IN THE INCOME TAX APPELLATE TRIBUNAL,
DEHRADUN CIRCUIT BENCH: DEHRADUN

BEFORE, SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.3129/Del/2018
(Assessment Year: 2014-15)

UTTRAKHAND POORV SAINIK KALYAN NIGAM LTD., Malik & Co., 305/7, Thapar Nagar, Meerut,	**Vs.**	Income Tax Officer, Ward-2(5), Dehradun
PAN – AAACU7129D		
(Appellant)		**(Respondent)**

Appellant By	**Sh. Sanjay Malik, Advocate** **Sh. Sankalp Malik, Advocate**
Respondent by	**Sh. A.S. Rana, Sr. DR**
Date of Hearing	**21.06.2023**
Date of Pronouncement	**23.06.2023**

ORDER

This is an appeal against order dated 22.03.2018 passed by the Commissioner of Income Tax (Appeals), Dehradun [hereinafter referred to as the learned CIT(A)], pertaining to assessment year 2014-15.

2. The has raised the following grounds of appeal:

1. *The Ld. CIT(A) erred in holding that the appellant corporation was not set up by a central, state or provisional act for the welfare and economic upliftment of ex-serviceman being the citizen of India as required u/s 10(26BBB) of the Income Tax Act, 1961.*
2. *That the basic requirement of law is that the corporation should have been established by Central, State or Provincial Act for welfare and economic uplift of ex-serviceman being citizen of India. Government of Uttarakhand released order no 123/2003 dated 28th October 2003 to established Uttarakhand Poorva Sainik Kalyan Nigam Limited and registered it with Registrar of Companies. The Uttarakhand Poorva SainikKalyan Nigam Limited has incorporated under Companies Act, 1956 on dated 01.03.2004 and established under the Companies Act which is a Central Act as the Companies Act itself establishes the National Company Law Tribunal and National Company Law Appellate Tribunal and those two statutory authorities owe their existence to the Companies Act.*
3. *That the assessee main motive is to provide employment to ex- serviceman and their dependencies for their welfare. Thus the exemption claimed by the assessee u/s 10(26BBB) was legal and it should not be withdrawn.*
4. *That the order passed by the Ld. Assessing Officer dated 14.03.2016 u/s 143(3)/147 of the Income Tax Act, 1961 is illegal, null and void.*

   a) Notice u/s 148 issued on 22.01.15 (within the assessment year). Proceedings initiated u/s 147 and notice issued u/s 148 is also bad in law as time limit of filing return u/s 139(4) has not lapsed.

   b) No approval was taken from the Higher Authorities, hence proceeding u/s 148 is bad in law, thus prayed that order may be annulled.

c) The return filed by the assessee on 06.10.15 was within the time u/s 139(4) of the Act. The said return was not processed till the assessment order was passed. Thus, prayed the assessment order may be annulled.

5. The appellant craves to amend, leave to add, later, delete, modify or substitute any of the grounds urged above.

3. We deem it fit to address the ground no. 4 first as it challenges the validity of assumption of jurisdiction by learned Assessing Officer in the reassessment proceedings.

4. We have heard rival submissions and perused the materials on record. We find that the assessee has filed its return of income for the assessment year 2014-15 belatedly under section 139(4) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 06.10.2015 declaring total income of Rs. Nil, after claiming exemption for the profit of Rs.5,11,44,966/- under section 10(26BBB) of the Act. This return was not selected for scrutiny by learned Assessing Officer. But we find very strangely, the learned Assessing Officer issued a notice under section 148 of the Act on 22.01.2015 itself, which is prior to the date of filing of return of

income by the assessee. We find that the assessee has got time to file the return belatedly in terms of section 139(4) of the Act till 31.03.2016. While this is so, there is absolutely no need for learned AO to issue reopening notice under section 148 of the Act. The learned Assessing Officer could have as well selected the belated return filed by the assessee for scrutiny and proceeded to determine the total income of the assessee in the manner known to law. Without doing so, when the due date for filing the belated return of income under section 139(4) of the Act was available to the assessee, the learned AO prematurely reopened the assessment by issuing notice under section 148 of the Act on 22.01.2015 much before the end of the assessment year itself. Against the belated return of income filed by the assessee under section 139(4) of the Act on 06.10.2015, learned AO had time to issue notice under section 143(2) of the Act till 30.09.2016.

5. Learned DR before us vehemently argued that since the assessee had not filed the original return of income under section 139(1) of the Act, the learned Assessing Officer was duly justified in

reopening the assessment under section 147 of the Act. We are unable to comprehend ourselves to accept these arguments of the learned DR in view of the fact that when the return of income is not filed within the due date prescribed under section 139(1) of the Act, learned Assessing Officer is entitled as per the statute to issue notice under section 142(1) of the Act calling for the return of income. Without resorting to this statutory provision, the learned AO cannot directly proceed to reopen the assessment. In any case, when the due date for filing the return of income is available in terms of section 139(4) of the Act to the assessee, how there could be any satisfaction on the part of the learned AO to conclude that the income of the assessee has escaped assessment. Hence, the very basis of reopening deserves to be quashed for want of any satisfaction that could be legally recorded. The reopening made by learned AO deserves to be quashed on this count also.

6. We find that the assessee has raised this issue of reopening notice, being issued before the end of the assessment year itself before the learned CIT(A), which is evident from the written

submission filed before the learned CIT(A). The relevant portion thereof is enclosed in pages 14 and 33 of the order of learned CIT(A). Strangely, the learned CIT(A) remains completely silent on this legal issue and simply relying on the order of his predecessor for assessment year 2009-10, passed in assessee's own case, he proceeded to uphold the addition made by learned AO on merits. In this regard, it is pertinent to note that against the order of learned CIT(A) for assessment year 2009-10, the assessee preferred an appeal before this Tribunal and this Tribunal vide its order passed in ITA No. 3070/Del/2016 dated 31.05.2021 had quashed the reassessment proceedings. Since, for assessment year 2014-15, i.e., the year under consideration, the learned CIT(A) had merely relied on the order of the predecessor for assessment year 2009-10, which stood subsequently quashed by this Tribunal, the assessee deserves to get relief on merits also for the year under consideration.

7. As stated earlier, the return filed by the assessee on 06.10.2015 is a return filed belatedly u/s 139(4) of the Act. Nothing prevented the learned Assessing Officer to select this return for scrutiny and

frame the assessment in accordance with law. When this provision is available with the learned Assessing Officer, where is the need for him to issue reopening notice that too before the end of the assessment year itself. Hence the reopening notice issued u/s 148 of the Act in the instant case is to be declared premature. In any case, the revenue cannot resort to reopening proceedings merely because a particular return is not selected for scrutiny. Reopening of an assessment cannot be resorted to as an alternative for not selecting a case for scrutiny. There should be conscious formation of belief based on tangible information that income of an assessee had escaped assessment. This is conspicuously absent in the instant case before us. With regard to the legal issue raised by the assessee vide ground no. 4, we find that the issue in dispute has already been adjudicated by the Coordinate Bench of Delhi Tribunal in the case of ITO Vs. Momentum Technologies Pvt. Ltd. in ITA No.5802/Del/2017 dated 31.03.2021 for assessment year 2011-12, wherein, the Tribunal held as under:

> *"17 The above provisions does not make any distinction between return of income filed u/s 139(1) or U/s 139 (5) of the act. If the return filed u/s 139[5] is a valid return , then the notice u/s 143(2) of the act can be issued to the assessee within expiry of six months from the end of the Financial Year in which revised return of income*

is filed. In this case, Revised return is filed on 12/2/2013, so 143 (2) notice could have been issued to the assessee on or before 30/9/2013. Therefore, the assessment proceedings were pending before Id AO. However, Id AO issued notice u/s 148 of the act on 15/04/2013, i.e. when theoriginal assessment proceedings were pending as time limit for issue of notice u/s 143 (2) did not expire. Section 142(1) and Section 148 of the Act cannot operate simultaneously. There is no discretion vested with the Assessing Officer to utilize any one of them. The two provisions govern different fields and can be exercised in different circumstances. If income escapes assessment, then the only way to initiate assessment proceedings is to issue notice under Section 148 of the Act. In fact, the proceedings are pending u/s 143 of the act, it looks in appropriate to call for a return under Section 148 of the Act because income cannot be said to have escaped assessment when the assessment proceedings are pending. Such is also held by Honourable Madras High court in COMMISSIONER OF INCOME-TAX V QATALYS SOFTWARE TECHNOLOGIES LTD. [2009] 308 ITR 249 (Madras) where in following the decision of the- Honourable High court in COMMISSIONER OF INCOME-TAX v. K. M. PACHAYAPPAN in 304 ITR 264 (Madras) held that:

> *"7. Applying the principles enunciated in the judgments of the Supreme Court as well as the Delhi High Court, cited supra, the Tribunal is right in coming to a conclusion that no action could be initiated under section 147 of the Act, when there is a pendency of the return before the Assessing Officer. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or illegality in the order of the Tribunal so as to warrant interference."*

18. Same is also the mandate of Honourable Delhi High court in [2007] 292 ITR 49 KLM ROYAL DUTCH AIRLINES v. ASSISTANT DIRECTOR OF INCOME-TAX where in it has been held that Where an assessment has not been framed at all, it is not possible to posit that income has escaped assessment.

8. Similar view was also addressed by the Coordinate Bench of Bombay Tribunal in the case of Bakimchandra Laxmikant Vs.

Income-tax Officer, reported in [1986] 19 ITD 527 (Bombay), wherein it was held as under:

> ***9.*** *Question now remains what is the effect of the notice under section 148. Does the return filed after issue of notice under section 148 cease to be a return under section 139 or any loss determine in pursuance of such a return could be denied to be carried forward and set off ? The department's contention is that recourse to section 148 is a remedy available to the department to assess or reassess the income which had escaped assessment and in such a recourse the assessee cannot be granted a benefit to the prejudice of the revenue. It may be true that the assessee cannot be benefited in a proceeding under section 148 as this provision is meant to safeguard the interests of the revenue. It is an enabling provision to assess or reassess the income which escaped assessment. But at the same time we cannot overrule the right of the assessee to file the return within two years from the end of the assessment year under section 139(4). This right of the assessee, in our opinion, cannot be taken away or whittle down by the revenue by issuing a notice under section 148. We would have agreed with the contention of the department if the return in this case was filed beyond the prescribed limit under section 139(4). The notice under section 148 as aforesaid is issued to assess or reassess the escaped income and the notice should be deemed invalid if ultimately the alleged income is found to have not escaped. If in the case of income having escaped it is found ultimately that there was a loss, the whole basis of issue of notice under section 148 falls down and the notice, therefore, becomes for all practical purposes invalid. It should be deemed as if it were never issued. As a natural consequence, therefore, it is to be assumed that there was no notice under section, 148 in this case and the return filed on 15-12-1982 was not a return in pursuance of the notice under section 148. We, therefore, hold that it was a return under section 139(4) and in view of the Bombay High Court decision (supra), the assessee would be entitled to carry forward the loss.*

9. In view of the above, respectfully following the judicial precedents relied upon hereinabove, we have no hesitation to quash the reassessment proceedings framed by learned AO as void abinitio. Accordingly, ground no. 4 raised by the assessee on legal issue is allowed.

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

Order pronounced in Open Court on 23rd June, 2023

Sd/-	Sd/-
(SAKTIJIT DEY)	**(M. BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 23/06/2023
RK/Sr.PS
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI
(Dehradun Circuit Bench, Dehradun)