

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member**

ITA No.733/Hyd/2018
(Assessment Year: 2010-11)

Income Tax Officer Ward-1, Kadapa (Appellant)	Vs	M/s. Veerabhadra Constructions, Kadapa PAN:AAEFCV1257E (Respondent)
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For Revenue :	Shri Aravind Darshan, DR
For Assessee :	Shri P. Murali Mohan Rao

Date of Hearing:	30.10.2018
Date of Pronouncement:	21.01.2019

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is Revenue's appeal for the A.Y 2010-11 against the order of the CIT (A)-Kurnool dated 23.02.2018 cancelling the assessment made by the AO u/s 143(3) r.w.s. 147 of the I.T. Act dated 29.12.2016.

2. Brief facts of the case are that the assessee, a partnership firm, engaged in the business of civil contracts, filed its return of income for the A.Y 2010-11 on 23.09.2010 and the same was processed u/s 143(3) of the Act on 31.12.2012 determining the total income at Rs.12,29,020 as against the returned income of Rs.2,89,020/-. Thereafter, the AO examined the records of the assessee and noticed that the assessee has

debited Rs.5,40,09,067 towards work expenses against the gross receipts of Rs.6,27,83,632 and that out of the total work expenses, Rs.2,97,92,935 is towards labour charges which was made mostly by way of cash and that the assessee firm has also shown a sum of Rs.1,62,98,456 as labour charges payable. Therefore, he was of the opinion that the provisions of section 40(a)(ia) are attracted in respect of payments made by way of cash in excess of Rs.20,000 to the tune of Rs.1,34,94,479. He observed that the AO, during the course of original assessment, did not verify these aspects and therefore, there is escapement of income within the meaning of section 147 of the I.T. Act.

3. Therefore, he reopened the assessment u/s 147 by issuance of a notice u/s 148 and completed the assessment by making disallowance and bringing to tax various amounts. Aggrieved, the assessee preferred an appeal before the CIT (A) challenging the validity of the reopening as well as the merits of the additions made by the AO. The CIT (A) after going through the assessment records observed that during the original proceedings itself the assessee has discharged its duty by furnishing the full details which were necessary for passing the original assessment order and that the AO has also discharged its functions in the manner required of him at the time of original assessment. He observed that the AO had no tangible material in hand to hold that there is escapement of the income from the original assessment and that there is no omission/failure on the part of the assessee to disclose fully and truly all material facts necessary for his original assessment. Thus, following the judgment of the Hon'ble Supreme Court in the case of CIT vs. Kelvinator India

reported in 320 ITR 561 and the CBDT Circular dated 31.10.1989, he quashed the assessment order u/s 143(3) r.w.s. 147 of the I.T. Act, against which, the Revenue is in appeal before us by raising the following grounds of appeal:

“1. 1. The order of the Learned CIT (Appeals) is erroneous both on facts and in law.

2. Whether CIT(A) is right in holding that the assessment proceedings u/s.143(3) r.w.s 147 are bad in law, under the facts and circumstances of the case.

3. The Learned CIT(A) failed to appreciate that as per the Explanation Ho section 147 "Production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of Section 147" and hence Assessing Officer has rightly issued Notice u/s.148 within Six years period.

4. The Learned CIT(A) failed to appreciate the Supreme Court judgement in the case of Indo-Aden Sal Mfg. & Trading Co.(P) Ltd. Vs CIT(1986)159 ITR 624 (SC) : 25 Taxman 356 (SC) wherein the apex court held that "Mere production of evidence before the Income tax Officer is not enough. There may be omission or failure to make a true and full disclosure, if some material for the assessment lay embedded in the evidence which the assessee could have uncovered, but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. The assessee knows all the material and relevant facts, the assessing authority may not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent. That is immaterial. But if there is omission to disclose the material facts, then subject to the other conditions, jurisdiction to reopen is attracted. "

5. Any other additional ground that may be urged at the time of appeal hearing”.

4. The learned DR supported the orders of the AO while the learned Counsel for the assessee supported the orders of the

CIT (A) and placed reliance upon the case law filed in the paper book before us.

5. Upon going through the records and also the case law on the issue, we find that the assessment has been completed u/s 143(3) of the Act and the reopening of the assessment is after a period of 4 years and therefore, the first proviso to section 147 comes into play according to which until and unless the AO has records a finding that there is an escapement of income due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of its income, the assessment cannot be reopened. The Hon'ble Supreme Court in the case of CIT vs. Kelvinator India reported in (2010) 187 Taxmann.com 312 held that the concept of 'change of opinion' must be treated as in-built test to check abuse of power by the AO and therefore, after 1.4.1989, the AO has the power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from the assessment and the reasons must have a live link with formation of belief. Following the said law laid down by the Hon'ble Apex Court, the various Benches of the Tribunal have held that the reopening of the assessment without any tangible material is not sustainable. In the case before us also, there is no material, much less tangible material which has to the knowledge of the AO subsequent to the assessment u/s 143(3), to form a belief that there is escapement of income. Further, AO has not recorded that there is failure on the part of the assessee to disclose fully and truly all material facts. The learned DR has not brought on record any evidence to rebut the above findings of the CIT (A). Therefore, respectfully

following the decision of the Hon'ble Supreme Court, we see no reason to interfere with the order of the CIT (A) and the Revenue's appeal is accordingly dismissed.

6. In the result, Revenue's appeal is dismissed.
Order pronounced in the Open Court on 21st January, 2019.

Sd/-
(S.Rifaur Rahman)
Accountant Member

sd/-
(P. Madhavi Devi)
Judicial Member

Hyderabad, dated 21st January, 2019.
Vinodan/sps

Copy to:

- 1 ITO Ward 1, Vasanthapet, Proddatur 516360
- 2 M/s. Veerabhadra Constructions, 3/141, Thallamapuram (V),
Prodattur (M), Kadapa, A.P
- 3 CIT (A)-Kurnool
- 4 Pr. CIT - Kurnool
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order