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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' : NEW DELHI

BEFORE SHRI A.D.JAIN, JM AND SHRI R.C.SHARMA, AM

ITA No.1791/Del/2010
Assessment Year : 2001-02

M/s Poysha Investments Pvt.Ltd., **(Merger with Higain Investments Pvt.Ltd.),** **181-C, Western Avenue,** **Sainik Farms,** **New Delhi.** **PAN No.AAACP6937A.** (Appellant)	Vs.	**Income Tax Officer,** **Ward-14(3),** **New Delhi.** (Respondent)

Appellant by : Shri Ved Jain, Ms.Rano Jain and Shri Venkatesh Chowrasia, CAs.

Respondent by : Smt.Banita Devi Nareom, Sr.DR.

ORDER

PER R.C.SHARMA, AM :

This is an appeal filed by the assessee against the order of CIT(A) dated 26.2.2010 for the AY 2001-02, in the matter of order passed u/s 147/143(3) of the IT Act.

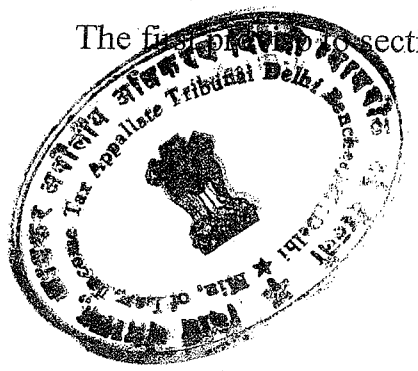
2. As many as eight grounds have been taken by the assessee but the crux of the issue revolves around validity of reopening u/s 147 of the Act.

3. Brief facts of the case are that the assessee filed his return of income on 12.10.2001 in which he had shown loss of Rs.1,06,430/-. Assessment was framed on 24.2.2003 u/s 143(3). Subsequently, the AO received information from Directorate of Income Tax (Investigation), New Delhi that the assessee has received accommodation entries from certain persons during the year. Therefore, the assessment was reopened and notice u/s 148 was issued on 13.3.2008. AO

framed assessment u/s 147 read with Section 143(3) wherein he concluded that the amount of Rs.4,80,000/- received from M/s Natraj Communications Pvt.Ltd. was unexplained cash credit u/s 68 of the IT Act. Before the CIT(A), the assessee challenged the validity of reopening in view of proviso to Section 147, as well as merit of addition. By the impugned order, CIT(A) confirmed the action of AO. With regard to validity of reopening as well as merit of addition, against which assessee is in further appeal before us.

4. We have considered the rival contentions, carefully gone through the orders of the authorities below and found from the record that return for the relevant assessment year under consideration i.e. 2001-02 was filed on 12.10.2001 and assessment was completed u/s 143(3) vide order dated 24.2.2003. The assessment has been reopened on 13.3.2008 after expiry of four years from the end of the relevant assessment year under consideration. As per proviso to section 147, no action can be taken after expiry of four years from the end of the relevant assessment year unless the income has escaped assessment by reason of failure on the part of the assessee to file return of income or to disclose fully and truly all material facts necessary for the assessment. From the record, we found that assessee has disclosed fully and truly all material facts necessary for the assessment which is clear from the assessment order itself. During the course of scrutiny assessment proceedings u/s 143(3), the AO has specifically asked queries regarding share application money received during the year. As such, there was no failure on the part of the assessee to disclose fully and truly all material facts. Neither in the reasons recorded nor in the notice issued for reopening we find any whisper regarding non-disclosure of material facts fully and truly by the assessee and the reopening was merely on the basis of subsequent information from the Investigation Wing.

1. The first proviso to section 147 reads as under:-



"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 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 failure on the part of the assessee to 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 necessary for his assessment, for that Assessment Year."

5. It is crystal clear from the plain reading of the above proviso that where an assessment u/s 143(3) has been made, no action can be taken under section 147 after the expiry of 4 years from the end of relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of assessee to make the return u/s 139 or in response to notice issued u/s 142(1) and 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In view of the above clear mandate of the proviso assessment completed u/s 143(3) cannot be reopened unless there is a failure on the part of the assessee to disclose fully and truly all material facts. Here, the pertinent question to be decided by us is that whether in the reasons recorded for reopening the assessment, A.O. has alleged that there was failure on the part of the assessee to disclose fully and truly all the material facts. The reasons so recorded are placed at page 69 & 70 of the paper book and it is quite clear from the reasons so recorded for reopening that nowhere the AO has alleged that there was a failure on the part of the assessee to disclose fully and truly all material facts. Nor in the notice issued for reopening as placed at page 64, there was any whisper regarding failure of assessee to disclose truly and fully all material facts.

6. The Hon'ble Gujarat High Court in the case of Sheth Brothers Vs. JCIT (2001) 251 ITR 270 (Guj) has observed that where the assessment was sought to be reopened after a period of four years and there was admittedly no omission or failure on the part of the petitioner, the AO, i.e., the Respondent, could not assume

jurisdiction under section 147. Following was the precise observation of Hon'ble High Court:-

> "As the assessment was sought to be reopened after a period of four years and there was admittedly no omission or failure on the part of the petitioner, the AO, i.e., the Respondent, could not assume jurisdiction under section 147. "The Act provides for the machinery in Chapter XIV under section 147 to 153 for the assessment of escaped income in certain circumstances. The fundamentals underlying these provisions of the Act is to see that the entire income of an assessee assemble in respect of a particular Assessment Year is subjected to one single assessment for that particular year for income which is assessable for that particular year for income which is assessable in one Assessment Year for any reason. The Act does not contemplate piecemeal assessment; one assessment in relation to a portion of the income and another in respect of another portion."
>
> Reopening of assessment was, thus merely a fresh application of mind by the AO to the same set of facts. In such circumstances, no notice under section 148 could have been issued. Hon'ble Allahabad High Court has, in the judgment in the case of Foramer vs CIT observed that the notice under section 147/148 on the basis of mere change of opinion by the Income tax Authorities is not valid as held by the Supreme Court in Indian and Eastern Newspaper Society v CIT (1979) 12 CTR (SC) 190; (1979) 119 ITR 996 (SC), Gemini Leather Stores v ITO & Ors. 1975 CTR (SC) 1127; (1975) 100 ITR 1 (SC) and Jindal Photo Films Ltd. v Dy. CIT (1999) 154 CTR (Del) 355; (1998) 234 ITR 170 (Del) and had held that the law that an assessment could not be reopened on a change of opinion was the same before and after amendment by Direct Tax Laws (Amendment) Act, 1987."

7. Hon'ble Bombay High Court in the case of ICICI Bank Ltd. v DCIT & Anr. (2004) 188 CTR (Bom) 380 observed that concluded assessment can be reopened beyond a period of four years only if there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment. It was further observed that having furnished all material facts, even if the assessee erroneously claims higher depreciation, it will not be a case of failure to disclose fully and truly all material facts. Also if the legal inference drawn from the material facts is erroneous, it cannot be said that there is failure on the part of the assessee.

8. The Calcutta High Court in the case of Jayashree Tea Industries Ltd. 245 ITR 567 observed that the notice under section 148 after expiry of 4 years was bad in law as the department failed to prove that the assessee do not disclose fully and truly all material facts necessary for the assessment.

9. In the instant case, undisputedly, it is not the allegation of the department that the return of income was not filed by the assessee under section 139 or in response to notice under section 142(1) or 148 nor there is any allegation that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Assessment was completed u/s 143(3) and the notice for reopening u/s 148 was issued long after expiry of 4 years from the end of the relevant Assessment Year. Reasons recorded for reopening and the notice issued u/s 148 did not allege any failure of the assessee to disclose fully and truly all the material facts necessary for the assessment. In view of these undisputed facts and applying the proposition of law as discussed hereinabove with respect to first proviso to Section 147, we are inclined to reverse the findings of lower authorities on this legal issue. As the legal issue has already been decided in favour of the assessee, we are not going to decide the merit of addition disputed by the assessee.

10. Before parting with the issue, it may be mentioned that provisions of law as contained under section 147 (a) and cases coming within the purview of proviso to section 147, namely cases where scrutiny assessment have been completed, are peri para materia' and, therefore, the principles enunciated by Hon'ble Supreme Court in the case of ITO v Lakhmani Meweldas (1976) 103 ITR 437 (SC) may be said to be valid in respect of the law on the statute book with effect from 1-4-89. These principles are summarized as under:-

i. "The duty on the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment.

ii. The duty of the assessee did not in any case extend beyond making a true and full disclosure of the primary facts. Once he has done that his duty ends.

iii. In order to be able to initiate such proceedings under section 147(a), the ITO should have reason to believe that income chargeable to tax has escaped assessment for particular year and this escapement has resulted by reason of the omission or failure on the part of the assessee to make a return for the year or to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions must coexist to confer jurisdiction on the ITO.

iv. The grounds or reason which lead to the formation of the belief must have a material bearing on the question of escapement of income and that because of assessee's omission or failure to disclose fully and truly all material facts.

v. The live link between the material before the officer and the belief formed by him regarding the escapement is "because of the assessee's failure to disclose " primary facts necessary for his assessment of the year. Such link must be a logically sound basis and should not be far-fetched.

11. In view of the material placed on record, we found that share application money was shown in the balance sheet filed by the assessee alongwith the return of income. The AO has also raised query on 11.11.2002 for filing details of share application money. The assessee filed reply on 12.12.2002, wherein all the details were filed as asked by the AO and which specifically related to the Natraj Communication Pvt.Ltd. from whom share application money was received, thus there is no reason to say that assessee has failed to disclose fully and truly all material facts. Hon'ble Delhi High Court in the case of Wel Inter Trade (P) Ltd. – 308 ITR 22 held that if the assessee has disclosed truly and fully all material facts necessary for the purpose of assessment, an action u/s 147 cannot be taken after expiry of four years from the end of the relevant assessment year on the basis of mere change of opinion of the AO that a large sum ought to have been disallowed in original assessment.

12. In view of the above, being agreeing with the learned AR Shri Ved Jain that on the facts of the case the legal issue is squarely covered by the proviso to Section 147, we are inclined to reverse the orders of the lower authorities and allow the appeal in favour of the assessee.

13. In the result, the appeal of the assessee is allowed.

Decision pronounced in the open Court on 3rd June, 2010.

(A.D.JAIN)
JUDICIAL MEMBER

(R.C.SHARMA)
ACCOUNTANT MEMBER

Dated : 04.06.2010.
VK.

Copy forwarded to: -

1. Appellant By, Hand
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Deputy Registrar

सहायक पंजीकार
Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
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Delhi Benches, New Delhi