IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'H' : NEW DELHI)

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
and
SHRI GEORGE GEORGE K, JUDICIAL MEMBER

ITA No.3770/Del./2013
(ASSESSMENT YEAR : 2002-03)

DCIT, Circle 16 (1), New Delhi.	vs.	The Handicrafts and Handlooms Exports Corporation of India Ltd., Jawahar Vyapar Bhawan, 5th Floor, 1, Tolstoy Marg, New Delhi – 110 001. **(PAN : AAACH0628J)**
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Suresh Anantharaman, Advocate
REVENUE BY : Shri P. Dam Kanunjna, Senior DR

Date of Hearing : 04.06.2015
Date of Pronouncement : 12.06.2015

O R D E R

PER GEORGE GEORGE K., JM :

This appeal, at the instance of the department, is directed against the order of the Commissioner of Income-tax (Appeals)-XII, New Delhi dated 15.03.2013. The relevant assessment year is **2002-03**.

2. The solitary effective ground reads as follows :-

> "Ld. CIT (A) erred in law and on the facts of the case in quashing the reopening of the assessment under section 148 of the I.T. Act."

3. Briefly stated, the facts of the case are as follows.

The assessee company is a public sector undertaking under the Ministry of Textiles. It is engaged in the business of export and domestic sales of handicrafts, handlooms, readymade garments, carpets, jewellery etc. The assessee had filed its return of income on 31.10.2002 declaring an income of Rs.63,25,117/-. The assessment was taken for scrutiny by issuing of a notice u/s 143(2) of the Act. The scrutiny assessment was completed vide order dated 28.02.2005 by accepting the returned income as declared by the assessee. Subsequently, a notice u/s 148 of the Act was issued and duly served upon the assessee on 31.03.2009 by recording the following reasons :-

> ***"1. In this case scrutiny assessment was completed on 28th February, 2005 for the assessee year 2002-03 at an income of Rs 63,25,120/-. The assessee was allowed deduction u/s 80HHC amounting to Rs 2,38,91,769/- which includes "Income from other sources" amounting to Rs.1,18,06,275/-. As deduction u/s 80HHC was allowable only against business income, the Act of the assessing officer is not correct. The mistake resulted in under assessment of income by Rs.54,81,158/- (as per annexure enclosed) with the consequent short levy of tax of Rs.19,56,773/-.***
>
> ***2. Section 35DDA of the Income-tax Act, 1961, provides that where an assessee increases any expenditure in any previous year by way of payment of any sum to an employee at the time of his voluntary retirement, one fifth of the amount so paid shall be deducted in computing the profit and gains of the business for that previous year and the balance-shall be deducted in equal installment for each of the four immediately succeeding previous year.***

The assessment of M/s Handicraft & handloom Exports Corporation for the assessment year 2002-03 was completed after scrutiny in February 2005, determining an income of Rs.63,25,120/-. The assessee had debited to profit and loss account a sum of Rs.71,69,000/- on account of payment under voluntary retirement scheme which was fully allowed by the Assessing Officer whereas as per Income Tax Act, one fifth of the total expenditure of Rs.14,33,800/- was to be allowed as deduction and the remaining four fifth expenditure of Rs 57,35,2001- was to be disallowed. The mistake resulted in under assessment of income by Rs.57,35,2001- with consequent short levy of tax Rs.20,47,466/-.

3. Income Tax Act, 1961, provides that any expenditure not being expenditure of capital nature laid not wholly or exclusively for the purpose of business is allowable as deduction in computation of the income chargeable under the head "profit & gains of business or profession" further it has been judicially held in the case of Hasinagar Industries and another V CIT 231 ITR 842 that if bad debt debited in the profit & loss account relates to any advances on capital account they are not admissible as deduction as the loss is capital loss. If the loan taken on capital account become irrecoverable, the loss incurred is capital loss.

The assessment of above assessee for the assessment year 2002-03 was completed after scrutiny in February 2005, determining an income of Rs.63,25,120/-. The advances were of capital in nature and should have been added to the income of the assessee. The omission to do so resulted under assessment of income by Rs.76,91,649/- involving short levy of tax of Rs.27,45,909/-."

The various objections raised by the assessee for reopening the assessment, was rejected by the Assessing Officer and reassessment u/s 147 read with section 143 (3) of the Act was completed by an order dated 30.12.2009, computing the total income at Rs.1,24,24,380/-.

4. The assessee being aggrieved by the reassessment filed an appeal to the CIT (A). The CIT (A) quashed the reassessment for the reason that proviso to section 147 is applicable and there is no failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment.

5. The revenue, being aggrieved, is in the appeal before us.

6. The ld. DR supported the order of assessment and submitted that on account of under-assessment, reopening of assessment is justified and the CIT (A) has erred in quashing the reassessment proceedings.

7. On the other hand, the ld. AR reiterated the submissions made before the income-tax authorities and also relied on the recent judgment of Hon'ble jurisdictional High Court in the case of Madhukar Khosla vs. ACIT reported in 367 ITR 165. The ld. Counsel submitted that without any new material coming into the possession of the Assessing Officer that indicate escapement of income, the reassessment is bad in law.

8. We have heard the rival submissions and perused the material on record. The CIT (A) had quashed the reassessment proceedings for the reason that the reopening has been done after four years and Proviso to section 147 of the Act is applicable to the instant case. According to the CIT (A), the Assessing Officer having not recorded in the notice u/s 148 that there has been a failure on the part of the assessee "to disclose fully and truly all material facts necessary for his assessment", the reassessment

is bad in law. The relevant findings of the CIT (A), for ready reference, is reproduced below :-

> ***"(On page 6)……..***
> ***From the above, it is clearly evident that there is no allegation or whisper that there is failure on the part of the assessee to disclose fully and truly 'all material facts'. This very issue goes to the jurisdiction of the AO to issue notice under section 148 of the Act. The non recording of such satisfaction in the reasons recorded makes the entire re-assessment proceeding bad in law and void.***
>
> ***It is seen that the reopening u/s 147 was done subsequent to the four-year period stipulated in the proviso to Section 147 and, consequently, the same could only be initiated if any income chargeable to tax had escaped assessment by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice under Section 142(1) or Section 148 or "to disclose fully and truly all material facts necessary for his assessment" for that assessment year.***
>
> ***There has been no failure which could be attributed to the assessee of not disclosing fully truly all relevant primary material facts necessary for completion assessment because in the reasons itself it is mentioned that - the assessee had debited to profit and loss account a sum of Rs.71,69,000/- on account of payment under voluntary retirement scheme ... " It is evident that reasons recorded are based on the balance sheet of the assessee which were furnished with the return of income. Further it is self evident that the information was available in course of original assessment and all the material information necessary for framing an assessment. It is also seen that no new facts or material had been brought on record which provides reasons to believe that the income of the appellant has escaped assessment. In view of the above facts this is not a fit case for reopening of assessment.***
>
> ***My attention was further drawn to the proviso to section 147:***

> ***"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 OM 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. "***

As the Assessing Officer has no where stated in the reasons recorded that the assessee has failed to disclose fully and truly all material facts necessary for assessment. This case is squarely covered by my order in the case of JCIT(OSD), Circle 9(1), New Delhi Vs SMS Demang Pvt. Ltd. the ITAT Delhi Bench '0' in ITA No. 5666/Del/2011vide order dated 08/02/2013 has upheld the similar issue and has stated that:-

" ... In the present case before us as discussed above the Assessing Officer during original assessment proceedings had raised a question on the issue of the claimed bad debt and on the provision of warranty and current liabilities vide query no.12 of the questionnaire and being convinced with the submission of the assessee made in this regard he had accepted the claim. The tax Audit Report filed by the assessee was already there on record on the basis of which reopening of assessment u/s 147 has been initiated after recording the reasons.

Under these circumstances we find that the Id. CIT(A) has rightly accepted the objection of the assessee that initiation of reopening proceedings u/s 147 of the Act in the present case after the expiry of 4 years from the end of the relevant assessment year was not valid as per the proviso to section 147 of the Act since there was no failure on the part of the assessee to disclosed fully and truly all material facts necessary for its assessment for assessment year under consideration ...

We do not find reason to interfere with the findings of the Id. CIT(A) that initiation of reopening proceedings in the present case was barred under the proviso of section 147 of the Act and hence we are of the view that the ld. CIT(A) has rightly quashed the assessment u/s 147/143(3) of the Act made in furtherance to the invalid notice issued U/S 148 of the Act."

Reliance in this respect is also placed on the following judgment is as under:-

In the case of Commissioner of Income-tax Vs Purolator India Ltd. [2012] 343 ITR 155 (Delhi High Court) it is held that:-

" ... One of the jurisdictional pre-conditions for reopening of an assessment after four years is that there should be failure on the part of the assessee to disclose material facts necessary for assessment. The expression "material facts" in Explanation 1 to section 147 of the Income-tax Act, 1961 refers to primary facts. The term "primary facts" or "material facts" are those facts which are material and relevant for the decision of the question before the Assessing Officer and non-disclosure of which would have a material bearing on the question of escapement of income from assessment. Whether or not "primary facts" have been disclosed is normally a question of fact and depends upon the facts and circumstances of each case. The requirement of Explanation 1 is that there should be full and true disclosure of the primary or material facts and not beyond that. It is the obligation of the assessee to disclose fully and truly the primary facts. It is not the obligation of the assessee-to indicate and state what legal inference can be drawn from the primary facts.

The assessee had claimed special deduction for the assessment year 2000-01 under section 80HHC. The deduction was reduced by the Assessing Officer. The original return of income was accompanied by audited accounts and auditor's report required to be submitted in terms of section 80HHC (4) of the Act. Similarly, the assessee had claimed deduction under section 80-IB of the

Act, which was specifically mentioned in the audited accounts and the auditor's report. The special deductions were allowed. Subsequently, in March, 2006, reassessment proceedings were initiated by the Assessing Officer after recording that the computation of deduction under section 80HHC was allowed without reducing the deduction claimed and allowed under section 80-IB as required by section 80-IA (9), which is also applicable to section 80-IB. The tribunal held that the reassessment proceedings were not valid. On appeal to the High Court:

Held, dismissing the appeal, that there was no indication that the assessee had failed or admitted to disclose the material or primary facts. These were available on record. The Assessing Officer had failed to draw correct legal inferences at the time of original assessment from the primary facts. This was not an error or omission on the part of the assessee. It was not alleged that the assessee had suppressed, misrepresented or falsified the record/facts. It was also not alleged that there was any subsequent factual information on the basis of which it was found that the assessee had not fully disclosed the primary facts or had falsified or disclosed incorrect primary facts. The reassessment proceedings were not valid ... "

Atma Ram Properties Pvt. Ltd. vs. DCIT[2012) 343 ITR 141(Delhi) the Delhi High Court has stated as under:-

" ... In order to initiate proceedings for reassessment after four years, there should have been a failure on the part of the assessee to disclose material facts necessary for assessment. If the Assessing Officer had failed to apply legal provisions/section of the Income-tax Act, 1961, the fault cannot be attributed to the assessee. The requirement is that the assessee should have failed or omitted to make full and true disclosure of material facts. The assessee is not required to disclose, state or explain the law ... "

BLB Limited Vs Assistant Commissioner of Income-tax [2012] 343 ITR 129 (del.)

" ... Held, allowing the petition, that the assessee had disclosed fully and truly all material facts relevant for the

assessment. The reasons recorded did not disclose or state that there was failure or omission to disclose fully and truly all material facts. There was no indication and it was not alleged that there was some material or information available on record when reasons to reopen were recorded, to show that the assessee had concealed or had not disclosed fully and truly all material facts. In the original assessment proceedings the Assessing Officer had considered and examined whether or not the non-compete fee payment was of capital or revenue nature. The Assessing Officer accepted the stand of the assessee and treated the non-compete fee as a revenue expenditure. The reassessment proceedings could not, therefore, be initiated on the ground that the Assessing Officer was legally wrong and had misapplied and wrongly understood the law/legal position."

Further reliance is also placed in the case of CIT vs USHA International Ltd. In ITA No. 2026/2010 dated September 21, 2012 where in the court reiterated that onus is on AO to prove that there is failure on the part of the assessee to disclose truly and fully of all particulars of income which resulted into an escaped assessment. In case of the non-observation of the same, the entire proceedings in pursuant of the same are void and bad in law.

The Assessing Officer was not correct in his action to assume jurisdiction over the appellant for the year under consideration in view of the proviso to section 147 of the Act. Additionally reasons recorded are based on balance sheet furnished with return of income and accepted in original assessment. It is a case of change of opinion i.e. reappraisal of same facts. On which earlier Assessing Officer had taken a view on which the new Assessing Officer differs. In view of the above, it is submitted that, proceedings initiated u/s 147 of the Act and completion of assessment u/s 147/143(3) of the Act is illegal and is quashed."

The CIT (A) has considered the precedent on the subject and held that the reopening is bad in law since the Assessing Officer has not mentioned in

the reasons recorded that 'the income has escaped assessment' on account of the failure of the assessee to fully and truly disclose material facts necessary for assessment. Moreover, in the recent judgment of the Hon'ble jurisdictional High Court in the case of Madhukar Khosla vs. ACIT (supra), the Hon'ble Court has held that 'if there is no "reason to believe" that the income has escaped assessment based on new "tangible material", then the reopening of assessment amounts to impermissible review'. The relevant finding of the Hon'ble jurisdictional High Court reads as follows:-

> ***"11. The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible materials", then the reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made. The impugned notice, the AO's order rejecting the objections, and the arguments of the Revenue nowhere indicate how the AO was impelled to seek re-opening of the assessee's case, as distinguished from the several other completed assessments."***

9. In the instant case, the CIT (A) has clearly mentioned that the escapement of income was not on account of failure on the part of the assessee to fully or truly disclose all material facts necessary for assessment. Further, there is nothing on record to suggest that there is a new material in possession of the Assessing Officer, indicating escapement of income, to initiate reassessment proceedings. Therefore, in the light of the above mentioned judicial pronouncement, we hold that CIT (A) is justified in quashing the reassessment proceedings and we see no reason to interfere with the same. It is ordered accordingly.

10. In the result, the appeal of the revenue is dismissed.

Order pronounced in open court on this 12th day of June, 2015.

Sd/-	**sd/-**
(N.K. SAINI)	**(GEORGE GEORGE K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 12th day of June, 2015
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Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XXV, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
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