IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.08.2020

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
&
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.Nos.972 to 974 of 2013

The Commissioner of Income Tax
Chennai. ... Appellant in all 3 Petitions

Versus

M/s.Tidel Park Ltd.,
4, Rajiv Gandhi Salai, Taramani,
Chennai - 600 113.
... Respondents in all 3 Petitions

Common Prayer: Tax Case Appeals filed under section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Madras, 'B' Bench, Chennai, dated 11.04.2013 in ITA No.2120/Mds/2011, ITA No.2121/Mds/2011, and ITA No.2121/Mds/2011 respectively as against the orders dated 30.09.2011 passed by the Office of the Commissioner of Income Tax, Chennai in I.T.A. No.54/2011-2012 in I.T.A. No. 61/2011-2012 for the assessment year 2005-2006 of 2003-2004, and as against the orders of dated 31.12.2010, passed by the Assistant Commissioner of Income Tax, Chennai for the Assessment year 2003-2004 and 2005-2006 for the PAN/GIR No. AABCT0666R respectively.

For Appellant : Mr.M.Swaminathan,
for Ms.V.Puspha, Standing Counsel

For Respondent : Mr.R.Venkatnarayanan
for M/s.Subbaraya Aiyar Padmanabhan

COMMON JUDGEMENT
(Judgment of the Court was delivered by KRISHNAN RAMASAMY, J.)

The Court was held by Video Conference, as per the Resolution of the Full Court dated 3 July 2020, by Judges at their respective residences and the counsel, staff of the Court appearing from their respective residences.

2. Mr.M.Swaminathan, learned Standing Counsel appeared for the appellant/department and Mr.R.Venkatnarayanan, learned counsel appeared for the respondent/assessee.

3.All these Tax Case Appeals have been filed against the common order dated 11.04.2013 of the Income Tax Appellate Tribunal, Madras “B” Bench, Chennai. TCA No.972 of 2013 has been filed against the order passed in I.T.A.Nos.2120/Mds/2011 (for the assessment year 2003-04) and TCA Nos.973 & 974 of 2013 have been filed against the order passed in ITA No.2121/Mds/2011 (for the assessment year 2005-06) and Cross Objection No.17/Mds/2012.

4. The brief facts relevant to the case of TCA.No.972 of 2013 are as follows:-

4.1. The assessee is a company promoted as a joint venture by M/s TIDCO & M/s ELCOT and both are Government of Tamil Nadu Undertakings. Assessee is engaged in developing, operating and maintaining information technology parks and the name of the park developed, maintained and operated during the relevant previous year was "Tidel Park". Assessee has obtained approval for setting up industrial park from the Ministry of Industry, Government of India. CBDT had also notified it as an industrial park under section 80IA(iii) of the Act.

4.2. For the relevant Assessment Year, the assessee filed its return declaring an income of Rs.76,67,750/- and claimed deduction of Rs.6,73,15,795/- under section 80-IA (4)(iii) of the Income Tax Act. Thereafter the assessment was completed on 10.03.2006 under section 143(3) of the Act. On 26.03.2008, assessee was served with a notice proposing to reopen the assessment. The assessee, in its reply filed on 17.04.2008, requested the Assessing Officer to treat the return originally filed as the return filed in pursuance of such notice and also requested the Assessing Officer to give reasons while resorting for re-assessment. The department furnished the reasons inter alia mentioned that the assessee had not filed the audit report in Form No.10CCB along with return, which was required for availing the deduction under section 80 IA of the Act. Thereafter, the re-assessment was completed on 26.12.2008 withdrawing the deduction made under section 80-IA of the Act.

4.3. Aggrieved by the same, the assessee filed an appeal before the CIT(A) questioning the withdrawal of deduction made under Section 80lA. The CIT(A) allowed the appeal of the assessee by directing the Assessing Officer to accept the report in Form No.10CCB filed by the assessee during the course of re-assessment proceedings and to allow the deduction claimed under section 80-IA of the Act.

4.4. The Assessing Officer, pursuant to the directions of CIT(A), issued fresh notice to the assessee under Section 148. Though the assessee objected to the second re-opening of assessment, the Assessing officer chose to proceed with the re-assessment and completed the same on 31.12.2010 denying deductions claimed under section 80-IA of the Act. In the said re-assessment proceedings, the Assessing Officer took a view that the deduction under section 80IA(4)(iii) could be availed only for the profits derived from developing, operating and maintaining facilities of the nature mentioned therein and could not be applied for the rentals received from the property. The assessee contended that during the course of original proceedings itself, the details of its claim under section 80IA (4)(iii) was called for by the Assessing Officer and they were furnished. The Assessee also pointed out that one of the questions raised by the Assessing Officer in his letter dated 11.02.2006 was to explain how it could claim rental income, interest on income, other income, revenue shares from lessees, and operation and maintenance charges received as eligible deduction under section 80lA of the Act. However, the Assessing officer was not impressed with the reasons given by the assessee and he was of the view that since the production of books of account, evidence from which material evidence could, with due diligence, be discovered, would not amount to disclosure required under section 147 of the Act, rejected the claim of the assessee.

4.5. Against the said order, the Assessee went on appeal to the CIT(A), assailing the re-assessment as well as the denial of deduction under section 80-IA of the Act. According to the assessee, reopening of assessment, which was based on a change of opinion and that too, after four years from the end of the relevant Assessment Year, was not proper. The CIT(A) allowed the appeal of the assessee on the ground that there was no failure on the part of the assessee to disclose fully and truly the material facts required for the assessment and thus held that the reassessment proceedings was invalid.

4.6. Aggrieved by the order of the CIT(A), the Revenue had filed an appeal before the ITAT which had rejected the appeal on the grounds that there was no tangible material with the Assessing Officer for taking a different view and that resorting to reopening of assessment was based on change of opinion which was not possible and thus, the very basis for assumption of jurisdiction for reopening of assessment was absent and upheld the finding of CIT(A) and dismissed the appela filed by the Revenue.

5. The brief facts relevant to the case of TCA.Nos.973 & 974 of 2013 are as follows:-

5.1. The assessee company claimed deduction under Section 80-IA(4)(iii) of the Act for the relevant Assessment Year. This was allowed in the original assessment under Section 143(3) of the Act, completed on 19.12.2007. The Assessing Officer issued notice on 17.03.2010 under section 148 proposing re-assessment. The Assessee's reasons for objecting to the re-assessment was that the interest from sinking fund was one of the items on which such details were furnished and deduction under section

80-IA of the Act was allowed to it only after considering its reply. The contention of the assessee was rejected by the Assessing Officer as he was of the view that since production of books of account and evidence from which material evidence could, with due diligence, be discovered, would not amount to disclosure required under Section 147 of the Act.

5.2. Aggrieved by the same, the Assessee went on appeal to the CIT(A), assailing the re-assessment as well as the denial of deduction under section 80-IA of the Act. Acoording to the assessee, re-opening of assessment was based on a change of opinion and that too after four years from the end of the relevant Assessment Year. The CIT(A) allowed the appeal of the assessee on the ground that there was no failure on the part of the assessee to disclose fully and truly material facts required for the assessment and thus held the reassessment proceedings to be invalid.

5.3. Aggrieved by the order of the CIT(A), the Revenue had filed an appeal before the Income Tax Appellate Tribunal (ITAT) which had also rejected its appeal on the ground that there was no tangible material with the Assessing Officer for taking a different view and resorting to re-opening, based on change of view, which was not possible and thus the very basis for assuming a jurisdiction for reopening was absent. Therefore, it held that the CIT(A) was right in invalidating the re-assessment and dismissing the Revenue's appeal.

6. The appellant/department in TCA.No.972 of 2013 suggested the following substantial questions of law:-

> "1.Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in invalidating the reopening of the assessment despite the fact that the Assessing Officer had not considered the issue relating to Section 43B in the original assessment completed on 17.03.2010?
>
> 2.Whether on the facts and circumstances of the case, the assessee is eligibile for deduction under Section 80IA on the lease rental income from Industrial Park to be assessed under the head Profits and gains of Business or Profession?"



6.2. The appellant/department in TCA.Nos.973 & 974 of 2013 suggested the following substantial questions of law:-

> "1.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in invalidating the reopening of the assessment?

2.Whether on the facts and in the circumstances of the case, the assessee is eligibile for deduction under Section 80IA on the lease rental income from Industrial Park to be assessed under the head Profits and gains of Business or Profession?”

7. The learned counsel appearing for the appellant submitted that the deduction under Section 80IA could be available only for the profits derived from developing, operating and maintaining facilities of the nature mentioned therein and could not be applied for rentals received from property. Therefore, he contended that in the present case, the lease rentals received by the Assessee is not eligible for deduction under Section 80IA and however, all these facts have not been considered by the Commissioner of Income Tax (Appeals)-VI, Chennai as well as the Tribunal.

8. The learned counsel for the revenue further contended that the re-opening of assessment under Section 147 read with Section 148 of the Income Tax Act, 1961 was resorted not only for the purpose of withdrawal under Section 80IA, but for the other reason that the interest shown as payable towards deduction was allowed without considering Section 43(b) of the Act. According to the appellant, unless and until the interest shown as outstanding in the accounts of the company or a company enterprise was paid before the end of the previous year or before the due date of filing of the return, claims in this regard could not be allowed. In the present case, the interest shown as outstanding was not paid before the end of the previous year, and therefore, the Assessee is not entitled to deduction and these aspects were not considered at that time of original assessment proceedings and therefore, the re-opening of the assessment under Section 147 is valid.

9. The learned counsel also contended that for the assessment year 2005-06, the assessment was reopened within the period of limitation under Section 148 and notice was issued on 17.03.2010 for reassessment. Since the Assessing Officer had not taken any view on the rent received from the premises, the Assessee is eligible for deduction under Section 80IA of the Act. However, through the re-assessment proceedings under Section 147, the Assessing Officer reached a conclusion that the Assessee was not eligible for deduction under Section 80IA. Further he stated that both the CIT(A) and the Tribunal have not considered the submissions of the department regarding the eligibility of deduction under Section 80IA, since the income derived from the lease rentals has not fallen under the head of profit and gains of the business and profession and it should have been considered under the head of income and profits.

10. Per contra, the learned counsel for the respondent/assessee would submit that in the present case, lease rental received by the assessee was from and in the course of the business, which will clearly amount to profit derived from the business out of developing, operating and maintaining facilities provided to the Software or Industrial park units, which is eligible for deduction. Therefore, the lease rentals received could be treated as business income and not as an income derived from the house properties. In this regard, the Counsel referred this Court's Judgment in the case of CIT vs. M/s. Elnet Technologies Ltd., passed in TCA.Nos.2336 & 2623 of 2006, dated 09.10.2012.

11. The learned counsel also referred to another Judgment, which was rendered by a co-ordinate bench of this Court in the case of CIT vs. Chennai Properties and Investments Ltd. He contended that the income of lease rental laid on and from the house properties could be considered only as income from the business and not as income from the house properties. He further submitted that it is well a settled principle that the lease rental income derived from the Software Park could be considered only as income from the business and not income from the house properties as contended by the department.

12. The learned counsel for the respondent/assessee contended that the assessment has been completed on 31.03.2008, for the assessment year 2003-04, whereas the notice for re-assessment proceeding under Sections 147 and 148 of the Act has been issued by the department on 17.03.2010. Therefore, the notice issued under Section 148 of the Act was beyond the four year period of limitation as prescribed therein. That apart, no other new material was found by the department to show that the income has escaped assessment, to initiate the proceedings under Section 148. Therefore, he submitted that the appeal is also barred by limitation and it is liable to be dismissed.

13. Furthermore, the learned counsel for the respondent/assesee contended with regard to the payment of interest that in the course of the original assessment proceeding itself, the Assessing Officer had issued a letter on 11.02.2006, with regard to the interest shown as Rs.6.69 crore was payable as on 31.03.2003. The Assesee in his reply letter dated 24.02.2006 had clearly stated that the payment of amount of Rs.6.69 crore was made before the completion of the relevant assessment year and in that regard, all the particulars had been provided by the Assessee to the Assessing Officer. After perusal of all the particulars, the Assessing Officer had passed the detailed assessment order. Therefore, there is no concealment of any material fact during the course of the assessment, so as to enable the department to reopen the assessment under Sections

147 and 148 of the Act. Thus, both the CIT(A) -VI as well as the Tribunal have considered the facts elaborately and given its finding and the same does not require any re-consideration as contended by the department. Hence, he prayed for dismissal of the appeals.

14. We have heard elaborately the submissions made by the both sides on all the appeals and perused the materials available on record.

15. These appeals are relating to the assessment year 2003-04 and 2005-06. In all the three appeals, the department had taken a view that the income earned by the Assessee will be treated as income from the house property and not income from the business or profession, so as to become eligible for deduction under Section 80IA. We are unable to understand as to how the department has taken such a view against the Assessee when the main object of the company is to construct, maintain and lease out of the Software Technologies Park and the main income of the Assessee was lease rentals.

16. We have perused the entire order passed by the Assessing Officer under Section 147. But, we are unable to find anything in the order as to what was the object of the assessee company etc., It shows that the Assessing Officer, without application of mind, had passed the re-assessment order, with assumption, presumption and surmise, which will not be permissible under any of the statute. We also tried to find something in statutes to support the finding of the Assessing Officer, but found none.

17. Further, both the CIT(A)-VI and the Tribunal have thoroughly scrutinised the entire facts and passed the order. The original assessment order was passed by the Assessing Officer after taking into consideration of all the material facts. During the course of the re-assessment proceeding also, the Assessing Officer has not found any tangible material by which income has escaped from the assessment. Therefore, we are of the opinion that without any application of mind, the Assessing Officer re-opened the assessment under the pretext that income has escaped assessment and passed the re-assessment order under Section 147, which is a patent error committed by the Assessing Officer. Under these circumstances, we do not find any merit in all these three appeals filed by the Revenue and the same are liable to be dismissed on the above said point also.

18. The present issue is squarely covered by the Judgment of this Court passed in the case of CIT vs. M/s.Elnet Technologies Ltd., and CIT vs. Chennai Properties and

Investments Ltd., in which the judgment in the case of The Commissioner of Income Tax, Chennai Vs. M/s.Tidel Park Ltd., passed in TCA.No.901 of 2015, dated 03.08.2020 has been followed, wherein we have passed a detailed order, referring to the decision of this Court rendered in the case of Principal Commissioner of Income Tax-4, Vs. M/s.Khivraj Motors Pvt. Ltd., in TCA.Nos.314&315 of 2017, dated 27.07.2020.

19. In TCA.No.972 of 2013 (for the assessment year 2003-04), the learned counsel for the appellant/department has raised one more issue with regard to non-payment of interest. As contended by the Assessee and upon perusal of all the records, it is clear that the Assessee had paid the interest amount of Rs.6.69 crore within the relevant assessment year and all these facts have been disclosed by the Assessee to the Assessing Officer. After taking into consideration all these aspects, the Assessing Officer had passed the original assessment order. Therefore, we do not find any merit in the submissions of the learned counsel on the basis that the deduction was granted without payment of any interest during the relevant financial year and hence, the appeal is liable to be dismissed well on this point also.

20. Yet another issue also raised with regard to limitation for reopening the assessment under Section 147. The notice under Section 148, for reopening of the assessment was issued on 17.03.2010 for the assessment year 2003-04. If at all, if the department intended to reopen the assessment under Sections 147 and 148, it should have issued the notice under Section 148 within four years from the end of the relevant assessment year. In the present case, after completion of the period i.e., on 31.03.2008, the department issued a notice under Section 148 for re-assessment. Therefore, we are of the view that the re-opening of the assessment for the assessment year 2003-04 was beyond the period of limitation and accordingly, the Tax Case Appeals in TCA.Nos.972, 973 & 974 of 2013 are liable to be dismissed on this point also.

21. As aforesaid, in all the three appeals, the re-opening of the assessment by the department was without any evidence to show concealment on material facts on the part of the Assessee. The department tried to provide its second opinion, under that pretext the original assessment proceedings of the Assessing Officer was sought to be re-opened without providing any opinion with respect to the rental income. We would stress upon to state that the department should not have come to the conclusion and re-opened the assessment under Sections 147 and 148 of the Act under the pretext that the Assessing Officer has not provided any opinion. In fact, the Assessing Officers cannot make any assessment without forming any opinion and pass the assessment

order. Therefore, the question of the Assessing Officer failing to provide any opinion does not arise. Accordingly, on this point also, the appeals of the department are liable to be dismissed.

22. At this juncture, we would like to stress that the re-assessment proceedings under Section 147 of the Act do not provide for re-assessment on a mere change of opinion. The re-assessment on a mere of change of opinion is not permissible under law. Such change of opinion amounts to review of the order of the assessment, which is not permissible under law. In support of our opinion, we would like to press into service the Judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd., reported in (2010) 187 Taxman 312 or 320 ITR 561 (SC). The extract of the relevant Paragraph No.4 which reads as follows:-

> "4.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 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 re-open 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 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 re-assess. 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 1-4-1989, 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 "reasons 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 herein below the relevant portion of Circular No.549, dated 31.10.1989, 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." "

23. In view of the reasons stated above, we do not find any question of law arising for our consideration in all the three appeals viz., TCA.Nos.972,973 & 974 of 2013. We do not find any illegality or error in the decision making process of the CIT (A)-VI and the Tribunal and therefore, the orders passed by the both Courts below are correct and sustainable and do not require any interference. Hence, all the appeals filed by the department deserves to be dismissed.



24. In the result, the Tax Case Appeal Nos.972, 973 & 974 of 2013 are dismissed. No costs.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To
1.The Income Tax Appellate Tribunal Madras, 'B' Bench, Chennai.
2.The Commissioner of Income Tax, (Appeals)VI
121 Mahathma Gandhi Road, Chennai
3.The Assistant Commissioner of Income Tax,
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Chennai 34.

Copy to
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Income Tax Appellate Tribunal
III Floor, Rajaji Bhavan
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+1 CC to M/s. Subbaraya Aiyar Padmanabhan, Advocate sr 27186.

T.C.A.Nos.972 to 974 of 2013

SVI(CO)
SP(16/10/2020)