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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No.1299/DEL/2020
Assessment Year 2006-07

Humboldt Wedag India Pvt. Ltd. A-36, Mehtab House, Mohan Co-operative Industrial Area Mathura Road New Delhi	v.	ACIT, Circle-11(2), New Delhi.
TAN/PAN: AAACH7474G		
(Appellant)		(Respondent)

I.T.A. No.1413/DEL/2020
Assessment Year 2006-07

ACIT Circle-11(2) New Delhi	v.	Humboldt Wedag India Pvt. Ltd. A-36, Mehtab House, Mohan Co-operative Industrial Area Mathura Road New Delhi
TAN/PAN: AAACH7474G		
(Appellant)		(Respondent)

Assessee by:	Shri S.K. Aggarwal, CA		
Department by:	Shri T. James Singson, CIT-DR Shri Sanjay Kumar Yadav, Sr.DR		
Date of hearing:	11	05	2023
Date of pronouncement:	26	05	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned Cross Appeals have been filed by the Assessee and the Revenue against the order of the Commissioner

of Income Tax (Appeals)-XLII, Delhi [‘CIT(A)’ in short], dated 06.02.2020 arising from the assessment order dated 28.03.2014 passed by the Assessing Officer (AO) under Sections 147/254/154/251/143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2006-07.

2. The grounds of appeal raised by the assessee read as under:

> *“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the reassessment order passed by the Deputy Commissioner of Income Tax, Circle-8, Kolkata ("Ld. AO") under section 147 of the Act disallowing the consultancy fees of Rs. Rs. 69,08,000 paid to M/s Tuticorin Trexim Pvt. Ltd.*
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> *2. On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in not appreciating that reassessment proceedings and the reassessment order passed by the Ld. AO is wrong, bad in law and without jurisdiction and liable to be quashed.*
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> *2.1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate that the notice under section 148 of the Act was issued after expiry of 4 years from the end of relevant assessment year and since appellant has disclosed fully and truly all material facts necessary for its assessment for subject assessment year, the notice under section 148 of the Act and the reassessment order passed by the Ld. AO is invalid and not sustainable in law.*
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> *2.2 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate that the reassessment proceedings were initiated by the Ld. AO on the basis of report of investigation wing without appreciating the documentary evidences provided by the appellant and not rebutting the same on the basis of any contrary material on record, the reassessment proceedings and the reassessment order is wrong and bad in law.*
>
> *2.3 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate that the reassessment order passed by the Ld. AO is without jurisdiction as the provisions of section 147/148 of the Act are not applicable in this case.*
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> *3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the disallowance of consultancy fees paid to M/s Tuticorin Trexim Pvt. Ltd. by Ld. AO in the reassessment order under section 147 of the Act without allowing cross examination of Mr. Praveen Aggarwal whose statement has been used to disallow the expenditure, which is against the principal of natural justice and the action of Ld. AO should have been deleted*

on this ground.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not allowing the cross examination of Mr. Praveen Aggarwal, whose statement has been used in the order to allege disallowance of aforesaid consultancy fees paid by the appellant in confirming the reassessment order on this issue.

5. On the facts and in the circumstances of the case and in law, the action of the Ld. CIT(A) in not allowing deduction for consultancy fees paid without affording the opportunity of cross examination of Mr. Praveen Aggarwal is against the principle of natural justice and consequently, the order of Ld. CIT(A) is not sustainable in law.

6. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not allowing consultancy fees paid of Rs. 69,08,000 without appreciating that,

6.1 No disallowance can be made on the basis of standalone statement of third party which has not been subject to cross examination by the appellant;

6.2. Such consultancy fees are genuine business expenditure incurred wholly & exclusively for business purpose and as per commercial expediency;

6.3 Appellant has discharged the burden of proof by furnishing details of the transactions i.e. contracts, invoices, ledger accounts evincing payment through bank, TDS compliances etc.;

6.4. Payment has been made to independent service providers for essential input services.

That the above grounds are independent and without prejudice to one another. The appellant craves leave to add, amend, alter and or modify any of the grounds of appeal on or before the hearing."

2.1 The grounds of appeal raised by the Revenue read as under:

"Whether the Ld. CIT(A) was correct on facts and circumstances on deleting the disallowance amounting to Rs.10,46,62,268/- made by the Assessing Officer on account of provision related to warranty/performance obligations."

3. Briefly stated, the assessee-company is mainly engaged in the business of designing, fabricating, manufacturing and supply of equipment plants and machinery for cement manufacturing companies. For the Assessment Year in question, the assessee

filed return of income at Rs.11,83,60,072/-. The return so filed was assessed at Rs.16,03,32,609/- under Section 143(3) of the Act vide order dated 2nd December, 2008. Thereafter, the Assessing Officer issued notice dated 25th March, 2013 under Section 148 of the Act for initiating re-assessment proceedings.

4. The reassessment proceedings were concluded and the taxable income was re-assesed at Rs.23,30,89240/- (including alleged escapement of income of Rs.69,08,000/- vide reassessment order dated 28.03.2014 passed under Section 147 r.w. Section 143(3) of the Act.

5. Aggrieved by the reassessment of income, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has also challenged the jurisdiction assumed by the Assessing Officer under Section 147 r.w. Section 148 of the Act and claimed that reopening notice was issued for reopening assessment without meeting the prerequisites of Section 147 to Section 151 of the Act. The Assessee also challenged the merits of the additions. The CIT(A) however dismissed the ground in relation to the lack of jurisdiction under Section 147 of the Act but however granted partial relief on merits.

6. Aggrieved by the partial relief granted by the CIT(A), both assessee and Assessing Officer have preferred respective appeals before the Tribunal.

7. When the matter was called for hearing, the ld. counsel for the assessee referred to the reasons recorded under Section 148(2) of the Act at the outset and challenged the validity of assumption of jurisdiction under Section 147 of the Act.

7.1 The ld. counsel for the assessee submitted that the Assessing Officer has wrongly usurped jurisdiction under Section 147 of the Act contrary to mandate of law for more than on reasons.

(i) The notice for reopening has been issued beyond four years from the end of the Assessment Year 2006-07 in question and the assessment in this case was earlier completed under Section 143(3) of the Act and therefore, the reopening notice is clearly time barred for the reason that embargo placed by 1st proviso to the erstwhile provision of Section 147 of the Act could not be successfully lifted by the Assessing Officer.

(ii) The reasons recorded do not meet the requirement of law both under main provisions of Section 147 of the Act as well as the proviso thereto.

(iii) The reasons recorded do not even allege that there is any failure on the part of the assessee to disclose material facts fully and truly and consequently, in the absence of such allegations, the case of the assessee has been reopened beyond the limitation period of four years from the end of the relevant assessment year and thus the notice so issued under Section 148(2) is *prima facie* time barred in law.

(iv) The reasons recorded also do not meet the requirement of main provision inasmuch as the reasons recorded suffers from non application of mind.

(v) The approval given by the superior authority

under Section 151 of the Act is nothing but a mechanical approval and thus does not meet the requirement of law.

We shall deal with the nuances of the arguments advanced on behalf of the assessee on the above broad propositions at appropriate place in succeeding paragraphs.

7.2. On merits, the ld. counsel for the assessee assailed the impugned order of CIT(A) wherein the additions of Rs.69,08,000/- on account of alleged bogus consultancy fees was sustained. It was alleged that the allegations made against the assessee are without any corroboration and has been made overlooking the relevant facts and hence not objectively justifiable.

7.3 The ld. counsel further submitted that the CIT(A) has not applied its mind to all considerations and the circumstances germane to the assessee. The ld. counsel submitted that the voluminous documents filed before the revenue authorities to support the consultancy charges are testament to the *bona fides* of the expenses incurred. The Ld. Counsel thereafter also defended the relief given by CIT(A) on the issue of provision for warranty under challenge by revenue. We shall deal with the arguments canvassed on merits, if so noted, at appropriate place.

8. The ld. DR for the Revenue, on the other hand, supported the order of the Assessing Officer and CIT(A) on assumption of jurisdiction under Section 147 of the Act. The ld. DR further supported the disallowance towards bogus consultancy fees

claimed through an accommodation entry of Rs.69,08,000/-. The DR however assailed the action of the CIT(A) for reversal of disallowance amounting to Rs.10,46,62,268/- made by the AO towards provision related to warranty/performance obligations and relied upon the assertions made by the Assessing Officer in this regard.

9. We have heard both the sides in the captioned cross appeals and also perused the reassessment order and the first appellate order in question. We have also carefully perused the reasons recorded under Section 148(2) of the Act for assumption of jurisdiction relied upon the completed assessment as well as the material referred to and relied upon has filed by way of paper book and also the case law cited.

10. Since, the assessee has *inter alia* questioned the legality of reassessment order itself which affects the jurisdiction and goes to the very root of the matter, we consider it necessary to adjudicate the grounds concerning the basic issue of lack of jurisdiction first.

10.1 The validity of reassessment order framed under Section 143(3) r.w. Section 147 of the Act as well as validity of issuance of notice under Section 148 of the Act for making the reassessment order under Section 147 of the Act is in controversy.

10.2 Before we proceed to deal with the jurisdictional aspects, it will be pertinent to reproduce the reasons recorded under S. 148(2) of the Act in contemplation as extracted in the

assessment order.

> *"It has come to the notice of the undersigned from the information provided by DIT(Inv), Kolkata vide letter F.No.35/2012-13/3606-3614 dated 06.02.2013 that the assessee has booked bogus expense amounting to Rs.69,08,000/- from entry operator companies run by Sri Praveen Agarwal.*
>
> *Therefore, I have reason to believe that assessee has escaped assessment of income of Rs.69,08,000/-. Hence notice under Section 148 is issued."*

11. To begin with, it may be pertinent to observe that S. 147 is a substantive provision vesting jurisdiction to reopen a concluded assessment and therefore conditions stipulated for assumption of jurisdiction are required to be adhered strictly. Section 147 is structured with inbuilt safeguards. The AO is not permitted to exercise the powers under S. 147 arbitrarily or mechanically as an *ipsi dixit*. The reasons for reopening (extracted above) are the fulcrum for formation of belief towards alleged escapement. On appraisal of the reasons so recorded for exercise of drastic powers conferred under S. 147 for reopening of assessment for AY 2006-07 in question, it is self evident that there is no allegation whatsoever in the reasons recorded that there was a failure on the part of the assessee to disclose material facts fully and truly at the time of the original assessment carried out under Section 143(3) of the Act. As noted above, the notice under Section 148 was issued after expiry of four years from the end of the relevant assessment year and hence, Section 147 is required to be tested among others, on the touchstone of stringent conditions placed under 1st proviso to Section 147 of the Act.

12. On bare perusal of the reasons recorded, we find conspicuous absence of any allegation that any income chargeable to tax has escaped assessment 'by 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 allegation, the jurisdiction assumed under Section 148 to reopen a completed assessment is clearly *void ab initio*. We draw support for this proposition from the following decisions:

- Foramer vs. CIT (2001) 119 Taxman 61 (Allahabad High Court) {SLP dismissed by Hon'ble Supreme Court in (2003) 264 ITR 566 (Supreme Court)
- Tanita Construction Co. Ltd. vs. DCIT (2002) 257 ITR 84 (Calcutta High Court)
- Eagle Fashion (P) Ltd. vs. DCIT (2013) 30 taxmann.com 79 (Guj)
- CIT vs. Sonitpur Solves Ltd. (2013) ITA No.30 of 2011 (Guwahati)
- Himson Textile Engineering Industries (P) Ltd. vs. ACIT (2013) 35 Taxmann.com 528 (Gujarat)
- Rambagh Palace Hotels (P) Ltd. vs. DCIT (2013) 350 ITR 660 (Delhi)]
- Sadhbav Engineering Ltd. vs DCIT (2012) 20 taxmann.com 784 (Guj.)
- CIT vs. M.G. Motors (2011) 9 taxmann.com 290 (Delhi)
- CIT vs. Noble Resources & Trading (P) Ltd. (2010) 2020 Taxman 223 (Delhi)

13. We also simultaneously notice that there is no averment to the effect as to what facts necessary for assessment were not disclosed by the assessee in the course of the original assessment. The reasons being justiciable, the Assessing Officer is expected to record a finding to this effect in the recorded reasons. Ostensibly, the conditions stipulated under the 1st proviso to Section 147 are not complied with. In the light of the plethora of judgments, some of which are noted above, the re-assessment notice issued under Section 148 is clearly time barred owing to non compliance conditions prescribed on 1st

proviso to Section 147 of the Act. The entire reassessment proceedings as a consequence of such notice issued without jurisdiction is bad in law and thus liable to be annulled.

14. We do so accordingly. Since, we find *prima facie* force in the plea of the assessee that embargo of limitation placed under the 1st proviso could not be successfully lifted by the Assessing Officer while issuing notice under Section 148 of the Act in the instant case, we do not consider it necessary to delve into other aspects of lack of jurisdiction claimed.

18. In view of our finding that the issuance of notice under Section 147/148 is time barred and *void ab initio* and accordingly the reassessment order framed is without jurisdiction and therefore illegal, we do not consider it expedient to deal with the merit of the factual aspects of the case in respective appeals of the Revenue and the assessee. As a sequel to such observation, the appeal of the Revenue emerging from a *nonest* order is not sustainable in law.

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

Order pronounced in the open Court on 26/05/2023.

Sd/-
[CHANDRA MOHAN GARG]
JUDICIAL MEMBER

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER

DATED: **/05/2023**

Prabhat