

IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.6312/MUM/2024

(Assessment Year : 2012-13)

Shah Rukh Khan,

44, Mannat, BJ Road, Bandstand,

Bandra, Mumbai - 400050

PAN: AAHPK3293L

..... Appellant

v/s

DCIT, Central Circle – 4(2)

Kautilya Bhavan, Bandra Kurla Complex,

Bandra East,

Mumbai - 400050

Maharashtra

..... Respondent

Assessee by : Shri Aditya Ajgaonkar

Ms. Rupal Srimal

Shri Sujay Ajgaonkar

Revenue by : Ms. Kavitha Kaushik, Sr. DR

Date of Hearing – 27/02/2025

Date of Order – 04/03/2025

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The assessee has filed the present appeal against the impugned order dated 18/10/2024, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-52, Mumbai, [*"learned CIT(A)"*], for the assessment year 2012-13.

2. In this appeal, the assessee has raised the following grounds: -

- "1. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in holding that the Re-opening of Assessment in the case of the Appellant is valid in law.*
- 2. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in not properly dealing with the submissions and judgements relied upon by the Appellant during the course of the hearing of the Appeal.*
- 3. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in confirming the assessment order on an erroneous appreciation of the factual matrix of the transaction of remuneration for the feature film - RA One.*
- 4. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in re-adjudicating the issue of DTAA credit that had already been the subject matter of Appeal and that was to be allowed to the Appellant after verification by the Assessing Officer.*
- 5. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in upholding the validity of the re-assessment proceedings and notice issued u/s 148 of the Income-tax Act, 1961, in a clear case of 'change of opinion' by the Assessing Officer as the subject of double taxation relief claimed had already been examined by the Assessing Officer in the original 143(3) proceedings. He further erred in concluding that the Appellant has not disclosed fully and truly all material facts necessary for the assessment and that there has been a failure on part of the Appellant in warranting reassessment.*
- 6. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in upholding the validity of the re-assessment proceedings and notice issued u/s 148 of the Income-tax Act, 1961, by issuing the said notice after a period of four years from the end of the assessment year though there was no failure on part of the Appellant to disclose all material facts for his assessment.*
- 7. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in upholding the validity of the reassessment proceedings and the denial of the double taxation relief of Rs.1,40,00,000/- withheld at source in the UK. Infact, for the same Assessment Year prior to the issue of notice u/s 148, the CIT(A) had already directed the assessing officer to verify the same TDS deduction. However, before doing the same, the assessing officer reopened the Assessment on the same issue.*
- 8. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in not allowing the double taxation relief of Rs. 2,16,17,234/- claimed by the appellant being a part of the tax paid in the UK.*
- 9. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in not appreciating that the reopening of an assessment cannot be made on an issue that was already the subject matter of regular assessment and also an appeal as this would tantamount to change of opinion.*

10. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in not appreciating that as per the agreement between the appellant and Red Chilies Entertainments Pvt Ltd regarding the production of the film RA ONE, 70% of the shooting of the film was to take place in UK and therefore 70% of the income was to accrue in UK and on which withholding tax of the country was applicable. Therefore the sum of Rs. 1,40,00,000/- was deducted at source in the UK on the income earned in that country.

11. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in misinterpreting the books of accounts of the Appellant (including the Income and Expenditure Account) to deny the double taxation relief due to the Appellant.

12. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in confirming incorrect conclusion of the assessing officer that the TDS certificate of Rs. 140,00,000/- was not proved to be genuine by the appellant.

13. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in holding that the Appellant had himself treated the entire receipts as having arisen out of India.

14. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in concluding that the professional income from Indian Source cannot attract any foreign TDS or foreign tax liability though the performance of services is rendered partly outside India.

15. In the facts of the matter and in law, the Learned Commissioner Income Tax (Appeal) erred in upholding the interest imposed in the Assessment Order under Section 234A, 234B, 234C and 234D of the Income-tax Act, 1961."

3. In this appeal, the assessee has challenged the validity of the reopening of the assessment under section 147 of the Act and has also raised the grounds on merits, challenging the additions made by the Assessing Officer ("AO"). Since the ground challenging the reopening of assessment under section 147 of the Act has raised a jurisdictional issue, therefore, the same is considered at the outset.

4. As far as the issue relating to the validity of reopening under section 147 of the Act, the brief facts are that for the year under consideration, the assessee filed its original return of income on 29/09/2012 declaring a total

income of Rs. 83,42,22,630. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act along with a questionnaire were issued and served on the assessee. The AO, vide order dated 16/03/2015 passed under section 143(3) of the Act, assessed the total income of the assessee at Rs. 84,17,99,923, after making certain additions/disallowances.

5. Subsequently, after the expiry of 4 years from the end of the relevant assessment year, notice under section 148 of the Act was issued on 31/03/2019. In response to the aforesaid notice, the assessee filed his return of income on 29/04/2019. The AO, vide order dated 30/12/2019 passed under section 143(3) r/w section 147 of the Act, assessed the total income of the assessee at Rs. 84,17,99,920, after completely denying the claim made under section 90 of the Act.

6. In its appeal before the learned CIT(A), the assessee, inter-alia, challenged the reopening of the assessment. However, the learned CIT(A), vide impugned order, dismissed the ground so raised by the assessee by observing as follows: -

"7. Ground Nos. 1: This ground relates to the reopening of assessment u/s. 147 of the Act.

7.1. As far as reopening is concerned, the requirement is availability of reasons to believe and tangible material for the same.

7.2. As observed by Hon'ble Supreme Court, in the case of Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 (SC), "At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief.

7.3. Guidance is also drawn from the decision of Hon'ble Apex Court in case of

DCIT vs MR Shah Logistics P Ltd (arising out of Special Leave to Appeal (C) No.22921/2019 dated 28.03.2022):

**21. In Phool Chand Bajrang Lal & Ors. vs. Income Tax Officer & Ors after reviewing the previous case law, and concluding that a valid reopening is one, preceded by specific, reliable and relevant information, and that the sufficiency of such reasons is not subject to judicial review - the only caveat being that the court can examine the record, if such material existed.*

23. It is therefore, clear that the basis for a valid re-opening of assessment should be availability of tangible material, which can lead the AO to scrutinize the returns for the previous assessment year in question, to determine, whether a notice under Section 147 is called for.

29. Another aspect which should not be lost sight of is that the information or "tangible material" which the assessing officer comes by enabling re-opening of an assessment, means that the entire assessment (for the concerned year) is at large; the revenue would then get to examine the returns for the previous year, on a clean slate - as it were. Therefore, to hold- as the High Court did, in this case, that since the assessee may have a reasonable explanation, is not a ground for quashing a notice under Section 147. As long as there is objective tangible material (in the form of documents, relevant to the issue) the sufficiency of that material cannot dictate the validity of the notice."

7.4. One of the arguments of the appellant is that the re-assessment proceedings were done beyond the period of 4 years and that there is no failure on the part of the appellant to disclose all the facts. I have carefully perused the reasons recorded by the AO.

7.5. Explanation 1 to Sec. 147 of the Act states as under:-

"Explanation 1-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

7.6. Thus, the failure on the part of the appellant has to be assessed from the facts of each case. In the instant case, it was about undue avilment of foreign tax credit.

The AO had a prima-facie view that excessive relief had been claimed by the appellant and that the appellant had not fully and truly disclosed the particulars relevant for the assessment. Hence, the AO's action cannot be faulted with.

7.7. Explanation 2 to Sec. 147 as it existed then, reads as under:-

"Explanation 2-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

- (a)*
- (b)*

(c)

(c) where an assessment has been made, but-

(i) income chargeable to tax has been underassessed; or

ii) such income has been assessed at too low a rate, or

iii) such income has been made the subject of excessive relief under this Act, or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed,"

7.8. The appellant's case does gets covered by the above explanation.

7.9. Useful guidance is received from the decision by Hon'ble Jurisdictional HC in the case of 329 ITR 257, 3i Infotech Ltd vs ACIT (Bom HC) 2010, wherein it was held as under:

"The Explanation 1 to section 147 stipulates Assessing Officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to a disclosure within the meaning of the first proviso. In other words, an assessee cannot rest content merely with the production of account books or other evidences during the course of the assessment proceedings and challenge the reopening of the assessment on the ground that if the Assessing Officer was to initiate a line of enquiry, he could, with due diligence, have arrived at the material evidence. The primary obligation to disclose is on the assessee and the burden of making a full and true disclosure of material facts does not shift to the Assessing Officer. The assessee has to disclose fully and truly all material facts. Producing voluminous records before the Assessing Officer does not absolve the assessee of the obligation to disclose material facts and the assessee cannot be heard to say that if the Assessing Officer would have conducted a further enquiry, he would have come into possession of material evidence with the exercise of due diligence. An assessee cannot throw reams of paper at the Assessing Officer and rest content in the belief that the Officer better beware or ignore the hidden crevices in the pointed material at his own peril."

7.10. Further, in the case of P.V.S. Beedies (P.) Ltd. (237 ITR 13), the Apex Court held that even the audit party can point out a fact, which has been overlooked by the ITO in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. The logical following of this judgement is that the AO is entitled to examine the material independently and form his own opinion, which is what has been done by the AO here. Similar is the case with [2021] 438 ITR 657 (Allahabad), Suresh Chand Gupta vs PCIT. Hence, this part of argument of the appellant stands REJECTED.

7.11. Having considered the entire facts and judicial position on the issue, it does appear that the assessee has not disclosed fully and truly all material facts necessary for the assessment and there has been a failure on the part of the assessee, warranting re-assessment."

Being aggrieved, the assessee is in appeal before us.

7. During the hearing, the learned Authorised Representative ("*learned AR*"), at the outset, inter-alia, submitted that there is no allegation in the reasons recorded for initiating the re-assessment proceedings that income has escaped assessment due to failure of the assessee to disclose fully and truly all material facts.

8. On the other hand, the learned Departmental Representative ("*learned DR*") vehemently relied upon the orders passed by the lower authorities and submitted that proceedings under section 147 of the Act have correctly been initiated by the AO in the present case.

9. We have considered the submissions of both sides and perused the material available on record. In the present case, the return of income filed by the assessee was selected for scrutiny and assessment was concluded vide order passed under section 143(3) of the Act. However, after the expiry of 4 years from the end of the relevant assessment year, notice under section 148 of the Act was issued to the assessee. While initiating the re-assessment proceedings, the AO recorded the following reasons for reopening the assessment: -

"Reasons to believe that income chargeable to Tax escaped assessment u/s. 147 of the Income Tax Act:-

1. In this case, the assessee filed his return of income on 29-09-2012 declaring income at Rs. 83,43,22,623. Subsequently, the return of income was selected for scrutiny and assessment u/s 143(3) of the IT Act was completed with an assessed loss of 7 84,17,99,920.

2. On going through the case record of the assessee, it is found that M/s Red Chillies Entertainment Pvt. Ltd. (RECPL) (wherein the assessee is a Director and holds: 50% shares) has paid artiste remuneration to the assessee of Rs. 10 Cr. for the film Raone which was routed through Winford Production

Ltd.(WPL) (United Kingdom based Line producer). RECPL paid Rs. 10 crore to WPL after deducting TDS of Rs. 1 crore which ultimately paid Rs. 7.60 Crore to the assessee after deducting FEU (UK Tax deduction) of Rs. 1.40 Crore. The assessee offered this amount as income earned in UK and paid additional tax in UK of Rs. 2,70,17,977. This it is evident that such arrangement of payment has caused revenue loss to the government of India.

In view of the facts mentioned above, I have reason to believe that income of more than Rs. 1 lakh has escaped assessment within the meaning of section 147 of the I.T. Act. As the income chargeable to tax has been under assessed u/s. 143(3) of the IT Act, the case of the assessee is required to be reopened u/s.147 of the IT Act, so as to reassess the assessee's correct income for A.Y.2012-13.

In view of the above, a proposal in the prescribed proforma for your kind perusal and necessary approval within the provisions of section 151(1) of the I.T. Act, 1961 for the issue of notice u/s.148 of the IT Act for A.Y.2012-13 is put-up."

10. As per the assessee, in the aforesaid reasons recorded by the AO there is no allegation of any failure on the part of the assessee to disclose truly and fully all material facts, which is a paramount condition for invoking re-assessment proceedings under section 147 of the Act, after expiry of 4 years from the end of the relevant assessment year, in case where an assessment under section 143(3) of the Act has been made.

11. At this stage, it is relevant to analyse the provisions of the proviso to section 147 of the Act, as it stood during the year under consideration, which reads as follows: -

"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 the 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:"

12. Thus, as per the proviso to section 147 of the Act, in a case where the assessment was completed under section 143(3), re-assessment under section 147 can be done after the expiry of 4 years from the end of the relevant assessment year, only if income has escaped assessment (i) due to failure on the part of the assessee to make a return under section 139 or in response to the notice issued under section 142(1) or section 148; or (ii) due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. In the present case, from the facts, it is evident that assessment was completed in the case of the assessee under section 143(3) of the Act. Further, notice under section 148 of the Act was issued on 31/03/2019 i.e. beyond a period of 4 years from the end of the relevant assessment year i.e. 2012-13. Therefore, it needs to be examined whether the conditions prescribed in the proviso to section 147 of the Act are satisfied in the present case. There is no dispute that a return of income was filed by the assessee under section 139(1) of the Act. Further, from the perusal of the reasons recorded for reopening the assessment, as noted above, we find that there is not even an allegation by the AO that income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts.

13. From the perusal of the order disposing the assessee's objections against the reopening of assessment, forming part of the paper book from pages 204-210, we find that it was for the first time there was any whisper of the allegation that there was gross failure on the part of the assessee to disclose all the material facts fully and truly. Therefore, it is ostensible that

the reasons recorded while initiating the re-assessment proceedings were completely silent as regards the allegation that income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts, and vide order disposing the assessee's objections, the AO tried to improve upon the reasons by making the allegation, which is completely impermissible.

14. In this regard, it is relevant to note the following observations of the Hon'ble Jurisdictional High Court in Hindustan Lever Ltd v/s R.B. Wadkar, reported in [2004] 268 ITR 332 (Bom.): -

"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."

15. From the perusal of the reasons recorded while initiating the re-assessment proceedings, as noted in the foregoing paragraph, we further find that there is not even a mention of any new or tangible material which formed the basis to believe that income chargeable to tax has escaped assessment during the year under consideration. We find that the entire edifice of the impugned re-assessment proceedings is based on the perusal of case records which were already considered during the scrutiny assessment proceedings concluded under section 143(3) of the Act. This aspect is further evident from para 3.4 of the order passed under section 143(3) r/w section 147 of the Act, wherein the AO completely denied the claim made under section 90 of the Act, after noting that partial relief was granted to the assessee vide order dated 16/03/2015 passed under section 143(3) of the Act. Thus, the decision of the Hon'ble Supreme Court in Phool Chand Bajrang Lal v/s ITO, reported in (1993) 203 ITR 456 (SC), relied upon by the learned DR, also does not support the submissions of the Revenue as, in the present case, there were neither any fresh facts nor some information with regard to the facts previously disclosed, which came to the possession of the AO after conclusion of the scrutiny assessment proceedings, and the entire re-assessment proceedings were initiated on re-appraisal of facts already available on record.

16. Therefore, in view of the facts and circumstances of the present case, legal position and judicial pronouncement as noted above, we are of the considered view that the re-assessment proceedings initiated by the AO, in the present case, are bad in law on more than one count and are not in conformity with the provisions of section 147 of the Act. Therefore, the same

is quashed. Consequently, the assessment order passed under section 143(3) r/w section 147 of the Act is also quashed.

17. Since the relief has been granted to the assessee on the aforementioned jurisdictional aspect, the other grounds raised by the assessee in the present appeal are rendered academic, and therefore, are left open.

18. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 04/03/2025

Sd/-

**GIRISH AGRAWAL
ACCOUNTANT MEMBER**

Sd/-

**SANDEEP SINGH KARHAIL
JUDICIAL MEMBER**

MUMBAI, DATED: 04/03/2025

Prabhat

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai