

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&

SHRI ANIKESH BANERJEE, HON'BLE JUDICIAL MEMBER

I.T.A. No. 310/Mum/2025

Assessment Year: 2010-11

Swati Energy & Projects (P) Ltd. 1101, Krushal Commercial Complex G.M. Road, Chembur(W) Mumbai - 400089 [PAN: AABCS6672A]	Vs	DCIT, 14(1)(2), Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Pradip N. Kapasi, A/R
Revenue by :	Shri Bhangapatil Pushkaraj Ramesh, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 07/04/2025

घोषणा की तारीख /Date of Pronouncement: 08/04/2025

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the assessee is preferred against the order dt. 03/12/2024 by NFAC, Delhi [hereinafter 'the CIT(A)'], pertaining to AY 2010-11.

2. The grievance of the assessee reads as under:-

"GROUND NO. 1: RE-OPENING AND RE-ASSESSMENT :

The learned CIT(A) erred in law and on facts in upholding the re-opening of an assessment completed u/s 143(3) r.w.s 147 in the past on two occasions and further erred in passing an order of re-assessment in violation of various provisions of law and natural justice in particularly the following :

- 1) *Re-opening for change of opinion.*
- 2) *Re-opening on the basis of an audit objection.*
- 3) *Where audit objection was examined and was rejected by AO on due consideration of facts.*
- 4) *Where full and true disclosure of facts was made.*
- 5) *Where reasons were not recorded, sanction was not obtained u/s 151 and objections were not disposed or in the alternative were inadequately dealt with in violation of law.*

- 6) Where the assessment re-opened was substituted by three further orders passed subsequent to the assessment.
- 7) Where proceedings were conducted without valid jurisdictions.
- 8) Where the previous orders were subjected to appeal.
- 9) Where notice was served after 31.03.2017
- 10) Where income was brought to tax in subsequent year.
- 11) Where there was uniform rate of taxation.

GROUND NO 2: DISALLOWANCE OF COMMISSION EXPENSE OF RS.

The learned CIT(A) erred in law and facts in disallowing the payment of commission of Rs. 4,88,53,351/-, made in the course of business, wholly and exclusively incurred for the purposes of business, the liability for which had accrued, arisen and the payment for which was made after deducting tax at source and the genuineness of the expenditure was not doubted, merely and simply on the ground that the income relating to such expenditure was taxed in the subsequent following year A.Y 2011-12 and further erred in ignoring the fact that the appellant was a Company taxed at uniform rate of taxation where there was no loss of revenue.

GROUND NO. 3: WITHOUT PREJUDICE, ALLOWANCE FOR A.Y 2011-12

The learned CIT(A) erred in law and an facts is not granting the prayer of your appellant made without prejudice to allow the claim of commission expenses of Rs. 4,88,53,351 in computing total income for immediately subsequent assessment year, A.Y 2011-12 in which year the revenue relating to such expenses is recognized and taxed.

GROUND NO. 4: LEVY OF INTEREST U/S 234D

The learned CIT(A) erred in law in not adjudicating the ground for contesting the levy of interest u/s 234D, where no such levy of interest was leviable in law more so, where no refund of tax was granted.

GROUND NO. 5:

The appellant prays for the leave to add, amend, alter, delete or modify, any of the above grounds."

3. Representatives were heard at length. Case records carefully perused and the relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules, 1963.
4. Briefly stated the facts of the case are that the assessee filed its original return of income on 29/09/2010 declaring total loss of Rs. 3,88,95,318/-. The return was selected for scrutiny assessment and subsequently an order u/s 143(3) of the Act was passed on 13/03/2013

determining total income at Rs. 3,82,55,520/-. Subsequently the completed assessment was reopened and the order was framed on 08/12/2016 determining the revised assessment income at Rs. 3,85,50,556/-.

4.1. Once again, notice u/s 148 of the Act was issued on 31/03/2017 reopening the already reassessed income and the reasons for reopening the assessment were provided to the assessee which read as under:-

“The assessee filed return of income for A.Y.2010-11 on 29.09.2010 declaring loss of Rs.3,88,95,318/-. Assessment was completed u/s.143(3) on 13.03.2013 determining loss of Rs.3,82,55,515/-.

2. It is seen from the records that the assessee in computation of income has claimed expenses of Rs.4,88,53,351/- on account of commission on order received by, stating in. Note (4) to Computation that commission of Rs.4,88,53,351/+ paid during the year but the same was not debited to P&L account following matching principal. But as the same is incurred during the year, the same has been claimed as expenses. Further, the assessee vide letter dated 7.12,2012 further clarified that commission was paid to Maharashtra Enviro Power Ltd. during the year for procurement and service of order, The transaction on which commission is paid has been executed in subsequent year. So following the matching principal of accounting said commission amount is carried forward in the subsequent year in books of accounts. But as the same is due and incurred during the year the same has been claimed as expenses in the computation of income. The contention of the assessee is not acceptable, as the income from profits and gains of business or profession shall be computed in accordance with the provisions contained in section 30 to 43D of the I.T. Act. During the relevant accounting year any liability due or accrued (paid / not paid / payable) is required to be routed through Profit & Loss account. The amount of commission was not routed through Profit & Loss account, therefore, the same is not allowable as deduction in computation of income. The books of account of the assessee were certified by the Chartered Accountant, however, this issue was not reported in Tax Audit Report. In view of the above, deduction claimed by the assessee should have been disallowed.

3. In view of the above, I have reason to believe that income chargeable to tax has escaped assessment to the tune of Rs.4,88,53,351/- on account of commission paid on order received. In view of the above facts, I am satisfied that this is a fit case for issue of Notice u/s.148 of the Income Tax Act, 1961.

Approval may kindly be accorded for issue of notice under section 148 of the I.T. Act, 1961.”

4.1.1. Since the notice itself is dated 31/03/2017, it can be seen that the re-opening is beyond four years from the end of the relevant assessment year which is AY 2010-11.

5. During the course of original scrutiny assessment proceedings, vide notice u/s 142(1) of the Act, dated 02/02/2012, the AO raised as many as 25 queries. Most relevant query for our consideration is question no. 22, which reads as under:-

"22. With reference to Commission paid, please furnish details in the following format:-

Name & address of the commission agent	Name and address of the sales party'	Sales Amt	Percentage of Commission	of Commission (Gross):	TDS:	Commission (Net)	Nature of Services Rendered
						

Also provide copies of credit notes issued in support of the aforesaid payment."

6. Vide letter dated 07/12/2012, the assessee filed a detailed reply to the queries raised by the AO. The relevant reply for our consideration reads as under:-

"13. Commission Paid Details (Point No.22)

We enclose herewith Statement for Commission on Sales paid during the year - Rs.418138/- (Page.239)

We also enclose herewith the Debit Notes of PAB Engineering Works and Ganpati Sales Corporation for the Commission Payments. (Page.240 to 243)

These Agents help us in Rate Contract with Customer Head Quarters, Analysing pricing and finalisation of rate contracts, Revising the rate contracts for revised prices, Data collection from customer for support, Getting Orders as per rate contracts from all Areas of Customer (from user departments), Assisting in Delivery of Goods from Transport warehouse to Customer Stores, Release and collection of Payments, Deposit of cheques in local branch of our Bank, After Sales Support to Customer due to proximity, Representing us at Customers various departments for day to day follow up and support. This follow up / support includes visits to all areas which are in the remote places. This becomes economically viable for us as otherwise we would have to open our office near to customers place and also appoint sufficient staff for daily support.

In addition to the above, a Commission of Rs. 48853351/- (Rupees Four Crores Eighty Eight Lakhs Fifty Three Thousand Three Hundred Fifty One Only) was paid to Maharashtra Enviro Power Limited during the year for commission due to them for procurement and service of order. The Transaction on which Commission is paid executed in subsequent year. So, following matching principal of accounting the said commission amount is carried forward in subsequent year in books of account. But as the same is due and incurred during the year, the same has been claimed as expense in the Computation of Income.

We enclose herewith various documents in support of the amount paid to Maharashtra Enviro Power Limited (Page.244 to 287)

- *Negotiation and pre appointment correspondence*
- *Agreement for Appointment as Liaison Agent*
- *Various Correspondence for release of order from customer, confirmation of payment / terms, extension of delivery, payment of commission, etc*
- *Invoices for Commission due & paid*
- *Affidavit from Maharashtra Enviro Power Limited for providing various services"*

7. It can be seen from the above that specific queries were raised by the AO during the original scrutiny assessment proceedings to which the assessee filed specific replies along with supporting documentary evidence.

8. Since the notice is issued more than four years after the relevant assessment year, let us see what was the disclosure made by the assessee in his return of income. In the computation of income exhibited at pages 198 to 201 of the paper book at note no. 4, the disclosure of the assessee reads as under:-

"Commission of Rs.4,88,53,351/- paid during the year but same is not debited to profit and loss accounts following matching principal. But as the same is incurred during the year, the same has been claimed as expenses."

8.1. And while computing the business income, the assessee has deducted expenses not debited to P&L account but allowable, Rs.4,88,53,351/-. Even in the audit report dated 01/09/2010, under the head other notes, the assessee has made the following disclosure:-

“The Commission of Rs. 48,853,351/- was paid during the year for procurement and service of order. The transaction on which commission is paid has been executed in subsequent year and revenue also realized in subsequent year so following matching principal of accounting the said commission amount is carried forward in subsequent year to be match with revenue income which accrue and arise in subsequent year.”

9. From the above undisputed facts, to a specific query, specific reply was filed and proper disclosure was made in the financial accounts and also in the computation of income.

10. Since the reopening is more than four years from the end of the relevant assessment year, the first proviso to Section 147 of the Act squarely applies, which read 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:

... ..

Explanation 1.— Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.”

[emphasis supplied]”

10. On similar situation, the Hon’ble High Court of Bombay in the case of *TAO Publishing (P.) Ltd. vs. DCIT [2015] 370 ITR 135 (Bombay)* has

interalia held as under:-

“10. As stated above, the reasons supplied to the Petitioner do not disclose that there was any failure on the part of the Petitioner to provide all the material facts. That being the position, this ground could not have been taken up against the Petitioner at the time of disposing of the objections. Once this was not the basis for issuance of notice for Reassessment, it cannot be held against the Petitioner that the Petitioner had failed to make a true and full disclosure. It will have to be held that the Petitioner did not fail to make full and true disclosure of all material facts. The jurisdictional requirement for carrying out the reassessment, after the expiry of period of four years, is not fulfilled in the present case.

11. The learned counsel for the Petitioner also submitted that, in fact, there was no failure to disclose all material facts as the Respondent No.1 had specifically sought details as regard the relevant expenditure and which were furnished. He relied upon the decision of the Apex Court in the case of Gemini Leather Stores v. ITO [1975] 100 ITR 1, to contend that the duty of the assessee was to place on record all the primary facts and drawing of inference from the primary facts is upto the Assessing Officer. However, this issue need not be gone into in depth any further, as the Petitioner is entitled to succeed on the first ground mentioned above.

12. In the circumstances, the Petitioner is entitled to the reliefs prayed for in the Petition. It will have to be held that the Respondent No.1 had no jurisdiction to proceed with the impugned reassessment proceedings.”

11. Similarly, in the case of *Sound Casting (P) Ltd. vs. DCIT [2012] 250 CTR 119 (Bombay)*, the Hon’ble High Court of Bombay held as under:-

“Held that the reopening of the assessment had admittedly taken place beyond a period of four years from the end of the relevant assessment year. There was no allegation in the reasons which had been disclosed to the assessee that there was any failure on his part to fully and truly disclosed material facts necessary for assessment for relevant assessment year. Hence, the jurisdictional condition for reopening the assessment beyond a period of four years had not been fulfilled. Even during the course of hearing, it had not been the submission of the revenue that there was any suppression of material facts on the part of the assessee. Therefore, the impugned notice was to be set aside.”

12. In another case of *First Source Solutions Ltd. vs. ACIT in [2021] 438 ITR 139 (Bombay)*, the Hon’ble Jurisdictional High Court, held as under:-

“11. Therefore, when the assessment is sought to be reopened after the expiry of period of four years from the end of the relevant year, the proviso to section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. This stipulation does not govern a notice for reopening within a period of four years. In the case at hand, as noted earlier, there is not even a whisper about what fact was not disclosed. In our view, therefore, the notice to reopen under section 148 of the said Act itself was issued without jurisdiction. Consequently, the order passed also cannot be sustained.”

13. Considering the facts of the case in totality, in light of the above discussion, we have no hesitation in setting aside the impugned notice u/s 148 of the Act thereby quashing the resultant assessment order. Since we have quashed the assessment order, we do not find it necessary to delve into the merits of the case.

14. Before parting, the Id. D/R in his written submission has relied upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs P.V.S. Beedies Pvt. Ltd.* [1999] 237 ITR 13 (SC) and also on several decision of the Hon'ble Allahabad High Court pointing out that the audit objection by the revenue audit party constitutes information on tangible material that justifies reopening.

14.1. We are of the considered view that such decisions apply when an audit party points out facts not in the knowledge of the AO originally whereas the facts discussed elsewhere clearly show that the basis for the re-opening was examined by the AO during the original assessment proceedings and the facts relating to the impugned payment of commission claimed this year have been extensively disclosed in the audited financial statement of accounts and also in the computation of income. Therefore, the decision relied upon by the Id. D/R are not applicable on the facts of the case.

15. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 8th April, 2025 at Mumbai.

Sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

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

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

आदेशानुसार/BY ORDER
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Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai