

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 6.9.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

Tax Case (Appeal) No.1441 of 2010

Commissioner of Income Tax-LTU
Chennai

...Appellant

Vs.

M/s.Hyundai Motor India Ltd.,
Plot No.H-1 SIPCOT Industrial Park,
Irungattukottai,
Sriperumpudur Taluk,
Kancheepuram District PIN: 602 105.

...Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'B' Bench, Chennai, dated 23.7.2010 made in ITA No.704/Mds/2010 as against the Order of the Commissioner of Income Tax (Appeals) LTU, Chennai -34, in appeal No.ITA No73/08-09/LTU(A), dated 26.02.10 against the Order of the Addl. Commissioner of Income Tax LTU, Chennai, dated 24.12.08 for the Assessment Year 2003-04.

For Appellant : Mr.T.Ravikumar
Senior Standing Counsel

For Respondent : Mr.Vikram Vijayaraghavan for
M/s.Subbaraya Aiyar Padmanabhan

J U D G M E N T
(Delivered by DR.VINEET KOTHARI,J)

The Revenue has filed this Tax Case (Appeal) under Section 260-A of the Income Tax Act aggrieved by the order dated 23rd July 2010 passed by the learned Income Tax Appellate Tribunal dismissing the Revenue's Appeal for the Assessment Year 2003-2004.

2. The Appeal was admitted by a co-ordinate Bench of this court on 31.1.2011, on the following purported substantial question of law for consideration:-

"Whether on the facts and in the circumstances of

the case, the Income Tax Appellate Tribunal was right in confirming the order of the Commissioner of Income Tax (Appeals) holding that the reopening of the assessment under Section 147 was not valid on the ground that the assessee had disclosed all particulars at the stage of original assessment and the reopening was only due to change of opinion, without appreciating that the Assessing Officer had not formed any opinion at all on the issue in question at the time of the original assessment and the assessment had been reopened within the period of four years?"

3. Learned Senior Standing Counsel for the Appellant/Revenue Mr.T.Ravikumar submitted that in the original Assessment Order under Section 143(3) of the Act for the Assessment Year 2003-2004 dated 17.3.2006 the issue regarding the payment of Technical Know-How Fees of Rs.9,63,81,500/- was not discussed by the Assessing Authority and merely because the Assessee had produced relevant Books of Accounts before the Assessing Authority in the course of Assessment under Section 143(3) of the Act, it cannot be said to be a case of re-assessment on a mere change of opinion under Section 147/148 of the Act and therefore, the learned Tribunal has erred in holding that re-opening of the Assessment is not valid, by its impugned order. He relied upon the following decisions in support of his contention:-

- i) Dr.Amin's Pathology Laboratory v. JCIT and others (252 ITR 673 (Bom))
- ii) Consolidated Photo & Finvest Ltd. v. ACIT (281 ITR 394 (Del))
- iii) EMA India Ltd. v. ACIT (226 CTR 659(All))
- iv) Sri Krishna (P) Ltd. v. ITO (221 ITR 538 (SC))

4. The relevant portion of the decision in Dr.Amin's Pathology case (supra) is quoted below for ready reference:-

"A reading of the assessment order clearly shows that the AO failed to notice an important item, viz., an amount of Rs.6,70,758 which represented unpaid purchases. The assessee-firm had claimed expenses in respect of all purchases. However, an amount of Rs.6,70,758 represented unpaid purchases. It is for this reason that the AO has come to the conclusion for issuance of notice under s.148 that the assessee-firm had suppressed an income to the extent of Rs.6,70,758. Under Expln.1 to the proviso, mere production of account books from which material evidence could have been discovered by the AO will not necessarily amount to disclosure within the meaning of the proviso. Therefore, mere production of the balance sheet

P&L a/c or account books will not necessarily amount to disclosure within the meaning of the proviso. In the present case, the facts show that the AO overlooked the aforestated item. That, he noticed it subsequently. That, at the time of passing the original order of assessment, he could not be said to have opined on the above item. Therefore, there was no change of opinion. Therefore, in the present case, the impugned notice is sustained."

5. On the other hand, the learned counsel for the Assessee Mr. Vikram Vijayaraghavan submitted that it is wrong to contend that on behalf of the Revenue the issue regarding payment of Technical Know-How Fee was not considered by the Assessing Authority in the Scrutiny Assessment under Section 143(3) of the Act. He submitted that for the said Assessment Year, the matter was referred to the Transfer Pricing Officer by the said Assessing Authority on 6.6.2005 and the learned Transfer Pricing Officer, vide order dated 9th March 2006, has not only considered the said payment of Technical Know-How Fee of Rs.9,63,81,500/- while analysing the various such payments for international transactions on the basis of Transactional Net Margin Method (TNMM) under Rule 10B of the Income Tax Rules, but, he had assessed amount of T.P. adjustments to the extent of Rs.18,34,295/- vide the aforesaid order dated 9th March 2006 which has been included in the assessed income separately by the Assessing Authority in the Assessment Order under Section 143 (3) of the Act, vide para 3 thereof. Therefore, once the conscious consideration of the said payment of Technical Know-How Fee has already been made by the Assessing Authority in the earlier Scrutiny Assessment under Section 143(3) of the Act therefore, the re-assessment on a mere change of opinion to treat it as part of capital asset and allow only depreciation thereon was not permissible and therefore, the learned Tribunal was justified in setting aside the re-assessment order.

6. The learned counsel for the Assessee further drew our attention to the reasons recorded by the Assessing Authority under Section 148 of the Act for the Assessment Year 2003-2004 in which the learned Assessing Authority has clearly taken note of the order passed by the Transfer Pricing Officer on 9th March 2006 regarding the Technical Know How-Fee of Rs.9,63,81,500/- in the said reasons recorded. Therefore, even while issuing such reassessment notice, the learned Assessing Authority was aware of the previous consideration of the said payment of Technical Know-How Fees made by the Assessee. He, therefore, submitted that the learned Tribunal was justified in quashing the re-opening of the Assessment under Section 147/148 of the Act in the present facts and circumstances.

7. We have heard the learned counsels at length and perused the materials available on record.

8. The learned Tribunal, in its order dated 23rd July 2010, has assigned the following reasons for setting aside the re-assessment proceedings for the Assessment Year 2003-2004 which has been done within the time limit of four years without invoking the proviso to Section 147 of the Act. The relevant portion of the order passed by the Tribunal is quoted below for ready reference:-

"5. We have considered the rival submissions. A perusal of the assessment order clearly shows that the original assessment had been completed u/s 143 (3) of the Income Tax Act, 1961 on 17.3.2006. It is also noticed that the assessee has challenged the reopening. It is further noticed that the AO has overruled the assessee's objection regarding the validity of the reopening on the ground that the issue of the payment of royalty and technical know fees being treated as a capital expenditure had not been dealt with in the original assessment order and the reopening had been done within 4 years and consequently the proviso to section 147 was not applicable. A perusal of the order of the learned CIT(A) clearly shows that the details pertaining to the lump sum payment of technical know fees, the copy of the agreement etc. were already submitted in the course of the original assessment proceedings on 26.12.2005. The fact that the AO in the course of the original assessment has called for the said details and has examined them and has accepted the claim of the assessee in the course of the original assessment shows that there is no default on the part of the assessee. Obviously, the assessee is not expected to advise the AO as to the course of action he has take in the assessment. The AO calls for the details and explanations from the assessee. The assessee is expected to give the details and the explanation called for. The AO has to consider the explanation and then make the assessment. Just because he has not discussed anything regarding the explanations called for from the assessee in the assessment order does not mean that the issue has not been considered by the AO or that he has not formed an opinion on the issue. Obviously, the AO would discuss issues in the assessment order on which there are disputes between the AO and the assessee. Where the AO

accepts the explanation of the assessee normally such issues would not be discussed in the assessment order. The fact that the AO has called for the details in the course of original assessment proceedings is not disputed. Once the details are called for and they are submitted it is presumed that the AO has applied his mind to the issues for which the details have been called for. The fact that no discussions or additions or disallowances have been made in the course of the assessment order passed originally would show that the AO has found the claim of the assessee to be reasonable and acceptable. Thus the AO has already formed an opinion on the basis of the evidences filed in the course of the original assessment proceedings. By re-examining the same and drawing a different inference it would only mean that there is a change of opinion. This is not permissible for reopening. This view is supported by the decision of the Hon'ble Supreme Court in CIT v. Kelvinator of India Ltd. reported in 320 ITR 561. In the circumstances, we are of the view that the reopening of the assessment as done by the AO is bad in law. It is also noticed that the learned CIT(A) has followed the decision of the Hon'ble Supreme Court in the case of Kelvinator India Ltd., referred to supra, to hold that the AO has no power to review and has the power only to do reassessment and that the reopening done in the present case is on a change of opinion. In the circumstances, the finding of the learned CIT(A) on this issue stands confirmed. 6. In the result, the appeal of the Revenue is dismissed."

9. We are of the clear opinion that in the present facts and circumstances of the case, the judgments relied upon by the learned Senior Standing Counsel for the Revenue are not applicable. It is not the case of the Assessee of mere production of Books of Accounts and relevant information to the Assessing Authority, but, they have been given active and conscious consideration by the Assessing Authority. As far as the amount of payment of Technical Know-How Fee of Rs.9,63,81,500/- is concerned, it is clear from the records that the said issue was considered not only by the Assessing Authority but, by the Transfer Pricing Officer also alongwith other expenditure incurred by the Assessee and it was found that it falls within the domain of international transactions as found by the Transfer Pricing Officer and the T.P. Adjustment of a sum of Rs.18,34,295/- was arrived by the Transfer Pricing

Officer which was included by the Assessing Authority while passing the Assessment Order under Section 143(3) of the Act.

10. Therefore, the reassessment proceedings undertaken by the Assessing Authority to disallow the said expenditure fully by holding it to be only adding as intangible asset falling within the domain of Section 32(1)(ii) of the Act and allowing only 25% depreciation thereon is nothing but a mere change of opinion by the Assessing Authority. It is well settled legal position that the reassessment under the provisions of Sections 147 and 148 of the Income Tax Act is not permissible on a mere change of opinion. The Assessing Authority, in order to invoke the reassessment proceedings under Section 147/148 of the Act, has to record "reasons to believe" about escapement of income in the hands of the Assessee. The parameters of powers under Section 147/148 of the Act have been discussed by the Apex Court and various High Courts in a large number of decisions and the latest in the series being in the case of CIT v. Kelvinator of India Ltd. (320 ITR 561 (SC)) which has been relied upon by the learned Tribunal to quash the reassessment in the present case.

11. The relevant portion of the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax v. Kelvinator of India Ltd. (320 ITR 561 (SC)) is extracted below for ready reference:-

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under 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 1st April, 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-1st April, 1989, power to re-open 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 re-open 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 fulfilment of

certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening 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 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989 ((1990) 82 CTR (St) 1), which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.--A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

5. For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

12. Therefore, we are satisfied that the learned Tribunal, in the present case, was perfectly justified in taking the aforesaid view that reassessment in the circumstances of the case was done merely based on a change of opinion at a subsequent stage and it was not permissible and set aside the same. The present Appeal filed by the Revenue is devoid of merit and is liable to be dismissed and the same is, accordingly, dismissed. The substantial question of law framed is answered in favour of the Assessee and against the Revenue. No order as to costs.

ssk

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner of Income Tax,
Chennai.
2. The Additional Commissioner of Income Tax-LTU
Chennai
3. The Registrar,
Income Tax Appellate Tribunal
'B' Bench, Chennai.

+lcc to Mr.T.Ravikumar, Advocate, SR.No.77088

+lcc to Mr.Subbaraya Aiyar, Advocate, SR.No.77650

TC(A) No.1441 of 2010

Kak(23/10/2019)

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