IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member)

ITA No. 2603/Kol/2019
Assessment Years: 2007-08

HLG Memorial Hospital Pvt. Ltd**……..Appellant**
Sen Railegh Road
Asansol – 713 305
West Bengal
[PAN : AABCH 3927 P]

Vs.

Asstt. Commissioner of Income Tax, Circle-2, Asansol**……..Respondent**

Appearances by:
Shri K.M. Roy, FCA, appeared on behalf of the assessee.
Shri Jayanta Khanra, JCIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : February 27th, 2020
Date of pronouncing the order : March 13th , 2020

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals) – Asansol, (hereinafter the "ld.CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 18/10/2019 for the Assessment Year 2007-08.

2. The assessee challenges the reopening of assessment in this case as bad in law.

3. The assessee filed its original return of income on 15/11/2007. The original assessment was completed u/s 143(3) of the Act on 31/12/2009. Thereafter reasons for reopening were recorded by the Assessing Officer and notice u/s 148 of the Act, reopening the assessment was issued on 09/07/2013.

4. After hearing rival contentions, I find that the Assessing Officer has reopened the assessment by recording the following reasons:-

> *"On scrutiny of your case file for the A.Y. 2007-08, it is observed from the schedule of depreciation that he assessee has claimed depreciation of Rs.2,40,000/-, Rs.2,11,200/- and Rs.1,992/- @ 40% instead of 15% on Medical devices such as USG, X-Ray and on UPS etc. which are not enlisted under the category of Life Saving medical equipments for depreciation @40% enumerated in the schedule of depreciation as per the Income Tax Rules, 1962. Thus excess depreciation to the tune of Rs.2,83,245/- has been claimed by the assessee. it is also observed that the assessee has claimed depreciation of Rs.4,15,310/- @ 10% on Building under construction.*

In the light of the above facts, it is apparent that the assessee has claimed excess depreciation to the tune of Rs.6,98,555/- liable for addition to the total income chargeable to income tax. As such, I have the reason to believe that the above amount has escaped assessment for the A.Y. 2007-08 and therefore fit case for reassessment u/s 147 of the I.T. Act, 1961."

4.1. On a perusal of the reasons recorded, I find that there is no allegation that the assessee has failed to disclose truly and fully, all the material facts necessary for the assessment. Under similar circumstances, the Kolkata 'A' Bench of the Tribunal in the case of M/s. Beekay Steel Industries Ltd. vs. DCIT CC-XXX, Kolkata, in I.T.A. No. 105/Kol/2015, order dt. 31/05/2017, held as follows:

"4.4. The Hon'ble Bombay High Court in the case of Tao Publishing (P) Ltd. v. Dy.CIT reported in (2015) 370 ITR 135 (Bom.), has held as follows:-

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

4.5. The Hon'ble Bombay High Court in the case of Sound Casting (P) Ltd. v. Dy. CIT reported in 250 CTR 119 (Bom.) (HC), has held that there is no allegation in the reasons which have been disclosed to the assessee that there was any failure on his part to fully and truly disclose material facts necessary for assessment and therefore reopening beyond four years was not valid. (A.Y. 2005-06).

4.6. The Hon'ble Delhi High Court in the case of CIT vs. Orient Craft Ltd. reported in [2013] 354 ITR 356 (Del.)(HC) has held as follows:

"The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147."

4.7. The Hon'ble Delhi High Court in the case of Haryana Acrylic Manufacturing Co. v. Commissioner of Income-Tax and Anor. reported in [2009] 308 ITR 38 (Delhi) has held as follows:

*"**26** Viewed in this light, the proviso to section 147 of the said Act, carves out an exception from the main provisions of section 147. If a case were to fall within the proviso, whether or not it was covered under the main provisions of section 147 of the said Act would not be material. Once the exception carved out by the proviso came into play, the case would fall outside the ambit of section 147.*

***27** Examining the proviso [set out above], we find that no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied:*

(a) an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year; and (b) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee: (i) 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 (ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148. This is clearly not the case here because the petitioner did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. If it is also found that the petitioner had disclosed fully and truly all material facts necessary for its assessment, then no action under section 147 could have been taken after the four year period indicated above. So, the key question is whether or not the petitioner had made a full and true disclosure of all material facts ?

29 *In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade Private Ltd (supra) we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania (supra) that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our view-point, we hold that the notice dated 29.03.2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 02.03.2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above.*

4.8. Applying the propositions laid down in the above case law to the facts to this case, we have to necessarily hold that the re-opening of the assessment proceedings is not valid that there is not even a whisper in the reasons recorded for the reopening of the assessment that there is a failure on the part of the assessee to disclose fully and truly all the necessary material facts required for assessment in view of the 1st proviso to Section 147 of the Act. In this case no tangible materials have come to the possession of the Assessing Officer subsequent to the Assessment Order u/s 143(3). Re-opening is done based on the same material and record and hence it is bad in law. As far as the contention, that there is a change in opinion is concerned, we are unable to agree with the ld. Counsel for the assessee as there was neither a query on this issue by the Assessing Officer during the original assessment proceedings, nor there was a reply by the assessee. Hence there was no opinion formed. Thus, the question of change of opinion does not arise.

4.9. In any event, as we have held that the re-opening is bad in law as it does not fulfill the requirement of the Proviso to Section 147 of the Act, and as no tangible material has come to the possession of the Assessing Officer, we quash the assessment and allow the appeal of the assessee.

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

5.1. Applying the propositions of law laid down in the above referred case-law to the facts of the case on hand, I hold that the re-opening of assessment is bad in law.

6. In the result appeal of the assessee is allowed.

5. Consistent with the view taken therein, I quash the reopening as bad in law as it does not fulfil the requirements of the proviso to Section 147 of the Act, as there is no

whisper that the assessee has failed to fully and truly disclose all material facts necessary for assessment and as no tangible material has come to the possession of the Assessing Officer.

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

Kolkata, the 13th day of March, 2020.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 13.03.2020
{SC SPS}

Copy of the order forwarded to:

1. ***HLG Memorial Hospital Pvt. Ltd***
Sen Railegh Road
Asansol – 713 305
West Bengal

2. ***Asstt. Commissioner of Income Tax, Circle-2, Asansol***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches