आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई। **IN THE INCOME TAX APPELLATE TRIBUNAL** **'A' BENCH: CHENNAI** **श्री एबी टी. वर्की, न्यायिक सदस्य एवं** श्री **अमिताभ शुक्ला,** लेखा सदस्य **के समक्ष** **BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND** **SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER**		
आयकर अपील सं./**ITA No.1269/Chny/2023** निर्धारण वर्ष**/Assessment Year: 2009-10**		
The DCIT, Corporate Circle-2, Madurai-625 002.	**v.**	M/s.Ramco Systems Ltd., 47, PSK Nagar, Rajapalayam-626 108.
		[**PAN: AABCR 2076 B**]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
Department by	:	Mr. Nilay Baran Som, CIT
Assessee by	:	Mr.S. Muralidhar, FCA & Mr. J. Prabhakar, FCA
सुनवाईकीतारीख/Date of Hearing	:	02.09.2024
घोषणाकीतारीख /Date of Pronouncement	:	20.11.2024

आदेश **/ O R D E R**

PER ABY T. VARKEY, JM:

This is an appeal preferred by Revenue against the order of the Learned Commissioner of Income Tax (Appeals)/NFAC, (hereinafter in short "the Ld.CIT(A)"), Delhi, dated 18.09.2023 for the Assessment Year (hereinafter in short "AY") 2009-10.

2. The main grievance of the Revenue is against the action of the Ld.CIT(A) quashing the re-opening of assessment after expiry of four (4)

years from the end of the relevant Assessment Year on the ground that the condition precedent as stipulated under the first proviso to sec.147 of the Income Tax Act, 1961 (hereinafter in short "the Act") has not been satisfied.

3. The brief facts are that the assessee company has filed its return of income (RoI) on 29.09.2009 returning taxable business loss of Rs.61,82,61,888/-, long-term capital gain of Rs.63,34,32,074/- and term capital gain of Rs.27,00,000/- resulting in net capital gain of Rs.1,78,70,186/- and which was set off against the total available carried forward depreciation from AYs 2000-01 to 2008-09 amounting to Rs.33,55,50,604/-. Assessment u/s.143(3) of the Act was completed on 28.11.2011 making additions resulting in total income of Rs.36,43,61,360/- [without considering the carried forward business loss or unabsorbed depreciation]. Against the aforesaid action of AO, assessee which filed appeal before Ld.CIT(A). And simultaneously, the assessee filed a petition u/s.154 of the Act dated 19.12.2011 to correct mistake in computing the total income and for consideration of the carried forward unabsorbed depreciation for adjustment against the total income for the year. Order u/s.154 of the Act dated 22.02.2012 was passed by the AO re-computing the total income Rs.38,32,31,502/- by accepting the claim and the AO adjusted the unabsorbed depreciation of Rs.33,55,50,604/-, and determined net taxable income at Rs.4,76,80,938/-. Thereafter, the

AO issued (suo moto) notice u/s.154 of the Act dated 02.08.2012 proposing the deletion of setoff of unabsorbed depreciation to the extent of Rs.2,80,14,345/- pertaining to AYs 2000-01 & 2001-02. Pursuant thereto, the assessee filed reply dated 04.09.2012 objecting the said proposal as not warranted by law and the AO didn't pursue the proposed withdrawal of accumulated depreciation adjustment. Thereafter, the Ld.CIT(A), Madurai passed two Appellate orders dated 30.12.2015 in [ITA No. 294/2011-12] which was partially allowed & [ITA No.4/2012-13] was fully allowed. The AO on 13.07.2016 gave effect to Ld.CIT(A)'s order re-computing the total income of Rs.5,49,93,391/- and adjusted/setoff unabsorbed depreciation to such extent, resulting NIL taxable income.

4. Meanwhile, the AO issued impugned notice u/s.148 of the Act on 30.03.2016 by taking note that the assessee company had set off unabsorbed depreciation loss related to AY 2000-01 of Rs.1,22,19,604/- with current business income and unabsorbed depreciation loss related to AY 2001-02 of Rs.1,57,94,741/- against Long Term Capital Gain. According to the AO, prior to 1/4/2002, unabsorbed depreciation loss, when carried forward, was eligible for set off only against business income and not against any other head of income. And that the carry forward was also restricted to eight assessment years succeeding the assessment year in which the depreciation was first computed. Hence, the set off of unabsorbed depreciation for AY 2000-01 of Rs.1,22,19,604/- beyond

eight years and the unabsorbed depreciation for AY 2001-02 of Rs.1,57,94,741/- against long term capital gain was not correct. And thereafter, Re-Assessment Order u/s.143(3)/147 of the Act was passed on 30.12.2016, disallowing Rs.2,80,14,345/- and thus determined the income of assessee at Rs.2,80,14,345/-.

5. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A) wherein the assessee raised the legal issue challenging the jurisdiction of the AO to have re-opened the assessment admittedly after four (4) years from the end of relevant Assessment Year without satisfying the conditions precedent as provided under the first proviso to sec.147 of the Act i.e. without satisfying that the assessee has failed to disclose fully and truly all material facts for which assessment was being re-opened; let us have a look at the relevant provisions of Law u/s.147 of the Act which reads as under:

> Income escaping assessment.
>
> 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**:
>
> [Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]
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> (**emphasis supplied**)

And on such plea/legal issue, the Ld.CIT(A) has noted the relevant fact necessary to adjudicate by taking note that the original scrutiny assessment for AY 2009-10 was passed u/s.143(3) of the Act on 28.11.2011 and that the impugned notice u/s.148 of the Act was issued by the AO on 30.03.2016 which event was found by Ld CIT(A) to be after expiry of four years from the end of the relevant Assessment Year; and thus, he correctly found that in this case, in order to usurp reopening jurisdiction, the AO had to satisfy the additional condition prescribed under the first proviso to sec.147 of the Act in addition to recording the reason to believe escapement of income. Having agreed with the Ld CIT(A) as noted, we note that the Ld.CIT(A) thereafter has rightly examined the *reasons recorded* by the AO to re-open which he has reproduced at Para No.6.3 of the impugned First Appellate order which is noted as under:

> "The assessee-company is engaged in business of software development and resale of computer software and hardware and filed its return of income for A.Y.2009-10 on 29.09.2009 admitting a total Income of Rs.Nil. The return was processed u/s 143(1) on 18.10.2010. Subsequently the case selected for scrutiny and 143(3) was completed on 28.11.2011 with assessed income of Rs.36,43,61,356/-.
>
> Prior to 1st April 2002, unabsorbed depreciation loss when carried forward were eligible for set off only against business income and not against any other head of

income. The carry forward time is also restricted to eight assessment years succeeding the assessment year in which it was first computed.

While going through the return of income, the assessee has not done so. The assessee company set off unabsorbed depreciation loss related to Asst. Year 2000-01 of Rs.1,22,19,604/- with current business income and incorrect set off unabsorbed depreciation loss related to A.Y.2001-02 of Rs.1,57,94,741/- with long term capital gain.

In order to assess/examine the same in the hands of the assessee, this case may be reopened."

6. A reading of the reasons recorded by the AO to justify re-opening is noted to be regarding allowability of unabsorbed depreciation pertaining to AY 2000-01 & 2001-02 to be set-off against income of AY 2009-10. However, it is noted that the AO in the reasons recorded (supra) has not alleged the assessee's failure to disclose fully & truly materials facts necessary for assessment of that year i.e, AY 2009-10 [refer first proviso to section 147 of the Act supra]. Having noted the crucial omission on the part of the AO while recording reason to re-open the assessment, we proceed further to note that the Ld.CIT(A) found that the scrutiny assessment u/s.143(3) of the Act was framed by order dated 28.11.2011 and the AO had determined the total income of Rs.36,43,61,360/- without considering any carry forward business loss or unabsorbed depreciation. Aggrieved, the assessee filed petition u/s.154 of the Act dated 19.12.2011 requesting the AO for set off unabsorbed depreciation against the total income assessed. Thereafter, the AO passed order u/s.154 of the Act on 22.02.2012 re-computing the total income at Rs.38,32,31,502/- and adjusting unabsorbed depreciation of Rs.33,55,50,604/-. The Ld.CIT(A) also found that the unabsorbed-

depreciation of Rs.33,55,50,604/- includes the unabsorbed depreciation of Rs.1,22,19,604/- pertaining to AY 2000-01 and Rs.1,57,94,741/- pertaining to AY 2001-02. The Ld.CIT(A) also noted that thereafter the AO *suo-moto* issued notice u/s.154 on 02.08.2012 wherein he proposed to rectify the set off of the unabsorbed depreciation of Rs.1,22,19,604/- pertaining to AY 2000-01 [being beyond the time limit of eight years] and Rs.1,57,94,741/- pertaining to AY 2001-02 [for being set off against income other than business income] which exercise we note that the AO dropped after being satisfied by the reply of the assessee. In such factual back ground, the Ld.CIT(A) found that the fact regarding unabsorbed depreciation of AY 2000-01 & AY 2001-02 being allowed as set off against the assessed income of AY 2009-10 was already on record while impugned notice u/s.148 was issued on 30.03.2016. Thus, according to the Ld.CIT(A) the issue regarding unabsorbed depreciation being already available before the AO as visible from the assessment records, it can't be said that there was any failure on the part of the assessee in disclosing fully and truly all material facts necessary for his assessment. Therefore, the Ld.CIT(A) rightly held that the condition precedent given in first proviso to sec.147 of the Act is not satisfied in the facts and circumstances of this case. In the light of the discussion and considering the relevant facts, we concur with the Ld.CIT(A) that in its assessment for AY 2009-10, the assessee company had disclosed fully and truly all

material facts necessary for making the claim for set off of unabsorbed depreciation of AY 2000-01 to the tune of Rs.1,22,19,604/- and Rs.1,57,94,741/- for AY 2001-02. And we find that the AO had applied his mind to these relevant facts, as evident from the order passed by him u/s.154 dated 22/2/2012 and subsequent notice wherein this precise issue was raised by AO u/s.154 dated 2/8/2012 which was dropped after being satisfied by the explanation/objection of the assessee as noted supra. Thus, we find that the Ld.CIT(A) has rightly examined the relevant facts and correctly held that the AO without satisfying the condition precedent as given in first proviso to section 147 of the Act, has erroneously re-opened the assessment u/s143(3) of the Act after '4' years from the end of the assessment year. Thus, we concur with the view of the Ld.CIT(A) that in this case, the action to re-open the assessment was wholly without jurisdiction. For taking such a view, we rely on the decision of coordinate bench Delhi in the case of DCIT & Anr. v. Dharampal Satyapal Ltd. & Anr. reported in [2016] 130 DTR 0241 (Del.)(Trib.), wherein, the Tribunal held as under:

> 23. Before we advert to the facts in this case, let us look into the well settled principles regarding reopening of assessment completed u/s 143 (3) of the Act.
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> 24. It is well settled in law that reasons, as recorded for reopening the reassessment, are to be examined on a standalone basis. Nothing can be added to the reasons so recorded, nor anything can be deleted from the reasons so recorded. The Hon'ble Bombay High Court, in the case of Hindustan Lever Ltd. vs. R.B. Wadkar [(2004) 268 ITR 332], has, inter alia, observed that ".....It is

needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the AO to disclose and open his mind through the reasons recorded by him. He has to speak through the reasons." Their Lordships added that "The reasons recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide link between conclusion and the evidence….". Therefore, the reasons are to be examined only on the basis of the reasons as recorded.

25. The next important point is that even though reasons, as recorded, may not necessarily prove escapement of income at the stage of recording the reasons, such reasons must point out to an income escaping assessment and not merely need of an inquiry which may result in detection of an income escaping assessment. Undoubtedly, at the stage of recording the reasons for reopening the assessment, all that is necessary is the formation of prima facie belief that an income has escaped the assessment and it is not necessary that the fact of income having escaped assessment is proved to the hilt. What is, however, necessary is that there must be something which indicates, even if not establishes, the escapement of income from assessment. It is only on this basis that the Assessing Officer can form the belief that an income has escaped assessment. Merely because some further investigations have not been carried out, which, if made, could have led to detection to an income escaping assessment, cannot be reason enough to hold the view that income has escaped assessment. It is also important to bear in mind the subtle but important distinction between factors which indicate an income escaping the assessments and the factors which indicate a legitimate suspicion about income escaping the assessment. The former category consists of the facts which, if established to be correct, will have a cause and effect relationship with the income escaping the assessment. The latter category consists of the facts, which, if established to be correct, could legitimately lead to further inquiries which may lead to detection of an income which has escaped assessment. There has to be some kind of a cause and effect relationship between reasons recorded and the income escaping assessment. While dealing with this aspect of the matter, it is useful to bear in mind the observations made by Hon'ble Supreme Court in the case of ITO Vs Lakhmani Mewal Das [(1976) 103 ITR 437] that, "……the reasons for the

formation of the belief must have rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the ITO and the formation of this belief that there has been escapement of the income of the assessee from assessment in the particular because of his failure to disclose fully and truly all material facts. year It is no doubt true that the Court cannot go into sufficiency or adequacy of the material and substitute its own opinion for that of the ITO on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment."

26. In CIT vs. Kelvinator of India Ltd. reported in 320 ITR 561, the Full Bench of Hon'ble Delhi High Court (which was later upheld by the Hon'ble Apex Court) held as under :-

> "It is a well settled principle of interpretation of statute that the entire statute should be read as a whole and the same has to be considered thereafter chapter by chapter and then section by section and ultimately word by word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review his own order. His jurisdiction is confined only to rectification of mistakes as contained in section 154 of the Act. The power of rectification of mistake conferred upon the Income-tax Officer is circumscribed by the provisions of section 154 of the Act. The said power can be exercised when the mistake is apparent. Even a mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Income-tax Appellate Tribunal has limited jurisdiction under section 254(2) of the Act. Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.
>
> It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income-tax Officer

does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue.

In Bawa Abhai Singh's case [2002] 253 ITR 83 (Delhi), a Division Bench of this court of which one of us (D. K. Jain J.) is a Member, clearly held (page 88) :

"The crucial expression is "reason to believe". The expression predicates that the Assessing Officer must hold a belief . . . by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran and Sons P. Ltd. v. ITO [1981] 130 ITR 1 (SC), the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material. In S.Narayanappa v. CIT [1967] 63 ITR 219, it was noted by the apex court that the expression "reason to believe" in section 147 does not mean purely a subjective satisfaction on the part of the Assessing Officer, the belief must be held in good faith ; it cannot be merely a pretence. It is open to the court to examine whether the reasons for the belief have a rational nexus or a relevant bearing to the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To that limited extent, the action of the Assessing Officer in initiating proceedings under section 147 can be challenged in a court of law."

It was further held that, "We are therefore of the opinion that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate

reassessment proceeding upon his mere change of opinion" further observed as under :-

> "We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

27. It is necessary to examine whether there was any "reason to believe" to have had such an exercise. The term "reason to believe" cannot be considered or evaluated in a water tight compartment and scope and applicability may vary from case to case, depending upon the facts and circumstances.

The power under sections 147 / 148 comes into existence if he had reason to believe that income has escaped assessment. Formation of reason to believe that income escaped assessment has to be that of a prudent person. The reasons for such belief have to be recorded in writing on the basis of material in the possession of AO. While the words "reason to believe" are wide in their import, it cannot include a mere suspicion or ipse dixit of the AO. The belief of the AO should lead him to form an honest and reasonable opinion based on reasonable grounds. (ITO vs. Lakhmani Mewal Das – 103 ITR 437 at 448 (SC) and Navinchandra Mohanlal Parik vs. vs. WTO – 124 ITR 68). The reasonability of the

grounds which led to the formation of belief warranting reopening is tested from the point of view whether or not they are germane to the formation of belief that income escaped assessment and after 4 years, an additional safeguard or condition that escapement of income was due to fault of the assessee, in not fully and truly disclosing the material facts at the time of original assessment. The Hon'ble Supreme Court endorsing the Full Bench decision of the Hon'ble Delhi High Court in CIT vs. Kelvinator of India Ltd. – 256 ITR 1 held in its order reported in 320 ITR 561, "…..that Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have link with the formation of belief." Therefore, if the fresh tangible material which the AO has in his possession is relevant to have nexus to the formation of belief then, of course, the AO would have the necessary jurisdiction to take action under the Act. What is required to be examined is not the adequacy or sufficiency of the grounds but the existence of belief. In our view, all that one has to examine is that whether there was some material which, gave rise to prima facie view if that income has escaped assessment and the belief was formed in good faith or was it mere pretence for initiating action u/s 147/148 of the Act.

7. As noted supra, the AO in order to successfully re-open the scrutiny assessment u/s 143(3) of the Act for AY 2009-10, by issuing the impugned notice u/s 148 of the Act dated 30.03.2016, which was an event after four (4) years from the end of relevant Assessment Year had to necessarily satisfy the condition precedent as provided under the first proviso to sec.147 of the Act i.e. the AO in the reasons recorded before re-opening of assessment, ought to have pointed out what material facts necessary for assessment assessee failed to fully and truly disclose. In the present case, the AO failed to satisfy the requirement of law as provided for in the first proviso to section 147 of the Act, which omission oust him from assumption of jurisdiction to reopen the assessment; and it is not

the case of the AO that he had any new/tangible material before him to form the belief that there had been any material non-disclosure by reason of which an escapement of income had taken place. Therefore, we find that the condition precedent as provided under first proviso to section 147 of the Act for re-opening of assessment being not satisfied, the impugned notice u/s.148 of the Act dated 30.03.2016 is held to be *ab initio void* and hence, the Ld.CIT(A) rightly quashed it, which action we uphold.

8. All other grounds have become academic and therefore not adjudicated.

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

Order pronounced on the 20th day of November, 2024, in Chennai.

Sd/-	**Sd/-**
(अमिताभ शुक्ला)	**(एबी टी. वर्की)**
(AMITABH SHUKLA)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 20th November, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF