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

BEFORE: SHRI BR BASKARAN, ACCOUNTANT MEMBER
&
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No. 4453/MUM/2023
(**Assessment Year : 2012–13**)

Team Global Logistics Pvt. Ltd. 701-702, Times Square Building, Andheri Kurla Road, Sakinaka, Andheri-400005.	Vs.	DCIT-11(3)(1) Aayakar Bhavan, M.K.Road, Mumbai-400020.
PAN/GIR No. AACCT2540H		
(Appellant)	..	**(Respondent)**

Assessee by	Shri. Dharmesh Shah a/w Ms. Mitali Parekh
Revenue by	Shri. P.D. Chougule (Addl. CIT) SR. DR
Date of Hearing	**16/07/2024**
Date of Pronouncement	**15/10/2024**

आदेश / O R D E R

PER SUNIL KUMAR SINGH (J.M):

1. This appeal has been preferred against the impugned order dated 13.10.2023 passed in Appeal no. CIT(A) 18, Mumbai/10147/2019-20 by the Ld. Commissioner of Income–tax(Appeals)/ National Faceless Appeal Centre (NFAC) [hereinafter referred to as the "CIT(A)"] u/s. 250 of the Income-Tax Act, 1961 [hereinafter referred to as "Act"] for the

Assessment year [A.Y.] 2012-13, wherein learned CIT(A) has dismissed assessee's first appeal against the assessment order dated 14.11.2019.

2. i) The brief facts give rise to this appeal state that assessee claimed to be engaged in freight forwarding services as MTO, software development services and filed its return of income for A.Y. 2012-13 on 30.09.2012, declaring total income at Rs. 6,68,55,810/-. The case was assessed u/s 143(3) of the Act vide order dated 18.02.2015 accepting the returned income.

ii) Subsequently information was received by assessing officer from the office of DDIT(Inv.) unit 4(1), Kolkata that the assessee had received Rs. 35,00,000/- from one M/s. Tribhuvan Dealtrade Pvt. Ltd. and it was found that the transactions done had no economic rationale. M/s. TDPL was found to be a paper concern involved in providing accommodation entries and the assessee was identified as one of the beneficiaries of accommodation entries provided by M/s. TDPL.

iii) On the basis of aforesaid information and after recording the reasons, the case was reopened u/s. 147 of the Act after obtaining necessary approval from the principal CIT-11, Mumbai vide letter dated 19.03.2019 and the notice u/s. 148 was issued on 22.03.2019 and served upon the assessee.

iv) In response to the said notice, assessee filed return for A.Y. 2012-13 on 25.04.2019. Reasons to reopening were provided to assessee vide letter dated 25.04.2019 and the assessee's

objections to reopening were rejected vide order dated 14.06.2019.

v) Further, statutory notices u/s. 143(2) r.w.s 142(1) were issued and served upon the assessee. Assessee was requested to furnish the details of transactions entered into with M/s. TDPL along with supporting bills/invoices thereof. Assessee submitted that it had entered into loan transaction with M/s. Tribhuvan Dealtrade Pvt. Ltd. in A.Y. 2012-13 and furnished the loan balance confirmation thereof. Further, submitting that it had paid interest to M/s. TDPL and deducted TDS from it.

vi) After considering assessee's submissions, learned assessing officer disallowed assessee's loan receipts of Rs. 35,00,000/- from M/s. TDPL and added as unexplained cash credit u/s. 68 of the Act and interest of Rs. 2,81,688/- paid on the aforesaid loan amount and added to the total income of the assessee.

3. Aggrieved, by the assessment order, assessee filed an appeal before learned CIT(A), who dismissed assessee's appeal.

4. Aggrieved by the impugned order, assessee has raised following grounds in this appeal:

" 1. The Ld. CIT(A) erred in law and in facts in not appreciating that the reopening of the assessment u/s. 147 of the Act and issue of notice u/s. 148 of the Act was invalid and bad in law.
2. The Ld. CIT(A) erred in law in confirming the assessment order passed in gross violation of principles of natural justice.
3. The Ld. CIT(A) has erred in law and in facts in confirming addition of Rs. 35,00,000/- made on account of alleged bogus loans u/s 68 of the Act.
4. The Ld. CIT(A) has erred in law and in facts in confirming the disallowance made towards interest payment of Rs. 2,81,688/- on loan taken during the year."

5. Learned AR has submitted that the reasons recorded by learned assessing officer are based on fundamentally erroneous premises, wherein learned assessing officer has wrongly stated that the issue under consideration was never examined by assessing officer as there was no regular assessment done for the year under consideration, whereas the scrutiny assessment was carried out for the year under consideration and the scrutiny assessment order u/s. 143(3) of the Act was passed on 18.02.2015. It is further submitted that the copy of satisfaction note as required u/s. 151(1) of the Act was also not supplied by learned assessing officer. Learned CIT(A) has also ignored these important facts and grossly erred in passing impugned order, further praying that the reopening and the notice issued u/s. 148 are bad under law and be quashed.
6. Learned DR has vehemently supported the impugned order passed by learned CIT(A) .
7. It is worth noting that Hon'ble Supreme Court in Civil Appeal No. 8629 of 2024, union of India and others V. Rajeev Bansal vide judgement dated 03.10.2024 observed that the revenue has to follow the following procedure for reopening assessment under old regime. (i) section 147 allows the assessing officer to reassess any income chargeable to tax if the officer had 'reasons to believe' that such income escaped assessment. (ii) The assessing officer has to ensure that the notice u/s. 148 was issued within the time limit prescribed u/s. 149 of the Act. (iii) The assessing officer has to obtain the sanction of the

specified authority u/s. 151 of the Act before issuing a reassessment notice. (iv) The assessing officer is also required to afford an opportunity of hearing in terms of decision of Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. V. Income Tax Office (2003) 1SCC72. (v) The assessing officer is therefore empowered to issue the notice of reassessment u/s. 148 of the Act.

8. Sections 147 to 151 of the Act deal with the procedure of reassessment. This scheme has been substantially overhauled by the finance Act 2021 with effect from 01.04.2021. However, there is no dispute that the instant appeal shall be governed by the old regime. "Reason to believe" requires schematic interpretation. The assessing officer has power to reopen provided therein a tangible material to come to the conclusion that there is escapement of income from assessment, reason must have a link with the formation of the belief.
9. Hon'ble Bombay High Court in writ petition no. 3638 of 2021, vide order dated 19.01.2022, Parinee Realty Pvt. Ltd. V. Assistant Commissioner of Income Tax Central Circle-2(3), vide para 2 to 9, held as under:

> *" 2. The re-opening is proposed to be made within four years of the end of the relevant assessment year. In such a situation even though proviso to Section 147 of the Act would not apply, and the Assessing Officer has to only make out availability of tangible material, it is settled law that if the re- opening is based on mere change of opinion, the notice issued under Section 148 of the Act has to be set aside. Paragraph No.12 of the judgment dated 23rd November, 2021 Reserve Bank Officers Co-operative Credit Society Ltd. vs. The Income Tax Officer 17(3)(1) and Ors. (w.p. 3332/2019) (unreported) reads as under:*
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> > *12. Section 147 enables the Assessing Officer to assess or reassess any income chargeable to tax which he has reason to believe has escaped assessment for an assessment year. The proviso to section 147 imposes*

additional requirements where an assessment is sought to be reopened beyond a period of four years from the end of the relevant assessment year. In the present case, the exercise of power is within a period of four years and, therefore, the requirements of the proviso are not attracted. Where the Assessing Officer purports to exercise power under section 147 within a period of four years of the end of the relevant assessment year, the condition precedent to the exercise of the power, is the existence of a reason to believe that any income chargeable to tax has escaped assessment. We must keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. The reassessment has to be based on the fulfillment of certain conditions. It is settled law that if the concept of change of opinion is removed, then in the guise of reopening the assessment, the review would take place. The concept of change of opinion has been built in the statute to check abuse of power by the Assessing Officer. The Assessing Officer has the power to reopen only when there is tangible material to come to the conclusion that there is escapement of income from the original assessment. The test of "tangible material" has been enunciated in a judgment of the Supreme Court in CIT v. Kelvinator [2010] 187Taxman312(SC) of India Ltd. held thus (page 564):

> *"...one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which can-not be per se reason to reopen, We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre-conditions. If the concept of 'change of opinion' is removed, as contended on behalf of the Department, then the review would take place in the garb of reopening the assessment. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has the power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief..."*

3. We have considered the reasons recorded and communicated to petitioner on 19th April, 2021. The reasons indicate that the Jurisdictional Assessing Officer (JAO) has proceeded on incorrect facts and also he has proceeded on pure change of opinion. We say incorrect facts because the assessment order under Section 143(3) of the Act was passed on 21" December, 2019 determining total income of Rs.1,20,89,790/-.

The JAO however states "Subsequently, an information was received on 20.01.2019 in this case from Investigation Directorate, Mumbai During the course of survey, it was found that assessee has taken interest bearing loan from various institutions in market and advanced part of loan so taken to group companies either at low interest rate or at NIL interest rate." Therefore, the information on which reliance has been placed was received before the assessment order dated 21" December, 2019 was passed. On this ground alone, we can safely conclude that the conditions precedent to the exercise of the powers to re-assessment, i.e., existence of a reason to believe that income chargeable to tax has escaped assessment has not been met.

4. We have to also note that after the information on 20th January, 2019 was received, as noted in the assessment order dated 21" December, 2019 five notices were issued by the Assessing Officer under Section 142(1) of the Act. In the notice dated 1" October, 2019 a specific query has been raised by which petitioner was called upon to provide party wise details alongwith address of the parties to whom loan and advances were given and details of interest received on such loans and also furnish the nature of the loans/advances. Petitioner responded by its letter dated 8th November, 2019 and 14th November, 2019. In the reply dated 14th November, 2019 at Item No.4, petitioner has provided party wise details alongwith address of the parties to whom loans and advances were given, interest received on such loans and the nature of the loans/advances. The list includes all the names given in paragraph no.3 of the reasons for re-opening.

These have been considered in the assessment order because in the assessment order there is reference to five notices issued under Section 142(1) of the Act and it is also noted that the assessee has filed details through ITBA Module in response to the notices issued from time to time which are placed on record.

5. Mr. Suresh Kumar submits that these cannot be said to have been subject of consideration of the Assessing Officer because the assessment order does not contain reference and/or discussion. We will have to reject the submissions of Mr. Suresh Kumar since this court has time and again held that once a query is raised during the assessment proceedings and the assessee 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 even necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. [Aroni Commercials Ltd. vs. Deputy Commissioner of Income-tax 2(1)], [2014] 44Taxmann.com304(Bom)

It is also settled law that change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

6. There can be no doubt in the facts of the present case that the issue of loan being given to group companies either at low interest rate or no interest rate was a subject matter of consideration by the Assessing Officer during the original assessment proceedings. It would therefore, follow that the re-opening of the assessment is merely on the basis of change of opinion of JAO from that held during the course of

assessment proceedings leading to the assessment order dated 21 December, 2019. This change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment.

7. According to the JAO, survey report submitted by DDIT investigation indicate that interest should be charged at 12% per annum on loan given to sister concern totaling to Rs.4,17,04,380/- and therefore income chargeable to tax has been under assessed by the said amount. According to the JAO this interest income of Rs.4,17,04,380/- has escaped assessment. We find it rather strange that such an opinion is formed by the JAO. It is an accepted position that petitioner has in fact not received any interest in respect of the loans/advances given to seven of its group companies in the assessment order 2017-18. When no income is received there is no question of paying any tax on income which respondent think should have been received but was in fact not received. Income which accrues to a person is taxable in his hands but we have not seen any provision of law which says that income which he could have earned but he has not earned is taxable as income accrued to him. It will be useful to reproduce paragraph no.7 of the judgment of this court in India Finance & Construction Co. (P) Ltd. vs. B.N. Panda, Deputy Commissioner,[1993] 200ITR 710 (Bom). The same reads as under:

> *7. The second transaction on the basis of which notice under section 148 is issued relates to a transaction entered into in May, 1982, under which the assessee-company advanced to M/s. C. R. Developers (P) Ltd. a sum of Rs.15 lakhs purporting to be an advance for the purpose of construction of a hotel. The advance is in the nature of a loan and no interest is being charged on this account. The respondents contend that the assessee-company should have received an interest income worth approximately income worth approximately Rs. 3 lakhs if interest had been charged on this advance. Hence, this interest income of approximately Rs. 3 lakhs has escaped assessment. Once again the reason which is recorded is beyond the scope of section 147. It is an accepted position that the assessee-company has in fact nor received any interest in respect of this advance from M/s. C. R. Developers (P) Ltd. in the assessment year 1988-89. When no income is received there is no question of paying any tax on income which the respondents think, should have been received but was in fact not received. In the case of CIT v. A. Raman and Co. [1968] 67 ITR 11, the Supreme Court said that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have but has not earned, is not made taxable as income accrued to him. The Court also said that the High Court exercising Jurisdiction under article 226 of the Constitution has power to set aside a notice issued under section 147(b) if the condition precedent for the exercise of jurisdiction does not exist. It is open to the court to ascertain whether the ITO had in his possession any information*

and whether from the information the ITO have reason to believe that the income chargeable to tax has escaped assessment. In the present case, the reasons which are recorded clearly show that there is no material at all on the basis of which the Assessing Officer could have reason to believe that any interest income had escaped assessment. No such income had accrued during the assessment year in question.

8. It will also be useful to reproduce paragraph nos.5, 6 and 7 of the judgment of the High Court of Delhi in Shivnandan Buildcon (P) Ltd. vs. Commissioner of Income-tax.[2015] 60 taxmann.com 347(Delhi)

5. On going through the said decision, it can be discerned that the Guwahati High Court held that there was nothing to show that the assessee had, in fact, received interest or that the company to whom the loan was given had, in fact, paid interest to the assessee. There was also nothing on record to show that the alleged interest was not reflected in the accounts. The only finding recorded was that the assessee "ought to have charged interest. Referring to an earlier decision of the Guwahati High Court, in Highways Construction Co. (P) Ltd. v. CIT [1993] 199 ITR 702, the Court observed that their attention had not been invited to any provision of the Income-Tax Act empowering the income- tax authorities to include in the income, interest which was not due or not collected.

6. In similar vein, when we asked Mr Sahni, who is appearing for the respondent to point out some provision of the Income Tax Act, whereunder such 'notional' interest could be made the subject matter of tax, the only reference he made was to Section 144 of the said Act. However, we are clear that Section 144 does not at all apply to the present proceedings because the present proceedings originate from an assessment under Section 143(3) of the said Act.

7. In the absence of any specific provision under which the so called notional income on advances, could be brought to tax, we do not see as to how the impugned orders passed by the Commissioner of Income Tax can be sustained.

9. As held by the Apex Court in the case of Indian & Eastern Newspaper Society, New Delhi vs. Commissioner of Income Tax, New Delhi, 119 ITR 996(SC), even if it is an error that the Assessing Officer discovered, still an error discovered on a re-consideration of the same material does not given him power to re-open. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is

conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view."

10. The learned AR has drawn the attention of the bench towards the reasons of opening recorded by learned assessing officer and which is at page 18 of the assessee's paper book. The relevant para 3.0 of Reasons of reopening, reads as under:

" 3.0 Hence, it is evident from the above that the assessee failed to disclose fully and completely the material facts in the return of income. It is also evident from the above discussion that in this case, the issue under consideration was never examined by the AO as there was no regular assessment done for the year under concerned. Also on the basis of information received, it was seen that the above issue has not been considered and verified which resulted into escapement of income. For the above reasons, it is not a case of change opinion by the AO."

11. Learned assessing officer has, in the "reason for reopening" commenced his reasons with the following lines "In this case assessee has filed its ROI on 30.09.2012, declaring total income of Rs. 6,68,55,810/-, the same has been processed u/s. 143(1) of the IT Act." The aforesaid contents of the reason for reopening shows that assessing officer was not aware of the fact that the scrutiny assessment of the assessee was already carried out and order u/s. 143(3) of the Act dated 18.02.2015 was passed, which is part of the assessee's assessee's paper book at page 44, wherein it is mentioned that after verification of various details filed by the assessee the return of income filed by the assessee is accepted and income is assessed at Rs. 6,68,55,810/-. It is further noticed that before passing the original order, learned assessing officer issued notice u/s. 142(1) of the Act dated 01.09.2014 which is placed at page 38-39 of the assessee's paper book. It further transpires that the learned assessing officer called for the

details of unsecured loans along with the loan confirmation and interest paid. In response thereof assessee submitted his letters date 09.10.2014 and 21.11.2014, which are part of assessee's paper book at page 40-43. Statement of unsecured loan from M/s. Tribhuvan Dealtrade Pvt. Ltd. is also shown of an amount of Rs. 35,00,000/-. This shows that in the reasons recorded for the reopening of the assessment, learned assessing officer has formed his reason to believe on the basis of the fact that original return filed by the assessee was not picked up for scrutiny. However, the record show that return of income of the assessee was scrutinised and assessment order u/s. 143(3) dated 18.02.2015 was passed. Once the issue of reopening was examined in the scrutiny assessment proceedings, the reason framed under wrong facts are not valid reason, therefore such reasons to believe cannot be sustained. In view of this, assessee's ground against reopening of assessment is allowed reassessment based on such invalid reason is quashed. In view of the fact that reopening of the assessment is quashed, we do not intend to adjudicate the remaining issues on merit.

12. In the result the appeal is allowed.

Order pronounced on 15.10.2024.

Sd/-	**Sd/-**
(BR BASKARAN)	**(SUNIL KUMAR SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 15/10/2024
Anandi Nambi, *Steno*
Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai