

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
MS KAVITHA RAJAGOPAL, HON'BLE JUDICIAL MEMBER**

ITA NO. 505/MUM/2023 (A.Y: 2009-10)

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| M/s. Nagpur Power & Industries Ltd 20 th Floor, Nirmal Nariman Point, Mumbai – 400021 PAN: AAACN5438N | v. | ACIT – 3(2)(2) Aayakar Bhavan, M.K. Road Mumbai - 400020 |
| (Appellant) | | (Respondent) |

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| Assessee Represented by | : | Shri Surinder Mehra |
| Department Represented by | : | Dr. Mahesh Akhade & Shri Chetan Kacha |
| | | |
| Date of Conclusion of Hearing | : | 11.05.2023 |
| Date of Pronouncement | : | 01.08.2023 |

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 17.01.2023 for the A.Y.2009-10.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2009-10 on 25.09.2009 declaring total income of ₹.22,32,43,573/-. The assessment u/s. 143(1) of Income-tax Act, 1961 (in short "Act") was completed on 22.11.2011 and total income was assessed at ₹.22,48,18,740/-. Subsequently, the assessment was reopened by issue of notice u/s. 148 of the Act dated 28.03.2016 and the same was served on the assessee. In response, assessee vide letter dated 06.04.2016 requested Assessing Officer to treat the original return of income filed on 06.04.2016 be considered as return filed in response to notice u/s 148 of the Act. Further, assessee requested to furnish a copy of the reasons recorded for reopening of the assessment.

3. The Assessing Officer vide letter dated 08.06.2016 provided the reasons for reopening. For the sake of clarity, the same is reproduced herein below: -

"The assessee company filed their return of income declaring total income of RS. 22,32,43,570. The assessee company is in the business of manufacturing of ferro manganese and alloys. The assessment was completed u/s. 143(3) on 22.11.2011 at a total Income of Rs. 22,48,18,740. In the assessment order, additions on account of interest income as per ITS details of Rs. 3,22,805 and disallowance u/s. 14A amounting to Rs. 12,52,364 has been made. The disallowance u/s. 14A was carried out applying the provisions of Rule 8D being 0.5% of the average investments.

The expenses include an amount of Rs. 7,34,375 as advances written off which cannot be allowed as the assessee-company is not in the

business of money lending. The fact that such advances can be out of trade compulsions is not seen from the records. Similarly, the travelling expenses include an amount of Rs. 28,09,232 as foreign travel, the business connection have not been established by the assessee company, as per the records."

4. The assessee was given reasonable time to raise any objections against the reopening of assessment. However, no objections were submitted before the Assessing Officer and accordingly, Assessing Officer proceeded to issue notices u/s. 143(2) and 142(1) of the Act and served on the assessee.

5. Assessing Officer observed from the Profit and Loss account that foreign travel expenses of ₹.28,09,232/- was incurred by the assessee and assessee was asked to show cause why the foreign travel expenses of ₹.28,09,232/- be not disallowed u/s 37(1).

6. In response, assessee submitted that the expenses were incurred in relation to the business of the assessee and gave detailed submissions relating to the trips made by the Directors of the company to London and New York.

7. The Assessing Officer after considering the above submissions observed that assessee has made the claim of travel expenses to London without there being any supporting documents. With regard to trip to

New York assessee has claimed that expenses were incurred to explore tying up with a university for a project on the company's Nagpur land. The Assessing Officer observed that no supporting documents were furnished to prove that such university has been set up till date. Even if the above said expenses were incurred to set up a new business, they can be neither be considered as either preoperative or preliminary which are liable to be deducted as a revenue expense in the Profit and Loss Account. Further, Assessing Officer observed that since the benefit accrues over a period of time so either the said expenses on a supposed University were to be capitalized once the project came into existence or should be treated as a deferred revenue expenditure which could be written off over a period of time. Accordingly, he disallowed the total foreign travel expenses and observed that the same cannot be said to be incurred wholly and exclusively for the purpose of business.

8. Further, Assessing Officer observed from the Profit and Loss account that the assessee has debited an amount of ₹.7,34,375/-as advances written off. Accordingly, assessee was given a notice to show-cause as to why the same should not be disallowed.

9. In response, assessee submitted that the Major amounts written off pertain to SAIL, Bokaro of ₹.3,07,158/-, SAIL, Rourkela of ₹.1,01,855/- and The Sandur Mangnese & Iron Ore Ltd. of ₹. 72,356/- The said amounts were outstanding since 31.3.1995, 31.3.1993 and 31.3.2005 respectively. It was submitted that assessee was purchasing raw materials from various concerns and the amounts written off pertain to differences with the said parties which have been outstanding since long. It was submitted that advances written off pertain to the business of the assessee, accordingly, these are allowable expenditure.

10. After considering the submissions of the assessee, Assessing Officer observed that advances written off do not qualify for a deduction unless the debts incurred were on revenue account and the assessee has not been able to produce any evidentiary material to show that the advances written off are in the nature of trade advance. Accordingly, he disallowed the same.

11. Aggrieved, with the above order assessee preferred an appeal before National Faceless Appeal Centre, Delhi. Before National Faceless Appeal Centre, Delhi, assessee has filed various grounds of appeal

objecting to the reopening of assessment and disallowances made by the Assessing Officer.

12. After considering the detailed submissions of the assessee, Ld.CIT(A) has dismissed the issue raised against non-disposing of objections by the Assessing Officer and also dismissed the issue raised against the reopening of assessment. With regard to disallowance made by the Assessing Officer on foreign travel expenses, Ld.CIT(A) sustained the addition made by the Assessing Officer. With regard to disallowance of advance written off, Ld.CIT(A) has allowed the ground raised by the assessee.

13. Aggrieved with the above order, assessee is in appeal before us raising following grounds in its appeal: -.

"1.a) That at the time of the original assessment made u/s. 143(3) the appellant company had disclosed entire facts and reopening done u/s. 147 beyond period of 4 years without there being any failure on the part of the appellant company to disclose fully and truly all material facts is bad in law and the C.I.T.(Appeals) has erred in not cancelling the same.

b) That the C.I.T.(A) has totally erred in ignoring the first proviso to Section 147 as it stood then, which clearly provides that where assessment is made under sub-section (3) of Section 143 and period of 4 years from the end of the relevant assessment year has expired, no action u/s. 147 shall be taken, unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

c) That the C.I.T.(A) has erred in not following the following decisions:-

- 1) IPCA Laboratories Vs. DCIT 251 ITR 416,419 (Bom)*
- 2) Caprihans India Ltd. Vs. DCIT 266 ITR 566,572 (Bom)*
- 3) Grindwell Norton Vs. ACIT 267 ITR 673, 676 (Bom)*
- 4) Hindustan Lever Ltd. Vs. ACIT 268 ITR 332, 334 (Bom)*
- 5) Supreme Treves Pvt. Ltd. Vs. DCIT (Bom)*
- 6) Rajeshwar Land Developers Pvt. Ltd. VITO 450 ITR 108 (Bom)*
- 7) Manan Trading Co. Pvt. Ltd. Vs. DCIT 449 ITR 587 (Bom)*
- 8) CIT Vs. Kelvinator of India Ltd. reported in 320 ITR 561 (SC)*
- 9) Garden Silk Mills Ltd. vs. DCIT 222 ITR 27, 29, 30 (Gujarat)*
- 10) CIT vs Usha International Ltd. 348 ITR 485 (Delhi)*
- 11) Deepak Kapoor vs. Principal C.I.T. and Others, 450 ITR 301 (Del)*
- 12) Mangalore Refinery & Petrochemicals Ltd. Vs. DCIT 450 ITR 282 (Bom)*

d) That the C.I.T.(A) has erred in placing much reliance only on order passed by the Assessing officer disposing of objections filed by the appellant company.

e) That the reopening of assessment u/s. 147 may be cancelled.

2.a) That the C.I.T.(A) has erred in upholding the disallowance of entire Foreign Travelling expenses of Rs. 28.09.232/-.

b) That the complete details of Foreign Travelling expenses were filed during the course of original assessment proceedings and all the Foreign Travelling expenses were allowed during the course of original assessment proceedings and the same are allowable deductions.

c) That all the Foreign Travelling expenses were wholly and exclusively incurred for the purpose of business of the appellant company and are allowable deduction and the C.I.T.(A) has erred in upholding the disallowance of the same in reassessment proceedings.

d) That the Assessing officer and the C.I.T.(A) have erred in not appreciating the explanation given by the appellant company

regarding Foreign Travelling expenses and the documentary evidence filed in support of the same.

e) That the reason given by the Assessing officer for disallowance of Foreign Travelling expenses are not legally tenable and the C.I.T.(A) has erred in not cancelling the said disallowance of Rs. 28,09,232/-

14. At the time of hearing, Ld. AR submitted that Assessing Officer has forwarded reasons for reopening and he submitted that in the above said reasons recorded the Assessing Officer has raised three issues and proceeded to make the addition only on two issues relating to disallowance of foreign travel expenses and advances written off. Even though the Assessing Officer has raised the issue of children education, however, subsequently after considering the submissions of the assessee he has not proceeded to make any addition on the above said issue.

15. Ld. AR submitted that the assessee filed an appeal before the Ld.CIT(A) on the above said two issues, however, Ld.CIT(A) has deleted the issue of advance written off in favour of the assessee and sustained the addition of foreign travel expenses and he submitted that the issue raised before ITAT is not the reasons recorded. In this regard, he brought to our notice Page No. 1 of the Paper Book that the original Assessment Order was passed on 22.11.2011 and he further, brought to our notice Page No. 3 of the Paper Book to submit that assessee has submitted list of advances, breakup of Directors remuneration and details of travel

expenses during the original assessment proceedings vide letter dated 21.09.2011.

16. Further, he submitted that the issue under consideration is relating to A.Y.2009-10 and the notice issued u/s. 148 of the Act dated 28.03.2016 which is beyond four years. In this regard, he brought to our notice Page No. 10 of the Ld.CIT(A) order and submitted that the Ld.CIT(A) by relying on various case law, held that under the substituted section 147 existence of only the first condition suffices, in other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. However, he himself observed that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. He observed that the case at hand is covered by the main provision and not the proviso.

17. Ld. AR of the assessee submitted that Ld.CIT(A) has gone ahead with the wrong pretext that the case of the assessee falls on the main provision not under proviso. However, he submitted that it is fact on record that the case of the assessee is reopened beyond four years. Therefore, the proviso is very much applicable and he prayed that the assessment passed by the Assessing Officer is bad in law.

18. On the other hand, Ld. DR relied on the findings of the Ld.CIT(A) and relied on the following case law: -

- i. CIT v. India Terminal Connector System Ltd., [2012] 21 taxmann.com 69 (Delhi)*
- ii. Nickunj Eximp Enterprises (P.) Ltd., v. ACIT [2014] 48 taxmann.com 20 (Bombay)*
- iii. Phool Chand Bajrang Lal v. Income Tax Officer [1993] 69 taxman 627 (SC)*

19. Considered the rival submissions and material placed on record, we observe from the record that the original assessment u/s. 143(3) of the Act was completed on 22.11.2011 and we also observed that assessee has filed all the relevant information before the then Assessing Officer. It is also fact on record that the issue involved is relating to A.Y.2009-10 and the notice was issued for reopening of assessment only on 28.03.2016. It is clearly reopened beyond four years and we also observed that Ld.CIT(A) has dismissed the ground of the assessee filed before him with the observation that the case of the assessee is covered by the main provision and not proviso. The observation of the Ld.CIT(A) is against the fact on record and we observe that the issue involved in the present case is falls under the first proviso to section 147 of the Act. Therefore, as per the proviso to section 147 of the Act two conditions are required to be satisfied firstly, the Assessing Officer must have reason to

believe that income chargeable to income tax has escaped assessment and secondly he must also have reason to believe that such escapement has occurred by reason of omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that assessment year. Since in the present case proviso to section 147 of the Act is applicable, Assessing Officer has to bring on record both the above said conditions on record. Since the Assessing Officer has not brought on record how the escapement of income has occurred by reason of omission or failure on the part of the assessee to disclose fully or truly all material facts necessary of the assessment, therefore the reopening of assessment is bad in law. Accordingly, the assessment passed u/s.143(3) r.w.s. 147 of the Act is bad in law and it is quashed.

20. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 01st August, 2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai / Dated 01/08/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum