

आयकर अपीलिय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
(समक्ष)Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 638/Kol/2017
Assessment Year: 2008-09

Deputy Commissioner of Income-tax, Circle-5(1), Kolkata	Vs.	M/s. Coal India Ltd. (PAN: AABCG3929J)
Appellant		Respondent

&

C.O. No. 38/Kol/2017
I.T.A. No. 638/Kol/2017
Assessment Year: 2008-09

M/s. Coal India Ltd.	Vs	Deputy Commissioner of Income-tax, Circle-5(1), Kolkata.
Cross Objector		Respondent

Date of Hearing	03.03.2020
Date of Pronouncement	29.05.2020
For the Appellant Revenue	Shri Ram Bilash Meena, CIT, DR
For the Assessee Cross Objector	Shri Harish Agarwal, AR

ORDER

Per Shri A.T.Varkey, JM

Both these appeal and Cross Objection filed by the revenue and assessee respectively against the order of Ld. CIT(A)-17, Kolkata dated 20.12.2016 for AY 2008-09.

2. At the outset, Ld. Counsel for the assessee submitted that in the impugned order the Ld. CIT(A) has given relief to the assessee by deciding the appeal on merits whereas he has not adjudicated the legal issue in respect of the validity of the second notice issued by AO under section 148 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) without completing the reassessment after issuance of the first section 148 of the Act

notice for reopening. According to Ld. Counsel, since this legal issue which is being raised if decided in favour of the assessee then the merits of the appeal challenged by the revenue before us would become academic in nature. Therefore, taking into consideration the submissions made by the Ld. AR and after going through the legal issue raised by the assessee, we note that the issue regarding the legal validity of the action of AO in issuing the second notice u/s. 148 of the Act, when the first notice issued by AO u/s. 148 of the Act consequent to which the assessee having filed the return, the AO having not passed the reassessment order, if found to be correct will go to the root of the matter and, therefore, we are inclined to accept the submission of the Ld. AR and we would like to adjudicate first of all the Cross Objection of the assessee.

3. Ground of appeal raised by the assessee in the Cross Objection is against the action of the AO in issuing the second notice u/s. 148 of the Act on 19.3.2013 which culminated in the second reassessment order dated 29.03.2013 [impugned action] when the fact remains that while the second notice u/s. 148 of the Act dated 19.03.2013 was issued, the AO had not passed the reassessment order after having issued the first notice u/s. 148 of the Act on 19.10.2011, which culminated in reassessment order only on 25.03.2013. In other words, the legal challenge is against the issue of second notice u/s. 148 of the Act. As per the assessee, the AO had issued for this AY 2008-09 the first reopening notice u/s. 148 of the Act on 19.10.2011 and the AO thereafter without framing the reassessment pursuant to the assessee filing the return on 17.11.2011, the AO had issued the second notice u/s. 148 on 19.03.2013 which action of AO is bad in law.

4. Brief facts of the case are that as per the decision taken by the Ministry of Coal, Govt. of India, the assessee had set up a shifting and rehabilitation fund for the purpose of shifting and rehabilitation, dealing with fire and stabilization of the areas under its wholly owned subsidiary companies M/s. Eastern Coalfields Ltd. and M/s. Bharat Coking Coal Ltd. For that purpose, the assessee had collected contribution from the subsidiary companies which was utilized as per the action plan ordered by Ministry of Coal. The contribution made towards the fund was to the tune of Rs.194.75 cr. which was shown in Schedule C with the audited accounts. The original assessment was carried out under

scrutiny u/s. 143(3) of the Act was framed by the AO vide order dated 02.12.2010. Thereafter, the AO issued the first reopening notice u/s. 148 of the Act dated 19.10.2011 to the assessee, in response to the same the assessee filed letter dated 17.11.2011 along with the return of income. The reason for reopening was that the interest earned for contribution to shifting and rehabilitation has escaped assessment.

5. While the first reopening notice u/s. 148 of the Act dated 19.10.2011 was pending before him, the AO without passing the reassessment order pursuant to the first reopening dated 19.10.2011, the AO issued the second reopening notice u/s. 148 of the Act on 19.03.2013 citing the reason that the contribution for shifting and rehabilitation fund of Rs.194.74 cr. was directly credited by the assessee to the Balance sheet instead of crediting the P&L Account and according to AO, since the assessee has not made any allowable expenditure out of the said fund the same need to be treated as income and accordingly, this has resulted in under-assessment of income. Assailing the action of AO the Ld. AR submitted that the second notice u/s. 148 of the Act issued on 19.03.2013 which had resulted in framing the second reassessment order by the AO dated 29.03.2014 is a fall out of an invalid notice and therefore, the impugned action is void. According to Ld. AR, the AO had no jurisdiction to issue the second reopening notice u/s. 148 of the Act dated 19.03.2013 since the AO had not passed his reassessment order pursuant to the first reopening notice u/s. 148 of the Act dated 19.10.2011 wherein the assessee had filed the return of income on 17.11.2011. According to the Ld. Counsel, without disposing of the return of income filed in pursuance of the first notice u/s. 148 of the Act dated 19.10.2011, the AO ought not to have issued the second notice of reopening u/s. 148 of the Act. For the aforesaid proposition of law he cited the decision of the Hon'ble Madras High court in A.S.S.P & Co. Vs. CIT reported in (1988)172 ITR 274 (Mad.) wherein a similar issue arose and the Hon'ble High court was pleased to hold that the second notice issued for reopening when the first notice for reopening pursuant to which the assessee had filed the return has not been disposed of then, the second notice of reopening could not have been issued by the AO and, therefore, it was found that the AO had no jurisdiction to issue the second notice and the reassessment framed pursuant to the second

notice was quashed. The Ld. AR also cited the decision of the Hon'ble jurisdictional High Court in the case of Indian Tubes Co. Ltd. Vs. ITO (2005) 272 ITR 439(Cal) wherein the Hon'ble High court held that "*so long as those returns were not assessed in accordance with law, there was no scope for issuing further notice under section 148.*" Therefore, second notice u/s. 148 of the Act issued by the AO was quashed. Therefore, the Ld. AR urged before us that framing of reassessment order dated 29.03.2014 (second reassessment order) pursuant to the second reopening notice u/s. 148 issued on 19.03.2013 is bad in law and without jurisdiction and need to be quashed.

6. Per contra, the Ld. DR contended that this issue has not been considered by the Ld. CIT(A), therefore, this issue should be remanded to the file of Ld. CIT(A) to give a decision on it. However, he supported the action of the AO that when the AO finds during the reassessment proceedings pursuant to the first reopening notice dated 19.10.2011 that income chargeable to tax has escaped assessment, he has all authority to issue notice in respect of the escaped income and, therefore the second notice u/s. 148 issued on 19.03.2013 without awaiting the event of framing reassessment after reopening notice dated 19.10.2011 was issued is valid in the eyes of law and need not be disturbed.

7. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee is a Public Sector Undertaking and the original scrutiny assessment order for AY 2008-09 was framed under section 143(3) of the Act on 02.10.2010. Thereafter, the AO issued the first reopening notice u/s. 148 of the Act dated 19.10.2011 pursuant to which assessee duly filed the return of income dated 17.11.2011 which culminated in first reassessment order being passed on 25.03.2013. Before framing of the first reassessment order dated 25.03.2013, the AO issued the second reopening notice u/s. 148 on 19.03.2013 which culminated in the framing of second reassessment order dated 29.03.2014 which is the impugned re-assessment order, which was challenged by the assessee before the Ld. CIT(A) who was pleased to give relief to the assessee on merits against which the revenue is in appeal and the assessee has preferred the Cross Objection challenging the action of the Ld. CIT(A) in not adjudicating the legal issue raised by the assessee which is now being discussed supra. The main contention of the

assessee is that the AO after issuing the first reopening notice u/s. 148 dated 19.10.2011 pursuant to which the assessee had filed the return of income on 17.11.2011, without disposing of that return by any reassessment order, the impugned second notice u/s. 148 of the Act dated 19.03.2013 was invalid. We note that the AO had issued first reopening notice u/s. 148 dated 19.10.2011 and when the reassessment proceedings were pending before the AO, he issued the second reopening notice u/s. 148 dated 19.03.2013. We note that pursuant to the first reassessment notice u/s. 148 dated 19.10.2011 wherein the assessee filed the return of income on 17.11.2011, the reassessment order was passed only on 25.03.2013 which means the return of income filed by the assessee pursuant to the first notice is of reopening dated 19.10.2011 was still pending before him when he (AO) issued the second notice u/s. 148 of the Act on 19.03.2013 which was undisputedly without disposing of that return filed on 17.11.2011 by any reassessment order is bad in law and is liable to be quashed as held by the Hon'ble Madras High Court in A.S.S.P & Co., supra and the Hon'ble Calcutta High court decision in Indian Tube Co. Ltd. supra wherein the Hon'ble High courts have followed the ratio laid by the Hon'ble Supreme Court in CIT Vs. Raman Chettiar (1965) 55 ITR 630 (SC), which we will discuss infra.

8. Thus, we note that section 148 of the Act does not authorize the AO to issue fresh notice when proceedings on a previous notice u/s. 148 of the Act are still pending and have not been finally disposed of. Similar view was taken by the Hon'ble Allahabad High Court in Commercial Art Press Vs. CIT (1978) 115 ITR 876 wherein it was held that when reassessment proceedings commence following the issue of a notice under section 148 and the same are pending, no fresh notice can be issued under the same provision. The Hon'ble Madras High Court while disposing of the order in A.S.S.P. & Co. (supra) observed that there could also be no dispute that after the reassessment order is made in pursuance of the first notice issued under section 148, if the ITO has any reason to believe that there is any escapement of the income which will be covered under section 147 of the Act, he can issue fresh proceedings with reference to the assessment order already made in pursuance of the notice under section 148 and in that way he can make any number of times revised order but that cannot affect the position that when a return has been made in

pursuance of the notice under section 148, till that return is disposed of by any assessment order or reassessment order, no further notice can be issued under section 148 of the Act.

9. It is noted that the Hon'ble Calcutta High Court has relied on the order of the Hon'ble Supreme Court in the case of S. Raman Chettiar (supra). The Hon'ble Calcutta High court in the case of Indian Tube Co. Ltd. (supra) had framed the question as under:

“The only question that arises for determination, therefore, in this writ application is whether the Income Tax Officer could initiate fresh proceeding under section 148 of the Act on March 29, 1983, when pursuant to the earlier invalid notice dated February 11, 1983, the petitioner had already submitted the returns.”

And after referring to the decision of the Hon'ble Supreme Court in S. Raman Chettiar (supra), the Hon'ble Calcutta High Court has held as under:

“Applying the aforesaid principles to the facts of the case, it is clear that when the petitioner filed returns in compliance with the invalid notice dated February 11, 1983, under section 148 of the 1961 Act, those returns should be treated as ‘returns’ and as such before making assessment on the basis of those returns, no further notice under section 148 of the Act could be passed.”

10. Therefore, we find force in the contention of the Ld. AR of the assessee that the second notice u/s. 148 without disposing of the return filed pursuant to the first reopening notice dated 19.10.2011 is invalid and, therefore, all the consequential action which has culminated in the assessment order dated 29.03.2014 is null in the eyes of law and resultantly void, therefore, is quashed. Since the legal issue has been decided in favour of the assessee, the revenue appeal against the decision of the Ld. CIT(A) who was given relief to the assessee on merits become academic and, therefore, dismissed.

11. In the result, the appeal of revenue is dismissed and the cross objection of assessee is allowed.

Order is pronounced in the open court on 29th May, 2020

Sd/-
(J. Sudhakar Reddy)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 29th May, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT, circle-5(1), Kolkata.
- 2 Respondent – M/s. Coal India Ltd., 10, N. S. Road, Kolkata-700 001.
3. The CIT(A)-17, Kolkata(sent through e-mail)
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Asstt. Registrar.