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

INCOME TAX APPEAL NO.1147 OF 2016

Principal Commissioner of Income Tax-11 … Appellant

V/s.

Sun-n-sand Hotels Pvt. Ltd. … Respondent

Mr.Arvind Pinto for the Appellant.
Mr.R.Murlidhar i/by Mr.Atul Jasani for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 16, 2019.

P.C.:-

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 15th September, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). This Appeal relates to Assessment Year 2008-09.

2. The Revenue urges the following two questions of law for our consideration:

> "1. Whether in law and on the facts and circumstances of the case, was the Tribunal justified in upholding the orders of the CIT (A)

quashing notice u/s 148 of the Act?
2. Whether in law and on the facts of the instant case was the Tribunal justified right in holding that sales tax rebate received by the Company is profits "derived from the industrial undertaking" for the purposes of section 80IA of the Act?"

<u>3. Re:Question No.1</u>

(a) The impugned order of the Tribunal dismissed the Revenue's appeal before it holding that the reopening notice dated 7th July, 2013 seeking to reopen the Assessment Year 2008-09 was without jurisdiction. This as the notice dated 7th July, 2013 was without jurisdiction, being based on change of opinion. This for the reason that during regular Assessment proceedings under Section 143(3) of the Act the Assessing Officer had occasion to deal with the issue of sales tax benefit given by the State Government is revenue in nature but cannot qualify for deduction under Section 80IA of the Act as it is not derived from the Industrial undertaking which forms the basis of the recorded reasons to issue the reopening notice dated 7th July, 2013. In the above facts, the impugned order hold that this would be a clear case of change of opinion. Therefore, as the notice of reopening is without jurisdiction, the consequent orders of Assessment is also bad.

(b) Mr. Pinto, learned counsel appearing in support of the appeal states that reopening notice dated 7th July, 2013 is within a period of less than four years from the end of the Assessment Year 2008-09. Therefore, the Assessing Officer has jurisdiction to issue a reopening notice as the bar of the proviso to Section 147 of the Act is not applicable.

(c) It is a settled position in law that reopening of assessment even within a period of four years from the end of the relevant Assessment Year cannot be done on the basis of a change of opinion. If the Assessing Officer had occasion to deal with the issue which is the basis of the reopening notice (as reflected in the recorded reasons), earlier in the regular assessment proceedings under Section 143(3) of the Act, then the notice for reopening would be a case of reviewing the earlier order. This is not permitted to held by the Supreme Court in **CIT Vs. Kelvinator of India Limited**[1] which observed as under :

> "We must also keep in mind the conceptual difference between power to review and power to

1 320 ITR 561

> reassess. The Assessing Officer has no power to review; he has power to reassess. But reassessment has to be based on fulfillment of certain preconditions 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 inbuilt test to check the abuse of power by the Assessing Officer..."

In the above view, the conclusion of the Tribunal in the impugned order cannot be found fault with.

(d) In the above view, this question does not give rise to any substantial question of law. Thus, not entertained.

4.Re:Question No.2

(a) In view of the proposed question of law No. 1 above being dismissed, this question has become academic.

(b) Therefore, in the present facts, this question being academic, does not give rise to a substantial question of law. Thus, not entertained.

5. Accordingly, the appeal is dismissed. No order as to costs.

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