

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH, 'B' PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.201/PUN/2017  
निर्धारण वर्ष / Assessment Year : 2008-09

The Dy. Commissioner of Income Tax,  
Circle-1, Jalgaon

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. Deepak Foods,  
Nilon's House, N.H. No.6,  
M.J. College Road,  
Jalgaon – 425002

PAN: AABFD7212L

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak  
Revenue by : Shri Deepak Garg

सुनवाई की तारीख / Date of Hearing : 22-07-2021

घोषणा की तारीख / Date of Pronouncement : 20-10-2021

**आदेश / ORDER**

**PER S.S. VISWANETHRA RAVI, JM :**

This appeal by the Revenue is against the order dated 09.11.2016 passed by the Commissioner of Income-tax (Appeals)-2, Nashik for assessment year 2008-09.

2. The appellant-Revenue raised two effective grounds, amongst which, ground No.1 is legal ground wherein the appellant-Revenue challenged the action of CIT(A) in declaring the reopening of assessment as bad under law

in the facts and circumstances of the case. Upon hearing both the parties, we proceed to hear ground No.1.

3. Brief facts relating to the issue concerning the assessee are that the assessee is a registered firm engaged in the business of manufacturing of Pan Fruity (Papaya Fruit Preserve) and conducts its business under the name and style as M/s. Deepak Foods. The assessee concerning for the year under consideration filed return of income declaring total income of Rs.61,36,560/-. Under scrutiny, the Assessing Officer accepted the same and passed an order u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') to that effect vide order dated 24.12.2010. Thereafter, the AO in order to reopen the said assessment recorded reasons on 11.06.2014 and upon getting sanction from CIT, issued notice u/s 148 of the Act on 23.06.2014. The assessee participated in the said re-assessment proceedings with protest and the AO added an amount of Rs.45,05,47,554/- treating the same as capital gain on the transfer of goodwill to the retiring partners vide order dated 03.03.2016 u/s 143(3) r.w.s. 147 of the Act. Having not satisfied with the re-assessment order, the assessee preferred an appeal before the CIT(A). Upon considering the submissions on reopening in terms of the first proviso to section 147 of the Act, the CIT(A) held there was no failure on the part of the assessee in disclosing fully and truly all the material facts during the course of original assessment proceedings and quashed the re-assessment as bad in law.

4. Before us, learned DR Shri Deepak Garg submits the AO recorded reasons on verification of facts during the proceedings initiated u/s 263 of the Act in the case of Smt. Shakuntala Sanghavi who is one of the partners

of the assessee that Shri S.C. Jain, Smt. Vasumati P. Sanghavi and Smt. Shakuntala S. Sanghavi retired from the assessee on 17.03.2008 and received Rs.2,00,00,000/-, Rs.21,52,73,777/- and Rs.21,52,73,777/- respectively, totaling to Rs.45,05,47,554/- as goodwill. These facts were not disclosed by the assessee firm in its return of income nor in the notes accompanying the Balance Sheet or in the audit report in Form No.3CD. Further, he submits the fact of retirement of the above three persons and the payment of goodwill were not considered or examined by the AO while completing the original assessment u/s 143(3) of the Act. He argued that no indication whatsoever in the return of income filed originally u/s 139(1) of the Act or return of income filed in response to the notice u/s 148 of the Act about the introduction or credit of goodwill to the retiring three persons. The CIT(A) without considering these facts held the re-assessment as bad in law arbitrarily. Further, he submits while referring to page No.39 of paper book that no new partnership deeds were filed even in the re-assessment proceedings showing the admission of new partners and prayed to allow ground No.1. The ld. DR referred to a decision of Hon'ble Supreme Court in the case of ITO Vs. TechSpan India (P.) Ltd. reported in (2018) 92 taxmann.com 361 (SC), submits that in the present case no opinion whatsoever rendered by the AO formed during the course of original assessment regarding the taxability of goodwill as credited to the accounts of retiring partners. He referred to para Nos.10 and 12 of the said decision and argued that the Court is ought to verify whether the assessment earlier made as either expressly or by necessary implication expressed an opinion on a matter which is the basis of alleged escapement of income that was taxable. He argued that during the course of original assessment proceedings there was no opinion formed by the AO regarding

the taxability of goodwill as there was no relevant necessary information regarding the admission of new partners and retirement of old partners was indicated in the return of income and since there is no opinion rendered by the AO, the re-assessment proceedings are valid under law.

5. The ld. AR Shri Nikhil Pathak submits that the finding of AO against the assessee in not disclosing the relevant facts truly and fully is incorrect and referred to page No.31 of the paper book and submitted that the assessee given full information regarding the names of new partners vide column No. (7a). Further details are given as per Annexure-1 regarding the change in partners or members or in their profit sharing ratio. He argued that the CIT(A) rightly held that the assessee disclosed all the relevant details truly and fully during the course of assessment proceedings itself. He further argued that having disclosed fully and truly all the relevant information, notice u/s 148 of the Act is bad under law in view of the first proviso to section 147 of the Act as the notice issued after the expiry of four years from the end of relevant assessment year. Further, he referred to page Nos.39, 41, 49 and 51 and argued all the relevant information regarding the admission of new partners and retirement of partners were disclosed in the tax audit report which was filed along with return of income. The ld. AR did not advance any arguments on the decision of Hon'ble Supreme Court (supra), only relied on the first proviso to section 147 of the Act and supports the order of CIT(A). He prayed to dismiss the ground No.1 raised by the Revenue in this regard.

6. Heard both the parties and perused the material available on record. We note that the contention of ld. DR is that the assessee did not disclose

the relevant details regarding the change of partners in the original proceedings and the AO has no occasion to consider the same. We find that in Form No. 3CD which is at Page No. 31 of the paper book, it was furnished in Column No. 7 that names of new partners i.e. Sanghavi Foods Pvt. Ltd., Shri S. Jhawar and Shri P. Jhawar having share ratio at 99.99%, 0.005% and 0.005%, respectively vide sub-column (a). In sub-column (b) the assessee indicated change in the partners or members or in their profit sharing ratio since the last date of the preceding year as per Annexure-1. The said Annexure-1 is placed at Page Nos. 38 and 39 of the paper book, wherein we find the details of partners capital account showing Sanghavi Foods Pvt. Ltd. Shri S. Jhawar and Shri P. Jhawar closing balance at Rs.54,63,06,295/-, Rs.15,315/- and Rs.15,315/-, respectively whereas the closing balance of the retiring members i.e. Shri S.C. Jain, Smt. V.P. Sanghavi and Smt. S.S. Sanghavi were shown at Nil. Therefore, we find the arguments of ld. DR are incorrect to the extent that the assessee did not fully disclose about the retirement of Shri S.C. Jain, Smt. V.P. Sanghavi and Smt. S.S. Sanghavi in the return of income. It is needless to say that the statements under Form No. 3CD, balance sheet and profit and loss account are part of return of income.

7. Coming to the other aspect that the AO had no occasion to consider the retirement of the said three persons and the payment of goodwill thereon. We note that we already held the relevant details of members of retirement and payment of goodwill is already there on record vide Form No. 3CD along with the return of income. Further, we note that the balance sheet as on 31-03-2008 is placed at Page No. 49 of the paper book and profit and loss account at Page Nos. 50 and 51 of the paper book. On

perusal of the balance sheet at Page No. 49 we note that the goodwill to an extent of Rs.45,05,47,554/- is reflected and arguments of ld. DR that the AO did not examine the issue in the original proceedings is far way from truth. Therefore, we hold that all the relevant information regarding the admission of new partners, retirement of old partners and payment of goodwill were disclosed along with return of income which were on record before the AO in the original assessment proceedings.

8. The other issue is as to whether the CIT(A) justified in holding the re-assessment as bad in law. In this regard, we may have to refer to section 147 of the Act concerning the relevant assessment as under:

*“147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*

**Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts that assessment year.”

9. In the light of the above provision u/s. 147 of the Act as it stands for A.Y. 2008-09. The first proviso explains where an assessment under sub-section (3) of section 143 of the Act is made for the concerned assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure to make a return under section 139 of the Act or in

response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts for that assessment year. In the present case, the end of assessment year for A.Y. 2008-09 is 31-03-2009, the AO should have issued notice u/s. 148 of the Act before 31-03-2013, whereas, the notice u/s. 148 of the Act was issued on 23-04-2014 which clearly shows the notice u/s. 148 of the Act for reopening of original assessment was issued beyond four years from the end of assessment year i.e. 31-03-2009. Further, there was no income chargeable to tax has escaped by reason of failure by the assessee, as discussed above, the assessee furnished all the details relating to admission of new partners, retirement of old partners and payment of goodwill thereon. Therefore, the assessee disclosed all relevant details fully and truly all material facts and were available on record before the AO in the original assessment proceedings.

10. Coming to the decision of Hon'ble Supreme Court in the case of Income Tax Officer Vs. TechSpan India (P.) Ltd. (supra) as relied by the ld. DR, wherein the Hon'ble Supreme Court held every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings. We note that the AO issued notice u/s. 148 of the Act on the basis of subsequent verification of facts initiated u/s. 263 of the Act in the case of Smt. Shakuntala Sanghavi by recording reasons that Shri S.C. Jain, Smt. V.P. Sanghavi and Smt. S.S. Sanghavi retired from M/s. Deepak Foods (assessee) on 17-03-2008 and received goodwill to an extent of Rs.45,05,47,554/- paid by the assessee to

the above said three retiring partners. In pursuance of such recording the AO issued notice u/s. 148 of the Act on 23-04-2014. No doubt that if the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year assess or reassess such income which has escaped assessment and which comes to his notice subsequently, but the proviso to section 147 of the Act limits such power by explaining, no action shall be taken under this section after expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure to disclose fully and truly all material facts by the assessee for that assessment year. The normal function of a proviso attached to main provision is to limit the scope of main provision in certain instances. In the present case, we note that the AO has power to reassess if he has reason to believe that any income chargeable to tax escaped assessment but however, the proviso limits that power that no action shall be taken after expiry of four years from the relevant assessment year, which means to say that if the AO has reason to believe that any income chargeable to tax as escaped assessment, the notice should be issued within four years from the end of said assessment year. Therefore, in our opinion proviso to section 147 of the Act is meant to limit the scope of provision u/s. 147 of the Act, going by this, it is safe to say that the proviso to section 147 of the Act is a qualifying proviso and it only seeks to limit the main provision in section 147 of the Act with stipulation or condition. In the present case, we already discussed the same in the aforementioned paragraphs that the AO should have issued notice u/s. 148 of the Act on or before 31-03-2013 whereas the notice issued was on 23-04-2014. Further, we also discussed that all the relevant details regarding the admission of new partners and also retiring



partners were fully disclosed in the audit report in Form No. 3CD, and payment of goodwill thereon. Therefore, in our opinion, the decision of Hon'ble Supreme Court as relied on by the ld. DR is not applicable to the facts and circumstances of the present case. Thereby, we find no infirmity in the order of CIT(A) and it is justified. Thus, ground No. 1 raised by the Revenue is dismissed. In view of our decision in ground No. 1, the ground No. 2 raised by the Revenue is becomes infructuous, requiring no adjudication.

11. In the result, the appeal of Revenue is dismissed.

Order pronounced in the open court on 20<sup>th</sup> October, 2021.

Sd/-  
**R.S. SYAL**  
**VICE PRESIDENT**

Sd/-  
**S.S. VISWANETHRA RAVI**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 20<sup>th</sup> October, 2021

RK

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent
3. The CIT (Appeals)-2, Nashik.
4. The Pr. CIT-2, Nashik.
5. DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy// आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune