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

INCOME TAX APPEAL NO. 402 OF 2013

The Commissioner of Income Tax-1,Mumbai ..Appellant

Vs.

M/s Bennett Coleman & Co. Ltd. ..Respondent

....

Mr. P.C. Chhotaray, Advocate for Appellant.
Mr. Percy Pardiwalla, Sr. Advocate a/w Mr. Jas Sanghavi i/b PDS Legal for Respondent.

....

CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 18 FEBRUARY 2015

P.C.:

1. This appeal by revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') assails the order dated 31 July 2012 passed by the Income Tax Appellate Tribunal (the 'Tribunal') in respect of Assessment Year 2003-04.

2. Mr. Chhotaray,learned Counsel appearing for revenue presses the following questions of law for our consideration:

> *"(a) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the initiation of reassessment proceedings u/s 147 of the Act in this case was not valid and quashing the reassessment order dated 28 November 2008 passed by the Assessing Officer?*

> *(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the Assessing Officer had no reason to believe that income has escaped assessment and that the reassessment proceedings have been initiated u/s 147 on mere change of opinion, ignoring the detailed reasons given by the Assessing Officer which have endorsed by the CIT(A)?"*

3. The respondent-assessee filed its return of income for the subject assessment year on 24 November 2003 declaring income of Rs.311.82 Crores. The Assessing Officer completed the assessment by order dated 20 February 2006 under Section 143(3) of the Act determining the income at Rs.337.30 Crores.

4. On 19 March 2008, the Assessing Officer issued a notice under Section 148 of the Act seeking to reopen the assessment for Assessment Year 2003-04. The reasons recorded in support of the impugned notice reads as under:

"In this case, the assessee has filed the return of income for A.Y. 2003-04 on 24.11.2003 declaring total income at Rs.3,11,82,91,010/-. The assessment order u/s. 143(3) of the Act has been passed on 28.02.2006 assessing the total income at Rs.3,37,52,12,080/-.

On perusal of the profit and loss account of the assessee it is noticed that the assessee had debited an amount of Rs.7,03,36,291/- as software charges. In the assessment order the Assessing Officer after discussing the issue in detail disallowed an amount of Rs.2,62,50,350/- being capital *expenditure and thereafter allowed depreciation at 60% on the said amount. As per Appendix 1 of [Rule(5)] of the Income Tax Rules, 1962, as amended with effect from 01.04.2003, from A.Y. 2003-04 onwards, on "computer including computer software" depreciation has to be allowed to the tune of 60%. With the inclusion of computer soil-ware in the depreciation chart as stated above, the entire expenditure of Rs.7,03,36,291/- should have been capitalized and depreciation at 60% or 30% as applicable should have been allowed depending on the date of installation. Thus the assessee's claim of software charges of Rs.4,40,85,941/- is not allowable and the assessee's income to the extent of Rs.2,71,42,796/- has escaped the assessment as worked out as under:-*

Total software expenditure debited		*7,03,36,291*
Less: Expenditure capitalized		*2,62,50,350*
Balance allowed as revenue expenditure		*4,40,85,941*
Purchased/installed upto 30.9.02	*1,23,91,210*	
Purchased/installed from 1.10.02	*3,16,94,731*	
Depreciation at 60% on 1,23,91,210		*74,34,726*
Depreciation at 30% on 3,16,94,731		*95,08,419*
		1,69,43,145
Income escaped the assessment 44085941-16943145)		*2,71,42,796*

On perusal of the profit and loss account of the assessee ills also noticed that in computing the income, the Assessing Officer has worked out the entitled Long Term Capital Loss allowed to be carried forward as indicated below:

L.T.C.L. Of A.Y. 2002-03	*= 5,11,55,521*
L.T.C.L. Of A.Y. 2003-04	*= 66,87,789*
Total LTCL allowed to carry forward	*= 5,78,43,310*

Perusal of the record reveals that the loss of the A.Y. 2003-04 eligible to be carried forward was is Rs.42,14,297/- only as indicated below:-

Long term capital gain of A.Y. 2003-04 as per assessee:	*3,47,46,686*
Less: Premium on debentures treated as capital by assessee	*3,89,60,983*
But treated as revenue by the Assessing Officer	
Long term capital loss of the year	*42,14,297*

Thus, by allowing a loss of Rs.66,87,789/- as Long Term Capital Loss of (lie year, there was an excess allowance of Long Term Capital Loss of Rs.24,73,492/-. Thus the assessee's income to the extent of Rs.24,73,492/- has escaped the assessment.

On perusal of the records it is also noticed that the assessee in computing the income of the year claimed a deduction amounting to Rs.6,97,50,863/- on account of interest u/s. 234B of the Act of A.Y. 1993-94 and in the assessment order the same claim has been allowed. The explanation given by the assessee for claiming the interest as deduction was that the interest was received as refund of 234B of the Act and the same was paid in the past as under:

A.Y. 1993-94	=	*42,16,122*
A.Y. 2000-01	=	*6,62,41,729*
A.Y. 2001-02	=	*93,33,004*
Total	=	*7,97,90,855*

In the above assessment years, the payment of the above interest was not allowed and was added back to the income of the respective years. Therefore, when part of it was refunded as over charge of interest u/s. 234B of the Act refunded to us, they cannot be taxed. In view of the matter, this amount of Rs.6,97,50,863/- is excluded from chargeable income of this year.

The assessee's above contention is not correct as the interest u/s. 234B of the Act is a penal interest and the same is not allowable as deduction in computing the income. Interest u/s. 234B of the Act is leviable if the advance tax including TDS is less than 90% of the tax levied on the assessed income. This interest being a penal interest, no deduction is allowable to the assessee in computing the income. The Assessing Officer, therefore, rightly disallowed assesee's claim in the earlier assessment years. This action of the Assessing Officer did not amount to taxation of the interest but only a disallowance of the claim. In such a situation, assessee's claim of deduction amount to Rs.6,97,50,863/- on account of interest u/s. 234B of the Act is not allowable for A.Y. 2003-04. Thus the assessee's income to the extent of Rs.6,97,50,863/- has escaped the assessment.

Therefore, I have reason to believe that in the case of the assessee, the income of the assessee chargeable to tax has escaped the assessment for A.Y. 2003-04. Issue notice u/s. 148 of the Act."

5. The respondent-assessee objected to the reasons recorded in support of the impugned notice, however the same was rejected by the Assessing Officer. Thereafter the Assessing Officer by his order dated 20 November 2008 passed an assessment order under Section 143(3) r/w Section 147 of the Act determining the petitioner's income to Rs.347.21 Crores.

6. On appeal, the Commissioner of Income Tax (Appeals) (the 'CIT(A)') by an order dated 12 March 2010 upheld the order of the Assessing Officer dated 20 November 2008 passed under Section 143 r/w Section 147 of the Act. On further appeal, the Tribunal by the impugned order allowed the respondent-assessee's appeal interalia holding that all the three grounds which form the basis of the impugned notice were a subject matter of consideration leading to order dated 20 February 2006 in regular assessment proceedings. In particular the impugned order records as under:

> *"On perusal of assessment order, we observe that AO at the time of making original assessment dated 28.02.2006 considered the issues of allowing software charges of Rs.4,40,85,941/- as revenue expenditure and a sum of Rs.2,62,52,350/- as capital in nature after discussing the issue in detail, as is evident not only from para 12 (at pages 27 to 30) of assessment order, but also the said fact is mentioned by the AO himself in the reasons recorded, as*

> *reproduced hereinabove in para 5. Similarly in respect of second ground taken by the AO to reopen assessment i.e. to allow carry forward of excess long term capital gains to the tune of Rs.24,73,492/-, we observe that the said issue was also considered by the AO in the assessment order in para 17 at page 38. Similarly, in respect of refund of interest of Rs.6,97,50,863/-, pertains to assessment year 1993-94, we observe that AO asked for details during the course of assessment proceedings and only after examining the same, he accepted the claim of the assessee while passing assessment order u/s. 143(3) of the Act dated 28.02.2006."*

From the above, it is evident that all the three grounds mentioned in the reasons recorded for issuing the notice for reopening were a subject matter of consideration by the Assessing Officer while passing an order dated 20 February 2006. The Tribunal after placing reliance on various decisions of this Court as well as Supreme Court concluded that the reopening proceedings have been initiated on a mere change of opinion and thus impermissible.

7. The grievance of the revenue is that the Assessing Officer had while passing the assessment order dated 20 February 2006 in regular assessment proceedings under Section 143(3) of the Act had taken an erroneous view. This according to the revenue would warrant a reopening notice under Section 148 of the Act. On the other hand, respondent-assessee did attempt to point out to us from the assessment

order that the grounds in support of the impugned notice were a subject matter of consideration in regular assessment proceedings.

8. We find that the impugned order of the Tribunal has recorded a finding of fact that all the issues which form the basis of the reopening notice, was a subject matter of consideration during the regular assessment proceedings. On the above facts the impugned order records that reconsideration of the same material would amount to a review of an assessment order which is not permissible. The Apex Court in CIT Vs. Kelvinator of India Ltd. reported in 320 ITR 561 has held that jurisdiction to reopen an assessment is not jurisdiction to review the assessment order. The contention urged by the revenue that it was wrong application of law by the Assessing Officer while passing original assessment order does not detract from the fact that there was an opinion formed during the regular assessment proceedings. The Assessing Officer has to at the very outset satisfy the condition precedent under Section 147 and 148 of the Act before he can exercise the jurisdiction to reopen an assessment. In the present facts, the reopening notice is based on a change of opinion as all the grounds were admittedly a subject matter of enquiry during regular assessment proceedings..

9. In view of the above, we find that the impugned order of the Tribunal has merely applied the well settled position in law that power to reopen an assessment is not the power to review an assessment and that reopening of an assessment cannot be taken place on a mere change of opinion as held by the Apex Court.

10. Thus, we find no reason to interfere with the impugned order of the Tribunal as no substantial question of law arises. Accordingly, appeal dismissed. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**