

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.1163/Bang/2018
Assessment year : 2007-08

Murudeshwar Power Corporation Ltd., 14, 7 th Floor, Naveen Complex, M.G Raod, Bengaluru. PAN – AADCM 8818 Q.	Vs.	The Asst. Commissioner of Income-tax, Circle-4(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri S Sukumar, Advocate
Revenue by	:	Smt. Swapna Das, JCIT

Date of hearing	:	09.05.2019
Date of Pronouncement	:	21.06.2019

ORDER

Per B.R Baskaran, Accountant Member

The appeal filed by the assessee is directed against the order dated 29/12/2017 passed by Id CIT(A)-4, Bengaluru and it relates to asst. year 2007-08.

2. The assessee, interalia, is challenging the validity of reopening of the assessment u/s 148 of the Act.

3. The facts relating to the case are stated in brief. The assessee company is engaged in the business of generation of power. It filed its

return of income for the year under consideration admitting Nil income. The same was processed u/s 143(1) of the Act. Subsequently, the AO reopened the assessment by issuing notice dated 27/3/2014 u/s 148 of the Act. The assessee filed a letter stating that the return of income originally filed by it may be considered as the return filed in response to the notice issued u/s 148 of the Act. The AO completed the assessment by making an addition of Rs.52 lakhs u/s 69C of the Act substantially and u/s 69B of the Act protectively.

4. The facts which led to the reopening of assessment is stated in brief. The AO reopened the assessment by recording the following reasons which was supplied to the assessee vide letter dated 12/2/2015 of the AO.

"The search and seizure proceedings was initiated u/s. 132 of the IT Act in the of M/s.RNS Infrastructure Ltd. It has been ascertained from the records seized in the premises that there is a sundry payment of Rs.52,00,000/- in the case of M/s Murudeshwar power Corporation Ltd. for the AY 2007-08, which has escaped tax."

It can be noticed that the revenue carried out search operations in the hands of M/s RNS Infrastructure Ltd and during the course of search, it was noticed that there was a sundry payment of Rs.52.00 lakhs in the case of the assessee for the year under consideration. Based on the above said information, the assessing officer has reopened the assessment.

5. The assessee objected to the reopening of the assessment and the said objection was disposed of by the AO by passing a separate order u/s 152 of the Act. For the sake of convenience we extract below the order passed by the AO.

Order u/s 152 of the Income-tax Act. 1961

01. *The assessment in the assessee's case was reopened for the assessment year 2007-08 after forming a belief that income chargeable to tax has escaped assessment which was duly recorded and the sanction under section 151 of the Income-tax Act was obtained from the Additional Commissioner of Income-tax Thereafter, a notice u/s 148 was issued on 27/03/2014 which has been duly served on the assessee.*

02. *In response, the assessee acknowledged the receipt of notice on 28/03/2014 vide letter dated 23/04/2014 filed on 24/04/2014 . In this letter, it was stated that the return filed on 29/10/2007 may be treated as return in response to the said notice.*

03. *The copy of the assessee's letter dated 23/04/2014 and 16/10/2014 are annexed to this order for facility of ready reference, Thereafter, vide letter dated 22/10/2014, It was claimed that a copy or the reasons recorded had been sought on 23/04/2014 which is evidently incorrect.*

04. *The Hon'ble Supreme Court had in the land mark judgment in the case of M/sGKN Drive Shaft Ltd. held on receipt of a notice u/s 148, the assessee is expected to comply with the terms of notice. This means a statutory form has to be filled and duly verified. The departmental e-filing website also provides for an option to e-file the return of income in response to a notice u/s 148.*

05. *The aforesaid judgment cast an obligation on the department to furnish the reasons recorded and need any objections raised after the initial compliance by the assessee and before continuing with the assessment proceedings. In the instant case, the assessee has failed to comply with its obligations laid down statutorily as well as judicially. In this context, the company which is ably assisted by internal auditors, statutory auditors, tax auditors and other professionals would have to reckon with the provisions of sections 144, 234A(3), 234(3) and 276CC of the IT Act,*

06. *Considering the time limitations Involved as well as in the interest of equity and natural justice, the copy of the reasons were furnished in good faith to enable the assessee to meet the assessment proceedings. As against this approach, the assessee has sought to raise objections on grounds which are also met hereunder.*

07. *The highlighting of the word 'reassess' In a statutory notice which is served in a non-statutory form does not render the proceedings void, Secondly,- there was no requirement to enter into a surmise when the assessing officer was more than fair in providing the reasons wherein it was not even due. Thirdly, for the purposes of the assessee's record, a copy of the approval dated 27/03/2014 is also enclosed to substantiate the fact-that a valid and legal notice was served*

08. *Having dealt with a technical objections, the substantive objection that alleged sundry payments appearing In the seized material of another entity would not form bearing on the assessment of the assessee's company Is pre-mature. The said seized material unless been proved to be not forming part of the accounting transactions of the said entity would continue to have evidentiary value. Once the payment is recognized in the hands of the other entity and the assessee in question has not reflected the same In its return of Income there arises a reason to believe that income chargeable to tax has escaped assessment. In the event, the assessee establishes that it had no role in the said transaction', then the assessment of such income could be dropped. In the absence of the assessee not leading evidence to the contrary, the assessment of such Income would be feasible. Thus, there is a difference of evidentiary value for the purpose of forming a reasonable belief for initiating assessment proceedings as against the actual assessment of income. Therefore, this objection is not tenable.*

09. *The assessee is yet to file the return of Income and requires that a copy of the seized material be provided. The source of any Information need not be divulged, Further, It is only when a document is used in the course*

of an assessment that the same needs to be shared within the terms of the provisions of section 142. In the instant case, the assessee is actually travelling towards an assessment u/s 144 wherein it would become rather difficult to provide data even before a decision on the assessment is taken.

*10. Last but not the least, the assessee contends that the reasons are not elaborate and therefore no reasonable relief to be found. The quantum of words used; does not define the reasonability of the formation of belief, The crux of the matter is the content. **In the instant case, it is clear that assessee is in receipt of Rs.52 lakhs from M/s RNS Infrastructure Ltd., which has not found place in the books. Accordingly, a reason to believe exists beyond doubt.***

11. The objections raised have been disposed of in accordance with the verdict of the Hon'ble Supreme court in the case of MIs GKN Drive Shaft Ltd."

Accordingly, the assessing officer rejected the objections of the assessee and completed the assessment by adding Rs.52.00 lakhs to the total income of the assessee.

6. The Id CIT(A) also confirmed the validity of reopening and hence assessee is challenging the same before us.

7. We heard the parties on this legal issue and perused the record. A reading of reasons recorded by the AO for reopening of assessment would show that the AO has mentioned that "there is sundry payment of Rs.52 lakhs in the case of the assessee for assessment year 2007-08". The said information has been obtained during the course of search and seizure proceedings conducted in the hands of M/s RNS Infrastructure Ltd. The reasons recorded is not clear as to whether the above said amount of

Rs.52 lakhs was paid by the assessee to M/s RNS Infrastructure Ltd., or the same received by the assessee from the above said company.

8. In the order passed to reject the objections of the assessee (passed u/s 152 of the Act, which is extracted above), it can be noticed that the assessing officer has observed in paragraph 10 that the assessee has received the above said sum of Rs.52 lakhs from M/s RNS Infrastructure Ltd., and the same has not been accounted for by the assessee. However a perusal of the assessment order, more particularly paragraph 3 of the same, would show that the AO has mentioned that the assessee has made payment of Rs.52 lakhs to M/s RNS Infrastructure Ltd. For the sake of convenience we extract below the relevant observations made by the AO.

“03. It was seen from the material found during the course of search in the case of M/s RNS Infrastructure Ltd. that during the assessment year 2007-08, a sum of Rs.52 lakhs had been recorded as sundry payments made to M/S RNS Infrastructure Ltd. and not accounted in the books. In response to the notices issued, the assessee had originally contested the re-assessment proceedings which have been met with an order u/s 152 of IT Act dated 20/02/2015. Thereafter, it has furnished details of various payments made to M/s RNS Infrastructure Ltd. It is seen from these extracts that these amounts relate to accounted transactions which have been routed through banking channels or through instruments such as telegraphic transfers. Accordingly, the sum of Rs.52 lakhs does not find a place in the assessee's books of accounts as well. Accordingly, this sum of Rs.52 lakhs is found to be an unexplained expenditure or an unexplained investment as neither the assessee nor M/s RNS Infrastructure Ltd. have confirmed the nature of transactions it pertains to. Accordingly, considering the time limitation factors, the provisions of Section 69C of IT Act are Invoked substantively and the provisions of section 69B are invoked protectively and the above said amount of Rs.52 lakhs has been brought to tax.”

9. It can be noticed that the assessing officer was not sure as to whether the impugned amount was received by the assessee or paid by the assessee at the time when he recorded the reasons for reopening. Under the provisions of sec.147 of the Act, the assessing officer should have reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Then only, he can resort to reopening of assessment.

10. In the instant case, we notice that the assessing officer has received information about some money transaction between the assessee and M/s RNS Infrastructure Ltd. As noticed earlier, the assessing officer is not aware as to whether the impugned money transaction is a case of payment made by the assessee or payment received by the assessee. Further, the assessing officer has also no information, at the time of reopening the assessment as to whether the said money transaction was accounted by the assessee or not. Without these details, in our considered view, the assessing officer could not have reached belief that the income has escaped the assessment in the hands of the assessee.

11. It is well settled proposition of law that the assessing officer is not entitled to reopen the assessment for making fishing enquiries. Following observations made by Hon'ble Gujarat High Court in the case of Pr. CIT vs. Dineshkumar Shah (Tax Appeal No.451 of 2018) supports this proposition:-

"It is well settled that even in case where the original assessment is made without scrutiny, the requirement of the Assessing Officer forming the belief that income chargeable to tax has escaped assessment, would apply. Reference in

this respect can be made of the judgment in case of Inductotherm (India) P. Ltd. v. M. Gopalan, Deputy Commissioner of Income Tax reported in [2013] 356 ITR 481 (Guj). It is equally well settled that the notice of reopening can be supported on the basis of reasons recorded by the Assessing Officer. He cannot supplement such reasons. The third principle of law which is equally well settled and which would apply in the present case is that reopening of the assessment would not be permitted for a fishing or a roving inquiry. This can as well be seen as part of the first requirement of the Assessing Officer having reason to believe that income chargeable to tax has escaped assessment. In other words, notice of reopening which is issued barely for making fishing inquiry, would not satisfy this requirement.”

12. Hence we are of the view that the assessing officer did not have reason to believe that the income has escaped assessment in the hands of the assessee. In our view, the AO has reopened the assessment only to make fishing enquiries, which is not permitted. Accordingly we are of the view that the reopening of assessment is bad in law. Accordingly we quash the orders passed by the tax authorities.

13. The assessee has also raised certain other legal issues. Since we have quashed the assessment order, we do not find it necessary to address them, as the same would be rendered academic in nature.

14. In the result, the appeal of the assessee is treated as allowed.

Order pronounced in the Open Court on **21st June, 2019.**

**Sd/-
(Pavan Kumar Gadale)
Judicial Member**

**Sd/-
(B.R Baskaran)
Accountant Member**

Bangalore,
Dated, 21st June, 2019.

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
10. Date on which the file goes to the Head Clerk
11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.