

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No. 312 of 2005 (O&M)
Date of decision: 09.01.2023**

M/s Kakkar Complex Steels (P) Ltd.

.....Appellant

Versus

The Commissioner of Income Tax, Jalandhar

.....Respondent

**CORAM:HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Present: Mr. Divya Suri, Advocate,
for the appellant.

Ms. Gauri Neo Rampal, Sr. Standing Counsel,
for the respondent.

Ritu Bahri, J.

This appeal, under Section 260A of the Income Tax Act, 1961, has been filed against the order dated 06.05.2005 passed by the Income Tax Appellate Tribunal, Amritsar, confirming the order passed by the Commissioner of Income Tax (Appeals), Jalandhar, whereby he had held that the Assessing Officer had rightly and validly reopened the assessment for the assessment year 1987-88 for the assessee-company (appellant).

In this case, the Assessing Officer, for the assessment year 1987-88, had resorted to the provisions of Section 154 of the Income Tax Act for the purpose of re-computing the deduction under Sections 80 HH and 80I in view of the provisions of Section 80B (5) inasmuch as there was a mistake

aforesaid which resulted in allowing excessive deduction. Re-opening of the assessment was based on audit objection pointing out error of law committed by the Assessing Officer in granting excessing deduction while framing/finalizing original assessment.

Learned counsel for the appellant has referred to the judgments passed by Hon'ble the Supreme Court in Parashuram Pottery Works Co. Ltd. vs. ITO (1977) 106 ITR 1 (SC), Indian & Eastern Newspaper Society Vs. CIT, (1979) 119 ITR 996 (SC) and Duli Chand Singhania Vs. ACIT, (2004) 269 ITR 192 (P&H), on the proposition that power under Section 147 of the Act for reopening of the assessment order can only be exercised, where the allegations are that the deductions were wrongly allowed on account of the fact that the “assessee had failed to disclose true and full material facts necessary for deductions.” For reference, Section 147 of the Income Tax Act, 1961 is reproduced as under:-

“147. Income escaping assessment

If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).

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 take 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:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment

for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.”

It is not the case of the respondent-department that the assessee had not disclosed fully and trully all material facts at the time of assessment. Benefit of exemption/deduction granted under Sections 80HH and 80I, thus, cannot be re-opened while exercising powers under Section 147 of the Act.

A perusal of the order dated 06.05.2005 passed by the Tribunal shows that vide assessment order dated 23.03.1993, assessment was initially finalized under Section 143 (3) on 29.03.1990 at a net income of Rs.20,13,062/-. After that it was observed that the assessee had availed excess relief under Section 80HH and 80I of the Act and thereafter, a notice under Section 148 was issued to the assessee on 08.01.1993. Pursuant to the said notice, the assessee filed its return under protest on 15.02.1993 with a note, “the return is filed at income already assessed at Rs.22,13,746/- vide order dated 06.01.1992 subject to appeal.” A notice under Section 143 (2) was issued to the assessee on account of excessive claim under Section 80HH and 80I of the Act. The assessee filed its reply dated 11.12.1992. The assessee worked out total income of Rs.44,37,121/- for the purpose of deduction under Section 80HH and 80I in its return for the assessment year under consideration. It had claimed deductions @ 20% and 25%, which worked out to Rs.8,87,424/- and Rs.11,09,280/- respectively. As per Income Tax Act, carried foward business losses can be adjusted only against the business of the current year and not against any other income.

The assessee was having profits of Rs.44,37,121/- and simultaneously, had

carried forward business losses amounting to Rs.8,88,037/- (finally determined at Rs.7,04,345/- vide order dated 11.03.1993 passed under Section 143 (3) for the assessment year 1986-87) to be adjusted against these profits. After adjusting the above said loss, income of the assessee would come to Rs.37,32,776/- (44,37,121 – 7,04,345) and it was entitled for deduction under Section 80HH and 80I to the extent of Rs.7,46,555/- and Rs.9,33,194/- respectively. Keeping in view that the losses of earlier years had to be set off while calculating the benefit of exemption, the excessive deductions claimed under Sections 80HH and 80I were accordingly added to the income of the assessee in a sum of Rs.1,40,869/- and Rs.1,76,086/- (total Rs.3,16,955/-). Against the order of the Assessing Officer, an appeal was filed before the Commissioner of Income Tax (Appeals), Jalandhar, who, vide order dated 05.02.1998, confirmed the order of the Assessing Officer. Feeling aggrieved, the assessee filed an appeal before the Tribunal.

The Tribunal by referring to Section 143 (3) of the Act, dismissed the appeal of the assessee and held that losses of the last year had to be set off against the current year's income. With regard to levy of interest under Section 215 of the Income Tax Act, the Tribunal observed that while passing the assessment order dated 29.03.1990, the Assessing Officer had not passed any specific order for charging of interest under this section. Further, in the assessment order dated 23.03.1993 passed under Section 148 of the Act, no order for charging of interest had been passed. Demand of Rs.3,98,194/- has been raised by the Income Tax Officer, without interest under Section 215 of the Income Tax Act. Finally, appeal filed by the assessee was partly allowed to the extent of charging of interest

under Section 215 of the Act.

During the pendency of the present appeal, the appellant has placed on record copy of misc. application (Annexure P-12), which was filed before the Income Tax Appellate Tribunal, Amritsar, pointing out certain errors in the order dated 06.05.2005. Thereafter, the Tribunal passed an order dated 16.11.2005 (Annexure P-13), dismissing the said application by giving a finding that there was no obvious and patent mistake in passing of the earlier order.

In the present case, assessment order under Section 143 (3) was passed on 29.03.1990 and notice under Section 147/148 of the Act was issued on 08.01.1993 before expiry of three years of assessment order. The assessee filed his protest return on 15.02.1993. Under Section 143 (3) of the Act, no action is to be taken after the expiry of four years from the end of the relevant assessment year. The assessment year, in the present case, is 1987-1988 and period of four years expired in the year 1992. Notice under Section 147 of the Accsed was issued on 08.01.1993. A Division Bench of this Court in **Dhuli Chand Singhania's** case (supra) has examined this issue and held that before exercising powers under Section 147/148 of the Act, the Assessing Officer has to record reasons that it was the assessee, who had failed to disclose fully and truly all material facts necessary for his assessment. In the present case, no such finding has been recorded by the Assessing Officer while passing the impugned assessment order. Notice under Section 147/148 of the Act has been issued on the basis of the audit report, as it was found that there was a carried forward loss from the business of the assessee from the earlier years amounting to Rs.8,88,037/-, which needed to be deducted from the total business profits and only on the

balance amount, the deduction was allowable to the assessee under Section 80HH and 80I at the stipulated rates. In **Dhuli Chand Singhania's** case (supra), the Division Bench of this Court observed as under:-

“9. The entire thrust of the findings recorded by the AO in his order dated 13.03.2003 is to justify his satisfaction about escapement of income. According to him, it was a clear case of escapement of income as defined in Explan. 2 to Section 147 as the assessee had been allowed excessive relief under Section 80-O of the Act. However, it is not necessary for us to go into the merits of this finding as the second requirement of the proviso has not been satisfied obviously. The reasons recorded by the AO for initiation of proceedings under Section 147 of the Act have already been reproduced above. A bare perusal of the same shows that the satisfaction recorded therein is merely about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Absence of this finding, which is a “sine quo non” for assuming jurisdiction under Section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the AO wholly without jurisdiction. As already observed, the learned counsel for the Revenue has conceded that neither in the reasons recorded nor in the order dated 13th March, 2003, has the assessee been charged with failure to disclose fully and truly all material facts necessary for his assessment. In *Fenner (India) Ltd. vs. Dy. CIT* (1999)155 CTR (Mad) 165 : (2000) 241 ITR 672 (Mad), similar matter had come up for consideration before the Madras High Court and it has been held as under:

“The precondition for the exercise of the power under S.147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the AO that any income chargeable to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further precondition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return under S.139 or in response to a notice issued under S.142 or S. 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the AO does not acquire jurisdiction to initiate any proceeding under S.147 of the Act after the expiry of four

years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the AO must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings.”

Hon'ble the Supreme Court in **Parashuram Pottery Works Co. Ltd. vs. Income Tax Officer**, (1977) 106 ITR 1 (SC) had observed as under:-

“13. It would appear from what has been' discussed above that one of the essential requisites for proceeding under clause (a) of [section 147](#) of the Act of 1961 is that the income chargeable to tax should escape assessment because of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The present is not a case where the assessee had omitted or failed to file the return. Question then arises as to what has been omission or failure on the part of the assessee to make a full and true disclosure. There is nothing before us to show that in the return filed by the assessee-appellant, the particulars given were not correct. Form C under rule 19 of the Indian Income-tax Rules, 1922 at the relevant time gives the form of return which had to be filed by the companies. Part V of that form deals with depreciation. The said part requires a number of columns to be filled in by the. assessee. It has not been suggested that any of the information furnished of any of the particulars given in those columns by the appellant company were factually incorrect. Nor is it the case of the revenue that the appellant failed to. furnish the particulars required to be inserted in those columns. Indeed, the copy of the return has not been filed and consequently no argument on that score could be or has been addressed before us. Part V of the form no doubt requires the assessee to state the written down value in column No. (2). Such written down value had to be specified without taking into account the initial depreciation because such depreciation in terms of clause (vi) of [section 10\(2\)](#) of the Act of 1922 could not be deducted in determining the written down value for the purpose of that clause. The case of the appellant is that in determining the amount of depreciation at the time of the original assessment for the two assessment years in question, the Income tax Officer relied upon the written down value of the various capital assets as obtaining in the records of the department. This stand has not been

controverted. When an income-tax officer relies upon his own records for determining the amount of depreciation and makes a mistake in doing so, we fail to understand as to how responsibility for that mistake can be ascribed to an omission or failure on the part of the assessee. It also cannot be disputed that initial depreciation in respect of items of capital assets in the shape of new machinery, plant and building installed or erected after the 31st day of March 1945 and before the 1st day of April 1956 is normally claimed and allowed. It seems that the Income-tax Officer in working 'the figures of depreciation for certain items of capital assets lost sight of the fact that the aggregate of the depreciation, including the initial depreciation, allowed under different heads could not exceed the original cost to the assessee of those items of capital assets. The appellant cannot be held liable because of this remissness on the part of the Income-tax officer in not applying the law contained in clause (c) of the proviso to [section 10\(2\)\(vi\)](#) of the Act of 1922. As observed by Shah J. in [Commissioner of Income-tax v. Bhanji Lavji](#),⁽¹⁾ [section 34\(1\)\(a\)](#) of the Act of 1922 (corresponding to [section 147'\(a\)](#) (1)79 I.T.R. 582. S.C. of the Act of 1961) does not cast a duty upon the assessee to instruct the Income-tax Officer on questions of law."

The ratio of the above said judgments is that the Assessing Officer has to issue notice under Section 147 of the Act within four years of the assessment year and while doing so, he has to observe that it was the assessee, who had not disclosed the income, which could not be taxed earlier.

In the present case, no such evidence is available on record to show that it was the assessee, who had made attempts not to disclose his income or the losses suffered by him in the last year. The assessment was of the year 1887-1988 and notice has been issued on 08.01.1993 i.e. beyond the period of four years. As per the aforesaid judgments, the Assessing Officer, after expiry of four years, cannot reassess the case and issue such notice.

In view of the above discussion, the present appeal is allowed and

the impugned order dated 06.05.2005 passed by the Income Tax Appellate Tribunal, Amritsar, is set aside.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

09.01.2023
ajp

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No