

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 616/VIZ/2018
(Asst. Year : 2010-11)**

Reddipalli Srinivas,
D.No. 17-11-4AB,
Opp. : Sai Baba Temple
Street, Revenue Colony,
Samabamurthy Nagar,
Kakinada.

vs. ACIT, Central Circle-1,
Visakhapatnam.

PAN No. AFMPR 7649 F
(Appellant)

(Respondent)

Assessee by : Shri G.V.N. Hari – Advocate.
Department By : Shri B.Rama Krishna, Sr.DR

Date of hearing : 10/12/2019.
Date of pronouncement : 10/01/2020.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-3, Visakhapatnam, dated 24/08/2018 for the Assessment Year 2010-11.

2. There is a delay of 32 days in filing this appeal. The assessee has filed a notarized affidavit by explaining the delay in filing the appeal. We have gone through the affidavit and find

that there is a sufficient cause to condone the delay. Accordingly, delay is condoned.

3. The grounds raised in this appeal are as follows:-

Sl.No.	Grounds of appeal	Tax effect relating to each ground of appeal
1.	The order of the Id. CIT(A)-3, Visakhapatnam is contrary to the facts and also the law applicable to the facts of the case	---
2	The notice issued u/s.148 is not in accordance with law and is liable to be quashed and consequently the entire re-assessment proceedings are liable to be cancelled as void-authorities below-initio.	---
3	Without prejudice to the above, the Id. CIT(A)-3, Visakhapatnam is not justified in partly sustaining the addition of Rs. 56,19,351/- out of the total addition of Rs. 1,03,23,682/- made by the Assessing Officer towards labour charges	17,07,158/-
4	Any other ground that may be urged at the time of appeal hearing.	---
Total tax effect		17,07,158/-

4. Facts of the case, in brief, are that there is a survey operation in the case of the assessee. Before the Assessing Officer, the assessee has stated that as per the register maintained by him, a total expenditure incurred was Rs.11,53,77,094/- and not as Rs. 9,94,34,061/-. When the Assessing Officer asked the assessee to explain the difference, it was submitted that he was uneducated and registers are maintained by his supervisors, therefore, as per the registers maintained by one of the Supervisor, total expenditure is

Rs.11,53,77,094/-. The Assessing Officer after considering the explanation of the assessee and as admitted before the survey team, the total expenditure has been considered only Rs.9,94,34,061/-. The assessee has brought a new theory and therefore the total expenditure incurred by him of Rs.11,53,77,094/- cannot be considered, hence addition of Rs.1,59,53,033/- was made, by order dated 28/03/2013 u/sec. 143(3) r.w.s. 153C of the Act. Subsequently, the Assessing Officer on 23/03/2017 issued a notice u/sec. 148 to the assessee for reopening the assessment on the ground that there is an escapement of income by recording the following reasons:-

"During the course of survey u/s 133A of the I.T. Act, 1961 on 24.11.2010 in the business premises of the firm M/s Veer Enterprises where the assessee Sri Reddipalli Srinivas is a Managing Partner and materials pertained to the assessee is found and impounded as annexed VEI70 that the assessee has labour charge payable of Rs 13,56,741/- where as shown in the balance sheet at Rs 2 05 22 103/- for the Asst. Year 2010-11. In the sworn statement in course of survey u/s 133A of the I.T. Act, he was asked to reconcile but could not reconcile Rs.1,50,00,000/- and admitted to be claimed excess of payable in the return of income Further on reconciliation of the above figures it is found that he has claimed to be paid labour charge of Rs.9,94,34,061/- whereas he claimed Rs. 11,53,77,094/- in the return of income for the Asst. Year 2010-11. From the above materials, facts and figure found in course of survey it is ascertained that assessee has inflated labour charges of Rs.1,59,43,033/- (Rs.11,53,77,094 – Rs. 9,94,34,061) for the Asst. Year 2010-11 in the case of assessee individual.

In view of the above, I have reasons to believe that income chargeable to tax in the hands of the assessee has escaped assessment within the meaning of section 147 of the I.T. Act,

1961 for the AY 2010-11."

Assessment is completed u/sec. 143(3) r.w.s. 147 of the Act dated 31/10/2017.

5. The assessee challenged the reopening before the Id. CIT(A). The Id. CIT(A) simply upheld the reopening without considering the submissions made by the assessee and without considering the reasons recorded.

6. On appeal before us, Id.AR has submitted that the notice issued by the Assessing Officer dated 23/03/2017 u/sec. 148 beyond the period of four years and therefore the Assessing Officer has to establish that the assessee failed to disclose fully and truly all the material facts to complete the assessment and the reasons recorded, nowhere the Assessing Officer has stated that there is a failure on the part of the assessee. He further submitted that the reasons given by the Assessing Officer for reopening on account of payment made to the labour charges which have already been considered by the Assessing Officer dated 28/03/2013 u/sec. 143(3) r.w.s. 153C of the Act, therefore reopening of the assessment is change of opinion which is not permissible in accordance with law and submitted that notice issued may be quashed.

7. On the other hand, Id.DR strongly supported the notice issued by the Assessing Officer and also reasons recorded and submitted that there is an escapement of income therefore reopening is valid.

8. We have heard both the parties, perused the material available on record and gone through orders of the authorities below.

9. In this case, there is a survey and subsequently, assessment was completed u/sec. 143(3) r.w.s. 153C dated 23/03/2017 on account of difference of labour charges amounting to Rs.1,59,53,033/- this aspect was duly considered during the course of assessment proceedings. Now the Assessing Officer reopened the assessment by issuing the reasons. From the reading of the above reasons, the Assessing Officer nowhere said that there is a failure on the part of the assessee not only that what is the new material came to the notice of the Assessing Officer for reopening beyond the four years also not mentioned. Under these facts and circumstances of the case, we are of the opinion that once the Assessing Officer want to reopen the assessment beyond the four years, he has to satisfy the conditions laid down by the proviso to section 147 of the Act. For the sake of convenience, proviso to section 147 reads as under:-

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:

10. From the above, it is very clear that it is the duty of the Assessing Officer to establish that there is a failure on the part of the assessee to disclose fully and truly all material facts to complete the assessment, but nowhere the Assessing Officer has stated that there is a failure on the part of the assessee. That apart, nowhere in the reasons recorded what is the new material fact has come to the notice of the Assessing Officer in respect of escapement of income. The same aspect of difference of labour payments which has already been considered by order dated 28/03/2013, the very same assessment if he wants to reopen after four years which is not permissible in accordance with law.

11. In the case of *Sadbhav Engineering Ltd. vs. DCIT* in Special Civil Application no. 5846/2010, the Hon'ble Gujarat High Court has held that for the purpose of invoking section 147 after the expiry of four years from the end of the relevant assessment year, the income chargeable to tax should have escaped assessment,

inter alia by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary to complete the assessment. In the assessment order, nowhere it is indicated that the assessments are sought to be reopened by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessments relevant to the assessment year, thus, initiation of the proceedings u/sec. 147 by issuing notice u/sec. 148 after expiry of four years from the end of the relevant assessment years is bad and cannot sustain.

12. In the present case also, for the reasons recorded by the Assessing Officer u/sec. 148 nowhere he has stated that there is a failure on the part of the assessee to disclose fully and truly all material facts to complete the assessment.

13. In the case of *CIT Vs. Elgi Finance Ltd.*, [(2006) 286 ITR 674 (Mad)], the Hon'ble Madras High Court has held that as per proviso to section 147 is concerned, the law prescribes a period of four years to initiate reassessment proceedings, unless the income alleged to have escaped assessment was made out as a result of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. In the present case, the Assessing Officer has not made out there is a failure on the part of the assessee.

14. In the case of *Fenner (India) Ltd. vs DCIT* (241 ITR 672) the Hon'ble Madras High Court has held that in order to reopen the assessment after expiry of four years from the end of the relevant assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee to disclose fully and truly all material facts. Issuance of notice u/sec. 148 after expiry of four years cannot be sustained as escapement of income, if any is not on account of any failure on the part of the assessee to disclose the material facts fully and truly. In the present case, no new material fact has been considered by the Assessing Officer, only on the basis of submissions earlier, the Assessing Officer sought to reopen the assessment. The Assessing Officer not recorded any reasons that there is a failure on the part of the assessee to disclose material facts fully and truly.

15. Respectfully following the above referred to precedents, we hold that the notice issued by the Assessing Officer u/sec. 148 is beyond four years is not valid and therefore same is hereby quashed.

16 In the result, appeal filed by the assessee is allowed.

Order Pronounced in open Court on this 10th day of January, 2020.

sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated: 10th January, 2020.

vr/-

Copy to:

1. *The Assessee – Reddipalli Srinivas, D.No. 17-11-4AB, Opp.:Sai Baba Temple Street, Revenue Colony, Samabamurthy Nagar, Kakinada.*
2. *The Revenue-ACIT, Central Circle-1, Visakhapatnam.*
3. *The Pr.CIT (Central), Visakhapatnam.*
4. *The CIT(A)-3, Visakhapatnam.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.