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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.04.2021

CORAM

THE HON'BLE MR.JUSTICE M. DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA

Tax Case Appeal No.1024 of 2014

The Commissioner of Income Tax,
Chennai.

... Appellant

Vs.

M/s.Tractor and Farm Equipment Ltd.,
35, Nungambakkam High Road,
Nungambakkam, Chennai - 600 034.

... 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 "A" Bench, dated 25.05.2012 passed in I.T.A.No.608/Mds/2012 for the assessment year 2003-04.

Preferred against the order of the Office of the Commissioner of Income Tax (Appeals) III, No.121, Mahatma Gandhi Road, Chennai 600 034 ITA.No.827/10-11/A-III, dated 30.12.2011, GI No/PAN No.AAACT2761Q, Year of Assessment 2003-2004 and dated of order 30.12.2011. and

Against the order of the Office of the Commissioner of Income Tax (Appeals)-III, No.121, Mahatma Gandhi Road, Chennai 600 034, ITA.No.697/09-10//A.III dated 30.12.2011, G.I.No/AAACT2761Q, year of assessment 2002-2003 and date of order 30.12.2011 and

Against the order of the Office of the Assessment Commissioner of Income Tax, Company Circle III (2), Chennai-34, G.I.R.No./PAN.AAACT2461Q, staus Company, Assessment year 31.03.2003 and date of Assessment order: 31.12.2010 and

Against the order of the Office of the Deputy Commissioner of Income Tax, Company Circle III (2), Chennai, 600 034, GIR.No./PAN AAAC2461Q, Status Company, Assessment Year 2002-2003 and Date of Assessment Order 29 December 2009.

For Appellant : Mr.M.Swaminathan,
Senior Standing Counsel
assisted by Ms.V.Pushpa,
Standing Counsel

For Respondent : Mr.Vikram Vijayaraghavan



J U D G M E N T
(Delivered by M.DURAI SWAMY, J.)

Challenging the order passed in I.T.A.No.608/Mds/2012 in respect of the assessment year 2003-04 on the file of the Income Tax Appellate Tribunal, Madras "A" Bench, Chennai, the Revenue has filed the above appeal.

2.The brief case of the appellant - Revenue is as follows:

The assessee - Company is engaged in the business of manufacture and sale of Tractors engineering plastic component and two wheeler batteries and trade in trailers, implements and accessories. The assessee - Company filed its return of income for the assessment year 2003-04 on 28.11.2003 declaring a total income of Rs.32,40,89,880/-. The return was processed under Section 143(1) of the Income Tax Act, 1961 on 30.03.2004. The assessment under Section 143(3) was completed on 14.02.2006. Subsequently, the assessment was re-opened. The assessee claimed expenditure towards commission of sale, consultancy charges and others in the return of income filed for the assessment year 2003-04. While finalizing the assessment under Section 143(3) for the assessment year 2006-07 and 2007-08, it has come to light that the consultancy charges paid by the assessee is nothing but fee for technical services and accordingly, the same has been disallowed under Section 40(a)(i). Similarly, payment of commission on sales and payments made under "others" also were liable to tax deduction under Section 195 and as the assessee failed to deduct tax, the expenditure claimed towards the above were disallowed under Section 40(a)(i). The assessee has claimed depreciation on brand equity at Rs.1,23,95,833/-, however, the details of agreement and terms and conditions therein have to be examined to ascertain the correctness or otherwise of the depreciation claimed. The assessee has not disclosed all the material facts fully and truly necessary for the assessment at the time of scrutiny as per the explanation 1 to Section 147. On 29.03.2010, a notice under Section 148 was served on the assessee. In response to the said notice, the assessee filed a reply on 28.09.2010 stating that the return of income filed for the assessment year 2003-04 on 30.11.2003 may be treated as one filed in response to the notice under Section 148. By a letter dated 21.10.2010, reasons for re-opening the assessment was sent to the assessee. A notice under Section 143(2) dated 23.09.2010 was served on the assessee. The assessee objected to the re-opening and the Assessing Officer has considered the same and completed the assessment. The Assessing Officer finalized the assessment and arrived at the revised total income at Rs.36,20,86,590/-. Aggrieved over the assessment order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) and the Appellate Authority allowed the appeal and held that re-opening of the assessment was not valid. Aggrieved over the order passed by the CIT(Appeals),



the Revenue filed an appeal before the Income Tax Appellate Tribunal and the Appellate Tribunal held that the re-opening of the assessment was done beyond four years from the relevant assessment years and as per proviso to Section 147, the reasons recorded has not shown any failure on the part of the assessee and dismissed the departmental appeal. Aggrieved over the order passed by the Income Tax Appellate Tribunal, the Revenue has filed the above appeal.

3.The above appeal was admitted on 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 upholding the orders of CIT(A) who held that the re-opening of assessment was not valid?

2)Is not the finding of the Tribunal bad by holding that the reassessment proceedings initiated were invalid especially when the Assessing Officer did not deal with disallowances made under Section 40(a)(i) and disallowance of depreciation on brand equity while dealing in the original assessment proceedings and therefore could not have formed any opinion on the said issues in the first instance?"

4.Heard Mr.M.Swaminathan, learned senior standing counsel appearing for the appellant - Revenue and Mr.Vikram Vijayaraghavan, learned counsel appearing for the respondent - assessee.

5.When the appeal is taken up for hearing, Mr.M.Swaminathan, learned senior standing counsel appearing for the appellant - Revenue fairly submitted that the questions of law that were framed in the above appeal at the time of admission were already decided against the Revenue by the Hon'ble Supreme Court of India in the judgment reported in [2010] 320 ITR 561 (SC) [Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.] held 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.-



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[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 1st April, 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)."



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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 fulfillment 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 re-open 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 re-open. 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 re-assess. But re-assessment has to be based on fulfillment 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 herein below the relevant portion of Circular No. 549 dated 31st October, 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



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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."

6. Mr. Vikram Vijayaraghavan, the learned counsel appearing for the respondent - assessee submitted that in view of the ratio laid down by the Hon'ble Apex Court in [2010] 320 ITR 561 (SC), the questions of law may be decided against the Revenue and the appeal may be dismissed.

7. In view of the submissions made by the learned counsel on either side, following the ratio laid down by the Hon'ble Supreme Court of India in the judgment reported in [2010] 320 ITR 561 (SC) [Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.], cited supra, the questions of law are decided against the Revenue and in favour of the assessee. The Tax Case Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar

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To

1. Income Tax Appellate Tribunal,
Madras "A" Bench.

2. The Commissioner of Income Tax, (Appeals)-III,
No. 121, Mahatma Gandhi Road, Chennai 34.

3. The Assistant Commissioner of Income Tax,
Company Circle III (2),
Chennai 34.



4.The Deputy Commissioner of Income tax,
Company Circle III (2),
Chennai 600 034.

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