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

\+ ITA 401/2024

PR. COMMISSIONER OF INCOME
TAX-7, DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishabh Nangia, JSCs & Mr. Nikhil Jain, Adv.

versus

SHREE BALKISHAN AGARWAL GLASS
INDUSTRIES LTD .....Respondent

Through: Mr. Aditya Kumar Garg, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 30.07.2024

CM APPL. 42916/2024 (828 Days Delay in Refiling)

Bearing in mind the disclosures made, the delay of 828 days in refilling the appeal is condoned.

Application stands disposed of.

ITA 401/2024

1. The Principal Commissioner impugns the order of the **Income Tax Appellate Tribunal**[1] dated 21 September 2020 and posits the following question for our consideration:

> "A. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in deleting the addition made by the Ld. AO u/s 68 of the Income Tax Act merely on the fact that there is typographical error in re-opening the case u/s 148 of the Act whereas the AO has duly considered to return of Income

[1] Tribunal

of the assessee in the Assessment order while computing the assessed income of the Assessee?"

2. It becomes pertinent to note that although the initiation of reassessment had been upheld by the **Commissioner of Income Tax (Appeals)**[2], the Tribunal has on an overall consideration of the facts as placed before it, come to fault the initiation of action under Section 148 of the **Income Tax Act, 1961**[3] itself.

3. It becomes pertinent to note that insofar as the validity of commencement of reassessment was concerned, the CIT(A) had rendered the following findings:

> **"2.6** Thus, all these decisions have clearly stated that where specific information is received by AO from the investigation wing and the AO applies his mind on such information and forms a reason to believe that income has escaped assessment, then reopening of the assessment will be a valid reopening. Considering above and taking the fact into consideration that the A.O. has issued the notice under section 148 after obtaining the statutory approval of the JCIT. Further the A.O. has also duly disposed the objection of the appellant against issue of notice vide order dated 07.11.2012, hence it is held that the case under consideration has been duly reopened after complying the provision of section 147 to 151 of the Act and order under section 147/143(3) dated 28.03.2013 is a legally valid order . Accordingly the additional ground and the ground no 1 to 4 taken by the appellant is dismissed."

4. The Tribunal has, however, taken note of a discrepancy appearing in the format which was prepared for the purposes of obtaining approval and where the **Assessing Officer**[4] had made a disclosure that no return had been filed. Undisputedly, a return filed along with audited account statements had been submitted for the concerned **Assessment Year**[5].

[2] CIT(A)
[3] Act
[4] AO
[5] AY

5. Thus, even if we were to proceed on the basis that the recital appearing under serial 7 of the format was a typographical error, we are still faced with the following conclusion recorded by the Tribunal:

> "**25.** A perusal of the above shows that at clause 7(a) the AO has categorically mentioned that no return has been filed by the assessee. However, a perusal of the paper book page 1 shows that the assessee has duly filed its return of income on 31.3.2006 declaring total loss of Rs.2,79,76,596/- vide receipt number 0851001128. A perusal of Page 3 of the paper book shows that the return was processed under section 143(1) on 26th July 2006. Thus, it is seen that the AO had no occasion to go through the return filed by the assessee along with the audited accounts before recording reasons and has mentioned that no return has been filed while reopening the assessment and the ld. Addl. CIT, without application of mind, has simply mentioned, "I am satisfied that this is a fit case for issue of notice under section 148." The Hon'ble Bombay High Court in the case of Kalpana Shantilal vs ACIT 100 CCH 0165 has held that sanction granted by higher authority for issuing of reopening notice had to be on due application of mind and it could not be mechanical approval without examining proposal sent by AO. The Hon'ble Delhi High Court in the case of Yum Restaurants Ltd. vs Dy. Director of Income Tax 99 CCH 232 has held that where authorities appear to have concurred with reasons for reopening assessment without applying their mind, reopening of assessment would be invalid. The Hon'ble Bombay High Court in the case of Ankita A. Choksey vs. Income Tax Officer And Others (2019) 411 ITR 207 (Bom) has held that condition precedent for issue of notice for reassessment is that the reasons to believe that income has escaped assessment must be based on correct facts. Notice based on wrong facts is without jurisdiction and has to be quashed. The Delhi Bench of the Tribunal in the case of DCIT vs. M/s KLA Foods (India) Ltd. and Others, vide ITA No.2846/Del/2015, order dated 8th April 2019, has held that condition precedent for issue of notice for reassessment is that reason to believe that income has escaped assessment must be based on correct facts. Notice based on wrong facts is without jurisdiction and is to be quashed. The Hon'ble Delhi High Court in the case of PCIT vs. M/s SNG Developers Limited, 404 ITR 312, has held that condition precedent for issue of notice for reassessment is that the reason to believe that income has escaped assessment must be based on correct facts. Notice based on wrong facts is without jurisdiction and has to be quashed. The above decision of the Hon'ble High Court was challenged by the Revenue before the apex court and the apex court dismissed the SLP vide SLP No.42379/2007, order dated 9th February 2018. Since, in the instant case, although the assessee has filed return of income which

was processed u/section 143(1), however, the AO proceeded to reopen the assessment by mentioning that no voluntary return has been filed by the assessee and, thus, proceeded to reopen the assessment on wrong appreciation of facts on record.

26. We further find the Hon'ble Delhi High Court in the case of BPTP vs PCIT, vide Writ Petition No. 13803/2018, order dated 11th January 2020, has held that if the AO has failed to perform its statutory duty, he cannot review his decision and reopen on a change of opinion. The reopening is not an empty formality. There has to be relevant tangible material for the AO to come to the conclusion that there is escapement of income and there must be a live link with such material for the formation of the belief. Merely using the expression 'failure on the part of the assessee to disclose fully and truly all material facts' is not enough. The reasons must specify as to what is the nature of default or failure on the part of the assessee. Similarly The Hon'ble Bombay High Court in the case of Anand Developers vs. ACIT, vide Writ Petition No. 17/2020, order dated 18th February, 2020 has held that a mere bald assertion by the AO that the assessee has not disclosed fully and truly all material facts is not sufficient. The AO has to give details as to which fact or the material was not disclosed by the assessee leading to its income escaping assessment otherwise the reopening is not valid.

27. Thus, we agree with the argument of the ld. Counsel for the assessee that the reason to believe that income has escaped assessment is not based on correct facts and the approval has been given in a mechanical manner and, therefore, such notice based on wrong facts and the approval given in a mechanical manner make the re-assessment proceedings invalid being not in accordance with law. Accordingly, we hold that the re-assessment proceedings initiated by the AO are not valid in the eye of law. Accordingly, the same is directed to be quashed. Since the assessee succeeds on this preliminary legal ground, the other legal grounds as well as the ground on merit, in our opinion, do not require adjudication being academic in nature. In the result, the appeal filed by the assessee is allowed"

6. It is thus, apparent that the Tribunal found that notwithstanding what was described to be a typographical error, the AO had failed to rest its opinion on a perusal of the return or the audited accounts which had been filed. Thus, viewed from that angle, as well as what came to be recorded by the CIT(A), and which too stood restricted to an investigation report as opposed to an independent application of

mind, we find no error in the ultimate view taken by the Tribunal.

7. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

JULY 30, 2024/kk