

**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 26.04.2013

+ **ITA 168/2013**

COMMISSIONER OF INCOME TAX-II

..... Appellant

versus

LIVING MEDIA INDIA LTD

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr N.P. Sahni, Advocate

For the Respondent : Mr Salil Aggarwal and Mr R.P. Mall, Advocates.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue under Section 260A of the Income Tax Act, 1961 is directed against the order passed by the Income Tax Appellate Tribunal on 01.08.2012 in ITA No. 4406/Del/11 relating to the assessment year 2006-07.
2. The facts of the case are that the assessee had filed its return of income on 29.11.2006. The assessment order was framed by the Assessing Officer under Section 143(3) of the said Act on 26.12.2008. On 19.01.2010 a notice under Section 148 of the said Act was issued by the Assessing Officer seeking to reopen the assessment which was earlier completed on 26.12.2008. The



purported reasons for reopening which had been recorded on 19.01.2010 were as under:-

“01. Assessment in this case was completed under section 143(3) on 26.12.2008 at an income of ₹ 16,73,26,015/- as against the returned income of ₹ 16,67,22,015/-. Scrutiny of income tax assessment records revealed that in the computation of income the assessee had deducted ₹ 1,87,41,755/- on account of provision for doubtful debts no longer required written back but in P&L account this amount was not added to the other income. The mistake resulted in under assessment of income by ₹ 1,87,41,755/- involving tax effect of ₹ 63,08,473/-.

02. In view of the above, I have reasons to believe that the income of ₹ 1,87,41,755/- chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income Tax Act, 1961.”

3. From the above extract, it is evident that the purported reasons pertain to the issue of provision for doubtful debts. The allegation was that the assessee had deducted ₹ 1,87,41,755/- on account of the said provision for doubtful debts but in the Profit & Loss Account the said amount had not been added to the taxable income. It was contended that this resulted in under assessment of income by ₹ 1,87,41,755/-, involving a tax liability of ₹ 63,08,473/-.

4. According to the learned counsel for the respondent/assessee, after about 9 months additional reasons were supplied by the Assessing Officer to the respondent/assessee which was received by the respondent/assessee on 29.10.2010. Those additional reasons were as under:-

“Additional Reasons recorded under section 147 of the Act.

01 Assessment in this case was completed under section 143(3) on 26.12.2008 at an income of ₹ 16,73,26,015/- as against the returned income of ₹ 16,67,22,015/-. Scrutiny of income tax assessment records revealed that:-



(a) Assessee had long term capital gain of ₹ 14,34,71,150/-, therefore, balance unabsorbed depreciation of ₹ 6,85,19,358/- (₹ 8,95,82,795/- minus ₹ 2,10,63,437/-) should also have been set off from long term capital gain. But the same amount was not set off from the long term capital gain. The mistake resulted in excess carry forward of unabsorbed depreciation of ₹ 6,85,19,358/- involving potential tax effect of ₹ 76,87,873/-.

(b) The Assessing Officer had disallowed ₹ 16,23,073/- in relating to expenditure under section 14A related to exempt dividend income of ₹ 3,54,28,042/- instead of correct figure of ₹ 3,17,48,567/- as per the provisions of section 14A read with Rule 8D. The mistake resulted in under assessment of income of ₹ 3,02,90,115/- involving tax effect of ₹ 1,28,33,604/-.

02 In view of the above, I have reasons to believe that the income of ₹ 6,85,19,358/- and ₹ 3,02,90,115/- aggregating to ₹ 9,88,09,473/- chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income Tax Act, 1961.”

5. Thereafter, the respondent/assessee submitted its objections which were rejected by virtue of an order dated 26.11.2010 and thereafter the assessment order under Section 147/143(3) of the said Act was passed on 08.12.2010.

6. While it is clear that the reasons which were recorded on 19.01.2010 only referred to the issue of doubtful debts, the additional reasons which were allegedly recorded subsequent to the issuance of the notice under section 148 of the said Act included the issues of unabsorbed depreciation and disallowance under section 14A of the said Act. As per the assessment order dated 08.12.2010, the Assessing Officer made additions in respect of bad debts, unabsorbed depreciation and disallowance under section 14A. The Commissioner of Income Tax (Appeals), while upholding the issuance of notice under section 148 and the proceedings under section 147 of the said Act, deleted the addition in respect of bad debts as also the disallowance under section 14A of the said Act. However,



the Commissioner of Income Tax (Appeals) held in favour of the revenue and confirmed the addition on account of the issue with regard to unabsorbed depreciation.

7. Both the revenue and the assessee filed the appeals before the Tribunal being ITA Nos. 4399/Del/2011 and 4406/Del/2011. The revenue was aggrieved by the finding of the Commissioner of Income Tax (Appeals) with regard to the deletion on account of the issue pertaining to bad debts. In so far as, the assessee was concerned, its appeal was directed against the findings of the Commissioner of Income Tax (Appeals) whereby the proceedings under Section 147/148 of the said Act were held to be valid and the revenue's contention with regard to the unabsorbed depreciation had been accepted.

8. The Tribunal, hearing both the appeals, passed a common order disposing of the same by virtue of the impugned order dated 01.08.2012. The Tribunal dismissed the revenue's Appeal with regard to the issue of bad debts and allowed the assessee's appeal on both counts, namely, that the proceedings initiated under Section 147/148 of the said Act were invalid as also on the plea of unabsorbed depreciation. The present appeal filed by the revenue pertains to the assessee's appeal before the Tribunal, that is, ITA No. 4406/Del/2011. The present appeal does not relate to the rejection of the revenue's appeal by the Tribunal. In other words, the present appeal is not concerned with the issue of bad debts which arose only in the case of revenue's appeal before the of Tribunal. The revenue is, therefore, in appeal before us against the finding of the Tribunal that the proceedings under Section 147/148 of the said Act were invalid and that the carried forward unabsorbed depreciation could not be set off against the long term capital gains.



9. Having heard the counsel for the parties, the first point which needs to be examined is whether the proceedings under Section 147/148 were validly initiated or not. We have already noticed above that the purported reasons recorded on 19.01.2010 only contain the issue with regard to bad debts. It is only subsequently that, sometime in October 2010, additional reasons were recorded with regard to the issue pertaining to unabsorbed depreciation and the disallowance under Section 14A of the said Act. In our view, the additional reasons could not have been recorded. The notice under Section 148 would stand or fall depending upon the reasons prior to the issuance of the notice. In the present case, according to the learned counsel for the respondent/assessee, no notice under Section 148 of the said Act has been issued pertaining to the purported additional reasons which were allegedly recorded sometime in October 2010 and served upon the assessee on 29.10.2010. Therefore, the additional reasons cannot be looked into for the purposes of determining the validity of the proceedings initiated under the notice dated 19.01.2010 issued under Section 148 of the said Act.

10. That being the position, the only thing that has to be seen is whether the reasons recorded on 19.01.2010 could, at all, form the basis of reopening of an assessment under Section 148 of the said Act. One point is clear, in that so far as the issue of bad debts is concerned the present appeal is not concerned with it and therefore, the deletion of the addition made on account of bad debts has become final. Until and unless, there was an addition on the basis of the original reasons, no other additions could be made in view of the expression “and also” used in Explanation 3 to Section 147. This was the subject matter of the decision of the Bombay High Court in the case of ***CIT v. Jet Airways: 331 ITR 236 (Bom)***. This was followed by this Court in ***Ranbaxy Laboratories Limited v. CIT: 336 ITR 136 (Delhi)*** and also in ***CIT v. Software Consultants: 341 ITR 240 (Delhi)***.



It was also subject matter of a recent decision of this court in the case of *CIT v. Cheil Communications India Pvt. Ltd.*: ITA No. 578/2012 decided on 17.04.2013. Therefore, no additions in absence of any addition on the issue of bad debts could have been made by the Assessing Officer.

11. Apart from this, we find that the initiation of the proceedings under Section 147 of the said Act were also bad as has been rightly observed by the Tribunal as under:-

“14. In the present case, the assessment has been completed u/s 143(3) originally. The details in respect of bad debts were filed and thereafter the assessment was completed. Therefore, it cannot be said that Assessing Officer has not applied his mind. Even otherwise, as we have discussed above in detail, no such claim on account of provision for bad debts has been claimed by the assessee. From where this figure has been picked by the Assessing Officer it is not known. Even during the course of appellate proceedings, the Bench asked to the departmental representative that at least it should be on record that from where he picked the figure on account of provision for bad debt that assessee had claimed this deduction. Copy of balance sheet along with Schedule 16 is placed on record and as per Schedule 16, the only claims have been made of Rs 46 lacs and odd. Reconciliation chart was filed before Assessing Officer. From that also it is appearing that assessee had not claimed any deduction on account of provision for bad debt. Ld. CIT(A) has considered this aspect and has given a finding of fact that assessee had not claimed any deduction on this account and therefore he deleted the addition. No doubt the Assessing Officer can reopen the assessment by exercising jurisdiction u/s 147 but there should be some material for assuming the jurisdiction and in recording the reasons there should be some reason to believe and that reason to believe can be based on any material. From the record of the assessment completed originally no where it is coming out that assessee had claimed any deduction on account of provision for bad debt. Therefore, in our considered view the Assessing Officer assumed jurisdiction without any material and therefore it cannot be said that



the Assessing Officer has assumed valid jurisdiction. Accordingly, we hold that there was no valid jurisdiction for recording reasons and accordingly we quash the assessment. For the sake of clarification before issuing notice u/s 148, the reasons recorded by Assessing Officer were on account of only for provision of bad debt, copy of which is placed at page 78 of the paper book. Other additional reasons were recorded during assessment proceedings. Since we have already held that assumption of jurisdiction, recording of reasons originally were not valid, therefore, entire assessment is quashed.”

12. The Tribunal also noted that the respondent/assessee had not claimed the said amount of ₹ 1,87,41,755/- in as much as the said amount had been written back by the assessee and the total deduction claimed by the respondent/assessee under the head of doubtful debts written off were only to the extent of ₹ 46,37,814/- which had not been denied by the Assessing Officer in the original assessment framed on 26.12.2008. In fact, the entire issue of the provision for bad debts was discussed by the Assessing Officer at the time of original assessment and, therefore, the Tribunal was also right in holding that the attempt to re-assess was based on a mere change of opinion.

13. With regard to the additional reasons which were recorded subsequent to the issuance of notice under Section 148 of the said Act, we have already observed that this could not have been done by the Assessing Officer. The validity of the proceedings initiated upon a notice under Section 148 of the said Act would have to be judged from the stand point of the reasons which existed at the point of time when the Section 148 notice was issued. The additional reasons cannot be provided or recorded subsequent to the issuance of notice under Section 148. It is, of course, open to the Assessing Officer, if some other information comes within his knowledge to issue another notice under Section 148 for different reasons. But that is not the case here. On the basis of the very



same notice issued under Section 148, the Assessing Officer has recorded additional reasons subsequent to the issuance of notice and this is impermissible in law.

14. Before parting with this matter, we would also like to point out that the Assessing Officer has not dealt with this matter in the proper manner. In the order rejecting the objections as also in the assessment order under Section 147/143(3) dated 08.12.2010 the Assessing Officer has stated the reasons for reopening the income tax assessment to be as under:-

“REASONS RECORDED BY THE ASSESSING OFFICER BEFORE ISSUE OF NOTICE U/S 148:

The reasons for reopening the income tax assessment of the company for assessment year 2006-07, is furnished hereunder:-

“Assessment in this case was completed under section 143(3) on 26.12.2008 at an income of ₹ 16,73,26,015/- as against the returned income of ₹ 16,67,22,015/-. Scrutiny of income tax assessment records revealed that:-

- (a) Assessment in this case was completed under section 143(3) on 26.12.2008 at an income of ₹ 16,73,26,015/- as against the returned income of ₹ 16,67,22,015/-. Scrutiny of income tax assessment records revealed that in computation of income of the assessee had deducted ₹ 1,87,41,755/- on account of provision for doubtful debts no longer required written back but in the P & L account this amount was not added to the other income. This mistake resulted in under assessment of income by ₹ 1,87,41,755/- involving tax effect of ₹ 63,08,473/-.

In view of the above, I have reasons to believe that the income of ₹ 1,87,41,755/- chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income Tax Act, 1961.

- (b) Assessee had long term capital gain of ₹ 14,34,71,150/-, therefore, balance unabsorbed depreciation of ₹ 6,85,19,358/- (₹ 8,95,82,795/- minus ₹ 2,10,63,437/-) should also have been set off from long term capital gain. But the same amount was not set



off from the long term capital gain. The mistake resulted in excess carry forward of unabsorbed depreciation of ₹ 6,85,19,358/- involving potential tax effect of ₹ 76,87,873/-.

- (c) The Assessing Officer had disallowed ₹ 16,23,073/- in relating to expenditure under section 14A related to exempt dividend income of ₹ 3,54,28,042/- instead of correct figure of ₹ 3,17,48,567/- as per the provisions of section 14A read with Rule 8D. The mistake resulted in under assessment of income of ₹ 3,02,90,115/- involving tax effect of ₹ 1,28,33,604/-.

In view of the above, I have reasons to believe that the income of ₹ 6,85,19,358/- and ₹ 3,02,90,115/- aggregating to ₹ 9,88,09,473/- chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income Tax Act, 1961.”

15. It will be seen from the above extract that what the Assessing Officer had done was that he had combined the original recorded reasons and the additional reasons and shown it as one set of reasons. There is no document on record which purports to be the reasons wherein the above-extracted three sub-paragraphs (a), (b) and (c) have been set out together. In fact, the purported recorded reasons dated 19.01.2010 comprise of two paragraphs numbered as “01” and “02”. The purported additional reasons also comprise of two paragraphs “01” and “02”. It is only in the additional reasons, in paragraph “01” that two sub-paragraphs are referred to as “(a)” and “(b)”. It is, therefore, clear that the Assessing Officer has conjured up a different set of reasons by combining the original reasons and the additional reasons allegedly recorded sometime in October 2010. This is impermissible and does not behove of the Assessing Officer who is supposed to be fair to the department as also to the assessee and to be honest to the record!

16. The Assessing Officer was also wrong in stating that the reasons as indicated by him involving three issues had been recorded before issuance of the



notice under Section 148. To make it clear, the reasons recorded prior to the issuance of the notice under Section 148 pertained only to the issue of bad debts. The other purported reasons pertaining to the issues of unabsorbed depreciation and disallowance under Section 14A of the said Act were, admittedly, recorded after the issuance of notice under Section 148.

17. In view of the foregoing, no interference with the impugned order by the Tribunal is called for as it does not raise any substantial question of law. We make it clear that, in view of the fact that we found that the Tribunal was right in concluding that the proceedings under Section 147/148 were itself bad, we have not examined the merits of the issue with regard to the carry forward of unabsorbed depreciation.

18. The Appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

APRIL 26, 2013

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