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**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"RAIPUR" BENCH, RAIPUR**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**
**& SHRI N. K. CHOUDHRY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos. 380 & 381/RPR/2014)
(**निर्धारण वर्ष /** Assessment Years : 2006-07 & 2007-08)

| **Dy.C.I.T.**<br>Circle 1(1)<br>Mahima Commercial Complex, Vyapar Vihar, Bilaspur (CG) | **बनाम/**<br>Vs. | **SECL**<br>Seepat Road, Bilaspur (CG) |
|---|---|---|
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCS2066E | | |
| (अपीलार्थी **/Appellant**) | .. | (प्रत्यर्थी / **Respondent**) |

&

आयकर अपील सं./I.T.A. Nos. 399 & 400/RPR/2014)
(**निर्धारण वर्ष /** Assessment Years : 2006-07 & 2007-08)

| **South Eastern Coalfields Ltd.**<br>Director (Finance), S.E.C.L. Seepat Road, Bilaspur (CG), Pin: 495006 | **बनाम/**<br>Vs. | **Deputy Commissioner of Income Tax,**<br>Circle 1(1), Bilaspur (CG) |
|---|---|---|
| (अपीलार्थी **/Appellant**) | .. | (प्रत्यर्थी / **Respondent**) |

| राजस्व की ओर से/Revenue by : | Shri R. K. Singh, CIT.DR |
|---|---|
| अपीलार्थी ओर से /Assessee by : | Shri Ajit Korde, Shri Vivek Ruia & Shri Ankit Agrawal, A.Rs. |

| सुनवाई की तारीख / **Date of Hearing** | 27/07/2021 |
|---|---|
| घोषणा की तारीख /**Date of Pronouncement** | 29/07/2021 |

आदेश/O R D E R

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**PER PRADIP KUMAR KEDIA - AM:**

The captioned cross appeals have been filed by the assessee as well as by Revenue against the orders of the Commissioner of Income Tax (Appeals), Bilaspur ('CIT(A)' in short), dated 29.08.2014 & 16.09.2014 emanating from the assessment orders both dated 25.02.2014 passed by the Assessing Officer (AO) under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (the Act) concerning assessment years 2006-07 & 2007-08.

ITA No. 399/RPR/2014 (Assessee's appeal) and ITA No. 380/RPR/2014 (Revenue's appeal) for A.Y. 2006-07

2. To begin with, we shall take up ITA No. 399/RPR/2014 filed by assessee and ITA No. 380/RPR/2014 filed by revenue concerning AY 2006-07 for adjudication purposes.

3. The ground of appeal raised by the assessee are two folds; (i) challenging the legality of jurisdiction under s.147 of the Act & (ii) challenging the action of the CIT(A) for re-adjudication of deduction of the provisions of leave encashment on merits by the AO.

4. When the matter was called for hearing, the learned counsel for the assessee, at the outset, challenged the action of the AO in usurping jurisdiction under s.147 of the Act wrongfully. The learned counsel contended that the reasons recorded by the AO do not meet the pre-requisites of assumption of jurisdiction and therefore, the notice issued under s.148 of the Act pursuant to reasons spelt out is bad in law. It was thus essentially submitted that consequent re-assessment order under challenge is without

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authority of law owing to lack of jurisdiction under s.147 of the Act. For this purpose, the learned counsel adverted our attention to the reasons recorded under s.148(2) of the Act and made two fold submissions.

4.1 Firstly, it was pointed out by the learned counsel that the notice was issued on 01.03.2013. He thereafter adverted to the reasons recorded under s.148(2) of the Act which prompted the AO to issue notice for reopening. It was pointed out that the copy of the reasons recorded does not make any reference to the date on which reasons were actually recorded. It is thus quite possible that reasons recorded are after the issuance of notice and not contemporaneous. It was pointed out that law is well settled that reasons must be recorded prior to the issuance of notice and not thereafter. The issue of notice without recording of reasons at the time of issuance is bad in law and is a nullity. It was contended that the onus lay upon the AO to prove that reasons were recorded prior to issuance of notice under s.148 of the Act.

4.2 Secondly, it was pointed out that notice for re-opening AY 2006-07 is dated 01.03.2013 in respect of assessment completed under s.143(3) of the Act earlier. Consequently, the case of the assessee is also covered by the additional embargo placed by the first proviso to Section 147 of the Act. The learned counsel submitted that the assessment has been reopened without meeting the requirements of the 1st proviso to Section 147 of the Act. The learned counsel submitted that the assessment was earlier completed under s.143(3) of the Act and notice for re-assessment has been issued after four years from the end of the relevant A.Y. 2006-07. Thus, the A.O. was entitled to exercise jurisdiction under s.147 of the Act only upon fulfillment of additional conditions imposed

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under 1st Proviso to Section 147 of the Act. The learned counsel in this regard adverted to the body of reasons recorded and contended that a bare reading of reasons recorded would show a total absence of any allegations to attract the 1st Proviso to Section 147 of the Act. It was contended that no allegation against the assessee that there is a failure on the part of the assessee to disclose fully and truly all the material facts necessary for completing the assessment is discernible in the recorded reasons. In the absence of any such allegation at the threshold, the notice issued under s.148 of the Act beyond four years in the case of completed assessment under s.143(3) of the Act, is without jurisdiction and hence, bad in law. The learned counsel for the assessee submitted that the impugned legal proposition is well settled by a long line of judicial precedents.

4.3 Learned counsel further pointed out that the action of the AO in issuance of notice is vitiated by the change of opinion on re-appraisal of same facts without any fresh tangible material available to the AO at the time of issuance of reopening of notice.

4.4 On merits, the learned counsel referred to page no.5 of the CIT(A)'s order and submitted that Rs.577.92 Lakhs has already been paid against the outstanding provision of leave encashment and thus Section 43B of the Act is not attracted to this extent. In the alternate, the leave encashment paid is required to be allowed on actual payment basis.

5. Learned CIT-DR for the Revenue, on the other hand, strongly defended the order of the AO on merits and claimed that jurisdiction assumed by the AO cannot be violated for the reasons recorded by the CIT(A).

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6. The learned CIT-DR submitted that no proper examination of facts were carried out at the time of original assessment proceedings while accepting the claim made on account of provisions for leave encashment contrary to the position of law. The details in respect of actual payment of leave encashment were not made available to the AO and were provided only before the CIT(A). Therefore, the material facts were not fully disclosed and placed on record to enable the AO to form any rational opinion on the issue. Thus, there is no case to change of opinion as sought to be made out by the learned counsel for the assessee. He, therefore, pleaded that in the absence of proper disclosure of material facts at the time of original assessment, the legal ground raised by the assessee challenging jurisdiction under s.147 of the Act is not sustainable in law either on the grounds of change of opinion or on account of 1st Proviso. The learned CIT-DR, thus, relied on the observations made by the CIT(A) in this regard.

7. We have carefully considered the rival submissions and perused the reasons recorded and other relevant materials referred before us. The assessee has challenged the jurisdiction usurped by the AO under s.147 of the Act *inter alia* on the ground that the embargo placed by the 1st Proviso to Section 147 of the Act has not been met and therefore, the action taken under s.147 of the Act is beyond the limitation period prescribed. We observe that relevant assessment year is 2006-07 and the original assessment was duly completed under s.143(3) of the Act for the relevant assessment year previously. We find that the notice under s.148 of the Act was issued on 01.03.2013 i.e. after the expiry of four years from the end of the relevant assessment year. Thus, the action of the AO under s.147 of the Act is required to be tested on the touchstone of stringent conditions placed under 1st Proviso to Section 147 of the

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Act in addition to shackles placed under main provisions thereof. In the aforesaid factual background, we perused the reasons recorded below. It will be apt to reproduce reasons recorded hereunder for easy reference:-

> *"Reasons recorded u/s 148(2) of I.T. Act, 1961 for issue of notice u/s 148 of I.T. Act 1961*
>
> *Perusal of the audited account reveals that assessee has claimed provisions for leave encashment amounting to Rs.577.92 lakhs for the year under consideration as admissible business expenditure.*
>
> *The provisions of section 43B(f) in this regard speaks as under:-*
>
> *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of –*
>
> *(f) any sum payable by the assessee as an employer in lieu of any leave at the credits of his employee,*
>
> *Shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him .*
>
> *In view of the above provision, assessee is not entitled for deduction of Rs. 577.92 lakhs on account of provision of Leave Encashment. Thus I have reason to believe that the income chargeable to tax on the amount of Rs. 577.92 lakhs has escaped assessment within the meaning of provision of section 147 of the I.T. Act, 1961. To assess the escaped income, notice u/s 148 is required to be issued."*

7.1 On a bare perusal, we find conspicuous absence of any allegation that any income chargeable to tax as escaped assessment 'by the reason of the failure on the part of the assessee to disclose fully and truly all material facts' necessary for assessment. In the absence of such allegations, the jurisdiction assumed under s.148 of

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the Act to reopen a completed assessment is clearly *void ab initio* and consequently, assessment order is bad in law. We draw support for this proposition from the following decisions:

*(a) CIT V/s. Foramer France (264 ITR 566)(SC)*

*(b) Hindustan Lever Limited V/s. R.B.Wadkar (268 ITR 332)(Bom)*

*(c) Mercury Travels Limited . V/s. Dy. CIT(258 ITR 533)(Cal)*

*(d) JSRS Udyog Limited & Ors .V/s ITO(313 ITR 321(Del)*

*(e) Bombay Stock Exchange Ltd.V/s. DDIT(E)(361 ITR 160)(Bom)*

*(f) Grindwell Norton Ltd v ACIT (2004) 267 ITR 673 (Bom)*

*(g) Shriram Foundry v DCIT (2012) 350 ITR 115 (Bom)*

*(h) Sound Casting Pvt. Ltd. v DCIT (2012) 250 CTR 119 (Bom)*

*(i) Voltas Ltd v ACIT (2012) 70 DTR 433 (Bom)*

7.2 We simultaneously notice that there is no averment to the effect as to what material facts necessary for assessment were not disclosed by the assessee in the course of original assessment proceedings fully as well as truly. The reasons being justiciable, the AO is expected to record a finding to this effect in the reasons recorded itself. The AO has failed on this score. Thus, the reasons recorded when seen on standalone basis do not pass the tests of basic requirement for assumption of jurisdiction under s.147 of the Act. The notice issued for reopening a completed assessment on the basis of such reasons, is thus, time barred and merge in void. The re-assessment order framed on the basis of a time barred notice, thus, cannot be countenanced in law. Hence, we find merit in the ground raised by the assessee towards lack of jurisdiction under s.147 of the Act.

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7.3 Consequently, in our considered opinion, the AO has misdirected himself in reopening the completed assessment without legal foundation. In this view of the matter, the impugned assessment under s.143(3) r.w.s. 147 of the Act is liable to be set aside and cancelled. We do so accordingly.

7.4 As we have held that notice under s.147/148 of the Act is not sustainable in law, we do not consider it necessary to go into all other legal grounds raised by the assessee in its appeal to support the plea for lack of jurisdiction and also other grounds on merits. Similarly, the grounds raised by the Revenue arising from an unsustainable re-assessment order are automatically rendered infructuous and academic and therefore not adjudicated upon.

8. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

ITA No. 400/RPR/2014 (Assessee's appeal) and ITA No. 381/RPR/2014 (Revenue's appeal) for A.Y. 2007-08

9. Now we advert to appeal of the assessee in ITA No.400/RPR/2014 as well as the appeal of the Revenue in ITA No.381/RPR/2014 for A.Y. 2007-08.

10. The assessee has raised similar grounds challenging the reopening of the assessment for A.Y. 2007-08 also.

11. It will be apt to reproduce reasons recorded hereunder for easy reference:-

> *"Reasons recorded u/s 148(2) of I.T. Act, 1961 for issue of notice u/s 148 of I.T. Act 1961*

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> *Perusal of the audited account reveals that assessee has claimed provisions for leave encashment amounting to Rs.1460.59 lakhs for the year under consideration as admissible business expenditure.*
>
> *The provisions of section 43B(f) in this regard speaks as under:-*
>
> *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of –*
>
> *(f) any sum payable by the assessee as an employer in lieu of any leave at the credits of his employee,*
>
> *Shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him .*
>
> *In view of the above provision, assessee is not entitled for deduction of Rs. 1460.59 lakhs on account of provision of Leave Encashment. Thus I have reason to believe that the income chargeable to tax on the amount of Rs. 1460.59 lakhs has escaped assessment within the meaning of provision of section 147 of the I.T. Act, 1961. To assess the escaped income, notice u/s 148 is required to be issued."*

12. The facts in issue are identical. The notice of re-assessment has been issued after 4 years from the end of the relevant AY 2007-08. The assessee has raised objection identical to A.Y. 2006-07 noted above. In parity with the reasons noted above, we find merit in the plea of the assessee towards lack of jurisdiction under s.147 of the Act and consequently, the notice under s.148 (2) of the Act dated 01.03.2013 is quashed and annulled. The impugned re-assessment order dated 25.02.2014 is thus set aside and cancelled and all grievances arising from such *nonest* re-assessment order fades into oblivion.

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13. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

14. In the combined result, assessee's appeals (ITA Nos. 399 & 400/RPR/2014) for both assessment years are allowed whereas Revenue's appeals (ITA Nos. 380 & 381/RPR/2014) for both years are dismissed.

**This Order pronounced in Open Court on 29/07/2021**

| Sd/- | Sd/- |
|---|---|
| (N. K. CHOUDHRY) | (PRADIP KUMAR KEDIA) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Ahmedabad: Dated 29/07/2021

*True Copy*

*S. K. SINHA*

**आदेश की प्रतिलिपि अग्रेषित /** Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर / DR, ITAT, RAIPUR
6. गार्ड फाइल / Guard file.

By order,

Sr. Private Secretary
ITAT, Raipur (on Tour)