

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

Before Justice (Retd.) C V Bhadang, Hon'ble President &
Shri B R Baskaran, Hon'ble Accountant Member

ITA No. 5462/Mum/2024 for A.Y. 2009-10

ACIT -CC 7(3), Mumbai	Vs.	Dharmanath Buildtech and Farms Private Limited, 412, 4 th floor, 17G, Vardhaman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai 400 001. PAN AACCD6799C
(Appellant)		(Respondent)

Appellant By : Shri R R Makwana, Sr. DR
Respondent By : Shri Niraj Sheth

Date of Hearing : 04.12.2024	Date of Pronouncement : 04.12.2024
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ORDER

Per Justice (Retd.) C V Bhadang, President:

By this appeal the Revenue is challenging the order dated 21.08.2024 passed by the CIT(A), by which the appeal filed by the respondent-assessee came to be allowed thereby deleting the addition of ₹5,39,83,358/- made by the Assessing Officer vide order dated 30.11.2016 on account of disallowance of the said amount as interest and finance charges. The appeal relates to assessment year 2009-10.

2. The brief facts are that the respondent is a company engaged in the business of real estate, construction and development. The assessee had filed its Return of

Income (RoI) for the year under consideration declaring a total income of ₹86,429. The case was selected for scrutiny and the assessment was completed by the Assessing Officer u/s. 143(3) of the Income-tax Act, 1961 ('Act' for short), vide order dated 30.11.2011.

3. Subsequently, the assessment came to be re-opened u/s. 147 and notice dated 31.03.2016 was issued u/s. 148 of the Act, particularly on the ground of an audit objection. In response to the said notice, the assessee filed the copy of RoI filed earlier and also requested for providing the reasons recorded for re-opening. The respondent on getting the reasons, filed objection to the re-opening which was rejected by the Assessing Officer vide letter dated 7.10.2016. Subsequently, re-assessment was completed by the Assessing Officer u/s. 143(3) r.w.s. 147 on 30.11.2016 assessing the total income at ₹5,52,01,510/-.

4. The respondent assessee challenged the same. The learned CIT(A) by the impugned order dated 21.08.2024 has allowed the appeal, which order is subject matter of the challenge at the instance of the Revenue.

5. The Revenue has challenged the order on the following grounds:

"1. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in law while holding that, it is as case of mere change of opinion and hence, held reopening proceedings under section 147 of the Act as invalid whereas the Hon'ble Kerala High Court in the case of Sree Narayana Guru Memorial Educational and Cultural Trust vs Asst CIT, (Exemption), Thiruvananthapuram in WP (C) No 11891 of 2023 has held that re-opening of assessment proceedings on the basis of Audit Objection would not be regarded as 'Change of Opinion. "

2. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in not accepting the fact that, no enquiry was conducted in the

course of original assessment proceedings as to whether the expenditure of Rs. 5,39,83,358/- was in the nature of a capital expenditure.

3. *On facts and circumstances of the case and in law. The Ld. CIT(A) erred in applying the decision of the Hon'ble High Court in the case of Raman & Weil (P.) Ltd. v. DCIT(2015) 56 taxmann.com 86 Bombay), whereby the Hon'ble High Court is of the view that Assessing Officer must have reason to believe the income eligible to tax has escaped assessment. This belief must be a prima facie view and not a final/concluded view.*

4. *On facts and circumstances of the case and in law. The Ld. CIT(A) erred in applying the decision of the Hon'ble Supreme Court in the case of M/s. GKN Driveshafts (India) Ltd v. ITO (2003) 259 ITR 19 (SC) whereby the Hon'ble Supreme Court had laid down the proposition that when a notice is issued u/s 148, proper course of action for the assessee is to file return and if he so desires, to seek reasons for issuance of the notice u/s 148 and on receipt thereof to file objections to the issuance of the notice. Hence the legal position is that the reasons recorded for re-opening the assessment is not required to be communicated at the stage of issue of notice u/s 148. The assessment in this case has been rightly re-opened within the period of six years from the end of the relevant assessment year and the communication of the reasons recorded for re-opening the assessment after the period of six years does not render the reassessment proceedings barred by limitation."*

5. *On facts and circumstances of the case and in law. The Ld. CIT(A) erred in considering the fact that, the interest and finance expenses of Rs. 5,39,83,358/- is in the nature of a capital expenditure and cannot be allowed as deduction in computing the income under the head "Income from Other Sources".*

6. *The appellant craves leave to add to alter, amend, modify and/or delete any or all of the above said grounds of appeal. The appellant reserves its right to file further submission in the appeal."*

6. We have heard the parties and perused record.

7. It is submitted by the learned DR that the case was re-opened on the basis of an audit objection, which is a valid reason for re-opening as held by Kerala High Court in Sree Narayana Guru Memorial Educational and Cultural Trust vs. ACIT in Writ Petition No.11891 of 2023 dated 19.02.2024. It is submitted that the re-opening cannot be said to be based on any change of opinion. It is submitted that the Assessing Officer has to have a 'reason to believe' that the income chargeable to tax has escaped assessment, which is a *sine qua non* for re-opening of the assessment. It is pointed out that on this a "prima facie" view the Assessing Officer is required to act in reopening the assessment. It is further submitted that the reasons recorded by the Assessing Officer are not required to be communicated at the stage of issuance of notice u/s. 148 of the Act. It is pointed out that the assessment in this case was rightly re-opened within a period of six years and merely because the reasons were communicated beyond the period of six years, cannot render the re-opening invalid. Reliance is placed on the decision of Bombay High Court in the case of Raman & Weil (P.) Ltd. vs. DCIT [2015] 56 taxmann.com 86 and the decision of Supreme Court in G K N Driveshafts (India) Ltd. vs. ITO 259 ITR 19. It is pointed out that there was no enquiry conducted in the course of original assessment proceedings as to the nature of expenditure of ₹5,39,83,358/- as to whether it was in the nature of capital expenditure or otherwise. On facts it is submitted that the interest and finance charges cannot be said to be in the nature of capital expenditure and cannot be allowed as deduction while computing income under the head "Income from other sources".

8. The learned AR has supported the impugned order. It is submitted that the CIT(A) has considered all these contentions threadbare and has rightly found the

re-opening to be invalid as being based on mere change of opinion. It is pointed out that the income was already assessed in scrutiny proceedings u/s. 143(3) of the Act and in the absence of any concealment by the assessee, the purported re-opening cannot be sustained.

9. We have considered the submissions. A perusal of record discloses that the RoI initially filed, declaring income of ₹86,429/-, was processed vide intimation dated 31.10.2010. Subsequently, the case was selected for scrutiny in which the Assessing Officer passed assessment order dated 30.11.2011. A perusal of the said assessment order indicates that according to the assessee there was no business activity carried out by the assessee during the relevant period except giving loan to associate companies and the only source of income was interest earned. According to the assessee it had received interest income of ₹5,52,07,432/-. Apart from office and administrative expenses of ₹11,56,919/- the assessee had claimed interest and finance charges of ₹5,39,83,358/- and after showing preliminary expenses written off of ₹3,825/- the net profit was shown as ₹ 63,330/-. During the scrutiny proceedings the assessee submitted its explanation vide letter dated 23.11.2011. According to the assessee the company vide Deed of Assignment, dated 22.07.2008, had taken over, debt payable to India Debt Management Pvt. Ltd., from Bakelite Hylam Limited (now Sanathnagar Enterprises Ltd.) and earned interest income of ₹5,52,07,432/- and also paid interest of ₹5,39,83,358/-. The Assessing Officer in the scrutiny proceedings had come to the conclusion that the income earned by the assessee is assessable under the head "Income from other sources" and, therefore, the claim of expenses is required to be tested 57(iii) of the Act. Thus, except assessing the income under a different head of "Income from other source", instead of "Income from business or

profession" as claimed by the assessee, there was no substantial change made by the Assessing Officer in the scrutiny proceedings except that the taxable income assessed was ₹12,18,160/-. It is in this context that the challenge to the reopening has to be examined and tested.

10. Following are the reasons recorded by the Assessing Officer in support of the reopening:-

"It is seen from the assessment records for A.Y 2009-10 of the assessee company entering into tripartite agreement on 22/07/2008 with M/s India Debt Management Pvt. Ltd (IDM) and M/s Bakelite Hylam Ltd. (BHL) In F.Y. 2006-07 & 2007-08 IDM had given loan to BHL. The loan portfolio of BHL was subsequently assigned by the IDM to the assessee company in July 2008 It is stated in the tripartite agreements that relationship between IDM and the assessee company is that of the parties to a privately negotiated arms length sale of the financial assets etc of BHL on a principle to principle basis. The AIR also confirms that it was sale of immovable properties as per the agreement Under the privately negotiated arms length sale of the financial assets of BHL were assigned to assessee company by the IDM for a consideration of Rs. 66.66 crores. Of this consideration, the assessee company made upfront payment of Rs. 3.40 crores to IDM and balance was converted into term loan of Rs. 63.20 crores given to assessee company as stated by the IDM in its submission dated 05/09/2011.

The assessee company accordingly paid interest and finance charges of Rs. 5,39,83,358/- in total on the term loan of Rs. 66.66 crores received from IDM and on the loans from other parties. Being the term loan received and interest thereon of Rs. 5.40 crore paid by the assessee company for the sale assignments of financial assets. These expenditure should have been treated as a capital expenditure in nature and it should not have been allowed as allowable deduction u/s 57(iii) of the 1. T. Act.

In view of the above, I have reason to believe that the amount of Rs. 5,39,83,358/-chargeable to tax has escaped assessment within the meaning of sec. 147.”

11. It is necessary to note that the tripartite agreement dated 22.07.2008 with M/s. India Debt Management Pvt. Ltd. and Bakelite Hylam Limited (BHL) and the fact that as per Deed of Assignment dated 22.07.2008, the assessee had taken over debt payable to IDM by BHL was pointed out to the Assessing Officer and has been considered. It can thus clearly be seen that the purported reopening is based on change of opinion as to the head under which the income is assessable. As noticed earlier although the assessee had initially claimed that it was an income from Business and profession, the Assessing Officer in the scrutiny proceedings had come to the conclusion that it should be assessed under the head 'Income from other sources'. Now as per the reasons recorded in the reopening the Assessing Officer has opined that it should be treated as capital expenditure in nature and should not have been allowed as deduction u/s. 57(iii) of the Act.

12. Reliance placed on behalf of the Revenue on the decision of Kerala High Court in Sree Narayana Guru Memorial Educational and Cultural Trust (supra), in our opinion is misplaced, as the said case is distinguishable on facts. The case before the Kerala High Court arose out of assessment year 2016-17. The High court in para 4 has noticed that amendment by virtue of clause (ii) of Explanation -1 to Section 148 of the Act was added w.e.f. 01.04.2022, which provides that any audit objection, to the effect that the assessment in the case of an assessee for the relevant assessment year has not been made in accordance with the provisions of the Act would be a ground for reopening of the assessment. It is necessary to note that the present case arises out of assessment year 2009-10 which is much prior

to the introduction of clause (ii) to Explanation – 1 of Section 148 of the Act. In any event, the reasons recorded as well as the disposal of the objection vide communication dated 07.10.2016 do not make any reference to audit objection as being the basis for reopening. Ground no. 1 raised thus fails.

13. In so far as ground nos. 2 & 5 are concerned, the examination as to the nature of expenditure can arise only if the reopening is found to be valid and the previous assessment could be revisited. The grounds thus fails.

14. There cannot be any manner of doubt that at the stage of issuing the notice for reopening the Assessing Officer has to form a prima facie opinion. However, the reasons recorded in this case clearly indicate that it was based on change of opinion as to the treatment to be given to the expenditure, which was already subject matter of scrutiny proceedings earlier. The decision in Raman & Weil (P.) Ltd. (supra), turned on its own facts. That was a case where the assessee company had not declared/disclosed to the department, that it did not possess factory license to manufacture and still it claimed deduction u/s. 80IB of the Act. It was in these circumstances held that the initiation of the re-assessment proceedings, on the basis of prima facie view, that the assessee might not have started manufacturing during the relevant year so as to entitle the assessee to claim the deduction u/s. 80IB of the Act, was found to be justified. Ground no.3 thus cannot be accepted.

15. Reliance placed on the decision of Supreme Court in the case of G K N Driveshafts (India) Ltd. (supra), is equally misplaced. That was the case where the assessee had challenged the issuance of notice for reopening without even seeking the reasons, filing objection or waiting for the Assessing Officer to decide the

objection. It was in these circumstances found by the Supreme Court that when a notice u/s 148 of the Act is issued, the proper course of action for the assessee is to file return and if he so desires, to seek reasons for the issuance of notice u/s. 148 and on receipt thereof to file objections to the issuance of notice. In the present case, indeed the assessee had sought for the reasons, filed his objections, which has been decided by the Assessing Officer. That apart, the issue whether the reasons for re-opening are required to be communicated with the notice u/s. 148 was not even an issue involved in the said case. In any case, we are not inclined to examine the said issue, in as much as the reason for reopening is itself based on the change of opinion as to the treatment of the expenditure. Thus, ground no.4 cannot be accepted.

16. Ground no.6 is formal in nature.

17. We have carefully gone through the impugned order passed by the CIT(A) and do not find any infirmity so as to interfere with the same. The appeal is without any merit and is accordingly dismissed.

Order pronounced in the open court on 4th December, 2024

Sd/-
[B R Baskaran]
ACCOUNTANT MEMBER
Mumbai, Dated : 4th December, 2024

Sd/-
[Justice (Retd.) C V Bhadang]
PRESIDENT

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Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The PCIT, Mumbai.
4. The CIT
5. The DR, 'D' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai