

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

INCOME TAX APPEAL NO. 692 OF 2018

Pr. Commissioner of Income Tax-13

Mumbai, Aaykar Bhavan,

M. K. Road, Mumbai-400 020.

...Appellant

V/s.

NESCO Ltd.

Nesco Estate, Western Express Highway,

Goregaon (E), PAN AAACN1222E

...Respondent

Mr. Akhileshwar Sharma , Advocate for Appellant.

Mr. Satish Mody with Ms. Aasifa Khan, Advocate for Respondent.

CORAM : DHIRAJ SINGH THAKUR &

ABHAY AHUJA, JJ.

RESERVED ON : 29th JULY, 2022

PRONOUNCED ON : 21st OCTOBER, 2022

JUDGMENT : (PER ABHAY AHUJA, J)

1. This is an Appeal filed by the Principal Commissioner of Income Tax- 13, Mumbai under Section 260-A of the Income Tax Act, 1961 (“the Act”) challenging the order dated 22nd March, 2017 passed by the Income Tax Appellate Tribunal, Mumbai (“ITAT”) dismissing the Appeal filed by the Revenue.

2. The Respondent-Company is an assessee under the provisions of the Act and the relevant assessment year is 2008-2009.
3. The Respondent-Company had filed its return of income for the relevant assessment year on 6th October, 2008 declaring a total income of Rs.46,33,63,270/-, which was processed under Section 143(1) of the Act. Thereafter there was a scrutiny assessment. The assessment was completed under Section 143 (3) of the Act on 27th December, 2010 assessing the total income at Rs. 46,52,72,576/-.
4. The case of the assessee was subsequently re-opened pursuant to issuance of notice under Section 148 of the Act dated 28th March, 2013 i.e. within four years for the following reasons :

“Under the provisions of the Income Tax Act, 1961 any provision made in the books of contingent liability is not allowable as expenses while computing income under the head business or profession.

In this case the assessee company filed its return of income for the A. Y. 2008-09 on 06.10.2008 declaring income of Rs. 46,83,63,270/-. The assessment has been completed after scrutiny on 27.12.2010 by computing income of Rs. 46,52,72,576/-.

On perusal of records it was observed that the assessee company debited Rs. 6,50,00,000/- as claim for compensation paid/provided. Further it was stated in para no. 15(a) schedule 13 to notes forming part of the accounts that provision for compensation pending settlement as on 31.03.2008 was Rs. 131000000/-(including the PY 31.03.2008). However, the provision made in the accounts is remained to be added back to

the total income.

In view of the above facts, I have reason to believe that income of Rs. 6,50,00,000/- chargeable to tax has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.”

5. Response came to be filed by the assessee and after receiving the reasons the assessee objected to the re-opening of the assessment which was disposed by an order dated 18th November, 2013.

6. Thereafter, the Assessing Officer acting under the provisions of Section 143(3) read with Section 147 of the Act passed an assessment order making dis-allowance of Rs. 6,50,00,000/- on account of the claim of compensation provided for by the Respondent-Company in its books. The Assessing Officer observed that the assessee/Respondent-Company had debited an amount of Rs. 6,50,00,000/- towards the claim for compensation paid/provided to the profit and loss account (P&L Account). He noted that on perusal of notes to account, it was seen that the provision for compensation pending settlement as on the closing date of the financial year was at Rs. 13,10,00,000/-, which was not added back to the total income. The Assessing Officer observed that the provisioning was purely contingent in nature depending upon the happening or not happening of an event and that this provisioning could not therefore be

treated as expenditure for the year under consideration. The Assessing Officer was of the view that allowing such provisions from the income of the assessee would give a distorted picture of P&L Account, which was against the accounting principles and the scheme of the Act. Observing that the assessee had made provision for expenses, which were not crystallized and in view of the fact that such provision had been reversed by the assessee in the next financial year, he came to a conclusion that the provisioning was not required to be made. He observed that such an act indicated that the provisions have been made to create notional loss/reduce the profits. Holding that since the assessee follows mercantile system of accounting the expenses accrued are to be booked but the expenses which are not accrued cannot be booked and that such a provision made in the books cannot be allowed as deduction under the Act, the Assessing Officer rejected/disallowed the amount of Rs. 6,50,00,000/- and added it back to the total income.

7. Aggrieved by the same, the assessee filed an Appeal before the Commissioner of Income Tax (Appeals) ("CIT(A)"), challenging the re-opening under Section 147 of the Act as well as the dis-allowance of the claim of compensation of Rs. 6,50,00,000/- .

8. The CIT(A) after considering the submissions made on behalf of the assessee as well as the Revenue held that since the initiation of the proceedings was based on change of opinion, the notice for re-opening under Section 148 could not be held to be validly issued, as there was no new, fresh tangible material or any new information which could suggest escapement of income as the issue under consideration was well within the knowledge of the original Assessing Officer at the time of the scrutiny assessment. With respect to the dis-allowance of the claim of compensation of Rs. 6,50,00,000/-, it was observed that the dis-allowance was not made on any sound ground or with any legal authority and the CIT(A) went on to delete the dis-allowance of expenditure of the said amount.

9. Aggrieved by the said order, the Revenue filed an Appeal before the ITAT. The ITAT confirmed the order of the CIT(A) holding that since there was no fresh tangible material in the possession of the Assessing Officer on the basis of which a belief could be formed for escapement of income, the re-opening notice was bad in law. It was also observed by the ITAT that since the impugned issue was examined by the A.O., in view of the query asked by him, which was properly replied with proper details after which the original assessment order under Section 143(3) came to be passed

accepting the impugned claim, the Assessing Officer did not have the shield of Explanation-1 to Section 147 to justify the re-opening which was done without there being any fresh tangible material in the possession of the Assessing Officer. The above findings of fact have not been controverted by the Revenue.

10. With respect to the issue on merits, the ITAT has upheld the validity of claim made by the assessee with respect to the compensation of Rs. 6,50,00,000/- confirming the order of the CIT(A).

11. Aggrieved by the order of the Tribunal upholding the order of the CIT(A) on re-opening as well as on merits, the Revenue has filed this Appeal proposing the following questions of law:-

“A. Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT was correct in quashing the notice issued u/s. 148 when provisions for issue of notice were applicable and reasons for re-opening was recorded by the Assessing Officer.

B. Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT was right in not appreciating the fact that income has escaped assessment within the meaning of sub-clause (a) to Explanation 2 of section 147 of the Income-tax Act, 1961?

C. Whether on the facts and in the circumstances of the case, the Hon’ble ITAT erred in holding that the reassessment proceeding u/s. 147/148 of the Income-tax Act, 1961 is bad in law, by holding it to be based on a change of opinion without appreciating the fact that no informed decision was taken by the A.O. due to failure on part of the assessee to disclose truly

and fully all material facts for making the assessment?

D. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in allowing the compensation of Rs. 6.50 crores holding that the same to be an ascertained liability, without appreciating the fact that the same was only a provision and allowing a provision from the income of the assessee will give a distorted picture of the Profit and Loss account of the assessee?"

12. It is noted from the concurrent factual findings as recorded in the orders of the CIT(A) and the Tribunal that the amount of claim of compensation of Rs.6,50,00,000/- comprises of provision for payment of compensation by the assessee with respect to the disputes with Macedon Indo Austrian Ventures Pvt. Ltd., Western Railway, Mumbai and Shivangi Crafts Ltd., Kashipur.

13. Pursuant to supply of machines by the Assessee Company to Macedon Indo Austrian Ventures Pvt. Ltd. which consisted of machines with manufacturing defects, production suffered leading to disputes between the assessee and the Austrian company. A complaint came to be filed by the Austrian company against the assessee with the MRTP Commission, New Delhi. It is to provision for payment of compensation to Macedon Indo Austrian Ventures Pvt. Ltd. that a provision of Rs.4 crores was made by the assessee in the books of accounts in the previous year relating to the assessment year 2008-09; A provision for a compensation

of Rs.2.02 crores (with chargeable interest) was shown in the name of Western Railway, Mumbai. A provision for compensation of Rs.49.50 lacs (with interest) was shown in the name of Shivangi Crafts Ltd. on the ground that the assessee had not manufactured and supplied textile machinery inspite of accepting the order dated 19th October, 1997 and receipt of advance of Rs. 20 lacs. Pursuant to a litigation filed in the High Court of Bombay, the assessee was under a obligation to make the provision of actual liability.

14. It is recorded that the actual working has been given by Senior Legal Manager vide his letter dated 30th March, 2008 and that the entire amount of Rs. 6,50,00,000/- has been found to be based on actual occurrence of financial incidence purely related to business activities, which remains uncontroverted by the Revenue.

15. When the assessee's case was taken up for scrutiny, during the assessment proceedings under Section 143(3) of the Act, the aforesaid facts were considered and have been relied upon in the order of the CIT(A) and the Tribunal. It is recorded that the details about the amount of compensation debited in the P & L Account for the aggregate amount of Rs.6,50,00,000/- is found to be reflected in the accounts. It is also recorded that the assessee has submitted party-wise details giving

justification for allowability of compensation with respect to each party which was shown in the subsequent year. That the amount of compensation is recorded to be paid as and when settled by the Civil Courts and the amount not paid was returned back as part of other income. These factual findings stand undisputed and uncontroverted by the Revenue. The working referred to in the CIT(A) order has been found to be based on actual occurrence of financial incidence related to business activities of the assessee. These are concurrent findings of fact by the CIT(A) and the Tribunal. No contrary fact has been brought to our notice by the Revenue. It would therefore not be correct to say that the provisioning could not be treated as expenditure. The Assessing Officer could not have disallowed the claim of compensation of Rs.6,50,00,000/-. The CIT(A) has rightly deleted the disallowance of the claim of compensation of Rs. 6,50,00,000/- which has been confirmed by the Tribunal.

16. Further, it is also recorded in the Tribunal order that the Assessing Officer before recording the reasons for reopening has made reference to the same documents/material which were also on the record of the Assessing Officer in the original assessment proceedings under Section 143(3). We, therefore, observe that there does not appear to be any fresh tangible material that has come into the possession of the Assessing Officer before

recording the reasons for re-opening the assessment. Even in the recorded reasons, the Assessing Officer clearly states that his observations are based “on a perusal of records” but no fresh or new tangible material has been referred to or brought on record.

17. The re-opening is within a period of four years from the end of the relevant assessment year. Therefore, it is important that the officer re-opening a assessment has reason to believe based on tangible material that income has escaped assessment. What we observe from the aforesaid facts is that the dis-allowance of the claim of Rs. 6,50,00,000/- on account of compensation is based on record that was already with the Assessing Officer at the time of the proceedings under Section 143 (3) of the Act. There is no new or fresh tangible material that has been brought on record. This appears to be an attempt to view the same material from a different angle of perception. It is nothing but a case of change of opinion, which cannot be permitted. We also agree with the Tribunal that since the impugned issue was examined by the A.O. on a query raised by him and which was replied to with details during the original scrutiny proceedings, Explanation 1 to Section 147 would not be applicable in the facts of the case.

18. In view of the above discussion, we do not find any error or perversity in the order of the Tribunal. The Appeal does not raise any substantial question of law and is therefore, dismissed. No costs.

(ABHAY AHUJA, J.)

(DHIRAJ SINGH THAKUR J.)

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