

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.08.2020

CORAM

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

T.C.A.No.450 of 2017

Principal Commissioner of Income Tax 6
No.121, Nungambakkam High Road,
Chennai 600 034.

... Appellant

Versus

M/s. Safe Corrugated Containers Pvt Ltd,
F-17, Old F-BB, SIPCOT Industrial Complex,
Gummidipundi, Chennai- 601 201

... Respondent

Prayer: Tax Case Appeal filed under section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Madras, 'C' Bench dated 25.1.2017 in ITA No.1250/Mds/2016 Assessment year 2006-2007 and the Appellate order date 04.03.2016 made in ITA.No.47/CIT(A)-15/14-15 passed by Income Tax Department The Commissioner of Income Tax (Appeals)-15, Chennai-34 and the Assessment order dated 12-03-2014 made in PAN/GIR No.AAFCS2534K passed by The Deputy Commissioner of Income Tax Company Circle-VI(1), Chennai-34, Assessment year 2006-2007, and the Assessment order dated 15-12-2008 made in ITNS65 GIR/PAN No.AAFCS2534K passed by the Assistant Commissioner of Income Tax Company Circle VI(1) Chennai-34 for the Assessment year 2006-2007.

For Appellant : Mr. J. Narayanaswamy,
Senior Standing Counsel

For Respondent : No Appearance

JUDGMENT

(Judgment of the Court was delivered by Mr.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

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Court appearing from their respective residences.

2. This tax case appeal has been filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "C" Bench, dated 25.01.2017 in I.T.A.No.1250/Mds/ 2016.

3. Heard Mr. J. Narayanaswamy, learned Senior Standing Counsel for the department/appellant and none appeared for the respondent/assessee.

4. The appellant filed the present appeal and suggested the following substantial questions of law:-

"1. Whether the Appellate Tribunal was right in cancelling the reopening of assessment under Section 147 of the Income Tax Act, when there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment relating to the Asst. Year 2006-07?

2. Is the finding of the Tribunal not perverse when the assessee claimed sale of shares in the previous assessment year 2005 - 06 as "capital gains" and the very next asst. year 2006-07 sale of shares is shown as "business loss" and set off against the business income, which is against sub-clause [iv] to clause [c] to explanation 2 of Section 147 of the Income Tax Act?

3. Whether the Tribunal was right and justified in cancelling the reopening of assessment u/s 147 overlooking the binding decisions in Hoda Siel Products Ltd Vs. DCIt & Anr (Del) reported in 340 ITR 53 which was upheld by Honourable Supreme Court in 340 ITR 64?"

5. Mr. J. Narayanaswamy, learned Senior Standing Counsel for the department has submitted that the respondent/assessee incurred loss of a sum of Rs.26,51,684/- out of sale of shares and the said loss was debited by the assessee in the profit and loss account of the previous year, relevant to assessment year 2006-07, as revenue expenditure. Whereas, the same assessee incurred a profit out of the sale of shares in the previous assessment year 2005-2006 and claimed the said profit as "capital gains" and paid tax at the rate of 10%. This aspect was not considered by the Assessing Officer, while making the assessment and therefore, reassessment was made by the Deputy Commissioner of Income Tax under Section 147 of the

Act and an order was passed holding that the assessee company cannot claim loss on sale of shares as revenue loss for the assessment year 2006-07, when the same assessee had claimed the profit on sale of shares as "capital gains" for the assessment year 2005-06 and paid the tax only at the rate of 10%.

6. Against the said reassessment order passed by the Deputy Commissioner of Income Tax, Company Circle VI(1), Chennai, an appeal was filed by the Assessee before the Commissioner of Income Tax (Appeals)-15, Chennai.

7. Before the Commissioner of Income Tax (Appeals)-15, the respondent/assessee claimed that they have been dealing with the shares for several years and therefore, the loss on sale of shares could be treated as "business loss". However, the Commissioner of Income Tax (Appeals)-15, Chennai rejected the contentions of the respondent/assessee and confirmed the action of the Assessing Officer in initiating the proceedings under Section 147 of the Act, as there was no opinion formed by the Assessing Officer in the original assessment proceedings and accordingly, dismissed the appeal.

8. Challenging the said order, the respondent/assessee preferred an appeal before the Income Tax Appellate Tribunal (ITAT). The ITAT, after hearing the arguments of both the counsel, passed a detailed order holding that the details of loss on sale of shares have been clearly disclosed in the profit and loss account by the assessee, while filing the original return of income and that the Assessing Authority made a thorough scrutiny after issuing scrutiny notice and thereafter, passed the original assessment order and therefore, the department cannot say now that no material was disclosed by the assessee and hence, the reassessment order passed under Section 147 of the Act was not proper and thus, allowed the appeal of the assessee.

9. We have given due attention to the submissions made by the learned counsel for the appellant and perused the materials available on record.

10. In the present case, the Commissioner of Income Tax (Appeals)-15, Chennai came to the conclusion that in the original assessment proceedings, no opinion was formed by the Assessing Officer. Therefore, in order to form a fresh opinion, the reassessment proceeding was initiated under Section 147 of the Act. At this juncture, it would be apposite to refer paragraph no.5.1 of the order of the Commissioner of Income Tax (Appeals)-15, which reads as under:-

"5.1. Ground No.1 to 5 raised by the

appellant are against the action of the AO in reopening assessment u/s 147 of the IT Act. The Assessing officer had reopened the assessment u/s 148 on the reason that Rs.26,51,684/- was debited as loss on shares which is a capital loss resulting in escapement of income. The appellant submitted before the Assessing Officer that it had been trading in share market for past several years and therefore, loss on sale of shares should be treated as business loss. The Assessing Officer asked it to submit financials for AY 2005-06 to verify its claim which were not submitted. As per assessment record of AY 2005-06, profit on sale of shares was shown as Long term capital gain. Therefore, the Assessing Officer disallowed loss on sale of shares. The appellant has submitted that notice u/s148 was served without assigning any reason. It is not mandatory for the Assessing Officer to inform the appellant of reasons along with the notice u/s.148. Reasons are furnished as and when the appellant request for such reason. In the original assessment proceedings, no opinion was formed by the AO. Therefore, it can be said that there is no change of opinion. The action of AO initiating proceedings u/s.147 are confirmed. These grounds of appeal are dismissed."

11.Learned counsel appearing for the department/appellant submitted that since no opinion was formed by the Assessing Officer in the original assessment order, reassessment proceeding was initiated under Section 147 and that the Assessing Officer is empowered to form an opinion by initiating reassessment proceeding under Section 147 of the Act.

12.We are not in agreement with the above contention of the appellant/department for the reason that no assessment order can be made by any Assessing Officer, without forming any opinion prima facie. In the present case, the assessee company has filed its income tax return for the year 2006-07 on 28.11.2006 declaring the total loss of Rs.18,15,356/- and the same was processed under Section 143(1) on 19.03.2008. Again the case was taken up for scrutiny by issuing notice under Section 143(2) on 08.10.2007. Subsequently, a notice under Section 142(1) was issued on 20.04.2008, calling for some information. The said required information was also furnished by the assessee. After thorough examination of the information received from the assessee and on scrutiny of the

balance sheet, including the profit and loss account, the Assessing Officer (AO) passed the assessment order on 15.12.2008. The said assessment order has not been challenged. Therefore, by no stretch of imagination, it can be said by anyone that the order was passed without forming any opinion, as the Assessing Officer (AO) could pass the assessment order, only after forming an opinion and therefore, the original assessment order itself should be considered as it has been passed after forming an opinion by the Assessing Officer.

13.The learned counsel for the appellant further submitted that the change of opinion in the reassessment proceedings under Section 147 is permissible. At this juncture, it would be appropriate to extract the provisions of Section 147, which deals with the income escaping assessment, hereunder:-

"147. If the Assessing Officer has reason to believe that any income has escaped assessment for any of the assessment year, he may, subject to the provisions of Section 148 to 153, assess or re-assess such income and also other income chargeable to tax but has escaped assessment and which comes to his notice. Subsequently, in the course of the proceedings under this section, or recomputing the loss on shares or depreciation allowances or any other allowances as the case may be, for the assessment order is concerned. [herein after the Section 148 to 153 is referred to as the relevant assessment year]. "

14.On perusal of Section 147, it is clear that if the Assessing Officer has reason to believe that any income chargeable has escaped assessment for any assessment year, the reassessment can be made. But, in the present case, no income was escaped from the assessment. The loss on sale of shares was disclosed by the assessee in the original return of income. Thereafter, scrutiny was conducted and after such thorough scrutiny, the assessment order was passed. Therefore, the Assessing Officer formed a clear cut opinion after a thorough scrutiny of all the documents and passed the original assessment order. The Tribunal has also rightly dealt with this aspect at paragraph no.6 of its order. At this juncture, it would be relevant to re-produce paragraph no.6, which reads as follows:-

"6. I heard the rival submissions and perused the material on record. It is not disputed that along with original return of income, assessee had provided Audited balance sheet, profit and loss account and schedules.

Profit and loss account placed at paper book page no.6 clearly mentions loss on sale of shares of Rs.26,51,684/- as a specific item of expenditure. The loss claimed by the assessee in the return was Rs.18,15,356/-. The loss was determined by the Id. Assessing Officer in the original assessment at Rs.17,94,091/-. The only disallowance made was for non deduction of tax at source on a sum of Rs.21,265/-. It would be naïve to presume that Id. Assessing Officer would not have gone through the profit and loss account of the assessee, especially when such profit and loss account reflected a loss of Rs.15,93,811/-. It is not a case where loss claimed was not visible. Substantial part of loss claimed by the assessee was on account of loss in sale of shares of Rs.26,51,684/-, which was debited in its profit and loss account as a specific item. It is not a case, where the Id. Assessing Officer was required to discover any material evidence with diligence. The entry was visibly available on the face of the record itself. Thus, we cannot say that Id. Assessing Officer had determined the loss of the assessee without verifying the profit and loss account filed by it. In a case where reopening is attempted after four years from the end of an assessment year, first proviso to Sec.147 of the Act would clearly apply. Nothing has been brought on record by the Revenue to show that assessee had failed to disclose fully and truly all material facts necessary for the assessment. Further, hon'ble Apex Court in the case of Kelvinator India Ltd (Supra) held that in the absence of fresh tangible material, reopening could not be done where original assessment was completed u/s.143(3) of the Act. I am of the opinion that reopening done for the impugned assessment year was bad in law. Consequently the assessment is set aside. "

15. A perusal of the order of the Commissioner of Income Tax (Appeals)-15 would make it clear that he has been persuaded to pass the orders as if there was no change of opinion, as, according to him, no opinion was formed by the Assessing Officer. However, the fact remains that the original assessment order was passed by the Assessing Officer after forming the opinion.

16. It appears that the reassessment proceeding under Section 147 was made to form change of opinion and therefore,

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it would clearly amount to reviewing the original order of assessment under Section 147 under the pretext of reassessment. We make it clear that in the reassessment proceedings under Section 147, the original assessment order cannot be reviewed. Further, the proceedings also cannot be initiated merely because there is a possibility of change of opinion. Accordingly, we hold that no review on the original assessment order is permissible in the reassessment proceedings initiated under Section 147. Therefore, we are of the view that the Tribunal had rightly set aside the impugned reassessment made under Section 147 of the Act. In this regard, we would like to press into service of the Judgments of the Honourable Supreme Court rendered in Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd., reported in (2010) 187 Taxman 312 or 320 ITR 561 (SC) to support our finding. The extracts of the relevant paragraph nos. 2 to 4 read as follows:-

"2. A short question which arises for determination in this batch of civil appeals is, whether the concept of "change of opinion" stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1987?

3. To answer the above question, we need to note the changes undergone by Section 147 of the Income Tax Act, 1961 [for short, "the Act"]. Prior to Direct Tax Laws (Amendment) Act, 1987, Section 147 reads as under:

" 147. Income escaping assessment.

If--

[a] the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

[b] notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year)."

3.1. After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1-4-1989, Section 147 of the Act, reads as under:

"147. Income escaping assessment.-- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year)."

3.2. After the Amending Act, 1989, Section 147 reads as under:

" 147. Income escaping assessment.-- If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).

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." "

17. In view of the reasons stated above, we do not find any questions of law arising for our consideration in the present tax case appeal. Further, we do not find any infirmity or illegality in the order passed by the Tribunal. Therefore, we are of the view that the present Tax Case Appeal is liable to be dismissed.

18. In the result, this Tax Case Appeal No.450 of 2017 is dismissed. No costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal "C"
(SMC) Bench, Chennai.

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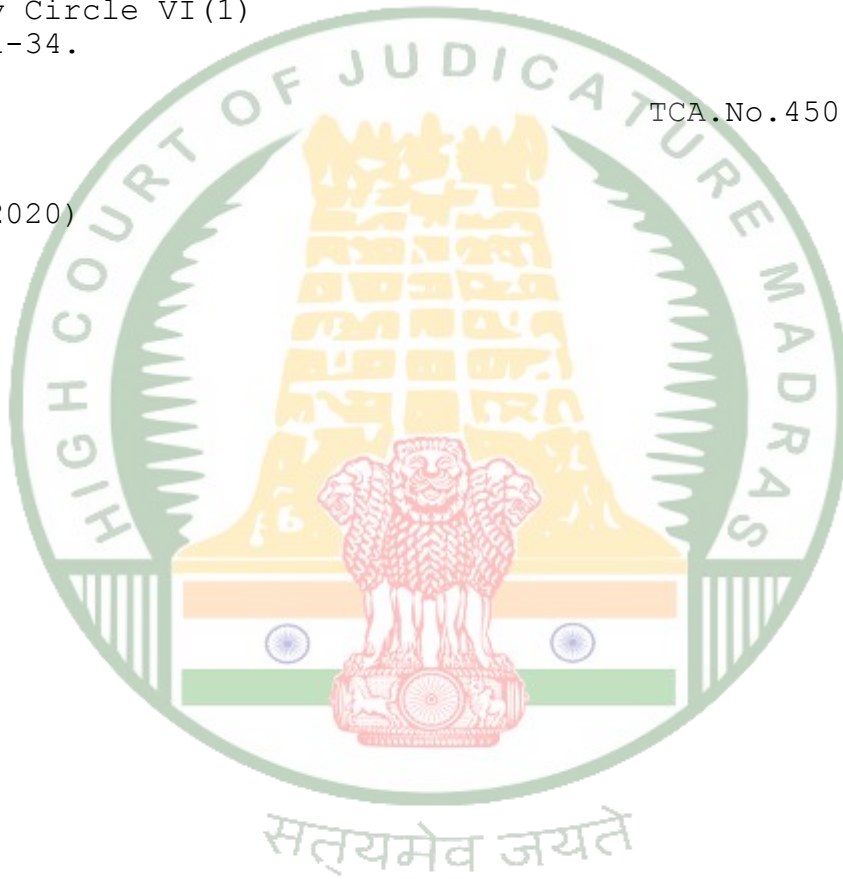
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