

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE
BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

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| ITA No.78/Bang/2020 |
| Assessment Year : 2009-10 |

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| Shri G Mallikarjuna Naidu, No.2455, 9 th Main, BSK 2 nd Stage, Bengaluru-560 070. PAN – ADHPM 4253 H | Vs. | The Income-tax Officer, Ward-7(2)(4), Bengaluru. RESPONDENT |
| APPELLANT | | |

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| Appellant by | : | Shri V Sridhar, C.A |
| Respondent by | : | Shri Priyadarshi Mishra, Addl.CIT (DR) |

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| Date of Hearing | : | 18-01-2021 |
| Date of Pronouncement | : | 01-02-2021 |

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

The present appeal has been filed by assessee against order dated 25/11/2019 passed by Ld.CIT(A), Bangalore-10 for assessment year 2009-10 on following grounds of appeal:

- “1. The order of CIT-A is opposed to Law and facts of the case.*
- 2. The CIT-A erred in holding that reopening is valid which is reopened beyond 4 years after completion of original assessment U/s 143(3), without recording in the reasons for reopening that there was failure on the part of the appellant to disclose truly fully all materials facts necessary for assessment is not correct.*

3. The order of CIT-A holding that reopening is valid based on the same facts which already available in record and no new material has come in possession after completion of assessment u/s 143(3).

4. The order of CIT-A in not following CBDT instructions No-1425, dt.i6.i.3.98 with respect to hire charges which includes interest payable does not come under purview of interest u/s 2(28A) of the I.T. Act for consequent disallowance U/s 40(a)(ia).

5. The order of CIT-A in holding that form 26A is not complete with respect to Rule 31ACB of the I.T. Rules is not correct since, the appellant requested time to file the requisite form in the absence of allotment of TAN.

6. The CIT-A whose power is co-terminus with that of the assessing officer could have exercised the power u/s 131 or u/s 133(6) of the I.T. Act to ascertain the accounting of income and payment of interest by M/s. GE Capital 8 Reliance Capital and granted benefit of provision of section 40(a)(1a) after holding that the provision of section 40(a)(ia) is retrospective.

7. The CIT-A erred in confirming the levy of interest u/s 234A, 234B & 234C of the Act and further calculation of interest u/s 234A, B & C of the Act is not accordance with Law since the rate method of calculation is not discernerable from the order of the assessment on the fact and circumstance of the case.

8. The appellant craves, lead to add, alter, amend, substitute, change and delete any grounds of appeal

9. For the above and other grounds that may urged at the time of hearing, the appellant prays that the appeal may be allowed and Justice rendered.”

Brief facts of the case are as under:

2. Assessee is an individual and filed his return of income for year under consideration on 26/09/2009 declaring total income of Rs.15,66,560/-. The case was selected for scrutiny and assessment under section 143(3) was concluded on 30/12/2011 accepting the returned income. Subsequently, the assessment was reopened by issuing notice under section 148 of the Act on 09/10/2014. Further, notice under section 129 of the Act dated 10/12/2014 was also issued along with notice under section 142(1) of the Act. Assessee through his authorised representative filed letter dated 18/02/2015 on 19/02/2015, wherein it was

mentioned that assessee is in the business of C&F Agency for cement companies like M/s India Cement India Ltd., and M/s. Zuari Cements Ltd. Ld. AO noted that, as per provisions of section 194A of the Act, assessee was required to deduct TDS for payment of interest on nonbanking financial companies, and hence disallowance of interest payment as per provisions of section 40 (a) (ia) of the Act was made. The Ld.AO also restricted depreciation claimed at 15% as against 30% claimed by assessee.

3. Aggrieved by the order of Ld.AO, assessee filed appeal before Ld.CIT(A).

4. Before Ld.CIT(A), assessee alleged that Ld.AO has not recorded satisfaction in the reasons recorded by him that income chargeable to tax has escaped assessment by reason of failure on part of assessee to disclose fully and truly all material facts necessary for assessment, to assume jurisdiction under section 147 of the Act. Additions on merits were also challenged by assessee.

5. Ld.CIT(A) while passing the appellate order rejected the contention that there is a non application of mind in reasons recorded by Ld.AO. On merits, Ld.CIT(A) confirmed the addition partly. Ld. CIT (A) granted relief to assessee in respect of depreciation on vehicles at 30%.

Aggrieved by order of Ld.CIT(A) assessee is in appeal before us now.

5. Ground No. 1 is general in nature and therefore do not require adjudication.

6. Ground No. 2-3 has been raised challenging validity of the notice issued under section 148, which is beyond 4 years.

At the outset, the Ld.AR submitted that, no new material facts were available for the assessment to be reopened beyond 4 years. He submitted that, the mandate of 1st proviso is to section 04/01/1947 is that, when assessment has been completed under section 143 (3) for year under consideration, no action shall be taken after expiry of 4 years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure on part of the assessee to disclose fully and truly all material facts necessary for assessment. He placed reliance on following decision:

- *PCIT vs L&T reported in (2020) 113 taxmann.com 47, which is upheld by Hon'ble Supreme Court by dismissing the SLP filed by revenue in PCIT vs L&T Ltd., reported in (2020) 268 taxman 390.*
- *Decision of Hon'ble Karnataka High Court in case of CIT vs Chaitanya Properties Pvt. Ltd., in ITA No. 205/2016 by order dated 16/02/2016*

7. On the contrary, the Ld.Sr.DR submitted that, the case was referred for limited scrutiny, and therefore the issues that were to be considered by the Ld.AO are not available. He therefore supported the orders passed by authorities below.

8. We have perused the submissions advanced by both sides in light of records placed before us.

9. It is established law that to reopen an assessment beyond a period of 4 years, where the original assessment has been completed under section 143 (3) of the Act, the reasons recorded has to show the escapement of income, is due to failure on part of the assessee to disclose fully and truly all material facts necessary for the assessment for the year under consideration. There must be a live link between the reason recorded and the formation of the belief that income chargeable to tax has escaped assessment because of the failure on the part of the assessee. Both the conditions must coexist in order to confer jurisdiction on the assessing officer.

10. In the present facts of the case the reasons recorded by the Ld.AO are as under:

“The assessee paid interest to loan borrowed from M/s. GE Capital and MIs. Reliance Capital during the year amount totaling to Rs. 15,28,009/-. These financial institutions are not registered with RBI and not regulated by the provisions of Banking Regulation Act. Therefore, the assessee is required to deduct tax on interest paid to these companies as per provisions of section 194.A of the Act. Whereas the assessee has not deducted tax on the interest paid to above NBFCs and therefore, the interest paid requires to be disallowed u/s 40(a)(ia) of IT Act.

The assessee is a proprietor of business concerns namely M/s. Srinivasa Enterprises (C&F agents of India Cements), Ushodaya sales corporation (Cement Trading) and Srinivasa- Transports (Transportation activity). These business concerns are interlinked. Therefore, the assessee has used trucks/lorries to his own business. He has not rendered trucks/lorries for hiring business during the year. Instead he has used these vehicles for his own business purpose. But, he has claimed depreciation 30% on these vehicles. As per Income Tax Rules higher rate of depreciation i.e. 30% can be claimed for Motor Buses, Motor Lorries and motor taxis used in a business of running them on hire only. In the assessee case, trucks (Motor Lorries) were used for his business. Therefore, the assessee is eligible to claim depreciation @ 15% only and not at higher rate @ 30%.

Therefore, I have reason to believe that income chargeable to tax has escaped for the A.Y. 2009-10 in the assessee's case within the meaning of section 147 of the I.T. Act.

In view of the above, kind approval may be accorded to reopen assessment in the assessee case for the A.Y. 2009-10 and issue notice u/s 148 of the I.T. Act.”

11. On perusal of the above reasons recorded, clearly reveals that the Ld.AO proceeded on the material already available on record. Secondly, we note that, there is no satisfaction recorded by the Ld.AO that the income has escaped assessment due to failure on part of the assessee to fully and truly disclose all material facts necessary for assessment of year under consideration.

12. The Ld.AR referred to the audited accounts placed at page 9-38 of paper book. He submitted that, interest is disclosed by assessee at page 25, and the breakup of Scheduled 10 is placed at page 28, wherein, the finance charges amounting to Rs.2,337,983/- has been disclosed. It was submitted that there was no new material available with the Ld.AO for reopening the assessment.

13. In respect of the issue of depreciation the Ld.AR referred to page 19, wherein the fixed asset chart was placed showing the rates applied for the trucks at 30%. On merits, we note that, the Ld.CIT(A) deleted the addition of depreciation disallowed by the Ld.AO

14. At this juncture we place reliance on decision of *Hon'ble Supreme Court* in case of *CIT vs Kelvinator of India Ltd.*, reported in (2010) 320 ITR 561 wherein *Hon'ble court* held initiation of

reassessment proceedings to be not proper, when no tangible material came to the possession of the Ld.AO. *Hon'ble Karnataka High Court* in case of *CIT vs Hardware Trading & Co.* reported in *248 ITR 673* has followed the said ratio of *Hon'ble Supreme Court* in case of *CIT vs Kelvinator of India Ltd (supra)*. Before us, Ld. A.R. placed reliance on decision of *Hon'ble Karnataka High Court* in case of *Infosys Ltd vs DCIT* reported in *(2019) 416 ITR 226*, wherein Canteen of decisions of *Hon'ble High Courts* and *Hon'ble Supreme Court* have been referred to an identical proposition.

15. In the present case, the reasons recorded clearly reveals that all facts were available before the Ld.AO, when he completed the original assessment proceedings under section 143(3) of the Act, and no new materials were available on record for reopening the present assessment after expiry of 4 years.

16. We are therefore of the view that initiation of reassessment proceedings beyond 4 years will have to be held invalid for the reason that the reasons recorded by the Ld.AO, do not spell out that the escapement of income was due to assessee not fully and truly disclosing all material facts necessary for completion of assessment for relevant assessment years. In fact, in the present case we have also seen that the evidences were raised before the Ld.AO and the course of original assessment proceedings under section 143(3) of the Act and the same was not chosen to draw any conclusion. Therefore in the given circumstances we are of the view that *Explanation 1* cannot be resorted by the revenue. Therefore, in the absence of the statutory requirement of income

chargeable to tax have escaped assessment due to failure on part of assessee to disclose fully and truly all material facts, the notice of reopening of assessment stands invalid.

Accordingly we allow ground 2-3 raised by assessee.

17. As we have quashed the notice under section 148 issued by the Ld.AO, the assessment order passed in consequence thereof stands set aside and quashed.

Accordingly the addition made thereof stands deleted.

In the result appeal filed by assessee stands allowed.

Order pronounced in the open court on 1st February, 2021

Sd/-
(CHANDRA POOJARI)
Accountant Member
Bangalore,
Dated, the 1st February, 2021.
/Vms/

Sd/-
(BEENA PILLAI)
Judicial Member

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore

| | | Date | Initial | |
|-----|--|-------------|----------------|----------|
| 1. | Draft dictated on | On Dragon | | Sr.PS |
| 2. | Draft placed before author | -2-2021 | | Sr.PS |
| 3. | Draft proposed & placed before the second member | -2-2021 | | JM/AM |
| 4. | Draft discussed/approved by Second Member. | -2-2021 | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | -2-2021 | | Sr.PS/PS |
| 6. | Kept for pronouncement on | -2-2021 | | Sr.PS |
| 7. | Date of uploading the order on Website | -2-2021 | | Sr.PS |
| 8. | If not uploaded, furnish the reason | -- | | Sr.PS |
| 9. | File sent to the Bench Clerk | -2-2021 | | Sr.PS |
| 10. | Date on which file goes to the AR | | | |
| 11. | Date on which file goes to the Head Clerk. | | | |
| 12. | Date of dispatch of Order. | | | |
| 13. | Draft dictation sheets are attached | No | | Sr.PS |