IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.08.2020

CORAM

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

T.C.A.No.470 of 2017

Principal Commissioner of Income Tax 6
No.63, Race Course Road,
Coimbatore. ... Appellant

Versus

M/s. Vijayeshwari Textiles Ltd.,
(Now M/s.VTX Industries Ltd),
No.10/400, Palaghat Road,
Kuniyamuthur, Coimbatore - 641 008.
PAN:AAA CV 6388 F ... 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, 'D' Bench dated 31.1.2017 in ITA No.3176/Mds/2016. This Appeal filed against the order of the Income Tax Appellate Tribunal, Madras D Bench, dated 31/01/2017 in STA No.3176/Mas/2016. Coimbatore District Assessment Year 2007-2008, against the Commissioner of Income Tax (Appeals)-I, Coimbatore. Appeal No.04/15-16, dated 26/08/2016, Pan No.AAACV6388F, Assessment Year 2007-2008, against the Deputy Commissioner of Income Tax Corporate Circle-I, Coimbatore dated 23/03/2015, Pan No.AAACV6388F, Assestment Year 2007-2008.

For Appellant : Mr.T.R.Senthilkumar,
Senior Standing Counsel

For Respondent : Mr. R. Venkatnarayanan
for Mr.Subbraya Aiyar Padmanaban

JUDGMENT
(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 Court appearing from their respective residences.

2. Heard Mr.T.R.Senthilkumar, learned Senior Standing Counsel appeared for the Appellant/department and Mr.R.Venkatnarayanan, for Mr.Subbraya Aiyar Padmanaban, learned counsel appeared for the respondent/assessee.

3.The appellant filed the present appeal by suggesting the following substantial questions of law:-

> "1.Whether the ITAT is correct in law in quashing the reassessment order made under Section 143(3) r/w S. 147 of the Income Tax Act, on the ground that reassessment initiated after four years and no fresh material on record for such reassessment proceedings?
>
> 2.Whether the ITAT is correct in law in quashing the reassessment order without considering Explanation 1 and Explanation 29(c) to Section 147 of the Income Tax Act?
>
> 3.Whether the Appellate Tribunal was right in law in deleting the reassessment when the assessee has amortized a portion of the product development expenditure and the balance amount was claimed as deferred revenue expenditure, but the same was not debited in the profit & loss account which is against law?"

4. The appellant has filed the present appeal, aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) dated 31.1.2017 made in ITA No.3176/Mds/2016.

5. Learned counsel for the appellant/department submitted that the appellant/department issued a notice under Section 148 of the Income Tax Act, 1961, (in short "the Act") on 11.06.2013 for re-assessment under Section 147 of the Act. The counsel referred to Explanation 2(c)(iii) of the Act which reads as follows:-

"If the [Assessing] Officer... assessment year concerned.

> Explanation 1- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of foregoing proviso.
>
> Explanation 2- For the purpose of this Section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-
>
> (a) Where no return...
> ....

....
..........chargeable to income tax;

(b) Where a return of income..
....
.....................allowance or relief in the return;
....
................required under Section 92E],

(c) Where an assessment has been made, but-

(i) income chargeable to tax has been under assessed........; or

(ii) such income..
......................; or

(iii) such income has been made the subject of excessive relief under this Act...............or

(iv) excessive................................Act has been computed] "

6. By referring to the above Section, the learned counsel submitted that the department is empowered to make re-assessment under Section 147, in case, the income chargeable to tax has escaped assessment i.e., such income has been made the subject of excessive relief. In the present case, according to the department, the total product development expenditure was a sum of Rs.3,39,27,315/-. Out of the said amount, a sum of Rs.1,33,49,000/- was amortized towards the product development expenditure and the balance of Rs.2,65,78,000/- was claimed as deferred revenue expenditure, which is not allowable for deduction. However, the Assessing Officer wrongly allowed the deduction. Therefore, the notice under Section 148 was issued for making re-assessment in terms of Explanation 2(c)(iii) of Section 147 of the Act, by the Deputy Commissioner of Income Tax and passed the assessment order on 19.03.2015. He has also referred the relevant portion of the assessment order which reads as under:-

"Secondly, as per sub-clause (i) of clause (c) of Explanation 2 under Section 147 excessive under assessment of income chargeable to tax can be construed as escapement of income. In view of the above, the re-opening of assessment is as valid and holds well in the eyes of law.

5. Further, it is seen tht a sum of Rs.3,99,27,000/- has been claimed as deferred revenue expenditure in the computation of income statement. However, in the profit and loss

account the assessee has amortized a sum of Rs.1,33,49,000/- of product development expenditure and claimed as expenditure. The balance amount of Rs.2,65,78,000/- has been claimed as deferred revenue expenditure. Any expense not debited to the profit and loss account is not allowable while computing the total income of the assessee. Hence, this expenditure of Rs.2,65,78,000/- is disallowed and added back to the total income."

7. The counsel further submitted that against the said re-assessment order, the assessee preferred the appeal before the Commissioner of Income Tax (Appeals) - I, Coimbatore. The Commissioner of Income Tax (Appeals) - I, without appreciating all these facts narrated in the re-assessment order passed under Section 147, allowed the appeal by holding as follows:-

"5. I have considered the assessment order and the written submission of the assessee. It was found that during the original assessment proceedings, notice u/s 142(1) was issued calling for certain details which included the copy of product development expenses account, bills and vouchers, thereof and the nature of the product developed along with the note on product development expenditure. The details were submitted by the assessee vide letter dated 30.01.2010 along with a separate detailed note on the nature of product development expenditure. The Assessing Officer has accepted the contentions of the assessee and passed the assessment order dated 31.12.2010. Subsequently, the assessment was re-opened by issuing a notice u/s 148 on 11.06.2013. The reason given for re-opening is that any expenditure not included in the Profit and Loss Account is not allowable and this was noticed only after completion of assessment.

6. In the reassessment order dated 19.03.2015, in para 4(a) it is mentioned that "After completion of assessment only it is noticed that the assessee has amortized a portion of the product development expenditure and the balance amount was claimed as deferred revenue expenditure. The assessee has deducted this amount while computing the total income, even though the same was not debited to the profit and loss account which is not correct".

7. It could be clearly seen that the assessee has given the entire material facts on

the issue of product development expenditure during the original assessment proceedings itself and failure to produce full and true disclosure of facts during the original assessment proceedings has not been proved by the Assessing Officer. It has to be accepted that, when the Assessing Officer has raised an issue or query and the assessee has answered the query in the original assessment proceedings itself and the Assessing Officer has not made any addition, the issue has been examined and there is no failure on the part of the assessee to disclose the facts during the original assessment proceedings.

8. As the Assessing Officer has not brought any new material on record warranting the reopening of the assessment after four years. The reopening of the assessment is only on account of change of opinion of the Assessing Officer. Hence, issue of notice u/s 148 after four years from the end of the Asst. Year 2007-08 is without jurisdiction and invalid. When the reopening is invalid, the additions made does not stand the test of scrutiny and therefore stands deleted in the hands of the appellant".

8. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the appellant/department preferred an appeal before the Income Tax Appellate Tribunal (ITAT), Chennai. However, the Tribunal also refused to accept the contention of the appellant/department and dismissed the appeal and held as follows:-

"5. We have carefully gone through the provisions of Section 147 of the Act. When the Assessing Officer has completed assessment under Section 143(3) of the Act, the completed assessment cannot be reopened under Section 147 of the Act unless there was negligence on the part of the assessee, after expiry of a period of four years from the end of the relevant assessment year. In this case, the four years period from the end of the relevant assessment year expired on 31.03.2012. However, the Assessing Officer issued notice under Section 148 of the Act only on 11.06.2013. Therefore, obviously, the assessment was reopened after expiry of four years from the end of the relevant assessment year. The assessee admittedly filed the Profit and Loss account and other details which are required for completing the assessment. Therefore, it cannot be said that there was any negligence on the part of the assessee. Merely because the Assessing Officer could not examine the Profit and Loss account filed by the assessee in the course of regular assessment, that cannot be a reason to say that the assessee has not filed relevant details. This Tribunal is of the considered opinion that when the assessee provided all the relevant details before the Assessing Officer and the Assessing Officer has also completed assessment under Section 143(3) of the Act, it cannot be said that there was any negligence on the part of the assessee. Therefore, reopening of assessment beyond the period of four years from the end of the relevant assessment year is outside the scope of Section 147 of the Act. In view of the above, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed."

9. The learned counsel for the department further submitted that in the present case, the assessment order was made on 31.12.2010, notice under Section 148 was issued on 11.06.2013 and the re-assessment proceedings was initiated by the department within the period of limitation. Further, he submitted that the Assessing Officer has rightly invoked the provision under section 147 of the Act for re-assessment, since the assessee sought excessive relief under the Act. The assessee has debited in the profit and loss account a sum of Rs.1.33 crore as product development expenditure, whereas the assessee had taken Rs.3.39 crore as a deduction for the purpose of computing the income for the payment of Income Tax. According to him, whatever the amount is shown in the profit and loss account alone can be permitted to be deducted for the purpose of computing the Income Tax. All these facts were not considered by both the Commissioner of Income Tax (Appeals) - I, Coimbatore as well as the Income Tax Appellate Tribunal. Therefore, he pleaded before this Court that the orders passed by the Commissioner of Income Tax (Appeals) - I, Coimbatore, as well as the Income Tax Appellate Tribunal have to be set aside.

10. Per contra, the learned counsel for the respondent submitted that the assessee had spent a sum of Rs.3.39 crore, during the relevant assessment year 2007-08 towards the product development expenses. There is no dispute on either side with regard to the revenue nature of the expenditure. While so, the assessee is entitled to deduct the whole amount while making

calculation for the purpose of payment of Income Tax. In the present case, the assessee has debited a sum of Rs.1.33 crore in the profit and loss account for the year ending 31.03.2007 towards the amortization of 1/3rd amount of product development expenses, relating to the previous financial year ending 31.03.2006 relevant to the assessment year 2006-07. Therefore, both the Commissioner of Income Tax (Appeals) - I, Coimbatore, as well as the Income Tax Appellate Tribunal have appreciated these facts and held that the entire amount of Rs.3.39 crores spent by the assessee towards product development expenses during the current year is revenue expenditure and that the assessee is entitled for deduction of the entire amount.

11. Further, the counsel for the assessee submitted that apart from the merits of the case, the present appeal is also barred by limitation since the notice under Section 148 was issued beyond the period of limitation. That apart, during the course of original assessment and at the time of scrutiny, all these facts were disclosed and the relevant particulars were also furnished, but the same were not considered by the Assessing Officer. Therefore, he submitted that there is no justification in reopening the assessment under Section 147 of the Act, as there is no income on the part of the assessee relating to Income Tax, which had escaped from the assessment. Hence, he prayed for dismissal of the appeal.

12. We have given due attention to the submissions made by both the counsel and perused the material available on records.

13. The present dispute is relating to the assessment year 2007-08. The assessee company has filed its return for the assessment year 2007-08 on 13.11.2007, declaring a total loss of Rs.62,77,473/-. Subsequently, the case was taken up for scrutiny and notice under Section 143(2) of the Income Tax Act was issued on 03.09.2009. The assessment was completed under Section 143(3) of the Act on 13.12.2010 determining the total income at Rs.15,76,55,602/-. During the course of the scrutiny, the Assessing Officer called for several details and all the information were furnished by the assessee. The Assessing Officer pointed out certain mistakes and therefore, the order made under Section 143(3) was modified and rectification order was passed on 19.04.2012. The notice for reassessment was issued under Section 148 on 11.06.2013. It is to be noted that in the present case, the return was filed on 13.11.2007 for the assessment year 2007-08, for which reassessment proceedings under sections 147 and 148 ought to have been initiated within the period of four years, which was over by 31.03.2012. But, the notice for reassessment proceedings under Section 148 was issued on 11.06.2013, beyond the period of limitation. Therefore, we do not find any error in the finding of the Income

Tax Appellate Tribunal in this aspect.

14. Another contention of the department was that the product development expenses incurred during the year was a sum of Rs.3.39 crore and it cannot be deducted during the year since in the profit and loss account the assessee has shown only a sum of Rs.1.33 crores. We have gone through the materials on record and we are not in a position to accept the submissions made by the appellant/department for the following reasons.-

(a) Both the department as well as the assessee had accepted the sum of Rs.3.39 crore spent towards the product development expenditure as revenue expenditure, relevant to the assessment year 2007 - 08.

(b) Further, we noticed that a sum of Rs.4 crores was spent by the assessee towards the product development expenditure during the assessment year 2006-07. The assessee has amortized the 1/3rd of the product development expenditure of the previous year, namely a sum of Rs.1.33 crore and debited in the profit and loss account during the assessment year 2007-08. But, the assessee has deducted the entire amount of Rs.4 crores towards the product development expenditure of the previous year relevant to the assessment year 2006-07, while determining the income for the purpose of computing the income tax. Therefore, the assessee is entitled for deduction and the department cannot have any objection for the same. Therefore, in the previous year relevant to the assessment year 2007 - 08, though a sum of Rs.1.33 crore was debited towards product development expenditure in the profit and loss account, the said amount was rightly added by the assessee, while computing the income for the payment of income tax. Therefore, we do not find any error on this aspect.

(c) The assessee had spent a further sum of Rs.3.39 crore towards the product development expenditure during the assessment year 2007-08. The said amount being a revenue expenditure, the assessee has deducted it while computing income for the purpose of income tax. This computation was allowed in the original assessment order. Before the completion of the original assessment, scrutiny was also made and the assessee has furnished all the particulars demanded by the Assessing Officer. After thorough scrutiny of all the materials available with the Assessing Officer, the original assessment was made. Therefore, no material was concealed by the assessee and hence, we do not find any justifiable reason to reopen the assessment under Sections 147 and 148 of the Act.

(d) Further, a perusal of the reassessment order made under Section 147 would make it clear that the Assessing Officer has stated that the assessee has only shown a sum of Rs.1.33 crore as product development expenditure under the profit and loss account and therefore, the assessee is entitled to claim income tax benefit only to the extent of Rs.1.33 crore and hence, he disallowed a sum of Rs.2.6 crores (3.39-1.33). It is highly shocking to see the method of calculation made during the re-assessment under Section 147, as the same is without any basis. The assessee in his reply has clearly stated that a sum of Rs.1.33 crore is relating to the previous year, which is 1/3rd of product development expenses for which they are amortizing this year. As the assessee had deducted its entire amount of Rs.4 crores towards product development expenditure, while computing the income tax during the year 2006-2007, it has rightly added while computing the income for the income tax purpose. That apart, since the assessee has incurred a sum of Rs.3.39 crores towards product development expenditure during the assessment year 2007-2008, as the same is revenue in nature, it has deducted the entire amount, while computing the income tax.

(e) We do not see any error in the deduction made by the assessee and we could only find a lack of understanding on the part of the Assessing Officer during the course of reassessment under Section 147. Unless the revenue authorities are well versed with the accounts, these types of problems would be arising at all times.

15. All the submissions made by the department are relating to the facts which both the Commissioner of Income Tax (Appeals) - I, and the Income Tax Appellate Tribunal have elaborately discussed and the Tribunal has also given its findings as stated supra.

16. In our considered opinion, the product development expenditure incurred to the extent of Rs.3.39 crore by the assessee, is entitled to be amortized over the period of three years as per the accounting practice adopted by the Company and the assessee has rightly amortized the same.

17. Further, we are of the clear view that the re-assessment provisions under Section 147 of the Act do not provide for reassessment 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." "

18. In view of the reasons stated above, we do not find any question of law for arising for our consideration in the present case and we do not find any irregularity or illegality in the order passed by both the Commissioner of Income Tax (Appeals) - I, Coimbatore, and the Income Tax Appellate Tribunal. Hence, the present appeal filed by the appellant/department deserves to be dismissed.

19. In the result, the Tax Case Appeal is dismissed and the questions framed above in the present appeal filed by the Revenue are answered against the Revenue and in favour of the Assessee. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
1. The Appellate Tribunal D Bench,
   Chennai.

2. The Principal Commissioner of Income Tax-I
   No.63, Race Course Road, Coimbatore.

+1cc to M/s.Subbaraya Aiyar, Advocate,Sr.No.26229
+1cc to T.R.Senthil Kumar, Advocate Sr.No.26272

T.C.A.No.470 of 2017

vsn ii (co)
rr ii (14/09/2020)