se to be a reason for reopening.

6.3 In the background of the aforesaid discussions and respectfully following the precedent, as aforesaid, in our considered opinion, the reassessment in the instant case has to be held to be invalid and accordingly, the same is hereby quashed.

7. Since the reassessment is quashed on account of jurisdiction itself, the merits of the case have become academic and are not required to be adjudicated.

8. In the result, the Assessee's appeal is allowed.

Order pronounced on 04/10/2024.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

**Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

SRB

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar