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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 7931/2010

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Date of Decision : 31st January, 2012.

ARTECH INFOSYSTEMS PVT LTD Petitioner

Through: Mr.R.M.Mehta and Ms.Simran
Mehta, Advocates.

versus

COMMISSIONER OF INCOME TAX

DELHI I & ANR

..... Respondents

Through: Mr.Kamal Sawhney,
Sr.Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

Artech Infosystems (P) Ltd. has filed the present petition challenging re-assessment proceedings u/s 147 and 148 of the Income Tax Act (for short Act) initiated for the Assessment Year 2003-04 vide notice dated 22.03.2010. The petitioner has also impugned the order dated 18.11.2010 passed by the Assessing Officer disposing of and dismissing the objections filed by the

petitioner to the reassessment proceedings in terms of the order passed by the Supreme Court in the **GKN Driveshafts (India) Ltd. Vs. CIT (2003) 259 ITR 19 (SC)**.

2. The “reasons to belief” recorded by the Assessing Officer dated 19.03.2010 read as under:-

“The Return of Income for the AY 2003-04 was filed on 28.11.2003 declaring a loss of Rs.10,28,887/- and subsequently assessed u/s 143(3) dated 16.03.2006 at a loss of Rs.6,45,338/-.

On perusal of asstt records, and P&L A/cs an amount of Rs.2,12,31,472/- was shown payment towards software consultation overseas (M/s Artex Information System LLC) and was remitted to foreign company without deducting tax at source. However, during the asstt proceedings the assessee stated that payment made for consultancy services outside India are not chargeable under this act. As per clause (vii) of sub section (i) of Section 9, this clause is not applicable to assessee company in this case because as per 3 CD report (Sl. No.28a) assessee had neither any sale of software outside nor earn any income from outside India and consumed all software in house. Therefore, the consultancy charges paid to foreign company was to be disallowed and added back in the taxable income of the assessee.

In view of the above, I have reason to believe that an amount to the extent mentioned above chargeable to tax has escaped assessment for the assessment year 2003-04 and, hence, clearly attracts the provisions of 147 of the IT

Act. Therefore, notice u/s 148 of the Act is to be issued. Put up for statutory approval of the Ld. CIT, Delhi-I, New Delhi u/s 151 of the IT Act.”
(emphasis supplied)

3. The respondent along with the counter affidavit have filed copy of the order sheet dated 20.02.2006 and the reply furnished by the petitioner vide letter dated 06.03.2006.

4. Query No. 9 raised in the order dated 20.02.2006 reads as under:-

“Details of payments made to ‘Artech Info Systems LLC’ for cost incurred on behalf of Softek. Give ‘bank certificates’ & ‘bank statement’ showing the same. If no payment made till now, why same be allowed as an expense”

The response given by the respondent/assessee to the said query vide letter dated 06.03.2006 is as under:-

“Q 7. TDS detail on Payment made to the Artech information Systems LLC for the expenditures incurred on behalf of the Softek

It is submitted that the payment made for Consultancy Services outside India are not chargeable under this Act as per the clause (vii) of the sub section (1) of Section 9 which is reproduced as under:

“income by way of fees for technical services payable by

(a) the Govt; or

(b) a person who is a resident, except where

the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purpose of making or earning any income from any source in India”

As per clause (b) above, these services are utilized in the business and profession outside India and hence not chargeable under this Act. It is submitted that these Payment are for reimbursement of expenditures incurred by Artect LLC on behalf of the assessee company and hence paid on actual.”

5. It is clear from the aforesaid query and the answer that during the course of the original assessment proceedings, the Assessing Officer had gone into the question whether or not Section 9(1)(vii) of the Act was applicable to payment made by the petitioner to Artex Information Systems LLC. The Assessing Officer did not invoke Section 9(1)(vii) and was satisfied with the reply furnished by the petitioner/assessee. In the present case admittedly the re-assessment proceedings have been initiated and the Revenue has not taken the recourse to Section 263 of the Act. Dealing with the scope and ambit of Section 147 of the Act and the validity of initiation of reassessment proceedings, in the case of **CIT vs. Kelvinator of India Ltd. (2002) 256 ITR 1** (Del), it has been observed as under:-

“From a bare perusal of the provisions contained in section 147 of the said Act, as it stood up to March 31, 1989, it is evident that to confer jurisdiction under section 147(a) of the Act two conditions were required to be satisfied, viz., (1) the Assessing Officer must have reason to believe that income charge- able to tax has escaped assessment ; and (2) he must also have a reason to believe that such escapement occurred by reason of either ; (a) omission or failure on the part of the assessee to make a return of his income under section 139 or (b) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. The afore- mentioned requirements of law must be held to be conditions precedent for invoking jurisdiction of the Assessing Officer to reopen the assessment under section 147 of the said Act. It is trite that both the conditions aforementioned are cumulative. It is also a well-settled principle of law that, in the event it is found that any of the said two conditions is not fulfilled the notice issued by the Assessing Officer would be wholly without jurisdiction. The expression “reason to believe” finds place both in clauses (a) and (b) of section 147 of the Act. Sub-section (2) of section 148 of the Act mandates that before jurisdiction under section 147 of the Act is invoked by the Assessing Officer he is to record his reasons for doing so or before issuing any notice under section 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the Assessing Officer could reopen a completed assessment. Since assessment has been reopened on April 20, 1990, section 147 as amended with effect from April 1, 1989, would apply.

What would constitute “reason to believe” is no longer res integra.”

6. The aforesaid decision was taken in appeal to the Supreme Court and was dismissed by the decision reported in ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited, (2010) 320 ITR 723(SC)***. The Supreme Court in the said decision has observed as under:-

“On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen.

We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of

the Department, then, in the garb of reopening the assessment, review would take place.

One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words “reason to believe” but also inserted the word “opinion” in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words “reason to believe”, Parliament reintroduced the said expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the assessing officer.”

7. In view of the aforesaid legal position it is clear that the present case is of change of opinion and the Assessing Officer in the first/original assessment proceedings had gone into and examined the said question but accepted the stand of the petitioner. A wrong/incorrect opinion cannot be corrected in 147/148 proceedings but if the decision is erroneous and prejudicial to the interest of the Revenue, it can be corrected in proceedings under Section 263 of the Act. The Full Bench of the Delhi High Court in Kelvinator of India Limited had observed as

under:-

“It is well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income-tax Officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue.”

Reopening under Section 147 and 148 of the Act is not permissible on change of opinion. We may record here that the “reasons to believe” recorded on 19.03.2010 themselves clearly indicate that the issue/question was examined in the original proceedings.

8. The learned counsel for the petitioner has also drawn our attention to the order dated 18.11.2010 passed by the Assessing Officer rejecting objections. The Assessing Officer in this order has held as under:-

“And further in the case of CIT Vs. P.V.S. Beedies P. Ltd. (SC) 237 ITR 13 it was held by Hon’ble Supreme Court that position of Law pointed by Internal Audit Party-reopening on that basis is valid. Therefore, the contention of the assessee that reopening is based on change of opinion has no force and not sustainable.”

9. The petitioner has rightly submitted that the Assessing Officer has misread the judgment of Supreme Court in **CIT Vs. P.V.S.**

Beedies P. Ltd. (SC) (1999) 237 ITR 13. In the said case it has been held that opinion of the audit party on a point of law cannot be regarded as information under Section 147(b) and cannot lead to valid initiation of the assessment proceedings. A factual mistake or a fact missed stands on a different footing. In the present case in the order dated 18.11.2010, it has not been alleged that the audit party had pointed out any factual aspect, that was missed and not taken into account by the Assessing Officer.

10. Learned counsel for the petitioner has also submitted that the second portion of the reasons recorded, which refers to Form No.3CD(i.e. the audit report) serial No. 28(a) is factually incorrect. He has filed before us a copy of the audit report in Form No. 3CD, which is taken on record, the relevant portion of Sl.No.28(a) reads as under:-

“28 (a)	<i>In the case of a trading concern Give quantitative details of principal items of goods traded:</i>	<i>Micrografx</i>
	<i>(i) opening stock</i>	<i>173</i>
	<i>(ii) purchases during the previous year</i>	<i>NIL</i>
	<i>(iii) sales during the previous year</i>	<i>138 (Software used in house, hence capitalized)</i>
	<i>(iv) closing stock</i>	<i>Nil</i>
	<i>(v) shortage/excess if any”</i>	<i>35(Written Off)</i>

11. It is apparent from the reading of the aforesaid paragraph 28(a), that the same relates to the software purchase from the

Micrografx. This does not pertain to transaction or the payment made by the petitioner to M/s Artech Information Sys. LLC.

12. We may also note that in respect of software purchase from Micrografx, the Assessing Officer in the order sheet dated 22.02.2006 has asked the petitioner to explain:-

“In audit report u/s 44AB, clause 28(a) shows that 138 items of Micrographic software has been used-in-house & 35 items have been written off. To give exact nature of the software, details of opening stock, parties from whom software bought along with evidence (invoice), details of payment to those parties. To give details, with evidence, regarding capitalization & use of the software in house. Justify write-off of the software along with evidence. Justify the value at which capitalized.”

13. In response to the said query the petitioner in the communication dated 06.03.2006 had explained and stated as under:-

“Q.N.2- Details of the Software capitalized and written off”

The assessee Company's one of the business line is in developing, trading and marketing of Software Products. These products are mainly for the Bilingual Language like AFW for Hindi, Accounting Software like Winca, Unix & DOS based software like COBOL, PASCAL, FORTRAN & Software for Graphic Works like ABC flow Chart, Designers, charishma, Crayola Art Studio, Picture Publisher etc.

It is submitted that the Company had Imported some Graphic Software from M/s Micrografx during the Financial Year 1997-98. Due to lesser demand these Software were lying in the stock for last many years as immovable stock. For better utilization of this immovable Stock, it was decided to use some of these products in house for the home consumption and hence these products were capitalized under the grouping of Intangible Assets. Detail of the Software Capitalized and the Software written off are enclosed for your ready reference. The Cost of Acquisition for these Software was taken at the purchase cost of the Software. As desired by your honor, we are also enclosing the details of the Invoice and particulars of the Party from whom these Software were purchased. We are also enclosing the License Nos. for utilization of these Software. The Depreciation calculated on these Intangible Assessments have been added back in the computation and the Depreciation as application on Software i.e. on Computers are claimed u/s 32 of the Income Tax Act. Computation Sheet as attached with the Form 3CD is enclosed for your ready reference.

Out of the above said stock, assessee company had written off some of the non movable Software valuing of Rs.88568/-, lying in its stock for last many years. These software were imported during the Financial year 1997-98 and were lying non movable since then. As there was no demand for these software in the market, company had no option but to write off these non movable Stock and hence after the due approval of the Board of Directors, these Software valued at Rs.88568/- were written off during the said Assessment year. From the

above, your honor must have noticed that the assessee company has made it all the efforts to sale these products by marketing them in the so long as possible. These expenditures are purely in the nature of business expenditures and company had recognized this stock in its books of accounts and never claimed the purchase cost in past and are allowable u/s 37 of the Income Tax Act.”

14. In view of the aforesaid, it is clear that the Assessing Officer has proceeded on wrong factual basis also and has incorrectly recorded the reasons by presuming that Sl.No.28(a) relates to payment made by the petitioner to Artech Information systems LLC. whereas the said transaction was in respect of software purchase from Micrografx.

15. In view of the aforesaid the present writ petition is allowed and the re-assessment notice dated 22.03.2010 is quashed. Impugned order dated 18.11.2010 is also quashed. No costs.

SANJIV KHANNA, J

R.V.EASWAR, J

JANUARY 31, 2012
mr/Bisht