

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No.4152/Mum/2023
(Assessment Year :2011-12)**

M/s. Prime Developers Unit No.F-93, First Floor, Prime Mall Irla Society Road Vile Parle (W) Mumbai-400 056	Vs.	Assistant Commissioner of Income Tax-25(3), Mumbai Room No.233, Kautilya Bhawan, Bandra Kurla Complex, Bandra (E) Mumbai
PAN/GIR No.AAGFP5594C		
(Appellant)	..	(Respondent)

**ITA No.4246/Mum/2023
(Assessment Year :2011-12)**

Income Tax Officer- 34(3)(2) Room No.233, Kautilya Bhawan, Bandra Kurla Complex, Bandra (E) Mumbai	Vs.	M/s. Prime Developers Unit No.F-93, First Floor, Prime Mall Irla Society Road Vile Parle (W) Mumbai-400 056
PAN/GIR No. AAGFP5594C		
(Appellant)	..	(Respondent)

Assessee by	Shri Bhavesh Gala & Shri Devansh Divecha
Revenue by	Shri H.M. Bhatt
Date of Hearing	02/05/2024
Date of Pronouncement	10/05/2024

आदेश / O R D E R**PER AMIT SHUKLA (J.M):**

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against order dated 21/09/2023 passed by NFAC, Delhi for the quantum of assessment passed u/s.143(3) r.w.s. 147 for the A.Y.2011-12.

2. The brief facts are that the assessee has filed its return of income for A.Y.2011-12 on 30/09/2011 declaring net capital loss of Rs.1,99,90,580/-. The said return was subject to scrutiny and assessment order was passed u/s.143(3) on 21/03/2014 after examining the details filed by the assessee and as asked by the ld. AO through various questionnaires and notices u/s.142(1). Accordingly, the income was assessed at loss of Rs.1,99,90,580/-. Thereafter, assessee's case was reopened u/s.147 after recording the following reasons:-

'The assessee firm filed Its ROI for the relevant AY on 30.09.2011. Further, the regular scrutiny assessment u/s 143(3) of the Act was completed on 21.03.2014 after accepting the return income at Rs. 1,99,90,580/-.

2. It is seen from the record that as per schedule 10 of Balance Sheet, the sundry creditors Included an amount of Rs. 1,93,90,770/- pending since November, 2006 which was payable to M/s Videocon Athithi Shelter Pvt Ltd towards purchase of transferable development rights. Since considerable time of more than 06 years had elapsed, the amount of Rs. 1,93,90,770/- should be treated now as cessation of liability u/s 41 (1) of the Act and added back to the total income of the assessee firm.

Secondly, the assessee had sold 34 units to Shri Narendra D Patel (HUF), proprietor of M/s ABC Corporation and had recorded sales during the year at Rs. 16,95,00,000/- against the stamp duty valuation at Rs. 21,17,90,000/-. As per record, the booking was made in the FY 2004-05 and the amount of Rs. 16,95,00,000/- was received as an advance. However, perusal of the balance sheet of FY 2008-09 did not reveal the said amount against advance received. Thus, the difference of sale consideration and stamp duty value is required to be brought to tax.

4. Thirdly, the perusal of profit & loss account reveals that the assessee had debited an amount of Rs. 14,43,33,583/- on account of 'loss on cancellation of sale'. The details of loss reveal that the total sale consideration was made at Rs. 17,72,70,000/- for an area of 10364 sq mtrs. However, the total income as shown in the profit and loss account from the project (sale of shop) is shown at Rs. 4,91,02,350/ only. Hence, the sales of Rs. 17,72,70,000/ has not been reflected in the books of accounts during the year 2008-09. This has resulted in incorrect deduction/debit of Rs. 14,43,33,583/ on account of loss on cancellation of sale'. Therefore, the loss allowed of Rs. 14,43,33,583/- debited & allowed is required to be withdrawn.

5. The information gives a substantial basis for the formation of a reason to believe that income has escaped assessment on the above mentioned issues due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the AY 2011-12 as envisaged by 1 proviso to section 147 of the Income-tax Act. Further, there is no doubt that the above amounts to income chargeable to tax which has escaped assessment.

6. In view of the above, I have reason to believe that income of Rs. 1,93,90,770/- Rs. 4,22,90,000/- & Rs. 14,43,33,583/ on account of cessation of liability u/s 41(1) of the Act, difference between sale value and stamp duty value & incorrect allowed loss have escaped assessment for AY 2011-12 within the meaning of first proviso to section 147 of the Income-tax Act, 1961 as the assessee has failed to disclose fully and truly all material facts necessary for its assessment for the AY 2011-12. The notice u/s 148 rws 147 is, therefore, required to be issued to the assessee to reassess

such income and also other income chargeable to tax which has escaped the assessment, which comes to my notice subsequently in the course of re-assessment proceedings u/s 147 of the Act for AY 2011- 12.

3. In re-assessment order the ld. AO from the perusal of the balance sheet noted that assessee has shown amount of Rs. 1,93,90,770/- under the head “sundry creditors” which was pending since November, 2006 payable to M/s. Videocon Athithi Shelter Pvt. Ltd., towards purchase of transferable development rights. Since more than 6 years had lapsed, therefore, ld. AO held that it amounts to deemed cessation of liability u/s 41 (1) of the Act, accordingly, he made addition of Rs.1,93,90,770/-.

4. *Secondly*, on perusal of profit and loss account he noted that assessee debited an amount of Rs.3,54,46,840/- on account of loss on cancellation of sales. After verifying the details, he noted that total consideration was made at Rs.17,72,70,000/- for an area of 10364 sq.mtr, however, the total income as shown in the profit and loss account from the project of sale of shops was shown at Rs.4,91,02,350/-, thus, according to the ld. AO sale of Rs.17,72,70,000/- has not been reflected in the books of accounts during the year 2008-09. This has resulted incorrect deduction of Rs. 3,54,46,840/- and accordingly, he added back the claim of loss and cancellation of sales of Rs.3,54,46,840/-.

5. The ld. CIT(A) before whom the validity of reopening was challenged has dismissed the said ground. However, on merits he has allowed addition of Rs.1,93,90,770/- made on account of cessation of liability and in so far as disallowance of

Rs.3,54,46,840/-, the same has been dismissed. Now again against the said order assessee and Revenue are in appeal.

5. The grounds raised by assessee as well as by Revenue are as under:-

Assessee's Grounds of Appeal:-

1. *The Hon'ble Commissioner of Income Tax (Appeals), NFAC [CIT(A)] has erred in law and on facts in upholding the disallowance made by the Assessing Officer (AO) in the Assessment Order in connection with the loss claimed of amount of Rs.3,54,46,840/-*

2. *The CIT(A) has erred in law and on facts in upholding the disallowance made by the AO of amount of Rs.3,54,46,840/- without appreciating the facts and the relevant documents submitted by the Assessee during the course of re-assessment proceedings.*

3. *The CIT(A) has erred in law and on facts in upholding the disallowance made by the AO of Rs.3,54,46,840/- without appreciating the fact that the relevant documents have already been submitted during the course of original assessment proceedings which was concluded on 21 March 2014 u/s 143(3) of the Act considering the said claim. Therefore, said reason recorded in writing is merely on account of change of opinion and re-assessment u/s 147 of the Act is not permissible merely on account of change of opinion.*

Revenue's Grounds of Appeal:-

"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in deleting the addition of Rs. 1,93,90,770/- made in hand of assessee u/s 41(1) of the Income Tax Act, 1961 without appreciating the fact that the assessee has failed to discharge its onus to establish the genuineness of the such creditors."

6. At the outset assessee has challenged the validity of reopening u/s.147 stating that here in this case already assessment was completed u/s. 143(3) and reopening has been done beyond the period of four years from the end of the relevant assessment year and therefore, in terms of **first proviso** to Section 147, such reasons do not give jurisdiction to the ld. AO to reopen the assessment beyond the time limit of four years. He submitted that here in this case on all the points, ld. AO in the course of original assessment proceedings had raised a query and asked for the details which were duly furnished at the time of original assessment proceedings. In support of its contention, he drew our attention to queries raised by the ld. AO and replies furnished and details during the course of hearing which are placed in the paper book from pages 23-35. He pointed out that assessee had duly filed the details of sundry creditors, details of cancellation of sales, etc., which had been duly furnished and examined by the ld. AO. If all the details and issues on which reasons have been recorded were furnished, then assessee had made full and true disclosure before the ld. AO and therefore, there was no failure on the part of the assessee. If the case has been reopened beyond the period of four years from the end of the relevant assessment year, one of the key requirements is that, there has to be failure on the part of the assessee to disclose full and true material facts. From the bare perusal of the reasons recorded it is seen that there is no tangible material and in fact, AO is re-examining the same records, i.e., balance sheet and profit and loss account to record his reasons to believe

without ascribing any failure on the part of the assessee. Simply mentioning that there is failure to disclose fully all material facts does not tantamount to actual failure on the part of the assessee, but Id. AO has to establish the fact in the 'reasons recorded' itself and therefore, the reopening is invalid.

7. Before us, Id. DR referred to the observation and the finding of the Id. CIT(A) while dismissing the ground raised by the assessee. The relevant observation of the Id.CIT(A) on this issue as referred by him reads as under:-

5.2.4 With respect to the first issue it is noted that the matter was not scrutinized by the AO at the time of regular assessment. The appellant had submitted the list of creditors amongst other details during the course of assessment proceedings u/s 143(3). Section 147 requires the assessee to declare the material not merely fully but also "truly" The AO could not have applied his mind vis-à-vis details of "other liabilities" produced before him at the time of regular assessment. Further, there exists no requirement under section 147 of the Act that the material forming basis for the "reason to believe" should be from an outside source and that merely because the said liability was mentioned in the balance sheet and in the reply to the questionnaire during regular assessment it would not render the AO powerless to re-open the case. In this backdrop the issue raised by the appellant challenging the reassessment proceedings is dismissed.

5.3.5 The second issue raised in the grounds of appeal is that the issue of claim of loss of Rs. 3,54,46 840/- was examined by the AO at the time of regular assessment hence reopening of said issue is mere change of opinion. In this context, it is important to note that Section 147 requires the assessee to declare the material not merely fully but also "truly". The appellant failed to file before the AO and the time original assessment proceedings the true nature of the loss claimed as loss on cancellation of sale Thus the

AO could not have applied his mind vis-à-vis such claim. Further, there exists no requirement under section 147 of the Act that the material forming basis for the "reason to believe" should be from an outside source and that merely because the said expenses was mentioned in the profit and loss account and in the reply to the questionnaire during regular assessment it would not render the AO powerless to re-open the case. In this backdrop the issue raised by the appellant challenging the reassessment proceedings is dismissed."

8. We have heard the rival submissions and also perused the relevant finding given in the impugned order on the issue of validity of reopening u/s.147. Undisputedly, here in this case regular scrutiny assessment was completed u/s.143(3) vide order dated 21/03/2014. After the completion of assessment, notice u/s.148 has been issued on 27/03/2018 almost at the fag end of sixth year from the end of the relevant assessment year. In terms of then *first proviso* to Section 147, where assessment has been completed u/s.143(3), then there is an embargo of limitation for reopening of four years. Such an limtation can be overcome and ld. AO has to acquire jurisdiction for reopening the case beyond the period of four years from the end of relevant assessment year, then one of the prime condition is that there has to be failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Unless that failure is not established, the reopening cannot be done.

9. Apart from that, there has to be some tangible material and information coming on record having live link nexus with the income escaping assessment, especially more so in the cases where assessment has been completed u/s.143(3) and the

details of entries in the profit and loss account and balance sheet had already been scrutinized and examined by the AO. From the bare perusal of the reasons recorded, it is seen that AO is trying to draw his own inference from the balance sheet and profit and loss account, which is evident from para 2,3 & 4 of the reasons recorded (supra). Once these figures and entries in the balance sheet and the profit and loss account have already been examined and scrutinized, then without there being any other tangible material coming on record to demonstrate that there is no true and full disclosure of facts then perhaps reopening is justified beyond the period of four years. Here in this case, as pointed out by the ld. Counsel, the details of sundry creditors; details on account of loss on cancellation of sales and the sales recorded in the books of accounts were duly furnished in response to notice issued by the ld. AO during the course of original assessment proceedings. The duty of the assessee is to disclose all the material facts and the details as and when required by the AO. It is then upon the AO to draw legal and factual inference from such details. Here in the 'reasons recorded' ld. AO has made observation to entertain his reason to believe from the information already available on record and examined by the AO, i.e., balance sheet and profit and loss account. 'Reasons' do not give any substantial basis for the formation of reason to believe that income has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts for the purpose of assessment for A.Y.2011-12 as envisaged by first proviso to Section 147.

Mere writing of this phrase “*failure on the part of the assessee to disclose fully and truly all material facts for the purpose of assessment*” used in the proviso does not give any jurisdiction to the AO, albeit, Id. AO has to demonstrate as to what was the failure on the part of the assessee to disclose fully and truly all material facts.

10. Here in this case, assessee has duly disclosed details of sundry creditors before the Id. AO and only because the amount was payable for last six years that does not mean that there is cessation of liability which can be taxed. In such a case where is the failure on the part of the assessee to disclose the facts. Simply because, Id. AO has presumed in the reasons that, since more than 6 years have been lapsed therefore, it is a deemed cessation of liability which is incorrect in law and on facts, because till assessee recognizes such debt it cannot be treated as cessation of liability. *Secondly*, in so far as recording of the sales, assessee has given the details before the Id. AO, as how the sales have been recorded in the books and also has given specific explanation during the course of original assessment proceedings vide letter dated 13/01/2014 which for the sake of ready reference is reproduced hereunder:-

Explanation regarding less sale consideration than stamp duty valuation:

“The assessee has booked sale at Rs. 16,95,00,000/-, however stamp duty valuation is Rs. 21,17,90,000/-. The difference is of Rs. 4,22,90,000/-

The assessee booked sale made to ABC Corporation for the first time in financial year 2004-05 which can be seen from the page no. 34 of the agreement (already submitted vide submission dated 7 January, 2014). However, the sale rate per sq. mt. was not fixed and hence the agreement was not registered with the ROC Authorities. The agreement got register with ROC Authorities during the year under consideration and they valued as per the market value of financial year 2010-11. Since there was a huge time gap between sale and registration this difference has arose, which sufficiently stands explained.”

Thus, on this point also there was a full disclosure made by the assessee and explanation which has been accepted by the ld. AO. Once that is so, then how the presumption can be drawn to draw another inference by the ld. AO without any material information contrary to the explanation given by the assessee. Thus on this point also there is no failure on the part of the assessee to disclose fully and truly material facts.

11. *Lastly, with regard to loss on cancellation of sales also assessee vide letter dated 08/01/2014 has given working of loss on cancellation of sales. Before the authorities below and also before us it has been stated in the following manner:-*

“Regarding disallowance of loss on cancellation of sale of Rs.3,54,46,840/-

1. During the course of assessment proceedings, the AO has observed that as per Profit & Loss account the Assessee has debited an amount of Rs.3,54,46,840/- on account of "loss on cancellation of sale. The AO has asked to explain and justify as to why disallowance should not be made in its case on account of alleged incorrect deduction/debit of Rs.3,54,46,840/-

2. The Assessee would like to bring to your Honor kind attention towards the reason for reopening of the Assessment and then the

Assessment Order passed which reveals the numbers for the year 2008-09.

3. Further, the Assessee would like to state that the during the year under consideration, the Assessee has executed and registered on 22-12-2010 an agreement for sale for the sale of shops in the 'Prime Mall' to one Narendra D. Patel (HUF), Proprietor of M/s. ABC Corporation for the total sale consideration of Rs. 16,95,00,000/- The said amount of sale consideration has been offered as income under Schedule 11 Income from 'Prime Mall Project' as 'Sale of Shops' in the audited financials for FY-2010-11. The said details and relevant documents have also been submitted during the course of original assessment proceedings as aforesaid.

4. Further, duly registered executed agreement is attached herewith for your Honor ready perusal. Refer Exhibit-12.

5. The Assessee would like to state that the party name called M/s. ABC Corporation has advance an amount of Rs. 16,95,00,000/- a way back in Financial year 2004-05 and subsequently, it has received part keeping the balance amount for the purpose of booking of the said shops. The agreement ultimately executed and registered during the current financial year 2010-11. The sale consideration of Rs. 16,95,00,000/- has also been offered as an income. In such circumstances, the party has executed the agreement for the price which it has given an advance to the Assessee keeping remain the circumstances and price prevailing during the time of execution of an actual agreement for sale. This resultant into some loss to the Assessee in terms of trading loss which has been booked under Profit & loss Account of Rs.3,54,46,840/-.”

12. Here also once this explanation was there on the record and also explained before the ld. AO and ld. CIT(A), then we fail to understand what was the failure on the part of the assessee to disclose the facts. Ld. AO has tried to draw his own inference in the reasons and tried to justify it without actual finding what

was the failure on the part of the assessee to disclose fully and truly material facts. Accordingly, we hold that the reasons recorded by the ld. AO do not give jurisdiction to reopen the case beyond the period of four years from the end of the relevant assessment year. Accordingly, the entire reopening is hereby quashed and consequently the entire re-assessment proceedings as well as order passed by the ld. AO is held to be without jurisdiction and is hereby quashed.

13. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on 10th May, 2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Mumbai; Dated 10/05/2024
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai