

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No. 2232/Ahd/2017
(Assessment Year : 2008-09)

Nandam Exim Limited,
Survey No.198, 203/2, Saijpur –
Gopalpur, Pirana Road, Piplaj
Ahmedabad – 382 405.

Vs. DCIT,
Circle – 3(1)(1),
Ahmedabad.

[PAN No. AAACN 5327 L]

(Appellant)

..

(Respondent)

Appellant by : Shri S. N. Soparkar & Urvashi Sodhan, A.R.
Respondent by : Shri Mudit Nagpal, Sr. D.R.

Date of Hearing 18/10/2019
Date of Pronouncement 19/11/2019

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the assessee is directed against the order dated 07.10.2016 passed by the Commissioner of Income Tax (Appeals) - 9, Ahmedabad arising out of the order dated 30.06.2015 passed by the Learned DCIT, Circle-3(1)(1), Ahmedabad under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred as to “the Act”) for the Assessment Year 2008-09.

2. The assessee herein has challenged inter alia the reassessment proceeding initiated u/s 147 of the Act and the resultant effect thereof.

3. The brief facts leading to this case is this that the assessee engaged in the business of manufacturing of denim, bottom weight cotton, garments, yarn and trading of fabrics, filed its original return of income on 22.10.2008 declaring income at Rs.4,12,18,090/- for A.Y. 2008-09 which was finalized on 29.03.2010 by the Assessing Officer by assessing income at Rs.4,43,25,750/-. Subsequently, notice u/s 148 dated 22.08.2014 was issued whereby and whereunder the case of the assessee was reopened for A.Y. 2008-09. In response to the notice dated 22.08.2014, the assessee on 24.09.2014, submitted that the return filed on 31.10.2008 be treated as return filed in compliance to notice u/s 148 of the Act. Subsequently, the assessee was provided with a copy of reason recorded for such reopening by and under a letter dated 01.06.2005. Finally, the assessee's income was reassessed at Rs.4,62,18,100/- on 30.06.2015 by the DCIT, Circle – 3(1)(1), Ahmedabad u/s 143(3) r.w.s 147 of the Act, which was in turn, confirmed by the Learned CIT(A), hence the appeal before us.

4. At the time of hearing of the instant appeal, the Learned Counsel appearing for the assessee submitted before us that the validity and/or the maintainability of the initiation of proceedings u/s 147 of the Act and issuance of notice dated 22.08.2014 u/s 148 of the Act suffers by limitation. Since the issuance notice u/s 148 is beyond the period of 4 years from the end of the relevant assessment year, for which, the assessment was completed u/s 143(3) of the Act, the notice was bad in law, illegal and barred by limitation and therefore, the entire reassessment proceedings deserves to be quashed. Further that, it is a settled principle of law that no action shall be taken u/s 147 of the Act after 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 of income u/s 139 of the Act or to disclose fully or truly all material facts necessary for his assessment. No such failure on

the part of the assessee either in compliance of provisions of Section 139, 142(1) or in disclosing truly and fully all material facts necessary for the such assessment for A.Y. 2008-09 reflected in the reasons recorded by the Assessing Officer while reopening the assessment which would suggest escapement of income and thus issuance of such notice is bad and illegal in the eyes of law. In this respect Learned Senior Counsel relied upon the judgment passed by the Hon'ble Jurisdictional High Court in the case of Kanak Fabrics-vs-ITO reported in [2014] 49 taxmann.com 108 (Gujarat). On the other hand, Learned DR relied upon the order passed by the authorities below u/s 143(3) r.w.s 147 of the Act.

5. Heard the respective parties, perused the relevant materials available on record. It appears from the records that the return of income was filed originally u/s 139(1) of the Act on 31.10.2008 for A.Y. 2008-09 showing net taxable profit of Rs.4,12,18,090/-. Such original assessment was completed u/s 143(3) of the Act on 29.03.2010 and the total income was computed at Rs.4,43,25,750/-. The Learned AO made the following addition:

i.	On account of under valuation	Rs.10,88,079/-
ii.	On account of disallowance of interest u/s 14A of the Act	Rs.13,11,030/-
iii.	On account of depreciation on Motor Car	Rs. 6,19,251/-
iv.	Insurance	<u>Rs. 89,300/-</u>
	The returned income	Rs. 4,12,18,090/-
	Total	<u>Rs.31,07,660/-</u>

It is relevant to mention that the said addition was deleted by the Learned CIT(A) in appeal except addition of Rs.10,88,079/- in respect of under valuation of closing stock and addition of Rs.89,300/- on account of insurance on new Motor Car.

We have also gone through the reasons recorded for reopening of the assessment dated 22.08.2014 available at Page 84 of the Paper Book which is as follows:

“As per the section 43A of the Income Tax Act, 1961, gain or loss due to exchange rate fluctuation on repayment of borrowed capital or interest during any previous year after acquisition of such asset shall be reduced from the cost of the asset acquired with such borrowed capital.

It was observed from the profit and loss account that foreign exchange rate difference of Rs.44,18,355/- (net) was debited to the profit and loss account under manufacturing and operating expenses. As per the break up of this expense, assessee had incurred expense of Rs.45,12,971/- on foreign exchange fluctuation (FEF) on fixed asset at Sr. No.5 of the notes forming part of the accounts it was disclosed the FEF up to the date on which the assets were ready was charged to profit and loss account. In view of the provisions of section 43A of the Act, cost of the asset required to be increased to the extent of loss in FEF, which was not done resulting in underassessment of income of Rs.38,36,025/- after providing for depreciation of Rs.6,76,946/- @ 15% on expense of Rs.45,12,971/-, required to be added to the cost of asset. Incidentally, during the previous year 2006-07 relevant to A.Y. 2007-08, the FEF gain of Rs.50,34,115/- was reduced from the cost of asset and not credited to the profit and loss account.

In light of the facts recorded above, there is reason to believe that income of the assessee has escaped assessment for A.Y. 2008-09. Issue Notice u/s 148 of the I.T. Act”

In reply, the assessee submitted an objection against the said reopening of assessment on 16.06.2014 before the Learned AO which is available at page 85 to 96 of the Paper Book before us.

Admittedly, the end of the relevant assessment year is as on 31.03.2009 and the assessment was completed u/s 143(3) on 29.03.2010. According to the provision of section 147 of the Act, the reopening notice could have been issued within the period of 4 years from the end of the A.Y. i.e. by 31.03.2009. Further that the proviso of section 147

provides that where an assessment u/s 143(3) has been made for the relevant assessment year, no action shall be taken under section 147 after the expiry of 4 years from the end of 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 of income u/s 139 having not been disclosed fully and truly all materials facts necessary for his assessment. Since reopening is required to be done within 4 years from the end of relevant assessment year, the last day available for initiation of such reassessment proceeding was on 31.03.2013 whereas it is admitted position that the Learned AO has issued a notice u/s 148 on 28.08.2014. Apart from that as it appears from the records that the details from Foreign Exchange Fluctuation was submitted by the assessee during the course of assessment proceeding by the assessee by and under a letter dated 19.03.2010 and further that Serial No.5 of the notes forming part of accounts states the fact that Foreign Exchange Fluctuation pertaining the fixed asset has been charged to profit and loss account; the same was also available in audit report of the company submitted at the time of original assessment proceeding u/s 143(3) of the Act. The relevant portion as available in the Paper Book before us is as follows:

“5. Foreign exchange fluctuation loss of Rs.45,12,971/- in respect of fixed assets, pertaining to the year up to the date on which the assets are ready for its intended use have been debited to Profit and Loss account (Previous Year gain of Rs.5,0,34,115/- reduced from the cost of Fixed Assets.) Foreign Exchange gain of Rs.12,73,861/- (Previous Year Rs.2,776,975/-) in respect of Exports included in Sales and Operating income. Foreign Exchange Loss amounting to Rs.1,179,245/- (Previous Year gain Rs.7,91,269/-) in respect of various items is debited to profit and loss account.”

It also appears from records that during the course of assessment proceeding u/s 143(3) of the Act, the assessee company has submitted tax and audit report and also the books of accounts which was verified by the Learned AO. Thus the necessary materials

which were called for duly submitted by the assessee before the Assessing Officer during the course of original assessment proceeding. Taking into consideration the entire aspect of the matter, it can be observed that no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment was found so as to suggest escapement of income and therefore issuance of notice u/s 148 of the Act is bad in law; it is nothing but the change of opinion. It is relevant to mention here that the Statutory audit accounts under the Companies Act, as well as Tax Audit Report in Form 3CA & 3CD were also made available to the Learned AO. Upon considering those aspect the addition of Rs.31,07,660/- was made finalizing the original assessment on 29.03.2010 u/s 143(3) of the Act. It is the primary duty of the assessee to disclose necessary details of basic material for assessment and once the same is furnished it is the prerogative to the Assessing Officer as to why inference is required to draw from the details provided by the assessee. It is not the duty of the assessee to lead the Assessing Officer to any particular inference or fact or on law on the basis of such primary disclosure.

6. We have further carefully considered the judgment relied upon by the Learned Advocate passed by the Jurisdictional High Court in the case of Kanak Fabrics wherein upon perusal of reasons recorded it showed that there was not even a whisper to effect that income has escaped assessment on account of any failure on part of assessee to disclose fully and truly all material facts necessary for its assessment. Even in affidavit-in-reply filed by the Revenue, there was no allegation of any such failure on the part of the assessee. Thus it was held that in the absence of satisfaction recorded by the Learned AO, assumption of jurisdiction u/s 147 was invalid and consequently, notice issued u/s 148 could not be sustained. We, thus give a finding firstly that the notice u/s 148 of the Act issued on 22.08.2014 i.e. after the expiry of the period of 4 years from the end of the A.Y. 2008-09. The last day available for initiation of re-assessment proceeding was on

31.03.2013. Thus we find that assessment can only be reopened beyond the period of 4 years if and only if an income chargeable to tax as escaped assessment by reason of failure on the part of the assessee.

- i. to make a return u/s 139 or in response to notice under sub section 1 of section 142 or section 148 or
- ii. to disclose fully and truly all material facts necessary for his assessment for Assessment year.

It is an admitted position that the instant case in hand, the first situation does not arise. Further that consequently there is nothing in the reason for recording reassessment indicating that there is any failure of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration, thus we find that in the aforesaid premises the assumption of jurisdiction u/s 147 of the Act by issuing notice u/s 148 of the Act is without jurisdiction, particularly, when the Assessing Officer failed to record his satisfaction that the income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. We, thus find assumption of jurisdiction u/s 147 is invalid, bad in law and thus the same is hereby quashed. Thus, assessee's appeal is, therefore, allowed.

6. In the result, assessee's appeal is allowed.

This Order pronounced in Open Court on

19/11/2019

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad; Dated 19/11/2019
TANMAY, Sr.PS

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-9, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad