

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1287 OF 2014

The Commissioner of Income Tax-2 .. Appellant

v/s.

M/s. Aroni Commercial Ltd. .. Respondent

Mr. Suresh Kumar for the appellant
Mr. Atul Jasani for the respondent

**CORAM : M.S. SANKLECHA &
P. R. BORA, J.J.**

DATED : 6th JANUARY, 2017

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 21st February, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2005-06.

2. The Revenue urges the following substantial questions of law for our consideration :-

(i) *Whether on the facts and circumstances of the case, the Tribunal was correct in law in treating the reopening of the*

case as bad in law by holding it to be a mere change of opinion without appreciating the fact that the notice u/s 148 of the Income Tax Act, 1961 was issued within four years from the end of the assessment year and due process of law was followed in this regard?

(ii) Whether on the facts and circumstances of the case, the Tribunal was correct in law, in not adjudicating the issue of compensation claimed by the assessee as long term capital gains as against its treatment as business income by the Assessing Officer?

3. Regarding Question (i) :-

(a) During the subject assessment year, the respondent assessee had filed its return of income on 27th October, 2005 declaring an income of Rs.6.05 crores. The assessment was made under Section 143(3) of the Act on 29th December, 2007 determining the petitioner's income at Rs.6.13 crores.

(b) On 23rd June, 2009, the Assessing Officer issued a reopening notice under Section 148 of the Act. The reasons in support of the reopening notice as provided by the Assessing Officer (as reproduced in the assessment order) reads as under :-

“Perusal of the records revealed that you had received

compensation of Rs.4,59,72,000/- from Atofina Catalyst India Ltd. For settlement of disputes in relative to the management and operation of affairs of company and claimed as long term capital gain and offered tax @ 20% after claiming exemption u/s 54EC of the I.T. Act. The said claim was accepted by the department in original assessment u/s 143(3) dt. 29.12.2007.

However, the compensation treated as Long Term Capital Gain is not correct as the same is not covered u/s 45(1) of the I.T. Act. There was no transfer of capital asset or nor any extinguishment of any rights in capital assets.

The compensation received has to be computed as business income u/s 28(ii) and (va)(a) of the I.T. Act.

You are therefore, required to show cause as to why the said income should not be treated as “Business Income” and deduction u/s 54EC should not be rejected.”

(c) The respondent assessee objected to the reopening of the assessment as being without jurisdiction on account of it being issued on mere change of opinion. This was not accepted by the Assessing Officer and he proceeded to complete the assessment under Section 147 r/w Section 143(3) of the Act, by order dated 13th November, 2010. However, on merits of the claim, the Commissioner of Income Tax (Appeals) [CIT(A)] allowed the appeal, holding that compensation received was capital gains.

(d) Being aggrieved, the respondent assessee carried the issue

of reopening notice being without jurisdiction in appeal to the CIT(A). By order dated 18th November, 2011, the CIT(A) dismissed the assessee's appeal on the ground that there was no change of opinion as the nature of the compensation received, claimed as capital gains was not clear during the assessment proceedings.

(e) Being aggrieved, the respondent assessee carried the issue in further in appeal to the Tribunal. The Tribunal on facts found that during the regular assessment proceedings leading to an order dated 29th December, 2007, a specific question was asked with regard to claim made for capital gains on account of compensation received on extinguishment of a capital asset. In fact, it may be useful to reproduce the finding of the Tribunal on the above aspect as under :-

“9. We have heard both the parties on this legal issue and perused the orders of the Revenue Authorities as well as the written submissions and the paper book filed before us. The said question no.40 is perused and find the same is as under :-

“40. Please file complete details of compensation for extinguishment of Rs.4.59 crores. What were the rights so extinguished? Further, it is seen that as per para 4 of notes on accounts a sum of Rs.1320 lakhs was earned as capital gain on this extinguishment. However, in the computation only Rs.459 lakhs has been offered for tax and Rs.875 lakhs has been claimed exempt u/s 54EC.

Please explain and reconcile this difference.”

9.1 *Explanation of the assessee appearing in page 14 to the said question no.40 reads as under :*

“3) Explanation for treating Compensation for extinguishment of rights as long term capital gain.”

9.2 *Relevant contents of page 17 read as under :*

“As required by your goodselves, the explanation for treating compensation for Extinguishment of Rights as Long Term Capital Gain is as under”

9.3 *Relevant contents of page 18 read as under :*

“The conditions at (c) has been clearly satisfied, as we have received Rs.4.60 crores as consideration for termination of our rights.”

(f) On the basis of the above facts, the impugned order concludes that the very issue / basis of the reasons recorded in support of the reopening notice was considered during the regular assessment proceedings. It was only on the Assessing Officer being satisfied with the justification of the respondent assessee's claim that the Assessing Officer accepted it to be capital gains. Thus, allowing the respondent assessee's appeal.

(g) The grievance of the Revenue before us is that it is not a case of change of opinion. It is pointed out that the Assessing Officer had not dealt with the issue raised in the reopening notice in the

assessment order dated 29th September, 2007. This, it is submitted is an indication of non-consideration of the aforesaid issue by him. Further, it is contended that the aspect now raised to the effect that the amount received on the so called extinguishment of capital gains was in fact a business income on account of the agreement entered into by the respondent assessee and the same was not considered due to oversight during the regular assessment proceedings. In support, reliance is placed upon the decision of this Court in ***Export Credit Guarantee Corporation of India Vs. Commissioner of Income Tax, 350 ITR 651.***

(h) The first contention urged before us by the Revenue is identical to the contentions which was urged by the Revenue in the earlier decision of this Court in respect of the same respondent assessee reported as *Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-Tax and Anr., 362 ITR 403.* This Court had in the aforesaid decision dealt with the above objections raised by the Revenue as under :-

“We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and / or discussion to disclose its satisfaction in respect of the query

raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceedings even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinised by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings.”

The aforesaid observations will apply to the first grievance of the Revenue before us. In this case also a query was raised during the regular assessment proceedings and it was responded to by the assessee. This non consideration of the same in the assessment order is no evidence of the Assessing Officer not being satisfied with the issue raised.

(i) The next contention on behalf of the Revenue on consideration of the issue due to oversight in the regular assessment proceedings cannot be said to be forming of opinion. In support, the decision of this Court in *Export Credit Guarantee Corporation of India (supra)* was relied

upon, where the Court has held that there can be no change of opinion. If an Assessing Officer has ignored the relevant material in regular assessment proceedings in arriving at assessment. The aforesaid decision is completely distinguishable on facts. In the aforesaid case of *Export Credit Guarantee Corporation of India* (supra) though the assessment was completed just as in this case under Section 143(3) of the Act and the assessment order of the Assessing Officer therein was also silent on the issue on which the assessment was sought to be reopened, the distinguishing feature is in that case no query was raised with regard to the issue on which reopening was sought to be done. As opposed to the above, in the present case, query as reproduced hereinabove as raised touched upon all the facets of the amounts received on extinguishment of asset by the respondent assessee. Therefore, this is not a case where the Assessing Officer has ignored / overlooked by oversight the claim made by the assessee in its return of income while allowing it as in the case of *Export Credit Guarantee Corporation of India* (supra). This is a case where the Assessing Officer did apply his mind as evidenced by the query raised to the very issue which is now sought to be raised as the basis for reopening the notice and the Assessing Officer was satisfied with the response to the query during the regular assessment proceedings.

(j) In the above view, the view taken by the impugned order of Tribunal that the reopening notice is without jurisdiction as it is founded on a mere change of opinion is on facts covered by the decision of this Court in favour of the respondent assessee.

(k) In the above view, the question (i) as raised does not give rise to any substantial question of law. Thus, not entertained.

4. Regarding Question (ii) :-

(a) In view of the fact that in response to question (i), we have held that the Assessing Officer has no jurisdiction to issue the impugned notice, question (ii) which is on merits of the dispute, becomes academic. Thus, not entertained.

5. In the above view, the appeal is dismissed. No order as to costs.

(P. R. BORA, J.)

(M.S. SANKLECHA, J.)