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CHARTERED ACCOUNTANTS

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Facts

Assessee company was in business of providing cellular telecommunication services and was established in year 1997-98. During AY 2001-02, there was a change in shareholding of assessee company, as a result of which provisions of Section 79 were made applicable and accumulated losses from AY 1997-98 to 2001-02 lapsed. The assessee company being a telecommunication service provider was eligible for 100% deduction u/s 80-IA and made a claim for deduction u/s 80-IA for first time for AY 2005-06. The AO disallowed deduction on basis that there would not be any positive profit available for deduction after considering losses prior to assessment year 2001-02 to be set off against income of current year because for purpose of calculation of deduction u/s 80-IA read with Section 80-IA(5), provisions of section 79 could not be applied. High Court by impugned order held that since by virtue of Section 79, business loss of assessee prior to year 2001-02 had already lapsed, same could not be notionally carried forward and set off against profit and gains of assessee's business for year under consideration in computing quantum of deduction u/s 80-IA(1). The assessee thereafter preferred a special leave petition against said impugned order.

Ruling

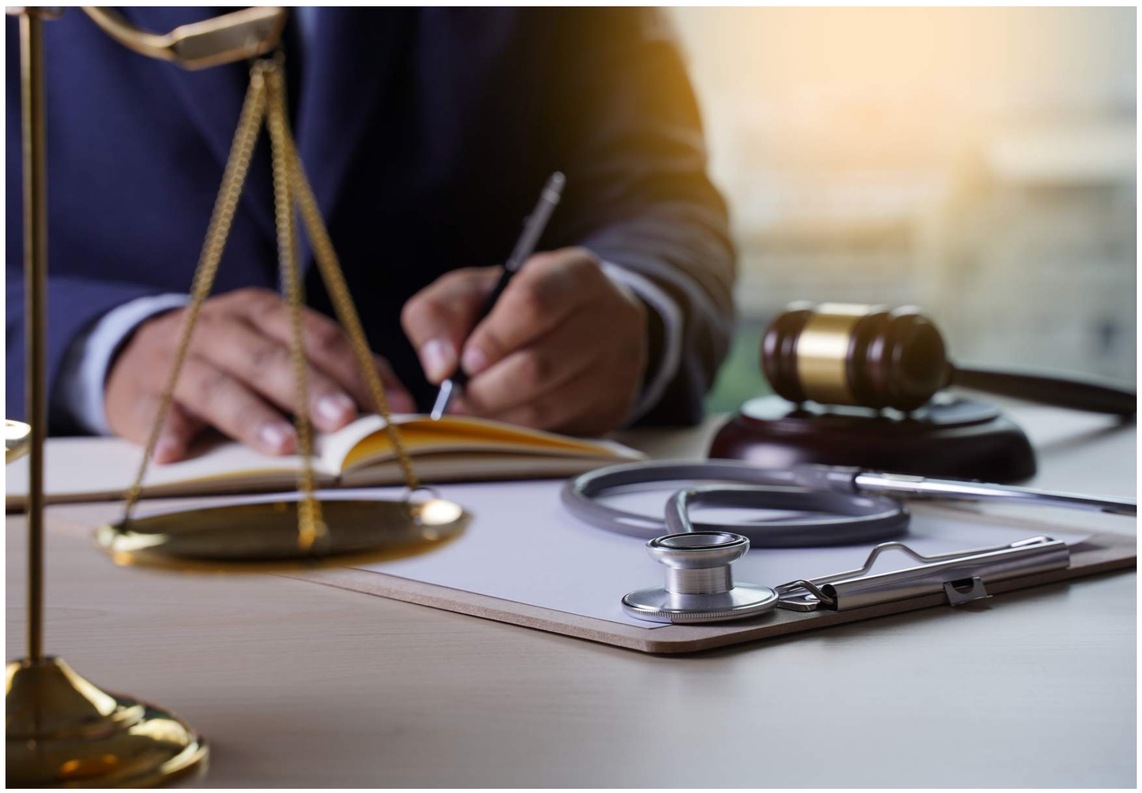
The Hon'ble Apex Court condoned the delay and dismissed subject to the fact that since by virtue of Section 79, business loss of assessee prior to year 2001-02 had already lapsed, same could not be notionally carried forward and set off against profit and gains of assessee's business for year under consideration in computing quantum of deduction u/s 80-IA(1). However, the issue of eligibility of claim, set off of losses for subsequent assessment years (2002-2003 to 2004-2005) is however kept open.

Source: SC in the case of ACIT vs Vodafone Essar Gujrat Ltd. vide [2023] 149 taxmann.com 1 (SC) on March 29, 2023

Date of the Panchnama last drawn is the starting point of limitation of 2 years u/s 158BE for completing block assessment

Facts

The execution of the search warrant dated 13-03-2001 (i.e. for search at the office and residence of the assessee) continued for some time and culminated only on 11-04-2001. During the search, the Tax authorities got the information about a locker belonging to the assessee in a bank. Therefore on 26-03-2001, second authorization was issued and executed for searching the said locker. Thereafter, notice u/s 158BC for filing block assessment was issued. The assessee filed his return and the assessment was completed by passing assessment order in April, 2003. The assessee thereafter filed an appeal challenging the assessment orders, inter alia, on the ground that the assessment was time barred. According to the assessee, limitation of two years as prescribed u/s 158BE was to be computed when Panchnama in respect of the second authorization was executed, i.e., on 26-03-2001. Since that Panchnama was drawn on 26-03-2001, two years period as prescribed u/s 158BE(b) came to an end by March, 2003 and the assessment order was passed in April, 2003, which according to the assessee was thus time barred. On the other hand, the plea of the department was that since the last Panchnama through related to search authorization dated 13-03-2001 was executed on 11-04-2001, limitation of two years was to be computed from that date and therefore the assessment was passed was well within the prescribed limitation. The CIT(A) dismissed the appeals. However, the ITAT allowed the appeals and held that the respective assessment orders were barred by limitation since the Panchnama w.r.t. last authorization was drawn on 26-03-2001.Against the order passed by the ITAT setting aside the assessment orders on the ground that the same were beyond the period of two years, the Revenue preferred the present appeals before the High Court. By the impugned common judgment and order, the Division Bench of the High Court has allowed the said appeals and has set aside the order passed by the ITAT by holding that as the last Panchnama though related to search authorization dated 13-03-2001 was executed on 11-04-2001, limitation of two years was to be computed from 11-04-2001. The impugned judgment passed by the High Court is the subject matter of present appeals.



Ruling

SC placed reliance on **VLS Finance Limited & Another v. CIT & Another [(2016) 12 SCC 32]** and held that the relevant date would be the date on which the Panchnama is drawn and not the date on which the authorization/s is/are issued. SC further stated that it cannot be disputed that the block assessment proceedings are initiated on the basis of the entire material collected during the search/s and on the basis of the respective Panchnama/s drawn. **Therefore, the date of the Panchnama last drawn can be said to be the relevant date and can be said to be the starting point of limitation of two years for completing the block assessment proceedings.** In view of the above facts, the Hon'ble Apex Court dismissed the appeal filed by the assessee.

Source: SC in the case of Anil Minda vs CIT vide [2023] 148 taxmann.com 407 (SC) on March 24, 2023

Where assessee is held not liable to deduct TDS, assessee cannot be treated as assessee in default if payee foreign co. is held liable to tax in reassessment

Facts

The assessee being a company in India in the present case is held to be not liable to deduct the tax at source. Now, so far as the appeals preferred by the assessee is concerned, the assessee is aggrieved by that part of the observation made by the High Court in the impugned judgment by which the High Court has observed that as the assessment proceeding in the case of foreign company i.e. Van Oard ACZ Marine Contractors BV (VOAMC) is reopened and therefore if the final view taken is that the VOAMC is assessable to tax, the assessee herein would also be treated as assessee in default, which would attract the consequences provided u/s 40(a)(i).

Ruling

Supreme Court held that once the assessee herein is held to be not liable to deduct the tax at source at all merely because subsequently the foreign company VOAMC is held liable to be taxed in India, the assessee herein cannot be treated as assessee in default, even the aforesaid is on surmises and conjectures. Whatever the consequences on the pending proceedings against or initiated by VOAMC pending in the Madras High Court, the necessary consequences shall follow. However, at present the observations of the the assessment proceedings in VOAMC which are reopened are held to be against the VOAMC and VOAMC is liable to be taxed in India, the assessee herein cannot be treated as assessee in default. The present appeal is hereby quashed and set aside with the above observation.

Source: SC in the case of Van Oord Acz India (P.) Ltd. vs CIT vide [2023] 149 taxmann.com 38 (SC) on March 23, 2023

Impugned order was set aside where AO withheld refund of TDS requested by assessee, a well-reputed company with a large net worth, on mere ground that assessee's case was selected for scrutiny with numerous issues to be examined.

Facts

The assessee filed a return for AY 2020-21 declaring a loss of INR 1613.83 crores and claimed a refund of INR 31.46 crores on account of TDS. Pursuant to a de-merger and to give effect to the Scheme of Arrangement, the assessee filed a revised return declaring a loss of INR 1670.16 crores and claiming a refund of INR 43.91 crores. The assessee was subjected to a scrutiny assessment u/s 143(2) which was responded to by the assessee with all the necessary clarifications as sought for. Subsequently, a notice u/s 142(1) was sent to the assessee wherein detailed information and documents were sought by the Revenue to which the assessee duly complied. On the same day, the assessee received an intimation u/s 143(1) which stated that a refund of INR 33.06 crores (inclusive of interest) due to him. The Refund Intimation also stated that the refund shall be credited within a period of 15 days from that date. Despite the lapse of several months after the passing of the Refund Intimation, no refund was received by the assessee. Aggrieved by the inaction of the Department, the assessee filed online complaints on the Income Tax Portal seeking disbursal of the refund amount as determined under the Refund Intimation. This was followed by detailed letters sent to the Department seeking disbursal of the refund amounts. Since no response was received, the assessee requested an inspection of the file and records of AY 2020-21 and asked for a copy thereof. In response thereto, the Revenue by an email of even date, informed the refund assessee that its refund has been withheld in view of a letter received from the Faceless Assessment Unit of the Respondent. However, the letter did not contain any enclosures or reasons for the withholding of the assessee. Additionally, since there was a difference of INR 12.43 crores between the Revised Return as submitted by the Assessee and the Refund Intimation, the Assessee filed an appeal before the CIT(A).

Rulings

HC stated as under:

- The reasons for withholding the refund are simply that the case was selected under CASS with a large number of “issues” to be examined. However, no details of any issue which requires examination has been set forth. There is then a passing mention of the fact that “it is also referred to transfer pricing”, however, what has been referred, is absent. No other details are given either.
- While withholding a refund, the AO is required to look into various factors in relation to an assessee, i.e., the amount of tax liability which a scrutiny assessment may eventually lead to (as is underway in this case) vis-a-vis the amount of tax refund due; the financial standing or credit worthiness of the assessee, and whether there would be any doubts in the Revenue recovering amounts from the assessee.
- The AO is also required to give detailed and compelling reasons as to how the release of the refund will adversely affect the interest of the Revenue. The reasons as set forth in the communication of 30-05-2022 are bereft of any details and only reproduce the wordings of Section 241A with some additional sketchy and vague details. There is also a complete absence of reasoning.
- The Assessee is a well reputed company with a large net-worth running into several billion dollars and not a “fly-by-night” operator. It is a tax assessee for the last several years and the credit worthiness of the Assessee is also not in dispute.

HC further held that merely because a notice has been issued u/s 143(2), it is not a sufficient ground to withhold the refund under the provisions of the Act. Further, it would be wholly unjust and inequitable for the AO to withhold a refund by citing the reason that a scrutiny notice has been issued and such an interpretation of the provision would be contrary to the intent of the legislature. The ReFAC(AU) has been completely swayed by the fact that the case of the assessee has been selected by CASS. HC held that the orders are bereft of cogent reasons and are not in consonance with the principles enunciated in Maple Logistics P. Ltd. vs PCIT, and Ingenico International India Pvt. Ltd. vs DCIT and hence, cannot be sustained. The order passed was accordingly set aside.

Source: HC, Delhi in the case of OYO Hotels & Homes (P.) Ltd. vs Deputy ACIT vide [2023] 148 taxmann.com 410 (Delhi) on March 23, 2023

CBDT's Circular 6/2016, which bars AO from disputing assessee's treatment of listed shares held for more than 12 months as capital assets, is retrospectively applicable.

Facts

The assessee filed its original return of income declaring a total income of INR 3.42 crores. The case was selected for scrutiny and notice u/s 143(2) subsequently, notice u/s 142(1) was issued. The assessee is in the business of manufacture and sale of plywood and related products having its registered office in Kolkata and four regional offices and seventeen branches. Several issues were discussed with the assessee and the assessment was completed u/s 143(3). In this appeal, the only issue under consideration was, whether the profit of INR 4.33 crores should be treated as long-term capital gains or business profit. The AO pointed out that the assessee has shown long-term and short-term capital gains from sale and purchase of shares and units of mutual funds. The show-cause notice was issued to the assessee placing reliance on the frequency of the transactions from where it was prima facie clear that the assessee was transacting in shares as a business and they were required to justify as to why the investment should not be assessed under the head “income from business” instead of capital gains as has been shown by them. The assessee in its reply contended that the investment transactions were shown in the books of accounts under the head “investments” and they had invested idle funds within the limit prescribed u/s 372A of the Companies Acct, 1956 and the investments were with a long-term view which is evident from the fact that during the FY in question, the assessee has earned INR 406.51 lacs as capital gain from investment activities. Further, the assessee stated that during the FY under consideration they had made only a few investment transactions compared to several other normal business activities such as trading of plywood and other products etc. Therefore, the assessee requested that the investments should be assessed under the head “capital gain”.

The AO while considering the response given by the assessee referred to the memorandum and articles of association of the assessee and stated that it is clear that the main objects of the company was to undertake business in shares and securities. That during the year under consideration the assessee had carried on in a systematic and in an organized manner several transactions of buying and selling of shares/units which constituted its business activities. On perusal of the capital gain statement, it was pointed out that not only the assessee company carried out large number of transactions where the volumes were also large and some of the transactions were completed in very short span of time of 4 to 5 days or even on the same day. Further, the assessee has engaged professional manager to manage its portfolio under Portfolio Management Scheme which would clearly establish that assessee was buying and selling the shares/units with an intention to earn profits. Thus, the AO concluded that the transactions is impressed with the character of commercial transactions entered into with a view to earn profits, the transactions were numerous, carried out in a planned, systematic and organized manner and, therefore, the profits arising therefrom should be treated as profits from business and not capital gains. In support of such conclusion the AO referred to the decision of the Hon’ble Supreme Court in CIT Versus Distributors

(Baroda) (P) Ltd. and also the decision of the High Court of Madras in the case of CIT Versus Amalgamation (P) Ltd. wherein it was held that the only requirement is that there must be a real substantial and systematic or organized course of activity or conduct with the purpose of earning profit which is the test for a business. The explanation offered by the assessee company that they held the shares as investments to earn dividends was rejected and an inference was drawn that the transactions in buying and selling the shares amounts to business activity with the motive to earn profit and it was held that this conclusion is supported by the decision of the Hon'ble Supreme Court in Dalhousie Investment Trust Co. Ltd. Versus Commissioner of Income Tax.

Aggrieved by such order the assessee preferred appeal before the Commissioner of Income Tax (Appeals), XI, Kolkata {CIT(A)}. The assessee contended that the mention of the business of share trading was one of the main objects in the memorandum and articles of association of the assessee company is not sufficient to lead to the conclusion that such business was actually carried on by the assessee and the fact being that no such business was done. It was further submitted that the question whether the gains of profits or business or capital gains depends upon whether the shares were held as stock -in-trade or investment. The CIT(A) commented that the assessee was dealing with as many as 12 brokers/intermediaries and the bulk of the transactions were done through them and the assessee has a full-fledged share department. Thus, the CIT(A) held that on an overall analysis of facts and circumstances of the case leads to the clear and inevitable conclusion that the intention of the assessee in the subject transactions was to earn profit from turnover and not by way of return on investment. The transactions were done in a systematic and organized manner with an intention to make profit. The assessee had no savings or surplus fund which could be invested in shares; the source of fund deployed in share transaction is directly seen to the borrowed fund of the business, volume and frequency of the transactions, the number of varieties of scrip transacted, the number of intermediaries through whom transactions were done and the stock-to-turnover ratio too were too high for an investor. It is further stated that the profit from business from plywood and related items has been shown as INR 2.27 crores while the gains from shares transactions is INR 4.51 crores. Thus, the CIT(A) affirmed the order passed by the AO treating the profits arising from transactions of shares and units as profits and gains of business.

Aggrieved by such order, the assessee preferred appeal before the Tribunal who observed that the CIT(A) has not doubted the genuineness of transactions and therefore the limited issue would be whether the transactions is in the nature of investment in shares or trading in shares. After considering the facts of the case, the tribunal was convinced to hold that the transactions were the investment in shares and the realization thereof and any surplus arising out of the sale of the shares has to be treated as capital gains and not business income.

Ruling

HC stated that the learned Tribunal rightly segregate the two claims, namely, the one claimed as long-term capital gain and the one claimed as short-term capital gain. In the category of long-term capital gain as well as short-term capital gain the learned Tribunal further segregated the issues under two heads namely where the assessee had paid STT and where STT was not paid. The first issue which was considered was with regard to the long-term capital gain on which STT was paid.

HC held that we fully agree with such a finding rendered by the tribunal as the CIT(A) concluded that the borrowed funds had been utilized solely for the reason that the funds flow was from a bank account which was a cash credit account. As the assessee has been able to demonstrate that the cash credit account is a mixed/composite account through which regular business transactions of plywood and allied products as well as shares transactions were routed. Furthermore, as rightly contended on behalf of the assessee, the CIT(A) had mentioned that the cash credit had a debit balance of INR 6.93 crores as on March 31, 2005 but there was no mention made of any debit balance on any other day. The revenue does not dispute that the assessee's share capital and reserve is INR 41.37 crores on an average whereas the amount invested in long term shares was less than INR 50 lacs and it was disputed only during the assessment year 2005-06.

HC further stated that the conclusion arrived at by the Tribunal in this regard cannot be faulted. Consequently, HC hold that the CIT(A) would not have drawn a presumption that merely because the fund flow was from a cash credit account, it pre-supposes that borrowed funds were utilized for the purchase of shares especially when it is a specific case of the assessee that it is a mixed account which has not been shown to be wrong by the revenue.

Source: HC, Calcutta in the case of CIT vs Century Plyboards (I) Ltd. vide [2023] 148 taxmann.com 301 (Calcutta) on March 14, 2023

Where assessee's application for immunity u/s 270AA was rejected on ground that same was filed beyond stipulated period available for filing said application, however, no opportunity of being heard was granted to assessee, matter was to be remanded to concerned officer to consider assessee's application u/s 270AA afresh

Facts

The assessee is an individual and had filed his return for the AY 2020-2021 declaring a total income of INR 1.74 crores. The return was picked up for scrutiny u/s 143(3). The said proceedings culminated in an assessment order dated 23-9-2022, whereby the AO disallowed certain expenditure quantified at INR 22.09 lacs as, according to the AO the same was estimated to be the assessee's personal expense. The AO issued the notice of demand dated 23-9-2022, raising a tax demand of INR 9.37 lacs. The assessee discharged the said demand on very next day. In terms of the order dated 23-9-2022, the assessee was also called upon to show cause why penalty u/s 270A not be issued. The said penalty notice was followed by another notice dated 14-12-2022. On 19-12-2022, the assessee filed an application u/s 270AA(2) seeking immunity from penalty proceedings. The said application was dismissed by the impugned order.

The Ld. AR of the assessee contended that the assessee has substantially complied with all conditions for availing the said immunity. It had accepted the assessment order and discharged the liability against tax and interest. The assessee had also not filed an appeal against the said assessment order. Concededly, the said application was filed after the delay of 48 days. The assessee claims that the delay in filing of the application u/s 270AA was on account of some technical glitches in the portal which prevented the said application from being uploaded within time. The Ld. Counsel appearing for the assessee submits that the assessee has a valid explanation for the delay and the impugned order is liable to be set aside on the ground that the assessee had not been afforded an opportunity of being heard. He also submits that remanding the matter to the concerned authority would not be a futile formality as the assessee has substantive explanation for the delay. He also contends that the concerned authority has the power to condone the same. The proviso to sub-section (4) of section 270AA makes it amply clear that before an application is rejected, the applicant must be given an opportunity of being heard. In the present case, there is no dispute that the assessee was not afforded the said opportunity.

Ruling

High Court considers it apposite to set aside the impugned order as the same has been passed without following the procedure as set out in section 270AA(4). In so far as the assessee's contention that the concerned officer is empowered to condone the delay and that the assessee has substantial explanation for the delay is concerned, we are refraining from making any observations. HC is of the view that it would be apposite that the concerned officer considers these submissions at the first instance. In view of the above, impugned order is set aside. The matter is remanded to the concerned officer to consider the assessee's application u/s 270AA afresh.

Source: **HC, Delhi in the case of Rohit Kapur vs PCIT vide [2023] 148 taxmann.com 397 (Delhi) on March 14, 2023**

Where revenue while framing assessment, accepted assessee's method of computation of capital gain u/s 45, reassessment proceedings initiated after expiry of four years on premise that transaction of capital reduction was wrongly characterized u/s 112(1)(c)(ii) as against section 112(1)(c)(iii), being a clear case of change of opinion was unjustified

Facts

The assessee is an investment holding company incorporated in Singapore. The ultimate holding company of the assessee, Lehman Brothers Holdings Inc. (LBHI) filed a petition under Chapter 11 of the U.S. Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York on 15-09-2008. After LBHI's filing for bankruptcy, the assessee was placed into Creditors' Voluntary Liquidation from 24-10-2008. The assessee did not conduct any business activity and laid off the entire staff. Hence, the assessee had no business transaction during the AY 2015-16. The assessee, inter alia, held 5,70,88,801 shares of LBCPL (a private limited company) as on 31st March 2014. During the year under consideration, Court by an order dated 05-09-2014, allowed the capital reduction of 4,87,80,488 equity shares held by the assessee in LBCPL in accordance with Sections 100 to 103 of the Companies Act, 1956 on payment of INR 100 crores at INR 20.5 per equity share. The assessee submitted the return of income which provided the details related to capital gain transactions filed under Schedule CG. The Computation of income was submitted with detailed working method of arriving at the capital gain/loss including the details of dates of the purchase and sale of shares and the conversion of amounts in foreign currency as well as the provisions of Companies Act, the Income tax Act and the order of this Court. The assessee claimed the capital gain in the sum of INR 25.14 crores u/s 45 r.w. the first proviso to Section 48 after setting off loss for AY 2014-15 in the sum of INR 19.60 crores and paid taxes at 20% u/s. 112(1)(i)(c)(ii). Thereafter on 22-11-2018, a notice u/s 142(1) was issued requesting the assessee to provide the High Court order granting capital reduction and financial statements highlighting the capital reduction in the balance sheet. In response thereto, the assessee provided the High Court order passed u/s 100 of the Companies Act, 1956 granting LBCPL to cancel the shares and consequently reduced capital. The respondent passed an Order u/s 143(3) whereby it noted that the assessee has no business operations/permanent establishment in India. It also noted that there was a capital reduction and the capital gain/loss had been computed as per the provisions of the Act. Senior Counsel for the assessee's submitted that the assessee had disclosed all primary facts required for the purposes of assessment and consequently there was no failure to disclose fully and truly any material fact necessary for reassessment after four years. He submitted that neither the reasons for reopening nor the order disposing of the objections alleged failure to disclose any material facts. He submitted that the impugned reasons did not disclose any new material facts or information based on which the assessment was sought to be reopened. He further submitted that the impugned reasons merely relied upon the details which were already a part of the

system/portal submitted during the original assessment, on account of there being no other transaction except the capital gain that the assessee derived on distinguishing the rights in the shares of LBPCL pursuant to the capital reduction. It was further contended that at the time of filing the return of income, the assessee was not covered by Section 112(1)(c)(iii) as it had transferred the shares of the private limited company. Accordingly, in the instant case, the assessment is being sought to be reopened in contravention of the law as it stood during the previous year 2014-15 and AY 2015-16 in which the assessee filed its tax return. In this regard, the learned counsel for the assessee placed reliance on the decision in case of Godrej Industries Ltd. v/s. B. S. Singh, Deputy Commissioner of Income-tax, which confirms that a retrospective amendment cannot be the basis for reopening of assessment. In any case, it may be noted that for the AY 2015-16, the four years period has expired on 31st March 2020, and absence any failure to disclose facts by the assessee or any tangible new material, the reopening of assessment proceedings by the respondent is bad in law.

Ruling

The entire emphasis on the assessee not truly and fully disclosing facts is baseless inasmuch as in the present case, there is only one transaction which was under consideration for the respondents. The entire transaction has been considered by the AO and has culminated into the order u/s 143(3). As apparent from the reasons there were no new tangible material in the hands of the AO. Once the assessment is concluded, it is deemed to have been concluded with application of mind by the AO from all perspectives legal and factual. In our view, the defense is misdirected and misconstrued and unsubstantiated. In our view, appropriate application of the law and correct advise to the concerned officer can save a lot of litigation and burden on the court as well as agony to the citizens. The case law referred by the respondents also is totally meaningless and out of context and by no stretch of imagination applicable to the facts of this case and therefore, we do not propose to deal with each one of them. Suffice it to say that, it is misconstrued and misapplied, on the other hand, the judgments relied upon by the assessee are relevant and support the contentions' so raised by the assessee. The petition was allowed and the impugned order was set aside.

Source: HC, Bombay in the case of Lehman Brothers Investments (P.) Ltd. vs ACIT vide [2023] 148 taxmann.com 236 (Bombay) on March 08, 2023

Where a reopening notice was issued upon assessee company, engaged in business of electronic appliances, on ground that an information was received on insights portal that high risk transactions had taken place in case of assessee which was required to be verified, since there was no any mention about "cash credits and subsequent debits" in reasons recorded and there was no live link or nexus between said information received and income escaping assessment, impugned reopening notice was unjustified

Facts

The Assessee is engaged in the business of trading in electronic appliances and has filed its returns on a regular basis. The Respondent No. 1 by its order u/s 143(3) accepted the returned income after considering the submissions filed by the Assessee. It filed its return of income u/s 139(1) for AY 2016-17 declaring a total income of INR 2.86 crores. The Assessee's books of accounts were audited, and the auditor uploaded the audit report in the Form No. 3CD. On 31st March, 2021 notice u/s 148 was issued to the Assessee for the AY 2016-17 with the prior approval of Respondent No. 2. Pursuant thereto, on 23rd April, 2021, the Assessee filed its return of income. The assessee issued a letter seeking reasons recorded. In response thereto, the assessee filed detailed objections. Since there was no progress on the disposal of the objections, the assessee uploaded online response, whereby the assessee requested disposal of the objections raised. Thereafter, second reminder letter was filed. The impugned order was passed disposing the assessee's objections to the proposed reassessment. Immediately, thereafter, a notice u/s 142(1) was issued to the assessee calling upon them to provide certain details. In response to the notice, the assessee filed letter raising grievance that the notice only gave one working days' time to file a reply. The assessee apprehending arbitrary and huge demands, filed this petition.

The Ld. Counsel of the assessee submitted as under:

- the AO has failed to establish that the jurisdictional conditions are satisfied to initiate reassessment proceedings.
- the reassessment is based solely on the information received under the head High Risk Transaction cases under the verification module on the "INSIGHTS PORTAL".
- the description on the portal is "Account Balance or value at the end of the reporting Period", against which an amount of INR 103.79 crores is mentioned.
- that there is nothing in the reasons or in the order disposing objections in this regard. Accordingly, on such vague and ambiguous information, assessment cannot be reopened.
- there is no live link or nexus between information received and the purported income i.e. escaped assessment.
- that there is no information or detail about the nature of transaction or account which is signed, sine qua non for the A.O. to have a "reason to believe" that income chargeable to tax has escaped assessment. In support of his contention, he relied upon the decision of the Apex Court in the case of **ITO vs. Lakhmani Mewal Das.**
- there is no new tangible material based on which the assessment was being reopened and that from the reasons

recorded, one could not deduce what was the new tangible material. He submitted that the reasons categorically recorded that the information requires further verification.

- apprehends that the reopening would only lead to fishing and roving enquiry conducted by the respondent No 1.
- that a reopening of the assessment cannot be based on conjecture, surmises and assumptions. He further submitted that from the information available on the “INSIGHT PORTAL” it can be concluded that the impugned order was passed in mechanical and in routine manner without any application of mind, which by itself would make reassessment proceeding bad in law and liable to be set aside. He submitted that since the respondent No. 1 had taken no efforts to verify the records of the assessee, the actions were without any due diligence and therefore, contrary to the law.

Mr. Suresh Kumar, learned Counsel for the respondent also submitted as under:

- the information on the “INSIGHT PORTAL” from the Financial Intelligence Unit of the Government of India is tangible and concrete information.
- that new tangible information was received in relation to the suspicious transactions from the Financial Intelligence Unit and the reasons for satisfaction were recorded and approved u/s 151 from the Additional CIT 5-2, Mumbai.
- the impugned order dated 11th March, 2022 passed by the Faceless Assessing Officer disposing of the objections was based on facts available on the record.
- since the case was reopened within four years from the end of the relevant assessment year and there was a large sum of cash transactions mentioned in the information, the same has not been scrutinized.
- the only requirement to initiate proceedings u/s 147 was to record reasons to believe satisfaction of the A.O., which had been recorded.
- the notice u/s 148 was issued after prior approval of the Additional CIT u/s 151 and consequently, the notice was issued u/s 143(3) is not in violation of the Supreme Court Judgment in the case of GKN Driveshafts (India) Ltd.
- as per the Faceless Assessment Scheme, cases are reopened u/s 147 by the Jurisdictional AO and thereafter cases are transferred to the Faceless Assessing Officer (FAO).

Ruling

HC held that we could not find any mention about the “cash credits and subsequent debits” in the reasons recorded. Moreover, as per the reasons itself the said transactions were to be verified. Hence there was a clear departure from the stand. There is no averment in the reply that would suggest that the information was verified and thereafter approval was taken. Having perused the reasons and the information, HC find no new tangible material as contended by the respondents. Debits and Credits can in no way disclose the nature of transactions or lead to an inference of income escaped assessment. The respondents have not taken any ground of extrapolation. There is no live link or nexus between the information received and the income escaping assessment. The assessee is carrying on a retail business of electronic appliances. Usually, appliances would be supplied to clients wherever required and payment would be received in cash upon delivery. Therefore, the cash deposits from various places cannot be doubted and considered as suspicious transactions. In our view, there is no prima facie case made out that income has escaped assessment. The assessee has fully disclosed all the material facts and there is no specific averment to show what material fact was required to be disclosed by the assessee that is not disclosed. The ratio of the Judgment in the case of Lakhmani Mewal Das that the reasons for formation of the belief must have rational connection with or relevant barring on formation of belief is squarely applicable to the present case. The Respondent No. 1 ought to have made prior enquiries about the nature of business before considering reopening of the assessment, which they have failed to do. HC also stated that the Respondent No. 2 has not applied his mind before granting approval u/s 151. We have seen the details mentioned in the rejoinder by the assessee which shows that out of 8 accounts mentioned, only 3 accounts belong to the assessee and the other 5 accounts did not belong to the assessee. The respondent has also not disputed that the Assessee is operating from approximately 25 different shops of varied sizes at different locations and not only from a rented commercial premises of area between 500 to 1000 sq. ft. It is pertinent to note that whilst the order has been passed by NFAC the reasons are recorded by respondent No. 1 to which there is no explanation in the affidavit in reply. In our view the response in the impugned order as to the nature of transaction, and as to how it makes it suspicious are missing. We also find that the decision of the Apex Court in the case of GKN Driveshafts (I) Ltd. v/s. ITO and the decision of this Court in the case of Asian Paint Ltd. v/s. Dy. CIT are also not followed.

Be that as it may, the law is well settled in respect of all the issues raised by the assessee herein and we find no reason to differ from it. In view of the above, we set aside the impugned notice and the impugned order and stay all consequential proceedings, that may be taken pursuant or in implementation of the said notice and order.

Source: HC, Bombay in the case of Digi1 Electronics (P.) Ltd. vs ACIT vide [2023] 148 taxmann.com 184 (Bombay) on March 08, 2023

Where assessee adopted revenue recognition policy wherein all costs with respect to real estate development were accumulated and charged when control of completed unit was transferred to client, marketing and sales expenditure with respect to development of real estate project would be allowed in year in which performance obligation would be satisfied

Facts

Assessee is engaged in the business of real estate, primarily in the development of residential as well as commercial complexes. Return of income was filed on 30-10-2019 which was subsequently revised on 30-6-2020, reporting total income of INR 11.17 crores computed under the normal provisions since tax payable on the book profit u/s 115JB was less than the tax payable under the normal provisions of the Act. Return of the assessee was processed for which intimation u/s 143(1) of the Act was issued on 07-10-2020. In the return so processed, adjustments aggregating to INR 18.36 lacs were made to the total income returned. This amount comprised of INR 4.20 lacs towards disallowance u/s 40(a)(ia) and INR 14.16 lacs u/s 43B. Further, there was an adjustment made in the book profit computed u/s 115JB, by which the book profit was increased by an amount of INR 1.63 crores. Aggrieved, assessee went in appeal before the ld. CIT(A). Before ld. CIT(A), it was submitted that,

- disallowance made u/s. 40(a)(ia) and 43B have already been added by the assessee itself, in the computation of income while arriving at the total income reported in the return filed by the assessee. Making adjustments of these amounts again and increasing the returned total income, tantamount to taxing the same amount twice.
- In respect of the upward adjustments made in the book profit u/s 115JB, it was submitted that it was an arbitrary adjustment. It was
- further stated that this amount represented amount withdraw from reserve/ provision which stood credited in the P&L account for the year and was reduced while computing the book profit since it had already been offered to tax in the earlier years.

Ld. CIT(A), after considering the submissions of the assessee, directed ld. AO to verify the facts with records and supporting evidence and consider making the additions/disallowance based on his verification.

Before the ld. CIT(A), assessee raised additional grounds claiming deduction of INR 3.83 crores representing expenditure incurred towards marketing expenses, during the year, which was initially not claimed in the return filed by the assessee. While raising the additional grounds, assessee relied on the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT [1998] 97 Taxman 358/229 ITR 383. In the course of appellate proceedings, ld. CIT(A) admitted the additional grounds for adjudication. Before ld. CIT(A), assessee contended that the said marketing expenses being purely related to sale are not linked with the cost of construction of the real estate project and, therefore, are allowable expenses u/s 37(1), which have been incurred during the year under consideration. In this respect, it was also contended that these expenses were included in the work in progress under the inventories in its books of account and were not charged to P&L account. It was submitted that in accordance with the accounting policies, these expenses were debited along with construction expenses to WIP which is reported in the Balance Sheet

under the head current inventories in Current Assets. On these submissions, ld. CIT(A) gave his findings that since assessee has not claimed these expenses in his return of income, there is no disallowance made by the ld. AO. and therefore, when no disallowance has been made, the question of allowing the same does not arise. Accordingly, this additional ground was dismissed by the ld. CIT(A). Aggrieved, the assessee is in appeal before the Tribunal.

Ruling

The Ld. Tribunal held that the CIT(A) has merely given directions to the ld. AO to verify the records and based on his verification of the records, he may consider the additions/disallowances to be made. We note that approach adopted by the ld. CIT(A) is not in accordance with the provisions of section 250 which prescribes the procedure in appeal to be complied with by the ld. CIT(A). Further, section 251 adequately empowers the ld. CIT(A) to exercise his powers while disposing the appeal. Despite such non-adherence of the provisions of law by the ld. CIT(A), we ourselves find it proper to verify the records in this respect for the meritorious disposal. Considering the facts on record and going through the computation of taxable income referred above, we without any hesitation hold that disallowance made u/ss. 40(a)(ia) and 43B, totaling to INR 18.36 lacs is not warranted.For additional ground, the Tribunal stated that the assessee has adopted revenue recognition policy based on satisfaction of performance obligation 'over time' when the control is transferred to the customer, meaning thereby all costs are accumulated during the course of its completion and the same is charged against the revenue when the control of the completed unit is transferred to the customer to satisfy the criteria of matching concept of accounting. In the matching concept, revenue and income earned during an accounting period is compared with the expenses incurred during the same period. This matching concept has been recognized by the Hon'ble Supreme Court in the case of Taparia Tools Ltd. v. CIT [2015] 55 taxmann.com 361/231 Taxman 5/[2015] 7 SCC 540. Tribunal further stated that Sections 145 and 145A provides for computation of income under the head 'profits and gains from business or profession' and 'income from other sources' by applying the 'Income Computation and Disclosure Standards (ICDS)'. Since no specific ICDS has been notified for real estate developers, revenue and cost recognition is governed by the applicable accounting standards and Ind AS.

Considering the factual matrix in the present case, the discussion made above on the accounting treatment in terms of applicable accounting standard and accounting principles as well as judicial precedents, Ld. Tribunal is of the considered view that claim of deduction made by the assessee towards marketing and sales expenses relating to project Avidipta-II are not allowable in the year under consideration while computing the total income under the provisions. However, keeping in mind the detailed discussion made above on the accounting treatment, Tribunal held that since these expenses have been accumulated in work-in-progress as per accounting standard and revenue recognition policy and also considering the matching concept of accounting principle, these have

to be allowed and considered against the revenue in the year in which performance obligation is satisfied, in other words, in the year in which the said project is completed and sales are booked in the profit and loss account. Accordingly, additional ground was dismissed..

Source: ITAT, Kolkata in the case of Bengal Peerless Housing Development Company Ltd. vs DCIT vide [2023] 148 taxmann.com 265 (Kolkata - Trib.) on March 01, 2023

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