IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

I.T.A. Nos. 1937 & 1938/Kol/2019
Assessment Years: 2005-06 & 2006-07

M/s. G.S. Atwal & Co. (Engg.) Pvt. Ltd.....Appellant
[PAN: AABCG 0816 E]

Vs.

DCIT, Circle-11(1), Kolkata.....Respondent

Appearances by:

Sh. Soumitra Choudhury, Adv., appeared on behalf of the Assessee.

Sh. Dhrubajyoti Ray, JCIT, appeared on behalf of the Revenue.

Date of concluding the hearing : May 06th, 2021
Date of pronouncing the order : June 18th, 2021

ORDER

Per J. Sudhakar Reddy, AM:

Both these appeals are filed by the assessee directed against the Common order of the Learned Commissioner of Income Tax (Appeals)-20, Kolkata [hereinafter the "CIT(A)"], passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), dated 06.06.2019 for the Assessment Years 2005-06 & 2006-07. As the issues arising in both these appeals are common and as the facts are identical, for the sake of convenience, they are heard together and disposed off by way of this common order.

2. The facts in brief are as follows:

That the return for the Assessment Year 2005-06 was filed on 05.10.2005 disclosing a total income of Rs. 719,24,787/-. The return was duly processed u/s. 143(1) and the case was selected for scrutiny and passed the order u/s. 143(3) on 28.11.2006 wherein assessed income Rs.756,14,140/-.

That the assessee Company has worked for HSCL in Libya in 1984. That due to some dispute the assessee company has approached the Arbitrators and the original Arbitration Award was passed on 28.11.1998 wherein the Ld. Arbitrators have awarded amounting to 2250000 Libyn Dinar.

That the Decree was passed on 20.6.2005 which was modified on 31.8.2005 and as per the modified Decree the assessee Company was awarded interest from 28.11.1998 to 19.6.2005 amounting to Rs.9,17,67,244/-.

That against the said Decree HSCL went to the HonTile Calcutta High Court and the assessee Company was awarded further interest from 20.6.2005 to 31.3.2008 amounting to Rs. 1,40,57,779/-. The total interest awarded to the assessee Company Rs. 10,58,25,023/-. The Hon'ble Calcutta High court has passed the order on 17.4.2008 wherein they have asked HSCL to pay Rs.1.5 crore from the month of May, 2008 in twelve equal instalment, totalling at Rs. 18,50,00,000/-. The assessee Company has offered Rs.7,78,13,692/- in the Profit & Loss a/c. The assessee has not offered interest income on Arbitration Award amounting to Rs. 10,58,25,030/- which is not related to assessment year 2009-10.

That in the CIT(A) order for the assessment year 2009-10 has deleted the addition. The department has also preferred an appeal before I.T.A.T. against the said CIT(A)'s order on the same set of facts.

That the A.O. has passed the order u/s. 154/143(3) on 16.09.2013 and on the same set of facts the A.O. has passed the order u/s. 148 on 09.10.2013.

That the A.O. has issued a notice u/s. 148 on 9.10.2013 which was served on the assessee on 17.10.2013. The A.O. has passed the reassessment order u/s. 147/143 dated 19.12.2013 without reasonable opportunity of hearing although the assessment will be barred by limitation on 31.03.2015, as the total interest awarded ,of Rs. 10,58,25,030/- to be divided equally in 10 assessment year i.e. Rs. 105,82,503/- for the assessment year 2005-06.

That the basis for reopening the assessment u/s. 148 by the A.O. after a lapse of 7 years and the interest has accrued only when the Hon'ble Court verdict was delivered on 17.04.2008, therefore, no court order passed in the said assessment year, thus the reopening itself is bad in law and should be quashed.

That the A.O. has estimated the addition at Rs. 105,82,503/- on account of interest from arbitration at Rs. 105,82,503/- is void and illegal.

That the A.O. was wrong in not allowing additional depreciation u/s. 32(1)(iia) amounting to Rs.91,17,497/-, although the assessee Company was involved in production of an article, therefore, the assessee Company was entitled to additional depreciation u/s. 32(1)(iia) amounting to Rs. 91,17,497/- and the A.O. was disallowed the said amount without any specific reason which is baseless.

That the A.O. has wrongly charged interest u/s. 234D amounting to Rs. 19,28,569/- is completely arbitrary, unjustified and illegal."

3. On appeal the ld. first appellate authority confirmed the order of the AO. Aggrieved, the assessee is in appeal before us on the legality of reopening the assessment u/s 147 of the Act as well as addition made on merits.

3.1. The ld. Counsel for assessee submitted the reopening of assessment is bad in law for both the assessment years for the reason that, the reasons were based on findings of the ld. CIT(A) in his order dated 20.07.2016 for the AY 2009-10. He referred to the reasons of reopening and the findings of the ld. CIT(A) in his order dated 20.07.2016 for the AY 2009-10 and submitted that the reopening of these assessments based on the directions of the ld. CIT(A) is bad in law. For this proposition, he relied on the judgement of the jurisdictional High Court in the case of *R.H. Dave vs. Commissioner of Income-Tax* reported in *140 ITR 1035 Cal.* He further relied on the decision of the

Kolkata 'D' Bench of the Tribunal in the case of *Shalini Agarwal vs. ITO, Ward-45(4), Kolkata* in *ITA No. 957/Kol/2017* and submitted that the decision of the Honourable Kolkata High Court has been applied by these Bench of the Tribunal. He further relied on the decision of the Kolkata 'C' Bench of the Tribunal in *ITO, Ward-1(2), Kolkata vs. Sri Biswajit Chatterjee* in *ITA No. 565/Kol/2013*. He prayed for relief.

4. The ld. D/R on the other hand relied on the order of the AO as well as the ld. CIT(A) and submitted that the reopening of the assessments is valid and has to be upheld. He referred to page-9 of the order of the ld. CIT(A) and relied on the same. He submitted that the order of the AO as confirmed by the ld. CIT(A) has to be upheld.

5. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and a perusal of the papers on record and the orders of the authorities below as well as the case laws cited, we hold as follows.

6. The sole issue that arises for our adjudication is whether the reopening of assessments is bad in law. The reasons for reopening of assessments u/s 147 of the Act read as follows:

> *"In this case, the High court vide its order dated: 17.04.2008 had directed HSCL to pay interest to the assessee for the period 28.11.1998 to 31.03.2008 i.e. for the period of delay in payment from the date when the original award was awarded on the amount of Award delivered on 28.11.1998.*
>
> *The enhanced interest received by "virtue of High Court order amounting to Rs. l0,58,25,030/- was not offered for tax in the A. Y. 2009-10.*
>
> *The CIT(A) in his findings vide order in Appeal No.67/CC-XX/CIT(A)C-III/11-12/Kol dated 20.07.2012 stated that such interest income should be taxed as income of the respective assessment year for which it accrued.*
>
> *As such, the total interest income of Rs. 10,58,25,030/- to be divided equally in 10(ten) assessment year from A. Y. 1998-99 to 2008-09.*
>
> *As this income of Rs. 1,05,82,503/- was not offered to tax by the assessee in respective assessment year, the income has escaped assessment.*
>
> *I have reason to believe that income has escaped assessment. Issue Notice u/s 148 of the I. T. Act to the assessee."*

6.1. Ld. CIT(A) in his order dated 20.07.2012 for the AY 2009-10 has, in this case held as follows:

> *"I have carefully perused the assessment order and submissions of the assessee. In the assessment order the A.O. himself has analyzed the law relating to taxability of interest received on delayed payments of compensation and agreed that amendment to section 145A, which provides for taxation of interest received by assessee on compensation or on enhanced*

compensation' as income of the year in which it is received, is applicable from A.Y. 2010-11 and was not applicable for the assessment year under appeal. However, he was of the view that under such a situation a substantial part of interest income would not be taxed at all. He was of the view that no tax mechanism or provision can ever allow an income to escape assessment and that since the present case falls outside the period from which the amendment to section 145A was effective, the same was to be dealt with on merits.

According to the A.O. the assessee's claim to receive principal and interest had accrued only when the favourable Court verdict was delivered on 17.04.2008 and the assessee could not have accounted for receipt of interest prior to the Court verdict because the right to receive interest came into being only with passing of the Court order. The A.O. further stated that interest was not an item of compensation for the period 28.11.1998 to 31.03.2008, i.e., for the period of delay in payment from the date when the original Award was awarded nor was it in consideration for the work done by the assessee. Payment of interest was provided by the Court on account of delay in payment of compensation by HSCL. Therefore, he was of the view that the interest income got crystallized in the hands of the assessee only during the year under appeal, hence, that amount also was taxable in the year under appeal. According to the A.O., the facts of the present case are totally distinguishable from the decision of the cases of Rama Bai Vs. CIT (supra) and C.I.T. Vs. TNK Gobindarajulu Chetty (supra).

In Rama Bai v. CIT (supra) and C.I.T. Vs. TNK Gobindarajulu Chetty (supra) the Supreme Court has laid down that interest on enhanced compensation for land compulsorily acquired awarded by the Court has to be taken to have accrued not on the date of the order of the Court granting such compensation but as having accrued year after years from the date of delivery of the land till the date of such order and such interest cannot be assessed to income-tax in one lump-sum . in the year in which the order is made.

In the instant case the award of Rs.7,78,13,692/- (Libyan Dinar 22,50,000/- + Rs.39,00,000/-) was awarded by the Arbitrators by an Arbitration Award dated 28.11.1998. The High Court vide its order dated 17.04.2008 directed HSCL to pay interest to the assessee for the period 28.11.1998 to 31.03.2008, i.e., for the period of delay in payment from the date when the original Award was awarded on the amount of Award delivered on 28.11.1998. Since, the interest in question was on account of delay in payment of Award money and the Court had specified that such interest was awarded for the period 28.11.1998 to 31.03.2008, as per law laid down by Supreme Court Rama Bai v. CIT (supra) and C.I.T. v. TNK Gobindarajulu Chetty (supra), such on delayed payment of awarded amount cannot be assessed to income-tax in one lump-sum in the year in which the same was received, rather it is to be assessed in the respective years in which the same had accrued. Accordingly, the entire interest of Rs. 10,58,25.030/- awarded by the Court cannot be assessed as assessee's income of the year under appeal since, the interest was awarded by the Court for the period 28.11.1998 to 31.03.2008, no part of such interest accrued during the assessment year under appeal, therefore, no part of such income is assessable as income of the assessment year 2009-lO.

As regards amended section 145A it is observed that the same has been amended by the Finance Act, 2009 with effect from 01.04.2010 wherein in sub-clause (b) this has been inserted as under:

"Interest received by an assessee on compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the year in which it is received."

CBDT has issued Circular No. 05/2010 dated 3rd June, 2010, wherein Para 46 it has in Para 46.4 clarified:

"This amendment has been made applicable with effect from 1st April, 2010, and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years."

Following the above referred to judgements as well as the amendment of Sec. 145A and the CBDT's Circular, it is amply clear that the interest on delayed payment of Arbitration Award amount cannot be assessed to income-tax in one lump-sum in the year under appeal in which

the same was received, rather it is to be assessed in the respective years in which the same had accrued. Hence, the A.O. is directed to delete the addition of Rs. 10,58,25,030/- made by him.

Grounds No.2, 3 and 4 are, thus, allowed."

6.2. We do not find any directions in this order of the ld. CIT(A). Only the issue of year of taxability of interest income was decided.

6.3. The issue is whether the reopening of assessments for both the assessment years is legally valid on the facts and circumstances of the case, based on the deletion of an addition of ₹10,58,25,030/- by the ld. CIT(A) in this order for the AY 2009-10. There was no direction in this order of the ld. CIT(A). The reasons for reopening are based on this order of the ld. CIT(A). We examine the legal position on this issue.

6.4. The Hon'ble Kolkata High Court in the case of *R.H. Dave* (supra) held as follows:

"Whether, on the facts and in the circumstances of the case, the Tribunal having held that the Appellate Assistant Commissioner had no juridiction to direct the Income-tax Officer to bring the amount to tax in an assessment year not involved in the appeal before him, was justified in law in refusing to delete such direction given by the Appellate Assistant Commissioner?

Here, we are not concerned with Clauses (b) and (c) to Sub-section (1) of Section 251. The Tribunal, as we have mentioned before, came to a categorical finding that the AAC had no jurisdiction to direct the ITO to bring the amount to tax in the correct assessment year, for, he could only decide the matter relating to the assessment year before him and not otherwise. This view of the Tribunal is corroborated by several decisions of the Supreme Court We may refer to the latest decision of the Supreme Court in the case of Rajinder Nath v. CIT , where the Supreme Court categorically observed that the expressions "finding" and "direction", in Section 153(3) were limited in meaning. The Supreme Court observed that a finding given in an appeal, revision or reference, arising out of assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the assessee and in relation to the particular assessment year; to be a necessary finding, the Supreme Court observed, that it must be directly involved in the disposal of the case ; it was possible in certain cases that in order to render a finding in respect of A, a finding in respect of B might be called for; for instance where the facts showed that the income could belong to either A or B and to none else, a finding that it belonged to B or did not belong to B, would be determinative of the issue as to whether it could be taxed as A's income ; a finding respecting B was initially involved as a step in the process of reaching the ultimate finding respecting A; if, however, the finding as to A's liability could be directly arrived at without necessitating a finding in respect of B, then a finding made in respect of B was an incidental finding only and it was not a finding necessary for the disposal of the case pertaining to A.

Here, we have noticed the language of Clause (a) of Sub-section (1) of Section 251, which empowers the AAC to set aside the assessment and refer the case back to the ITO for making a fresh assessment in accordance with the direction given by the AAC. This power must be limited to the assessment year in question.

In view of the categorical ratio of the Supreme Court in the aforesaid decision, in our opinion, the Tribunal having already held that the AAC had no jurisdiction to direct the ITO to bring the amount to tax in the correct assessment year, the Tribunal was in error in declining to delete the direction, because the ITO, according to the Tribunal, had the same power under Section 153(3) of the Act. Whether the AAC has the power under that section is another matter but if the authority holds that the AAC had no jurisdiction to come to a finding that the income could

be taxed in a particular year, then whether that amount could be brought to tax by resort to some other provisions, irrespective of the finding of the AAC is, in our opinion, irrelevant.

In that view of the matter, we are of the opinion, that the Tribunal was in error in coming to the finding, as we have mentioned, and to decline to delete the direction contained in the AAC's order."

6.5. This decision was followed by the Kolkata 'D' Bench of the Tribunal in the case of *Shalini Agarwal* (supra). The bench held as follows:

"9. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. It is observed that the ld. CIT(Appeals) after having allowed the claim of the assessee for deduction under section 54F to the extent of Rs.77,94,104/- and after having found that the construction of the house property of the assessee was not completed within the prescribed period, was of the view that the deduction allowed under section 54F was liable to be withdrawn in assessment year 2015-16 in which three years had expired from the date of transfer. He accordingly directed the Assessing Officer to tax the capital gains of Rs.77,94,104/- in the hands of the assessee for A.Y. 2015-16 by initiating the proceedings under section 147 of the Act. As submitted by the Id. Counsel for the assessee, the said direction given by the Id. CIT[Appeals] for A.Y. 2015-16, which was not in appeal before him while disposing of the appeal of the assessee for A.Y. 2013-14 is beyond his power and jurisdiction. Although the Id. D.R. has sought to justify the direction given by the Id. CIT(Appeals) by relying on sub-section (1] of section 150, we find that the said provisions is not relevant in the context of the powers of the Id. CIT(Appeals), since the said powers are governed by section 251 of the Act, which is relevant. In the case of R.S. Davey -vs.-CIT [140 ITR 1035], a similar issue relating to scope of powers of first appellate authority had arisen for the consideration of Hon'ble Calcutta High Court and it was held by the Hon'ble Calcutta High Court that the Id. CIT(Appeals) was not competent to give to the Assessing Officer the direction in respect of an assessment year which was not in appeal before him. Respectfully following the said decision of the Hon'ble jurisdictional High Court, we cancel the direction given by the Id. CIT(Appeals) to the Assessing Officer in respect of the assessment year 2015-16, which was not in appeal before him and allow Ground No. 3 of the assessee's appeal."

6.6. In the case of *Sri Biswajit Chatterjee* (supra) the Kolkata 'C' Bench of the Tribunal held as follows:

"11. Now the Revenue has agitated before us that Ld. CIT(A) erred in not giving direction to reopen the case of earlier years of the assessee in which investments were made. In this regard, we find that Ld. CIT(A) has been given power u/s. 251 of the Act to confirm the order of AO reduce, enhance or annul assessment order under the provision of Act there is no power available to Ld. CIT(A) to give direction to AO for reopening the case of other years. The Income Tax Act provides different schemes wherein the AO is empowered to assess or re-assess the income which has escaped assessment. So at the most, if the Revenue wishes to tax the escapement of income then it has followed the scheme provided under the Act. The relevant provisions for taxing the escape income are given u/s 147/263 of the Act. In holding so, we find support and guidance from the judgment of Hon'ble Supreme Court in the case of ITO vs. Murlidhar Bhaghubabu reported in 52 ITR 335 (SC). The relevant extract of the judgment is reproduced below:-

> *"Section 33(4) of 1922 Act only refers to a finding or direction made by an appellate authority and does not itself confer any power on an appellate authority to make a finding or direction. Indeed, section 34 of 1922 Act deals with entirely a different aspect, that of empowering an ITO to bring to assessment escaped income, and has no concern with the powers of an appellate authority. The provision which deals with the powers of an appellate authority is section 31 of 1922 Act."*

Respectfully following the judgment of Hon'ble Supreme Court in the case of Murlidhar Bhaghubabu (supra) we conclude that Ld. CIT(A) has no power under the provision of law for giving any direction to AO for reopening of assessment. 'The appeal before Ld. CIT(A) is confined to the particular assessment year which is before him. Thus, in view of the above proposition, we dismiss the ground of Revenue's appeal. Consequently, Revenue's ground is dismissed."

7. Applying the propositions of law laid down in this various case laws to the facts of the case, we hold that the ld. CIT(A) has no power to give directions to the AO to reopen the assessments for the assessment years which are not before him. We also do not find any direction given by the ld. CIT(A) in his order for AY 2009-10. The ld. CIT(A) applied the ratio of the judgement of the Hon'ble Supreme Court in the case of *Rama Bai* (supra) and deleted the interest added in the AY 2009-10. The other assessment years were not before him i.e. AY 2005-06 and 2006-07. The proposition of law laid down in the case law referred above is that the ld. CIT(A) has no power under the provision of law to give direction to the AO for reopening of assessment. Thus the reasons recorded for reopening of assessments is bad in law.

8. Thus we hold that the reopening of the assessments is bad in law. Hence we quash the same and allow the appeal of the assessee for both the assessment years.

9. In the result, both the appeals of the assessee are allowed.

Kolkata, the 18th June, 2021.

Sd/-	Sd/-
[Aby T. Varkey]	[J. Sudhakar Reddy]
Judicial Member	Accountant Member

Dated: 18.06.2021

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***M/s. G.S. Atwal & Co. (Engg.) Pvt. Ltd., 4B, Little Russel Street, Kolkata-700 071.***
2. ***DCIT, Circle-11(1), Kolkata.***
3. CIT(A)- 20, Kolkata (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

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By order

Assistant Registrar/DDO
ITAT, Kolkata Benches