आयकर अपीलीय अधिकरण, मुंबई " जी" खंडपीठ

Income-tax Appellate Tribunal -"G"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member

आयकर अपील सं/ ITA No.7005/Mum/2012 : **निर्धारण वर्ष/Assessment Year-2006-07**

Zee Entertainment Enterprises Ltd. (Formerly Zee Telefilms Ltd.) Continental Building, 135 Dr. Annie Besant Road, Worli,Mumbai-400 018. **PAN:AAACZ 0243 R**	Vs.	ADIT-Range-11(1) Room No.467, 4th Floor Aayakar Bhavan, Mumbai-400 020.

Revenue by: Ms. Vidisha Kalra-DR

Assessee by: S/Shri Anuj Kishnadwala & Jay Bhansali –ARs.

सुनवाई की तारीख **/ Date of Hearing: 23.09.2016**

घोषणा की तारीख **/ Date of Pronouncement: 19.10.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-

Challenging the orders,dated 17.10.2012 of the CIT(A)- 3,Mumbai,the assessee has filed present appeal.Assessee-company, engaged in the broadcast of T.V. Channels,filed its return of income on 07.12.2006,declaring total Loss at Rs.33.13 crores.The Assessing Officer(AO) completed the assessment u/s.143(3) r.w.s. 147 of the Act,on 30.12.2011, determining its income at Rs.117.41 crores.

Brief Facts

2.The original return,filed by the assessee,was processed u/s.143(1) of the Act.Later on scrutiny assessment u/s.143(3) of the Act was completed on 31.12.2009 ,accepting the income returned by the assessee.The AO reopened the case and issued a notice,dated 29. 03. 2011, u/s.148 of the Act. The reasons for reopening read as under:

> *On perusal of the assessment records relating to AY 2006-07, following discrepancy has been noted.*
> *1. "The assessment in this case for the assessment year 2006-07has been completed u/ s.143 (3) of the I.T. Act,1961 vide order dated 13.12.2009 determining total income at 1,01, 81, 34, 296/- under special provisions of the Act.*
> *While verifying case records of M/ s. Shakti Films, it is seen that during the previous year2005-06,M/s. Shakti Films had received Rs.3 crore from M/s. Zee Entertainment Enterprises, Ltd. M/s. Shakti Films intimated vide letter dtd. 29.1. 2008 that M/s.Zee Entertainment Enterprises Ltd. had not deducted TDS on the above payment. Thus, the above should have been disallowed u/ s. 40(a)(ia) for non-observance of provisions of TDS which the assessee failed to do. The omission had resulted in under- assessment of Rs.3 crores."*
>
> *2. "It is noticed that the assessee company had debited Rs.13,34,83,000/- under the head 'Bad debts and advances written off' to the Profit & Loss account and the same was allowed. Assessee vide letter dtd.2. 9.2009 had furnished details of Bad debts and advances written off amounting to Rs.13,34,83,000/-. Out of above, Rs.6,60,50,008/- was on account*

of advances and Rs.6,77,33,433/- was on account of debtors; Further it is seen from Point NO. 5 (d) of letter dtd.26.11.2009 that total advances as on 31.3.2906 were Rs.1, 96, 64, 64,893/ - as reflected in the balance-sheet which included 'other advances' (as per annexure) of Rs.38,39, 63,372/ - .The verification of details of 'other advances' revealed that that the 'other advances' of Rs. 38,39,63,371/- was inclusive of advances written off of Rs. 6, 60,50, 008/ -. Thus it is crystal clear that assessee had not written off advances of Rs. 6, 60,50, 008/ - from the books of accounts. As per the provisions of section 36(1)((vii) r. w. s. 36(2) of the 1. T. Act, the deduction on account of bad debts and advances written off is not allowable unless it is actually written off from books of accounts. Accordingly, the same were required to be disallowed. Omission to disallow the same had resulted in under-assessment of Rs. 6, 60, 50, 008/-.

On account of facts and circumstances as above, I have reasons to believe that income of' Rs. 9,60,50,008/- has escaped assessment for A. Y.2006-07 under the meaning of section 147 of the 1. T. Act.

The reasons recorded for reopening were furnished to the assessee vide letter dated 19. 05.2011.The assessee,vide its letter,dated 08.06.2011,objected to the reopening of the assessment.In its reply,the assessee has stated that the notice was issued in contravention of the Act,that no fresh evidence had been brought on record to form belief that income has escaped assessment,that no new material or information was received by the AO,that it was a case of mere change of opinion.The AO dealt with the objections raised by the assessee vide his order dated 07.10.2011.During the appellate proceedings,the First Appellate Authority(FAA)upheld the re-opening and confirmed the additions made by the AO.

3.The assessee had filed an application,vide its letter dated,11/08/2016,for admission of additional grounds.It was argued that the additional grounds were legal in nature and did not require new documents or evidences.In the additional grounds the assessee had raised two issues namely non-issuance of notice u/s.143(2) of the Act and initiation of reassessment proceeding on the basis of audit objections that were not accepted the AO himself.

4.During the course of hearing before us,the Authorised Representative(AR) argued that additional grounds raised by the assessee were purely legal ground and no new facts,other than those already on record,were required to be considered.He relied upon the case of NTPC (229 ITR 383).He further contend ed that the AO had not issued notice u/s.143 (2) of the Act, that non-issue of notice during the re-assessment proceedings made the assessment order ab initio avoid.He referred to the case of Kanchanjunga Impex Pvt.Ltd. (ITA/6057/Mum/2013-AY.2002-03,dated 23/09/2015).

5.The Departmental Representative(DR)objected to admission of additional grounds and contended that the assessee had never raised those grounds during the assessment proceed -

ings or the appellate proceedings,that it attended the hearing and submitted information on various occasions, that even by filing the appeal before the Tribunal it had not raised the issue with regard to notice, that no new ground could be taken before the Tribunal for the first time.She referred to the cases of NTPC (supra), Aravali Engineers Private Ltd. (237 CTR 312), Vision Inc. (208 taxman 153), Madhya Bharat Energy Corporation (337 ITR 389) Jayprakash Singh (219 ITR 737).She stated that the AO had informed that on perusal of the records it was found that certain documents were not available on the file,namely-letter of objection to the reopening filed by the assessee, disposal of objection by the AO, notice u/s. 143 (2) and original the assessment order u/s.143 (3)r.w.s.147,order sheet of the hearing/the assessment proceedings,that the records were old, that no cognizance of nonavailability of notice u/s.143 (2) could be taken that non-availability of notice could not be constructed to conclude that no notice u/s.143 (2)was issued in 2011 by the AO, that the assessee had not raised the ground about the audit objections before the AO or the FAA, that any fact brought out by the audit party was a valid ground for reopening the assessment. She relied upon the case of Somdutt Builders Private Ltd.(98 ITD 78), PVS Beedies Private Ltd.(237 ITR 13) and Rajesh Jhaveri Stockbrokers Private Ltd.(161 taxman 316), that AO had deliberated over the issue once it was pointed out by the revenue audit, that the fact that tax was not deducted u/s. 194C of the Act from the file of some other assessee, that the information was not available before the AO at the time of original assessment,that it was a new tangible information which came to the notice of the AO subsequently, that the provisions of section 194C were applica - ble to the facts of the case under consideration.

6.In his rejoinder,the AR stated that provisions of section 292BB were applicable from 01/ 04/2008,that the cases relied upon by the Department were distinguishable on facts,that no notice u/s.143 (2) was issued by the AO, that the assessee had raised a purely legal issue emanating from facts on record, that the AO vide his letter,dated 07/05/201,had opposed the audit objections and had requested the audit party to drop the same,that even after opposing the said audit objections,he proceeded to reopen the case of the assessee. The AR relied upon the case of Purity Techtextiles P.Ltd. (325 ITR 459)and argued that the assessment was passed under the dictates of the audit party, that AO had not formed any independent opinion, that it was a case of change of opinion.

7.We have heard the rival submissions and perused the material before us. We find that the assessee had raised more additional grounds before the Tribunal and same were not agitated

before the AO/FAA. Both the additional grounds, in our opinion,are purely legal grounds. In the case of NTPC (supra),the Hon'ble Supreme Court had held as under:

> "*Under section 254 of the Income-tax Act, 1961, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. …….There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) is too narrow a view to take of the powers of the Tribunal.*
>
> *Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."*

8.Clearly,the Tribunal can admit a particular issue arising from the facts on record even though same was not raised before the lower authorities.In the case of Aravali Engineers Private Ltd. (supra) the Hon'ble Punjab and Haryana High Court had held that a question of fact could not be allowed to be raised for the first time before the Tribunal.In our opinion, both the issues raised by the assessee before the Tribunal are purely legal issues.

9.In our opinion,non-issuance of notice u/s.143(2) of the Act is not in irregularity or a procedural lapse but it is a jurisdictional defect which is non-curable. As the issue emanates from the facts available on the record,so,in our opinion the assessee cannot be prevented from raising the additional ground about non-issue of notice.Rest of the cases relied upon by the DR do not directly deal with the issue of notice u/s.143 (2) of the Act.

9.1. We find that sufficient time was allowed by the Tribunal to the departmental authorities to produce the evidence of issue of notice and service of the same on the assessee.The AO himself has intimated that notice u/s.143(2) along with the order sheet were not available. In absence of the evidence of issue of notice we are of the opinion that the assessment order passed by the AO was not a valid order.We would like to refer to the matter of Geno Pharmaceuticals Ltd.(214Taxman83)of the Bombay High Court.In that case the Hon'ble Court has held that notice u/s.143(2)is mandatory and in absence of such service the AO

cannot proceed to make an inquiry on the return filed in compliance with notice issued u/s. 148.

10.Here,we would also like to take up the issue of completing the assessment order in pursuance of the audit objections.We find that the audit party had raised certain objections with regard to certain items vide its letter is dated 24/03/ 2010.Vide his letters,dated 07/ 05/ 2010,the AO requested to the in-charge of the audit-party to drop the objections and treat the objections as settled. We have gone through the audit objections raised by the audit party and the reasons recorded by the AO for reopening the assessment.We find that the reasons are based on the audit objections only. The DR could not controvert the fact that the AO had initiated proceedings u/s.147 of the Act,with regard to non-deduction of TDS and applicability of section 194C as well as the writing off of bad debts, on the basis of the audit objections.We have compared the language and the contents of the audit objections and the regions recorded by the AO for issuing a notice u/s.148 of the Act.Even a cursory glance indicates that the reasons recorded by the AO to reopen the case were result of the audit objections. At that time, as per the instructions of the CBDT(Ins.9/2006),the AO had no choice with regard to audit objections. He had to initiate some remedial action once audit party would raise objections-even if he was not convinced about the validity of the objections.In the case of IL& FS Manager(298ITR32)the Hon'ble Bombay High Court has held that re-opening on the basis of an audit objection,especially when the AO had opposed the audit objection-was invalid,that in such a case it could not be said that he had formed an independent opinion.

Considering the above,wer are of the opinion that it is a simple case of change of opinion- the AO had issued the 148 notice even after rejecting the objections.

11. Reopening of a completed assessment is a serious thing and the provisions of section 147 can be invoked if certain preconditions are fulfilled.The escapement of income is the basic ingredient for issuing 148 notice.But,it could be issued only if tangible material comes in possession of the AO after completing the original assessment.The power of re-opening is not for review the assessment passed143(3)of the Act.In the case under consideration the only tangible material,if it can be called so,that came in to existence after the passing of 143(3)order and before the issue of notice u/s.148 is the audit objection. As,stated earlier the AO did not accept the objections asked the audit party to drop the objections.The chronology of events prove that the AO was compelled to issue re-assessment notice because of the binding nature of the CBDT instruction.It is a pure and simple case of change of opinion,as

held earlier.We therefore,admit and decide both the additional grounds in favour of the assessee and hold that the re-assessment order was not a valid order.

As we have decided the jurisdictional issue in favour of the assessee,so,we are not deciding the other grounds of appleal,raised by it.

As a result,appeal filed by the assessee stands allowed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.
Order pronounced in the open court on 19th October, 2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 19 अक्टूबर , 2016 को की गई ।

Sd/-	**Sd/-**
(**राम लाल नेगी / Ram Lal Negi**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 19. 10.2016.
Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "G " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**