R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1679 OF 2017

Commissioner of Income Tax-LTU .. Appellant

Versus

IDBI Bank Ltd .. Respondent

....

- Mr. Tejveer Singh for the Appellant
- Mr. S.R. Mody a/w Ms. Aasifa Khan for the Respondent

....

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : JANUARY 23, 2020.

P.C.:

1. Heard Mr. Tejveer Singh, learned standing counsel, revenue for the appellant and Mr. S.R. Mody, learned counsel for the respondent - assessee.

2. This appeal has been preferred under Section 260A of the Income Tax Act, 1961 (**"the Act"** for short) against the order dated 30.3.2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench "I", Mumbai (**"Tribunal"** for short) in Income Tax Appeal Nos. 2365/Mum/2013 and 2194/Mum/2013 for the assessment year 2005-06.

3. Income Tax Appeal No. 2365/Mum/2013 was filed by the revenue whereas the other appeal was filed by the assessee arising out of the same assessment order passed by the Assessing Officer on reopening of assessment.

4. The appeal has been preferred projecting the following questions as substantial questions of law:-

(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding the re-assessment proceedings as bad in law despite the fact that reopening was done in the face of specific information received by the Assessing Officer from his counterpart at Surat; which was not available to him at the time of framing the original assessment?

(b) The order of Tribunal holding reassessment proceedings as invalid be quashed and the Tribunal may be directed to decide the other issues on merit.

5. For the assessment year under consideration, assessee filed return of income declaring 'Nil' income. In the assessment order passed under Section 143(3) of the Act, total income of Rs. 1796,96,08,020.00 was assessed as the income of the assessee.

6. Subsequently, notice under Section 148 of the Act was issued by the Assessing Officer to the assessee seeking to reopen the assessment of the assessee for the assessment year under consideration primarily on three grounds. The first ground was that an amount of Rs. 105,06,70,665.00 had to be added back to the book profit of the assessee under Section 115JB of the Act which amount was not disclosed by the assessee in the original return of income and thus, escaped assessment. The second ground was that assessee had paid Rs. 23,94,249.00 as MICR charges to MICR Centre managed by State Bank of India at Surat but has not deducted TDS on such charges under Section 194J of the Act. Therefore, Assessing Officer was of the view that there was failure on the part of the assessee in not adding back the aforesaid amount to the total income of the assessee under Section 40(a)(ia) of the Act. The third ground was that assessee had paid Rs. 58,94,437.00 to one Ratnakar Shetty, proprietor of M/s. Ratna Caterers but the assessee had failed to deduct TDS on such payment. Therefore, Assessing Officer stated that he had reasons to believe that there was failure on the part of the assessee in not adding back the said amount to the total income under Section 40(a)(ia) of the Act. Therefore, Assessing Officer expressed the view that income had escaped assessment due to failure on the part of the assessee which therefore, necessitated reopening of assessment.

7. The assessee submitted his response to the notice issued and furnished explanation. However, Assessing Officer did not accept the explanation furnished by the assessee and added the aforesaid amounts to the total income of the assessee vide his assessment order dated 15.9.2011 passed under Section 143(3) read with Section 147 of the Act.

8. Assessee preferred appeal before the Commissioner of Income Tax (Appeals)-24, Mumbai. By the appellate order dated 12.12.2012, Commissioner of Income Tax (Appeals) set aside addition of Rs. 23,94,249.00 as well as Rs. 58,94,437.00 which amounts were added to the total income of the assessee by the Assessing Officer on the ground of failure to deduct TDS on such payments but upheld the addition of Rs. 105,06,70,665.00

9. Against the aforesaid order of Commissioner of Income Tax (Appeals) dated 12.12.2012, revenue preferred Income Tax Appeal No. 2365/Mum/2013 whereas assessee preferred Income Tax Appeal No. 2194/Mum/2013 before the Tribunal. Tribunal took up the appeal filed by assessee first and by the impugned order dated 30.3.2016 held that the notice issued for reopening of assessment itself was not sustainable and therefore, reopening of assessment was declared as invalid. Consequently, appeal filed by the revenue was rendered redundant.

10. Aggrieved, revenue is in appeal before us.

11. Submissions made by learned counsel for the parties have been considered.

12. At the outset, we may advert to the three additions made by the Assessing Officer in the assessment order on reopening of assessment.

13. In so far addition under Section 115JB of the Act is concerned, the finding of the Assessing Officer is as under:-

> "5.1 The submission of the assessee has been considered but not acceptable. As per provisions of Sec. 115JB, amount of expenditure relatable to any exempt income if debited to profit and loss account shall be added back. It is seen that as per CIT(A) order dated 31.3.2009, the expenses disallowable u/S. 14A have been computed at Rs. 106,26,80,655/- hence the amount of Rs. 105,06,70,665/- has to be added back to book profits u/s 115JB (Rs. 1,20,09,990/- having been added back already in book profits returned by the assessee). **In view of this, amount of Rs. 105,06,70,665/- is added back to book profits u/S. 115JB of the IT Act, 1961."**

14. As already discussed above, Commissioner of Income Tax (Appeals) had upheld the aforesaid addition made by the Assessing Officer.

15. In the course of hearing, learned counsel for the respondent has placed before us a copy of order dated 10.2.2015 passed by this Court in Income Tax Appeal No. 337 of 2013, **Commissioner of Income Tax-8 Vs. M/s. Bengal Finance & Investments Pvt Ltd**, wherein a similar question arose for consideration. In the said decision, it was noted that Tribunal's decision in the case of **M/s. Essar Teleholdings Ltd Vs. DCIT**[1], that an amount disallowed

1 ITA No. 3850/Mum/2010

under Section 14A of the Act cannot be added to arrive at the book profit for purpose of Section 115JB of the Act, was not interfered by this Court when the appeal filed by the revenue i.e Income Tax Appeal No. 438 of 2012 was dismissed on 7.8.2014. Following the aforesaid decision, this Court held that a substantial question of law did not arise.

16. Reverting back to the second addition made by the Assessing Officer regarding MICR charges of Rs. 23,94,249.00, the assessee in its reply stated that there were decisions of the Tribunal in various places that in similar transaction, there was no obligation to deduct tax at source. Therefore, the basic issue of whether tax is deductible at source on MICR charges is debatable. This submission of the assessee was simple brushed aside by the Assessing Officer as not accepted. After referring to the provisions of Section 40(a)(ia) of the Act, Assessing Officer held that assessee failed to deduct TDS on MICR charges and therefore, the aforesaid amount was added back to the income of the assessee under Section 40(a)(ia) of the Act.

17. At this stage, we may also revert back to the third addition made by the Assessing Officer under the same provision i.e under Section 40(a)(ia) of the Act. As already referred to herein above, an amount of Rs. 58,94,437.00 was added back to the income of the assessee on the ground that assessee failed to produce proof of deducting TDS on the aforesaid payment made to Ratnakar Shetty, proprietor of M/s. Ratna Caterers.

18. Assessee in its reply had clearly stated that assessee had deducted tax at source and paid into government account, details of which were provided in the reply. Assessee also stated that the detailed information was gathered from the record of the bank and submitted copies of internal vouchers showing deduction of tax at source on such payment. Assessing Officer declined to accept the submission of the assessee by contending that mere furnishing copies of internal vouchers showing deduction of tax at source on some payments did not discharge the onus of the assessee.

19. These two additions had already been deleted by the Commissioner of Income Tax (Appeals). In further appeal by the respondent, Tribunal held that the reasons given by the Assessing Officer were not sufficient to frame notice for reopening a concluded assessment beyond the period of four years and declared such notice as invalid. Tribunal held as under:-

> "11. The 2nd Proviso of section 147 specially referred in respect of those cases including financial interest which are located outside in India, chargeable to tax and escaped assessment for any AY. However, the 1st Proviso attached with section clearly cast a duty mandate on the AO to find out if the particular word disclosed fully and truly necessary for his assessment for that AY, the reasons recorded by the AO "the words absolutely missing in para-4 & 5 of the reasons recorded that as to which fact or material was not disclosed by the assessee in its return of income".
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> 12. Admittedly, there is no details given by AO as to which the fact or material was not disclosed by the assessee which lead to escape assessment. Merely referring a bald assertion that "I have reason to believe that it is a failure of assessee part or not to add back the amount of Rs. 58,94,437/- to the total income u/s. 40(a)(ia) of the Act" is not sufficient to frame notice for re-opening concluded assessment beyond the four years. Thus the notice (impugned notice u/s. 48 is bad in law) and does not qualify a sustainable notice under the scrutiny of law, hence, the legal ground raised by the assessee is allowed and the re-opening of assessment is declared as invalid."

20. We are in agreement with the view expressed by the Tribunal as above. Since the very foundation of re-assessment was struck down, the revenue's appeal assailing the two deletions was rendered redundant.

21. Nonetheless, since the revenue is in appeal before us, we may examine the same even at this stage. In so far the second deletion is concerned, it is evident that the basic issue as to whether tax is deductible at source on MICR charges itself is debatable. Assessee had referred to several decisions of the Tribunal including a coordinate bench at Mumbai wherein it was held that there is no obligation to deduct tax at source in such a transaction. When that is the position, we fail to understand as to how the Assessing Officer could invoke jurisdiction under Sections 147/148 of the Act. Therefore, the first appellate authority was justified in deleting such addition. Regarding the third deletion, it is quite evident that assessee had disclosed details of TDS made from the payments to the caterer. Such information was furnished from the record of the bank where payments were made and in support of the payments, internal vouchers were furnished. If the Assessing Officer had any further doubt in this regard, he could have very well verified the record of the bank by issuing notice to the bank in question. Thus, the addition made by the Assessing Officer was rightly deleted by the first appellate authority.

22. Therefore, Assessing Officer was not justifying in taking the view that assessee had failed to disclose fully and truly all material facts for the purpose of assessment of his income for the assessment year under consideration and the Tribunal is correct in taking the view that Assessing Officer could not have issued notice to reopen the concluded assessment in the facts and circumstances of the case.

23. Therefore, on a thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. No substantial question of law arises in the appeal.

24. Appeal is accordingly dismissed but there shall be no order as to costs.

[MILIND N. JADHAV, J.] **[UJJAL BHUYAN, J.]**

Ravindra M. Amberkar Digitally signed by Ravindra M. Amberkar Date: 2020.01.28 11:25:09 +0530