

The Acit Vs. Triace

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Nov-26-2007

Judge : S R J., R Yadav

Appellant : The Acit

Respondent : Triace

Judgement :

1. The Revenue is in appeal before us against the order of id. CIT(A) dated 6/2/04 passed for assessment year 1995-96. The solitary grievance of the Revenue is that Id. CIT(A) has erred in deleting the addition of Rs. 18,50,000/- made by the A.O on the ground that assessee has generated good will which was transferred by it to one of the partners, though not on dissolution but on retirement and such transfer does come within the ambit of expression "otherwise" employed in Section 45 (4) of the Act.

2. The Id. Counsel for the assessee at the very outset pointed out that in this case return of income was filed n 27/10/95. The assessee has disclosed all the material facts fully and duly, i.e. copy of the partnership deed, copy of the retirement cum partnership deed dated 1/4/1994, detailed explanation in respect of payment made to the retired partner was made to the A.O. He further pointed out that after going through all these documents the assessment under Section 143(3) was made on 31/12/97. The A.O has re-opened the assessment-by issuance of a notice under Section 148 on 6/7/01, which was received on 13/7/01.

The assessee has challenged the re-opening of the assessment before the Id. CIT(A). The Id. CIT(A) rejected this ground of appeal, hence, assessee has moved an application under Rule - 27 of ITAT Rules and pleaded that order of the Id, CIT(A) be upheld on the ground that assessment was wrongly re-opened. He took us through the application moved under Rule - 27 and apprised us the ground taken in this application. Thus before embarking upon the merit of the addition it is necessary for us to adjudicate this preliminary issue.

3. With the assistance of Id. Representatives we have gone through the record carefully. Rule - 27 of ITAT Rule has a direct bearing on the controversy. This rule reads as under: The respondent though there may not have appealed, may support the order appealed against on any of the ground decided against him.

4. The Id Counsel for the assessee pointed out that though assessee has not challenged the order of CIT(A) on the issue of re-opening but it can support the order of the CIT(A) which is in favour of the assessee on merit. The Tribunal is required to go into the issue of re-opening and if it is held that re-opening is bad in law then on this argument alone the appeal of the Revenue deserves to be dismissed without going into the merit of the additions. The Id. Counsel for the assessee while taking us through brief facts of the case pointed out that return of income was filed by the assessee on 27/10/95 along with audit report.

The assessee has annexed assets schedule exhibiting the goodwill therein at Rs 18,50,000/-. It also appended a note to the audit report exhibiting the retirement of partner. The Id. A.O issued notice under Section 143(2) of the Act. In response to this notice assessee had filed a reply on 21/10/97 and enclosed copy of the partnership deed.

The Id. A.O sought the explanation of the assessee with regard to the payment made to the retired partner and copies of the accounts. The assessee had submitted all the details. Thereafter Id. A.O framed the assessment under Section 143(3) of the Act and accepted the stand of the assessee. The notice under Section 148 was served upon the assessee on 13/7/01, thus after expiry of four years from the end of the relevant assessment year. According to the Id. Counsel for the assessee this notice is bad in law in view of the interdiction provided in the

proviso appended to Section 147 on exercise of such powers by the Id.A.O. He further contended that Id. CIT(A) has rejected the contentions of the assessee simply for the reason that A. O has not discussed this issue in detail in the assessment made under Section 143(3). The Id.CIT(A) is of the opinion that A.O has not applied his mind and those the facts declared by the assessee is to be construed as could not be proceed in spite of due diligence hence, it is not a full disclosure of the facts. On the other hand Id D.R controverted the contentions of the assessee. He (SIC) out that assessee has not filed the appeal, hence, such arguments could not be entertained under Rule 27 of ITAT Rules. On the merit of re-opening he relied upon the finding of Id. CIT(A).

5. We have duly considered the rival contentions. No doubt this issue has been decided against the assessee by the Id. CIT(A) and assessee has not challenged that order but it can take up this issue before the Tribunal with the aid of Rule 27 because Rule 27 provided that assessee can agitate any ground, which has been decided against it, but if those arguments are being accepted by the Tribunal then the order of the Id.CIT(A) can be upheld even on other issues, because the issue regarding reopening is going to hit the root and the moment it is held that re-opening is bad in law then all other consequent proceedings would become redundant. Thus, we take up this issue first, 6. The proviso appended to Section 147 put an embargo upon the powers of A.O for re-opening of the assessment, if an assessment has been made under Section 143(3) of the Act and four years have expired from end of the relevant assessment year. In such cases the assessment can only be re-opened if it is established that an income has escaped assessment 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 148 or the assessee failed to disclose fully and truly all material facts necessary for his assessment for that assessment year. With the assistance of Id. Representatives we have gone through the computation of income, copy of retirement cum partnership deed, explanation of the assessee to the A.O dated 21/10/97 exhibiting the payment to retired partner and the assessment passed under Section 143(3). The assessee has disclosed the details regarding payment made to the partners. In reply, filed vide letter dated 21/10/97 the assessee has disclosed the following particulars: On 1/4/94, two partners have retired from the

firm. One partner has taken over few assets and liabilities whereas other partner has been paid goodwill amount of Rs. 1850000/-.

The Id. A.O has duly discussed the issue of payment to the retired partners in the original assessment. Thus all material facts have been disclosed by the assessee fully and truly in the original assessment proceedings. There is no failure on the part of the assessee. -The re-assessment notice after expiry of four years from the end of the relevant assessment year cannot be issued in such circumstances. Thus in view of our finding on this issue the appeal of the Revenue otherwise on merit deserves to be dismissed.

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