IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 14551 OF 2018

Champ Energy Ventures Pvt. Ltd., .. Petitioner.
v/s.
The Income Tax Officer, Ward 1 (2)
Pune & Another .. Respondents.

Mr. Mihir Naniwadekar with Mr. Rohan Deshpande i/b. Alisha Pinto, for the Petitioner.
Mr. Sham Walve, for the Respondents.

CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.
DATE : 18th JANUARY, 2019.

P.C:-

Petitioner has challenged a notice of re-opening of assessment dated 5th March, 2018, as at annexure A to the Petition. Petition arises in the following back-ground:-

(a) Petitioner is a company, registered under the Companies Act and is engaged in the business of manufacturing and selling of diesel, petrol and gas generators. For the Assessment Year 2013-14, Petitioner had filed return of income, which was taken in scrutiny by the Assessing Officer;

(b) In the return, Petitioner had presented the computation of income under normal provisions of the Income Tax Act, 1961 (for short "the

Act") as well as under provisions of Minimum Alternate Tax (for short "MAT"). Petitioner in the normal computation, had claimed an expenditure of Rs.1.89 Crores towards provision for warranty, which was included in the miscellaneous expenses. In the computation for MAT provisions, however, Petitioner had added back said sum of Rs.1.89 Crores on the ground that, same was unascertained liability;

(c) The return of income filed by the Petitioner was taken in scrutiny by the Assessing Officer. During the scrutiny, as it would be clear from the discussion to follow, the Assessing Officer had examined the Petitioner's claim of the said expenditure of Rs.1.89 Crores towards warranty liability. During such exercise, Petitioner itself had, while presenting computation for MAT provisions, had treated expenditure as unascertained liability.

2 Be that as it may, the Assessing Officer passed an order of assessment under Section 143(3) of the Act on 28th January, 2016, assessing Petitioner's income under the normal provisions. To re-open such assessment, she issued the impugned notice. In order to do so, she had recorded the following reasons:-

> " *The assessee has filed return of income for A.Y. 2013-14 on 30.09.2013 declaring a loss of Rs.1,05,082/-. The assessee is a private limited company and is engaged in the business manufacturing and selling diesel generators, petrol generators, LP-Gas & Natural gas generators. The case was selected for scrutiny through CASS. The income was assessed u/s. 143(3) of the Act at loss of Rs.5080/- 28.1.2016.*
>
> *2. On perusal of the case records it is revealed that the assessee had debited an amount of Rs.1,89,72,000/- toward provision for warranty included in miscellaneous expenses under the head other expenses to the P & L account. Further on verification of balance*

sheet that during the year under consideration the assessee had made provision for warranty provision of Rs.1,89,72,000/- and also revealed from the record that the above provision was made first time and for the period of four years. Further, computation of book profit revealed that the assessee while computing book profit made addition of Rs.1,89,72,000/- towards unascertained liability on account provision for warranty.

3. Thus, from the above it transpires that the above provision was unascertained and contingent in nature. As the provisions for warranty was unascertained liability it was required to be disallowed and added to total income. However, the assessee has not disallowed and added to the total income of the assessee. The amount which is provided for or kept apart cannot be held to be expenditure, actually incurred and consequently deduction is not admissible. Hence merely because the assessee is maintaining its account on mercantile basis, it cannot claim that the provision made towards warranty is an accrued liability. While computing the tax obligation under the MAT the assessee company himself admitted that provision for warranty expenses is an unascertained liability and consequently contingent in nature and while calculating book profit u/s. 115JB the assesssee has made addition of said provision in the book profit. However, computing the total income, the assessee has not made disallowane of warranty provision of Rs.1,89,72,000/-.

4. In view of the above, I have therefore, reason to believe that there is an escapement of income to the extent of Rs.1,89,72,000/- within the meaning of section 147 of the Income Tax Act, 1961."

3 Upon being supplied the reasons, Petitioner raised objections to the notice of re-opening of assessment under a communication dated 12th April, 2018. Such objections were rejected by the Assessing Officer on 27th November,2018. Hence, this Petition.

4 We have heard learned Counsel for the parties for final disposal of the Petition. Learned Counsel for the Petitioner submitted that, sole issue on the basis of which the notice of re-opening is issued,

was examined by the Assessing Officer, during scrutiny assessment. After being satisfied with the explanation of the Petitioner, the claim of expenditure was accepted. Assessing Officer now cannot re-open the assessment on the same ground which would be based on a mere change of opinion. In this context, Counsel relied on the observations made in the judgment dated 11th December, 2018 passed in Income Tax Appeal No.854 of 2016 , in which the Court had stated as under:-

> *" The Supreme Court in the case of Commissioner of Income Tax v/s. Kelvinator of India Ltd. (2010) 320 ITR 561 has held that even post the amendments in Section 147 of the Act w.e.f. 01.04.1989, the concept of change of opinion continues to apply. Learned Counsel for the Revenue however, contended that the Assessing Officer had not specifically raised queries in respect of proposed dis-allowane as recorded in the reasons. In our opinion, as long as certain claim made by the assessee was examined by the Assessing Officer, whether the Assessing Officer raised correct queries and came to the correct conclusion or not, in the context of reopening of assessment, would be of no consequence. There is a vital difference between a conclusion of the Assessing Officer after scrutiny which may appear to the Revenue to be erroneous and a situation where the Assessing Officer during the scrutiny assessment does not examine a particular claim of the assessee altogether. The later will follow within the purview of reopening of assessment, particularly when the notice is issued within a period of 4 years but the former may not. Since we uphold he Tribunal's decision on the invalidity of the re-opening, the other issues on merits need not be gone into. No question of law arises."*

5 On the other hand, Shri Walve, learned Counsel for the Revenue opposed the Petition, contending that, the Assessing Officer had recorded proper reasons. The impugned notice has been issued within a period of four years from the end of the relevant Assessment Year and, therefore, the element of true and full disclosure would not be relevant. He submitted that the Petitioner itself filed for the purpose of computing

book profit under Section 115JB of the Act, had treated the warranty liability as unascertained liability. Had this fact been brought to the notice of the Assessing Officer, her consideration of the Petitioner's claim of said expenditure for normal computation, would have been different.

6 What emerges from the record is that, the Assessing Officer in the reasons recorded, has referred to only one element, arising out of the Assessee's return namely - the Assessee's claim of expenditure of Rs.1.89 Crores towards provisions for warranty liability. The Assessing Officer points out that said liability was unascertained, contingent liability and, therefore, not allowable as an expenditure. The Assessing Officer drew inspiration from the declaration of the Petitioner for the purpose of MAT computation that the liability was unascertained. Counsel for the Petitioner, however, argued that liability may be unascertained but not necessarily contingent. The Assessee's treatment of such liability for MAT computation, therefore, was not relevant in any manner.

7 For the present, we are not required to comment on the validity of the Petitioner's claim of expenditure of Rs.1.89 Crores. This is so, because, we are concerned with the question of validity of re-opening of assessment and in this context, relevant consideration before us would be – whether the impugned notice is based on mere change of opinion. In other words, if the Assessing Officer had formed a belief on this issue during the original scrutiny, in the absence of any additional material available to her, it would not be open for her to re-open the assessment merely on the ground that, there had been an error in her considering Assessee's claim.

8 In this context, we may refer to the material on record. During scrutiny assessment, the Assessing Officer had placed multiple queries, to which the Petitioner had replied. In one such reply dated 6th January, 2016, Petitioner in the context of claim of warranty liability had made following representation:-

> *"5 Note on provision for Warranty Expenses-*
> *During the year under consideration, company received the bulk order of 1054 generator sets from Educomp Solutions Ltd. The said order was placed on certain terms and conditions as laid down in written agreement between the said company and us. The order was for 1054 generator sets to be installed in 1054 schools in Assam.*
> *Generally our company provide for one year free after sales service. However as per the agreement with Educomp, our company is liable to give five year free after sales service at respective schools in Assam.*
> *Accordingly, our company is liable to give four extra years of free service against normal period of one year. To meet the extended warranty period and probable warranty expenses to be incurred for Educomp, we charged generator sets at higher price to Educomp Solutions Ltd.*
> *The generator which was priced at Rs.28,500/- in normal course of business, was sold at Rs.46,636/- to Educomp Solutions Ltd. That excess amount charged per genset was on account of additional 4 year warranty.*
> …. …. …. …. ….
> *6* …. …. …. ….
> *7 Miscellaneous Expenses*
> *Miscellaneous Expenses for the FY 12-13 are Rs.2,06,91,882.25 whereas Miscellaneous Expenses for FY 11-12 were Rs.9,20,538.00. Major difference is on account of warranty expenses provided during the year of Rs.1,89,72,000.00."*

9 The Assessing Officer had thus, called upon the assessee to justify the expenditure towards provision for warranty and the assessee had made a detailed representation. According to the assessee, such claim

was genuine. After such exercise, Assessing Officer passed the order of assessment,in which, she made non-disallowance towards the expenditure in question. In other words, the assessee's claim was accepted. In absence of any tangible material out side of assessment record, it would not be open for the Assessing Officer to re-open the assessment on the said ground. Any attempt on her part would be based on a mere change of opinion as held by the Hon'ble Supreme Court in the case of ***CIT v/s. Kelvinator of India Ltd., 320 ITR 561*** has held that even post the amendments in Section 147 of the Act w.e.f. 01.04.1989, the concept of change of opinion, continues to hold the field. In the result, the impugned notice is quashed and set aside.

10 **Petition** is **disposed of.**

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**