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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/207/2016
IA NO: GA/1/2016 (OLD NO. GA/2156/2016)
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-4, KOLKATA
VS.
GRAPHITE INDIA LIMITED

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : AUGUST 02, 2022.

Appearance :
Mr. Aryak Dutta, Adv
....for appellant
Mr. Somak Basu, Adv.
...for respondent

The Court : This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 8th January, 2016 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata (Tribunal) in I.T.A. No. 398/Kol/2008 and I.T.A. No. 537/Kol/2008 for the assessment year 2000-2001 respectively.

The revenue has raised the following substantial questions of law for consideration :-

- i) Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in quashing the order passed under Section 147 of the said Act despite the fact that there was failure on the part of the assessee to disclose material facts in the

return of the income that SEB price used as indicator of realizable value of Power included an element of tax duty which is really did not have to pay?

- ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in quashing the Order passed under Section 147 holding inter-alia that there was a change of opinion by the Assessing Officer despite the fact the issue was never touched upon in the orders of assessment of appeal?

We have heard Mr. Aryak Dutta, learned standing Counsel appearing for appellant and Mr. Somak Basu, learned Advocate appearing for the respondent/assessee.

The short question involved in the instant case is with regard to the correctness of exercise of power by the assessing officer under Section 147/148 of the Act and reopening the assessment which was completed vide order dated 31st March, 2003. From the reasons for reopening it is seen that the basis was from the records, which was already submitted by the assessee during the course of the original scrutiny assessment. The learned Advocate appearing for the respondent has filed a compilation which was filed before the Commissioner of Appeals challenging the revised assessment order. From the said compilation we find that the assessing officer had issued two notices under Section 142(1) of the Act dated 10th December, 2002 and on 13th January, 2003. There were, therefore, three issues which were raised by the assessing officer and one such issue pertains to the basis of realizable market value for claim of deduction under

Section 80IA of the Act. In response to the said notices the assessee had submitted a reply on 13th March, 2003 and on 21st March, 2003. In the reply dated 21st March, 2003 the assessee has extracted the question posed to the assessee by the assessing officer regarding the claim of deduction under Section 80IA of the Act. We find that there were six questions which were asked to the assessee and the assessee has submitted a detailed reply. If that be the position whether the assessment could have been reopened. In our considered view, the Tribunal rightly granted relief to the assessee after noting the factual position, by pointing out that relevant material was placed on record by the assessee when they made the claim for deduction under Section 80IA of the Act and query was raised and the case was discussed and the assessee had placed material before the assessing officer and it is only thereafter the realisable market value of the power as adopted by the assessee was initially accepted by the assessing officer. Therefore, the Tribunal, in our considered view, rightly stated that the reassessment proceedings were clearly a case of change of opinion.

At this juncture, we take note of the decision of the Hon'ble Supreme Court in *COMMISSIONER OF INCOME TAX, DELHI VERSUS KELVINATOR OF INDIA LTD.*, [2010] 187 Taxman 312 (SC), wherein the Hon'ble Supreme Court pointed out that the assessing officer has no power to review, he has power to reassess but reassessment has to be based on fulfillment of certain pre-conditions and if the concept of change of opinion is removed then in the garb of reopening the assessment review takes place. Apart from that we note that the very same issue namely the direction claimed in 80IA in the assessee's own case for the

assessment year 1999 – 2000 and 2001-2002 was agitated and, ultimately, the matter travelled up to the tribunal and by order dated 6th December, 2007 the tribunal granted relief to the assessee in ITA No.949/Kol/2005 etc. As against the said order the revenue preferred appeal before the court in ITA/733/2008 which was dismissed by judgment dated December 10, 2008. That apart, in assessee's own case for the assessment year 2003-04 the assessee succeeded before Tribunal in ITA/304/305/Kol/2008 and ITA/559/Kol/2008 dated 24th August, 2016.

The learned standing Counsel appearing for the appellant placed reliance on the decision of the Hon'ble Supreme Court in the case of *KALYANJI MAVJI & CO. Versus C.I.T. WEST BENGAL-II*, (1976) 1 Supreme Court Cases 985. In the said decision the word "information" occurring in Section 34(1)(b) of the Income Tax Act, 1922 was considered and explained. We note that the said decision was considered by the Hon'ble Supreme Court in *INDIAN AND EASTERN NEWSPAPER SOCIETY VERSUS COMMISSIONER OF INCOME TAX 1979 (119) ITR 996* and the legal position was explained by stating that the proposition in *Kalyanji Mavji & Co.* to the effect that a case where income had escaped assessment due to oversight, inadvertence or mistake of the ITO must fall within S.34(1)(b) of the 1922 Act, is stated too widely and travels further than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to

him to reopen the assessment. An error discovered on a reconsideration of the same material does not give him that power.

The factual position has been noted by us in the preceding paragraphs where we find that the Assessing Officer had elaborately questioned the assessee on the very same issue and the assessee has submitted in details and documents to support their contention and therefore, on the self-same material a fresh decision cannot be taken as it would tantamount to review of the original assessment.

In the light of the above discussion, we hold that the order passed by the Tribunal does not suffer from any error.

In the result, the appeal filed by the revenue is dismissed.

The substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the stay application being GA/1/2016 (Old No: GA/2156/2016) also stands dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)