IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.2808/Bang/2017 : Asst.Year 2008-2009

M/s.Nike India Private Limited Ground & 1st Floor, Olympia Bldg No.66/1, Bagmane Tech Park C.V.Raman Nagar Bangalore – 560 093. **PAN : AABCN9612K.**	v.	The Asst.Commissioner of Income-tax, Circle 5(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.K.R.Vasudevan, Advocate
Respondent by : Ms.Neera Malhotra, CIT-DR

Date of Hearing : 11.02.2021		**Date of Pronouncement : 15.02.2021**

O R D E R

Per George George K, JM:

This appeal instance of the assessee is directed against the assessment order dated 27.10.2017 passed u/s 143(3) r.w.s. 144C of the I.T.Act. The relevant assessment year is 2008-2009.

2. The brief facts of the case are as follow:

The assessee is a private limited company, engaged in the distribution of Nike products like footwear, apparel sports equipment and accessories in India through its distribution network and franchise partners. For the assessment year 2008-2009, the return of income was filed on 30.09.2008 declaring a loss of Rs.16,02,53,855. Assessment u/s 143(3) r.w.s. 144C(13) of the I.T. Act was completed by determining the total income of Rs.5,04,65,625, after making transfer

pricing adjustment pertaining to the share of BCCI costs paid to Nike International Limited. Subsequently, notice u/s 148 of the I.T.Act was issued and draft assessment order dated 16.12.2016 was passed by making transfer pricing adjustment of Rs.6,62,47,745 relating to reimbursement of expenses paid by the assessee to its AE, namely, Nike Inc. USA. The assessee filed objections before the Dispute Resolution Panel (DRP) against the draft assessment order dated 16.12.2016. The DRP rejected the objections raised by the assessee. Accordingly, the final assessment order was passed on 27.10.2017.

3. The assessee being aggrieved, has filed this appeal before the Tribunal. Two issues are raised in this appeal, viz.,

(i) reassessment is bad in law.

(ii) Whether the authorities were justified in making TP adjustment pertaining to reimbursement of expenses.

5. We shall first adjudicate the issue of validity of reopening of assessment. The learned AR submitted that the A.O. has reopened the assessment after expiry of 4 years from the end of the assessment year without mentioning that there is failure on the part of the assessee to disclose truly and correctly all material facts necessary for assessment. The learned AR stated that the assessee has submitted all the details relating to 'reimbursement of expenses" before the A.O/TPO during the course of assessment proceedings and the same has been accepted to be at arms length. However, the A.O. has reopened

the assessment on change of opinion only on account of a subsequent decision rendered by the Tribunal in assessee's case for assessment years 2005-2006 and 2006-2007. It was contended that the subsequent order of a court cannot be taken into consideration to come to the conclusion that there was failure on the part of the assessee to disclose all material facts necessary for assessment. In this context, the learned AR relied on the judgment of the Hon'ble Bombay High Court in the case of Sesagoa Ltd. Vs JCIT(2008) 294 ITR 101. The Ld. A.R. further submitted that it is imperative on the part of the A.O. to mention in the reasons for reopening that there was failure on the part of the assessee to disclose truly and fully all material facts, when the reopening is done after expiry of 4 years from the end of the relevant assessment year. For this proposition, the learned AR relied on the judgment of the Hon'ble Madras High Court in the case of Shri Shakti Textiles Ltd. Vs. JCIT (2010) 193 Taxmann 216.

5.1 The learned AR further submitted that the Hon'ble Karnataka High Court has held in the case of CIT Vs. Karnataka Bank (2014) 52 Tamann.com 526 that when there is no case of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and further where the assessing authority applied its mind and being satisfied with the claim had allowed the case of the assessee, the assessing authority could not have initiated proceedings u/s 147 of the Act, after the end of 4 years. He submitted that an identical view has been expressed by

coordinate in assessee's own case for assessment year 2007-2008 in IT(TP)A No.356/Bang/2017 (order dated 14.10.2020).

5.2 It was further stated that the TPO has sought all details in relation to reimbursement of expenses during the course of original assessment proceedings and the assessee also furnished the same, vide its letter dated 13.04.2011. After perusing the details so furnished the TPO/AO came to the conclusion that the 'cost to cost' reimbursement of expenses incurred by the assessee was for its own business purposes and accordingly, the transaction was considered to be at arm's length. The Ld. A.R. submitted that the TPO/AO had taken a conscious view on the matter of reimbursement of expenses during the course of original assessment proceedings. However, the AO has reopened the assessment for considering the very same issue, in view of the subsequent decision rendered by the Tribunal against the assessee in assessment year 2005-06 and 2006-07. Hence, it is a clear case of change of opinion and reopening is not permissible as held by Hon'ble Supreme Court in the case of Kelvinator India Ltd. (2010) 320 ITR 561. Accordingly, the Ld. A.R. submitted that the reopening is bad in law and accordingly, the impugned assessment order is liable to be quashed.

6. The learned Departmental Representative relied on the finding of the DRP. Further, the learned DR submitted that the reopening was done by the A.O. on account of fresh facts coming to his notice as a result of order passed by the Tribunal

against the assessee in assessment year 2005-06 & 2006-07. The learned DR submitted that the TPO has held the reimbursement of expenses to be at arm's length in the original assessment proceedings based on the explanations given by the assessee that these expenses are related to the business of the assessee. However, in assessment years 2005-06 & 2006-07, the TPO had noticed that these expenses are not related to the business activities of the assessee. The view of the TPO was upheld by the Tribunal by holding that the nature of these expenses is such that they cannot be attributed to have been solely and exclusively incurred for the distribution business of the assessee. The learned DR submitted that the order so passed by the TPO/ITAT has brought fresh facts, which were not earlier considered in the original assessment proceedings. These fresh facts have led to the AO to believe that there was escapement of assessment. Accordingly, the learned DR submitted that the reopening is valid.

7. We have heard rival submissions and perused the material on record. For the relevant assessment year, viz., 2008-2009 notice u/s 148 of the I.T. Act was issued on 27.03.2015 and served on the assessee on 30.03.2015 for initiating reassessment in respect of reimbursement of expenses paid by the assessee to its AE. Since notice has been issued only on 27.03.2015, it is clearly beyond four years from the end of the concerned assessment year. Section 147 of the I.T. Act permits the A.O. to assess / reassess the income of an entity on account of income that has escaped assessment. The

power to assess or reassess income under section 147 of the I.T. Act cannot invoked routinely unless the following conditions are satisfied :

(i) There should be `reasons to believe' that income has escaped assessment – "reason to believe cannot be change of opinion"; and

(ii) AO is barred from taking any action under this section after the expiry of four years from the end of the relevant Assessment Year in the following cases:

(a) Where an assessment under section 143(3) or 147 has already been concluded for the relevant assessment year; and

(b) There is no failure from the part of the assessee to:

Make a return under section 139

Response to notice under section 148

Disclose fully and truly all material facts necessary for the assessment.

7.1 In the instant case, there was regular assessment that was completed u/s 143(3) r.w.s. 144C of the I.T. Act on 12.07.2012. During the course of original assessment proceedings, the issue for which the assessment is sought to be reopened was subject matter of examination by the A.O. The AO/TPO in the course of original assessment proceedings, vide notice dated 25.02.2011, had directed the assessee to furnish the details with regards to the payments towards recharge of expenses amounting to Rs.6,62,47,745. In reply to the notice of the A.O., the assessee vide letter dated 13.04.2011 had

disclosed all the relevant materials with regard to the payments towards recharge of expenses. The assessee's submissions dated 13.04.2011 is placed on record (Refer page 1 to 24 of assessee's paper book dated 04.04.2018). The AO/TPO after applying his mind and considering the submissions of the assessee, had accepted the arms length price on reimbursement of expenses amounting to Rs.6,62,47,745 without making any TP adjustment towards the same. Thus, it is clear that the assessee had disclosed all the material facts during the regular assessment proceedings. The reopening of assessment proceedings has been initiated on the basis of ITAT's order pertaining to assessee's own case for assessment years 2005-2006 and 2006-2007. The reasons recorded for reopening the assessment for the relevant assessment year is placed at page 52 to 53 of the paper book filed by the assessee. On perusal of the same, it is clear that the reopening of assessment has been initiated only on the basis of the earlier Tribunal order in assessee's own case for assessment years 2005-2006 and 2006-2007. Therefore, it cannot be alleged that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

7.2 The Hon'ble Apex Court in the case of New Delhi Television v. DCIT [(2020) 116 taxmann.com 151 (SC)] had held that reopening of the assessment beyond four years is bad in law when the tax payer has disclosed the facts at the time of original assessment proceedings and the A.O. did not draw any adverse inference regarding the same.

7.3 The Hon'ble Supreme Court in the case of L & T Limited [(2020) 113 taxmann.com 48 (SC)] observed that *"there was no element of lack of true and full disclosure on the part of the assessee, which resulted into any income chargeable to tax escaping assessment. The reasons clearly reveal that the Assessing Officer was proceeding on the material which was already on record. In the absence of the statutory requirement of income chargeable to tax have been escaped assessment due to the failure on the part of the assessee to disclose truly and fully all material facts been satisfied, the Tribunal correctly held that the notice of reopening of assessment was invalid".*

7.4 The Hon'ble Karnataka High Court in the case of CIT v. Karnataka Bank [(2014) 52 taxmann.com 526 (Karnataka)] had held that when there is no case of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and further, where the Assessing Authority applied its mind and being satisfied with the claim, allowed the case of the assessee, the Assessing Authority could not have initiated proceedings u/s 147 of the Act, after the end of 4 years.

7.5 The Hon'ble Madras High Court in the case of Sri Shakthi Textiles Ltd. v. JCIT [(193 Taxman 216 (Madras)] had held that indication of assessee's failure to disclose any material facts in the reasons recorded is a legal requirement. The relevant finding of the Hon'ble High Court is as under:-

> *"The Assessing Officer ought to have examined the question as to whether there were reasons for him to believe that the escapement was due to the failure on the part of the petitioner to make true and full disclosure of the income or not. In the event of arriving at such a belief that it was because of the petitioner's failure, he should have recorded the same in the order. That is the legal requirement. Only if the twin conditions, as laid down by the Supreme Court, are satisfied by way of recording reasons for both the conditions in the order, the Assessing Officer will get jurisdiction to issue notice under section 148 after the expiry of four years from the end of the relevant assessment year. Since the same had not been done the impugned notices were wholly without jurisdiction."*

7.6 The Tribunal in assessee's own case for assessment year 2008-2009, on identical facts, had quashed the reassessment proceedings. The relevant finding of the Tribunal in assessee's own case (supra) reads as follow:-

> *"9. We heard the rival contentions and perused the record. A perusal of reasons for reopening recorded by the A.O., which is extracted above, would show that the A.O. has reopened the assessment as a result of order passed by the Tribunal in the assessee's own case for assessment years 2005-06 & 2006-07, wherein the Tribunal has upheld the transfer pricing adjustment made in respect of reimbursement of expenses. It is a fact that during the year under consideration, the TPO had held in the original assessment proceedings that the reimbursement of expenses is related to the business activities of the assessee and hence are at arm's length. Be that as it may, the undisputed fact is that reopening has been done after expiry of 4 years from the end of the assessment year, in which case the conditions prescribed in proviso to section 147 of the Act has to be satisfied by the AO before reopening of assessment. The proviso to section 147 reads as under:*
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> > "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. Hence, it is imperative on the part of the A.O. to show that there was failure on the part of the assessee to disclose fully and truly all material facts relating to the assessment. Admittedly, no such allegation has been made by the A.O. in the reasons for reopening. The Hon'ble Madras High Court has held in the case of Shri Shakti Textiles Ltd. (supra) that the A.O. should have recorded in the reasons for reopening that there was failure on the part of the assessee to make true and full disclosure. The A.O. has not recorded that there was failure on the part of the assessee in the reasons for reopening. When there is no failure on the part of the assessee, the reopening after expiry of four years is bad in law as held by Hon'ble jurisdictional Karnataka High Court in the case of Karnataka Bank (supra).

11. In any case, we notice that the TPO/AO has taken a conscious decision on this issue on the basis of explanations furnished by the assessee. Having taken a conscious decision, it is not permissible for the AO to take a different view on the basis of subsequent decision of the Tribunal, after expiry of four years from the end of the relevant assessment year. The decision rendered by Hon'ble Bombay High Court in the case of Sesa Goa Ltd (supra) supports the case of the assessee.

12. *Accordingly, we find merit in the contentions of the assessee that the reopening is bad in law for more than one reason and hence the assessment order is liable to be quashed. Accordingly, we allow the legal ground urged by the assessee and accordingly the impugned assessment order is liable to be quashed. We order accordingly.*

7.7 In the light of the aforesaid reasoning and judicial pronouncements cited supra, we hold that the reassessment proceedings is bad in law and we quash the same. It is ordered accordingly.

8. Since we have quashed the reassessment proceedings, we refrain from adjudicating the issue raised on merits.

9. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 15th day of February, 2021.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 15th February, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The DRP-2, Bangalore
4. The Pr.CIT-5, Bangalore
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore