आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

श्री डी. करुणाकर राव, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLAu, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 6251/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2003–04)

Income Tax Officer
Ward–1(1), Piramal Chambers
5th Floor, Parel Mumbai 400 012 .... अपीलार्थी / Appellant

बनाम v/s

The Cotton Textile Export Promotion Council
Engineering Centre, 5th Floor
9, Mathew Road, Mumbai 400 004 .... प्रत्यर्थी / Respondent
स्थायी लेखा सं./ Permanent Account Number – AAAT9241M

राजस्व की ओर से / Revenue by : Mr. Morya Pratap
निर्धारिती की ओर से / Assessee by : Mr. K.K. Vaid

सुनवाई की तारीख / Date of Hearing – 12.06.2014	आदेश घोषणा की तारीख / Date of Order – 19.06.2014

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा / PER AMIT SHUKLA, J.M.

The present appeal has been preferred by the Revenue, challenging the impugned order dated 30th June 2011, passed by the learned Commissioner (Appeals)–I, Mumbai, for the quantum of assessment passed under section 143(3) r/w 147 of the Income Tax

Act, 1961 (for short *"the Act"*) for the assessment year 2003–04, on the following grounds:–

> *"1. Whether on the facts and circumstances of the case and in law, the learned CIT(A) was right in annulling the assessment when the reasons for reopening has been recorded properly before issuing the notice u/s 14B.*
>
> *2. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in not appreciating the fact that deficit arises out of expenditure out of income on which exemption has already been claimed and allowing of set off of deficit of earlier year against the income of current year will result in double deduction nwhich is contrary to the ratio laid down by the Hon'ble Supreme Court in Escorts Ltd. v/s Union of India, 199 ITR 43 and J.K. Synthetics Ltd. v/s Union of India, (1992) 65 Taxman 40."*

2. <u>Facts in brief</u>:– The assessee is a charitable trust, which has been granted registration under section 12A and has been claiming exemption under section 11 of the Act. The assessee has filed its return of income on 27th November 2003, declaring *"nil"* income after claiming exemption under section 11, along with the audit report in the form 10B, Income & Expenditure Account, Balance Sheet and other annexures. The said return of income was subject to scrutiny wherein various details and explanation was sought from the assessee. After examining the entire details, the assessment was completed under section 143(3), on a taxable income of ₹ 44,16,910, vide order dated 13th March 2006. Thereafter, on expiry of the period of more than four years, such an assessment has been re–opened under section 147, vide

notice dated 24th March 2010, issued under section 148. The notice was issued for re–opening the case on the following *"reasons recorded"*.

> *"The assessment for the year under consideration was finalized by the then Assessing Officer, wherein based upon the assessee's claim he allowed depreciation of ₹ 14,39,483. The depreciation is claimed and allowed on the asset, the capital expenditure incurred in respect of which was allowed as exemption on account of application of income u/s 11 of the Income Tax Act, 1961. This act of the assessee amounts to claim of double deduction in contravention of the law laid by the Hon'ble Supreme Court in the case of in the case of Escorts Ltd. v/s UOI 199 ITR (43).*
>
> *Further, the assessee trust has offered ₹ 51,29,452 as deemed income under section 11(3) and the Assessing Officer allowed expenditure towards object of the trust for the year as application instead of treating the entire amount of as deemed income.*
>
> *I have therefore, reason to believe that the cause of escapement of income within the meaning of section 147 of the Income Tax Act, 1961, is failure on the part of the assessee trust to make full and true disclosure of the material facts as far as both the above issues is concerned.*
>
> *The sanction u/s 1511) of the Income Tax Act, 1961, is solicited for issuance of notice u/s 148 of the Act, from the DIT (Exemption) as the assessment for the year under consideration has been finalized u/s 143(3) of the Act, and a period of four years have lapsed from the end of the relevant assessment year."*

3. The assessee, after obtaining the copy of the *"reasons recorded"* filed objections before the Assessing Officer for re–opening the case, vide letter dated 27th December 2010, mainly on the ground that there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Further, the re–opening has been done merely on account of *"change of opinion"* and there is

no new finding of facts or material. The Assessing Officer not only rejected the assessee's objection on the legal grounds but had also made addition on account of disallowance of depreciation on fixed assets for ₹ 14,39,483, and also taxing the deemed income under section 11(3) of the Act for ₹ 51,29,452. Thus, the assessment was completed under section 143(3) r/w section 147, at an income of ₹ 51,29,450, vide order dated 27th December 2010.

4. Before the learned Commissioner (Appeals), the assessee reiterated the same objections that there is no failure on the part of the assessee to disclose fully and truly all material facts and re–opening has been done on *"change of opinion"*. Reliance was placed on various decisions including that of the Hon'ble Supreme Court in CIT v/s Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) and the decision of the Jurisdictional High Court in German Remedies Ltd. v/s DCIT, [2006] 285 ITR 26 (Bom.). The learned Commissioner (Appeals) in his conclusion agreed with the contention of the assessee and held that the Assessing Officer has not pointed out any failure on the part of the assessee to disclose any material which is important for the computation of total income and also held that the re–opening is based on *"change of opinion"* because there is no tangible material to come to the conclusion that there is any escapement of income. He further held that insofar as the issue of depreciation on fixed assets while

computing the income under section 11 is concerned, the same is covered by the decision of the Jurisdictional High Court in CIT v/s Institute of Banking, [2003] 264 ITR 110 (Bom.). Thus, he held that the re–assessment made by the Assessing Officer is bad–in–law.

5. Before us, the learned Departmental Representative, submitted that the Assessing Officer has duly recorded the *"reasons"* in accordance with the law before issuing the notice under section 148 and so long as the ingredients of section 147 are fulfilled, the Assessing Officer has jurisdiction to re–open the case. The prima–facie reasons entertained by the Assessing Officer was that depreciation has wrongly been allowed which is in violation of principle laid down by the Hon'ble Supreme Court in Escorts Ltd. v/s Union of India, [1993] 199 ITR 43 (SC), which envisages that no double deduction should be allowed. He submitted that the Assessing Officer has mentioned about the failure on the part of the assessee to make full and true disclosure of the material facts *"reasons recorded"* and, therefore, re–opening cannot be held to be invalid.

6. We have carefully considered the rival contentions, perused the relevant findings of the authorities below and the material available on record. In the present case, the assessment had already been made under section 143(3), vide order dated 13th March 2006. The re–opening has been made after expiry of four years from the end of the

relevant assessment year and, therefore, the validity of re–opening has to be examined within the ambit of *proviso* to section 147. It is trite law that under the *proviso* to section 147, no action shall be taken for re–opening the case under section 147, wherein the assessment has been made under section 143(3) or 147, after the expiry of four years from the end of the relevant assessment year. Such a bar of limitation for re–opening the case beyond the period of four years, in such a case, is relaxed only under twin conditions, firstly, by the reason of the failure on the part of the assessee to make a return of income under section 139 or in response to the notice issued under section 142(1) / 148 and, secondly, failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year. Except for these two conditions, the assessment completed under section 143(3), cannot be re–opened after the expiry of four years.

7. Now, on a perusal of the *"reasons recorded"*, in the present case, it is seen that the Assessing Officer has sought to re–open the case on the following two grounds viz. –

(i) the Assessing Officer, while finalising the assessment, has allowed the depreciation of ₹ 14,39,483, on fixed assets even when the capital expenditure incurred on such fixed assets has been allowed as application of income under section 11. Hence, this leads to claim of double deduction which is not in accordance with the decision of the Hon'ble Supreme Court in Escort Ltd. (supra); and

(ii) the assessee trust has offered sum of ₹ 51,29,452, as deemed income under section 11(3) and the Assessing Officer has allowed the expenditure towards the object of the trust in the year as oapplicatio nfrom this income instead of treating the entire amount as deemed income.

8. Thus, the Assessing Officer's *"reasons"* for re–opening is on account of the fact that the earlier Assessing Officer has wrongly allowed the claim of depreciation and also allowed the expenditures from deemed income. Once the Assessing Officer himself alleges that the claim has wrongly been allowed by the Assessing Officer, then where is the question of there being a failure on the part of the assessee to disclose fully and truly all material facts. Mere making a bald assertion in the *"reasons recorded"* that there is a failure on the part of the assessee is not sufficient, it has to be demonstrated in the *"reasons recorded"* itself. The Assessing Officer has to set out the facts and the material which has not been disclosed by the assessee, which had lead to the escapement of the income. It is from the *"reasons recorded"* alone that the Assessing Officer can to assume the

jurisdiction under section 147, for re–opening the case and, therefore, the *"reasons recorded"* should be such, that it should provide a live link nexus between the material brought on record and the income escaping assessment. In the present case, the claim of depreciation on the assets, has been completely set out in the balance sheet and in the income and expenditure account filed by the assessee along with the return of income, which has also been examined by the Assessing Officer in scrutiny proceedings. Thus, we do not find any failure on the part of the assessee to disclose fully and truly, relevant material facts on this score. In any case, the claim made by the assessee with regard to depreciation in the computation for the purpose of section 11, is not a false claim because the decision of Jurisdictional High Court in Institute of Banking (supra), has held that the depreciation on the fixed assets has to be allowed on commercial principles even if the capital expenditure on the same has been held to be application of income under section 11. Thus, the assessee's claim cannot be held to be false. Similarly, regarding the second issue, from the records, it is seen that the assessee has itself disallowed the amount of ₹ 51,29,452, as deemed income under section 11(3) and also offered the amount for tax. Even otherwise also, what is the failure on the part of the assessee.

9. Thus, we do not find that the *"reasons recorded"* in his case clothe the Assessing Officer with the jurisdiction to re-open the case under section 147 and, therefore, the proceedings initiated vide notice under section 148, is null and void.

10. Before us, the learned Counsel for the assessee has relied upon the latest decision of the Jurisdictional High Court in Lupin Ltd. v/s ACIT, in W.P. no.1095 of 2013, judgment dated 7th May 2014, wherein the Hon'ble High Court opined as under:-

> *"8. It is true that the reasons for initiating the re-assessment proceedings does in fact state that there was a failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment. However, merely making this bald assertion is not enough. It is now well settled that the reasons which are recorded by the Assessing Officer for re-opening the assessment, are the only reasons which can be considered. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. The reasons recorded should be clear and unambiguous and should not suffer from any vegueness. The reasons are the manifestation of the mind of the Assessing Officer and therefore, should be self-explanatory and should not keep the Assessing assessee guessing for the reasons. The reasons provide the link between the conclusion and the evidence. The reasons recorded must be based on evidence so that in the event of a challenge, the Assessing Officer must be ale to justify the same based on the material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment for that assessment year, so as to establish the vital link between the reasons and the evidence. This vital link is the safeguard against arbitrary re-opening of the concluded assessment.*
>
> *9. In the present case, as stated earlier, there are absolutely no details as to which fact or material was not disclosed by the Petition that lead to its income escaping assessment. There is merely a bald assertion in the reasons that there was a failure*

> *on the part of the petitioner to disclose fully and truly all material facts. In our view, this is not enough. It is equally important that Respondent no.1 clearly sets out what facts or other material was not disclosed by the Petitioner that had led to the income escaping assessment as contemplated under section 147 of the Act. This is absent in the present case. In our view, therefore, on this ground alone, the Petitioner is entitled to succeed in this writ petition."*

11. Thus, in view of the aforesaid *"reasons"* given by us and also in view of the ratio laid down by the Jurisdictional High Court in Lupin Ltd. (supra), we do not find any reason to deviate from the conclusion drawn by the learned Commissioner (Appeals) that re–opening under section 147 is bad–in–law. Accordingly, we affirm the order of the learned Commissioner (Appeals) annulling the assessment. Thus, the grounds raised by the Revenue are treated as dismissed.

12. परिणामतः राजस्व की खारिज अपील की जाती है।

12. In the result, Revenue's appeal is dismissed.

आदेश की घोषणा खुले न्यायालय में दिनांकः 19th June 2014 की गई ।
Order pronounced in the open Court on 19th June 2014

Sd/-	**Sd/-**
डी. करुणाकर राव	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
D. KARUNAKARA RAO	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED: 19th June 2014

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

(1) *निर्धारिती / The Assessee;*
(2) *राजस्व / The Revenue;*
(3) *आयकर आयुक्त(अपील)/ The CIT(A);*
(4) *आयकर आयुक्त / The CIT, Mumbai City concerned;*
(5) *विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;*
(6) *गार्ड फाईल / Guard file.*

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai