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W.A. Nos.1203 and 1204 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.07.2022

Pronounced on : 01.09.2022

CORAM

**THE HONOURABLE MR. JUSTICE R. MAHADEVAN
AND**

THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

W.A. Nos.1203 and 1204 of 2015

M/s.Mobis India Limited,
Rep. by its Director,
Mr.KYO BIN HA

.. Appellant in both appeals

Versus

Deputy Commissioner of Income Tax,
Large Tax Payer Unit-II,
1775, Jawarharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai-600 101.

.. Respondent in both appeals

PRAYER in W.A. No.1203 of 2015 :Writ Appeal filed under Section 15 of Letter Patent praying to set aside the order dated 04.08.2015 in W.P.No.3354 of 2015.

PRAYER in W.A. No.1204 of 2015: Writ Appeal filed under Section 15 of Letter Patent praying to set aside the order dated 04.08.2015 in W.P.No.3355 of 2015

For Appellant : Mr.R.V.Eswar Senior Counsel
in both W.As. For Mr.R.Sandeep Bagmar

For Respondent : Mrs.Hema Muralikrishnan
in both W.As. Senior Panel Counsel



W.A. Nos.1203 and 1204 of 2015

COMMON JUDGMENT

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MOHAMMED SHAFFIQ, J.

These two writ appeals are filed by the appellant / assessee aggrieved by the order of the Learned Single Judge dismissing the writ petitions, on the ground of existence of alternate remedy. The writ petitions were filed against the orders of assessment relating to the assessment years 2008-09 and 2009-10, challenging the assumption of jurisdiction to reassess under Section 147 read with Section 148 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. Brief facts: -

2.1. The appellant is a company engaged in the business of manufacture and assembly of automobile parts/components. They are wholly owned subsidiary of M/s.Hyundai Mobis Company Ltd., Korea. During the financial year 2007-08, by virtue of a Business Transfer Agreement dated 26.04.2007 (hereinafter referred to as “BTA”), the appellant acquired the Customer Care Parts (hereinafter referred to as “CCP”) business from M/s.Hyundai Motors India Ltd., (hereinafter referred to as “HMIL”). In terms of the said agreement, the fixed assets, current assets, current liabilities, Dealer and Vendor Network (hereinafter referred to as “DVN”), goodwill, material contract including supply



and sales contracts, leasehold properties, after service parts business personnel and other rights including tangible and intangible assets relating to the CCP business were acquired for a total consideration of Rs.425,25,00,000/-.

2.2. Assessment Year 2008-09:

2.2.1. For the Assessment Year 2008-09, the appellant filed its return on 30.09.2008 declaring a total loss of Rs.17,58,19,692/- and book profit under Section 115JB of Rs.55,38,41,237/- along with complete and detailed financials and a Memo of income, setting out the methodology for computation thereof. The appellant claimed depreciation to the tune of Rs.75,09,65,951/- in respect of DVN, which was duly disclosed in the Tax Audit Report annexed along with the return of income. The return was accepted under Section 143 (1) of the Act. Subsequently, it was selected for scrutiny and notice under Section 143 (2) of the Act was issued on 12.08.2009. As the assessment involved cross-border/international transaction with Associated Enterprise, the same was referred to Transfer Pricing Officer (TPO) under Section 92 CA of the Act. Importantly, the issue of depreciation in relation to DVN was also taken up for assessment and the same was completed on 21.12.2011 under Section 143(3) of the Act by determining the tax payable at Rs.17,39,900/-.

2.2.2. After completion of assessment under Section 143(3) of the Act for the assessment year 2008-09, the appellant filed an application for rectification



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under Section 154 of the Income Tax Act, 1961, on 07.06.2013 claiming depreciation on goodwill in terms of the BTA amounting Rs.20,07,32,500/- as the same was omitted to be claimed at the time of filing the return of income. It is to be noted that in the petition for rectification, the appellant brought to the notice of the respondent the payments made towards goodwill, on which depreciation was claimed under Section 32 of the Act and that, the claim of depreciation on goodwill was allowed for the subsequent Assessment Years viz., 2009-10 and 2010-11 after detailed consideration in the scrutiny proceedings. We are informed that the said rectification petition for the Assessment Year 2008-09 is still pending.

2.3. Assessment Year 2009-10:

2.3.1. For the Assessment Year 2009-10, the appellant filed its return on 30.09.2009 declaring NIL income along with complete and detailed financials and a memo of income, setting out the methodology for computation thereof. The appellant claimed depreciation to the tune of Rs.56,32,24,463/- and Rs.15,05,49,375/- in respect of DVN and Goodwill respectively, which were duly disclosed in the Tax Audit Report annexed along with the return of income. The return was taken up for scrutiny and notice under section 143(2) of the Act was issued on 26.08.2010. As the assessment involved international transactions with associate enterprise, the same was referred to TPO under section 92CA of the Act. Importantly, the issue of depreciation in relation to DVN was also taken up



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for assessment and the same was completed under section 143(3) on 22.03.2013 by determining the tax payable at Nil.

3. Thereafter, the appellant was orally informed to furnish details on DVN acquired from HMIL for the Assessment Year 2008-09 to verify/revisit/re-examine/reassess the allowability of depreciation thereon. In response, the appellant submitted a detailed note dated 03.09.2013, wherein it was stated that the DVN was valued by an Independent Valuer. The appellant had claimed depreciation on DVN at 25% under Section 32 (1) (ii) of the Act on the premise that the same constituted "intangible commercial rights". In support of the same, the appellant set out the business model of CCP and as to how the same would constitute "intangible commercial rights", besides placing reliance upon various judgments including the judgment of the Delhi High Court in ***Areva T and D India Ltd v. Deputy Commissioner of Income Tax [(2012) 345 ITR 421 (Del)]*** and the Apex Court in ***CIT, Kolkata v. Smifs Securities Ltd [(2012) 24 taxmann.com 222 (SC)]***, in support of their claim of depreciation on DVN.

4. Whiles, the Revenue sought to re-open the assessment by issuing notice dated 05.02.2014 and 10.03.2014 for the Assessment Years 2009-10 and 2008-09 respectively under Section 148 of the Act with regard to the claim of depreciation on DVN and Goodwill, all of which arise out of BTA. The appellant sought for the reasons for reopening in terms of ***GKN Driveshafts (India) Ltd v.***



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Income Tax Officer and others [(2003) 259 ITR 19]. However, despite repeated reminders, the reasons were not furnished to the appellant. The appellant however, without prejudice to their right to be informed of the reasons in terms of GKN Driveshafts, proceeded to submit its objections, dated 07.11.2014 and 20.11.2014, *inter alia* highlighting the following:

a) That the non-furnishing of reasons is in gross violation of the procedure mandated by the Hon'ble Supreme Court to be followed in terms of GKN Driveshafts with regard to reassessment.

b) That the re-assessment is being made solely on the basis of audit objection which in turn related to Audit's opinion on a question / interpretation of law which is impermissible. The respondents had abdicated their quasi-judicial functions as it was made in accord with views/dictates of the Audit.

c) That the reassessment proceedings does not disclose any new/tangible material, which necessitated the initiation of the same. The power of reassessment is sought to be invoked on mere change of opinion, which is impermissible.

5. The appellant sought for information regarding the Audit Objection under the RTI Act. The information was obtained under the RTI Act comprising of the Audit point/objection relating to the claim of depreciation on DVN, the exchange of communications between the Respondent and the Audit. As we intend to deal with the said Audit, its impact on the reassessment proceedings



more closely and at greater detail in the following portions of the judgment, to avoid being repetitive and overloading on the same aspect, we intend to pause/hold back the discussion on the said aspect, under the present head “Brief Facts”, except to state that while the Audit objection attempted to thrust its point of view that DVN would not constitute “commercial rights”, the assessing authority initially resisted the same in no uncertain terms by stating that DVN indeed represented “commercial rights” and that, there was no new material and any reassessment would only tantamount to change of opinion, which does not confer jurisdiction to reassess. However, before the Audit could decide on the above objection submitted by the Assessing Officer, the impugned orders of reassessment dated 31.12.2014 came to be passed by the Assessing Officer, holding that the DVN was not intangible commercial right, and disallowing the claim of depreciation thereon.

6. Aggrieved by the same, the appellant filed the writ petitions challenging the orders of assessment for the Assessment Year 2008-09 and 2009-10 *inter alia* on the following grounds:

a) An audit objection by itself cannot form the basis for exercise of the power of reassessment. In any view, the audit objection related to interpretation of law and the same was thrust on the Assessing Officer, thereby encroaching upon the jurisdiction to exercise powers of assessment/reassessment vested



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nature and thus impermissible.

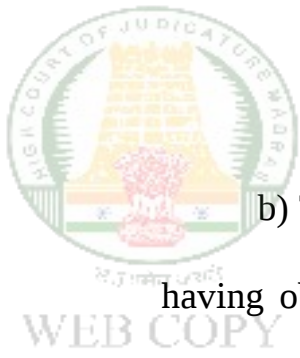
b) There was no failure on the part of the appellant to disclose any details with regard to the claim of depreciation on DVN and thus there is no warrant for exercise of powers of reassessment.

c) The impugned proceedings of reassessment are mere change of opinion and thus contrary to the law laid down by the Hon'ble Supreme Court and various High Courts including the Madras High Court. Further the assumption of jurisdiction in the absence of any tangible or any new material on the mere basis of different interpretation of law on the claim of depreciation, is impermissible.

d) The impugned order is made in gross disregard to the judgment of the Hon'ble Supreme Court in GKN DriveShafts thereby vitiating the entire proceedings.

7. ORDER OF THE LEARNED SINGLE JUDGE:

a) That the appellant for the Assessment Year 2008-09 was not informed of the reopening. For the Assessment Year 2009-10 the Assessing Officer disclosed reasons for reopening, however, the appellant had chosen not to file any objection to the issuance of notice under Section 148 of the Act. Thus, in the absence of any objection to reopening, the question of disposing the objection by passing a speaking order before proceeding with the assessment as contemplated by Apex Court in GKN Drive Shafts, does not arise.



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b) That the appellant had participated in the reassessment proceedings and having obtained an adverse order, it may not be open to raise the question of jurisdiction for the same, would be hit by the principle of acquiescence.

c) That the appellant has an efficacious alternative remedy by way of an appeal and thus it was held that the writ petitions were not maintainable.

8. CASE OF THE APPELLANTS:

The writ appeals are filed challenging the order of the Learned Single Judge on the following premise: -

a) The order of the Learned Single Judge is contrary to the law laid down by the Hon'ble Supreme Court in GKN Drive Shaft inasmuch as the reasons for reopening were not furnished to the appellant in terms of GKN Drive Shaft. The Learned Judge erred in stating that objections were not filed by the appellant failing to take note that the appellant despite not having been furnished reasons for reassessment had in fact filed their objections dated 10.11.2014 questioning the assumption of jurisdiction and thus the order of the Learned Single Judge stands vitiated for failing to taking to account factors that are relevant and have a material bearing on the issue.

b) That the impugned reassessment proceedings are nothing but change of opinion which cannot be the basis for assuming jurisdiction to make



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reassessment under the Income Tax Act as held by the Hon'ble Supreme Court and by this Court repeatedly.

c) That the Learned Single Judge ought to have seen that existence of an alternate remedy does not place any embargo on exercise of power under Article 226 of Constitution of India and it has been consistently held that the limitation if any is self-imposed and the discretion shall be exercised under Article 226 of Constitution of India, when it is shown that the proceedings are bad for want of jurisdiction which was the case of the appellant before the Assessing Officer and also before the Learned Single Judge. Thus, the order of the Learned Single Judge relegating the matter on the grounds of alternate remedy is unsustainable.

9. CASE OF THE RESPONDENTS:

a) That the proceedings for reassessment was not in compliance with the procedure contemplated in GKN DriveShafts is incorrect. For the Assessment Year 2008-09 after issuance of notice dated 10.03.2014, the appellant's authorized representative appeared before the respondent on 11.08.2014 and again on 27.10.2014 when the case was discussed and the appellant was directed to submit details in respect of their claim of depreciation on DVN and goodwill. While for the Assessment Year 2009-10 along with the notice under Section 148, the reasons for reopening was also furnished dated 05.02.2014 and the appellant's authorized representative had met the respondents and the matters



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were discussed and they were directed to furnish the details in support of their claim of their depreciation in DVN and Good Will.

b) The appellant did not file its objection for issuance of notice under Section 148 even after knowing the reasons for reopening for both the Assessment Years instead the appellant's participated in the reassessment proceeding by filing objections/submissions and also furnished details that were sought for. Thus in the absence of any objection to reopening, the question of disposing the objection by a speaking order in terms of the order of the Hon'ble Supreme Court in GKN Driveshafts simply does not arise.

c) That the order of the Learned Single Judge has only relegated the appellant on the ground of existence of alternate remedy and thus the same does not warrant any interference.

d) In any view, the appellant having participated in the assessment proceedings it must be understood that they have waived their right in terms of GKN Driveshafts of being informed of the reasons which prompted/necessitated or formed the basis for assumption of jurisdiction under Section 147 read with 148 of the Act. It was further submitted by the learned Counsel for the Revenue that the assumption of jurisdiction for making reassessment is valid inasmuch as it is not on the basis of change of opinion but on the basis of new and tangible material and therefore, the order of the Learned Single Judge relegating the appellant on the ground of availability of alternate remedy, does not warrant



interference.

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10. Heard both sides. Perused the materials on record.

11. We are of the view that the impugned proceedings of reassessment are bad for want of jurisdiction and cannot be sustained for the following reasons:

I. SCOPE OF JUDICIAL REVIEW UNDER ARTICLE 226:

It is trite law that power of Judicial Review under Article 226 of Constitution of India shall be exercised whenever it is shown that a quasi-judicial proceeding is found to be bad of jurisdiction. The mere fact that an alternate remedy exists does not result in any embargo in exercising the power of judicial review under Article 226 of Constitution of India. Alternate remedy and the restraint in exercise of power of Judicial Review pursuant thereto are only self-imposed restrictions. As the above position is well settled, reference is not being made to any decision though reliance was placed on number of decisions in support of the above proposition.

II. CHANGE OF OPINION:

The question of correctness of the claim of depreciation was examined by the assessing officer while making the assessment under Section 143(3) of the Income Tax Act, 1961. This would be evident from the fact that the assessing



officer while responding to the audit objection had made it clear that there was no material to show that the valuation with regard to DVN was erroneous and mere suspicion on the valuation by the audit party cannot be a reason for revisiting / reopening concluded issues. It was further stated that even at the time of assessment proceedings under Section 143 of the Act, the assessee submitted the cost of acquisition of DVN and judicial precedence in support of its claim and the assessment under Section 143(3) was completed thereafter. Thus any attempt now to re-examine the correctness of the claim of depreciation, when in the view of the assessing officer there was no material much less tangible material furnished by the audit for making the reassessment is impermissible. In this regard it may be relevant to refer to the following portions of the communications dated 09.12.2013 and 05.12.2013 of the Assessment Officer, in response to the audit objection, which is extracted again:

"3. Though no valuation is given for goodwill and Dealer & Vendor Network in the hands of seller(Hyundai Motors India Limited), the difference in value of the assets(fixed assets, current assets, less current liabilities) and the purchase consideration paid, which comes to Rs.380,67,93,802 can entirely be apportioned towards goodwill as per the decision of Hon'ble Supreme Court in the case of Smifs Securities Limited (cited above). Out of this sum of Rs.380.67 crores, the assessee had apportioned Rs.300,38,63,802 towards Vendor & Dealer Network, based on a Independent Valuer's Report. During the



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course of assessment proceedings for assessment year 2008-09 which was the first year of claim of depreciation on such intangible assets, the Assessing Officer has accepted this valuation. There is no finding by the Audit party nor any material evidence available to show that the valuation is erroneous. Mere suspicion about the valuation by the Audit party cannot be a ground for revisiting the entire issue.

10.1. During the course of assessment proceedings, placing reliance on the aforementioned provisions of the Act and judicial precedent, the Assessee has submitted that the actual cost for acquisition of the dealer and vendor network and goodwill is the actual cost/consideration paid by the Assessee. Accordingly, depreciation shall be allowable on the same under section 32(i)(ii) of the Act.

11. As submitted in detail, the Assessing Officer, being a quasi-judicial authority had taken a conscious decision to allow the assessee's claim of depreciation on intangible assets, which is further supported by the judicial decisions of the Apex Court of this country. Any further review of this order based on a different interpretation (as per Audit's view and which is not accepted by the Department) would only tantamount to change in opinion and not permissible in law.

Communication dated 05.12.2013:

12. Considering these detailed submissions and facts and position of Law, it is requested that the Audit objection in the assessee's case in LAR No.11/85-16/2012-13 – Para No.6-Part



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IIA for Asst. Year 2008-09 may kindly not be pursued further.”

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12. It is trite law that the power to assess the escaped income under Section 147 though stands broadened/expanded over the years through periodical amendments, one feature which has remained constant/unchanged and prevailed during the relevant assessment year is the limitation on the power to reassess on a mere change of opinion. In this regard, it may be relevant to refer to the judgment of Supreme Court in ***Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd.***, reported in 320 ITR 561 (SC), wherein, after setting out the legislative history and capturing the changes brought out periodically to Section 147 of the Income Tax Act, 1961, found that the powers are much wider under Section 147 in view of the amendments. However, it was made clear that the power of reassessment is not meant to be a power of review nor can assessments be reopened on mere change of opinion lest Section 147 become vulnerable to challenge as conferring arbitrary power to the Assessing Officer. It was further clarified that the concept of change of opinion as a limitation ought to be understood as an inbuilt test to check abuse of power by the Assessing Officer. It is thus clear that the power of reassessment ought to be exercised only if there is tangible material which warrants exercise of the power of reassessment. In this regard, it may be relevant to refer to the following paras of the above said



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"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 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



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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 hereinbelow 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 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."

[Emphasis supplied].

The above view of the Supreme Court has been reiterated repeatedly and it has been held consistently that reassessment cannot be made on mere change of opinion. Some of the judgments which are relevant are referred to herein:

A. CIT v. Techspan India (P) Ltd., (2018) 6 SCC 685 :

2018 SCC OnLine SC 435 at page 690

"19.The fact in controversy in this case is with regard to the deduction under Section 10-A of the IT Act which was allegedly



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allowed in excess. The show-cause notice dated 10-2-2005 reflects the ground for reassessment in the present case, that is, the deduction allowed in excess under Section 10-A and, therefore, the income has escaped assessment to the tune of Rs 57,36,811. In the order in question dated 17-8-2005,..... Even the said show-cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under Section 10-A of the IT Act was well considered in the original assessment proceedings itself. Hence, initiation of the reassessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the assessing officer is of the view that the deduction under Section 10-A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings.”

(emphasis supplied)

B. Woodward Governor India Ltd. v. Assistant Commissioner of Income-Tax, 2016 SCC OnLine Del 6632 at page 51,52:

“2..... It is urged that the two heads of income sought to be passed off as deductions and clubbed with the receipts that are legitimately admissible under section 80-IA, are contrary to the declaration of law by the Supreme Court in Pandian Chemicals Ltd. v. CIT,[2003] 262 ITR 278 (SC) and Liberty India v. CIT,[2009] 317 ITR 218 (SC).

.....

4. It is evident from a plain reading of the reasons furnished by the Revenue that there is no allusion to tangible material in the



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form of objective documents, information etc., outside of the concluded assessment and the documents pertaining to it. According to the binding ruling of the Supreme Court in CIT v. Kelvinator of India Ltd., [2010] 320 ITR 561 (SC), sans such documents, evidence or tangible material, there cannot be valid opinion leading to proper reassessment proceedings.

(emphasis supplied)

C. Great Eastern Energy Corporation Ltd. v. Income Tax,

2014 SCC OnLine Del 3856:

“6. Thus, according to the AO, income is stated to have escaped assessment on four counts. The first being on account of depreciation claimed on computer software. In this respect, it is noted that the returns furnished by the assessee had been duly scrutinized by the AO. Undeniably, the amount of depreciation claimed by the assessee was examined by the AO. This is also apparent from the fact that the AO had disallowed depreciation to the extent of Rs. 5,85,078/-, which was claimed by the assessee in respect of the building and warehouse. The AO has now alleged that the depreciation on computer software was to be allowed only to the extent of 25% instead of 60% as admitted earlier.Be that as it may, it is apparent that the dispute raised with regard to rate of depreciation by the AO merely indicates a change of opinion and there has been no failure on the part of the assessee to disclose any material fact in this regard.

10..... It is now well settled that assessment cannot be reopened on mere change of opinion. The Hon'ble Supreme Court in the case of CITv.Kelvinator of India Limited: (2010) 320 ITR 561 (SC)affirmed the decision of the full Bench of this Court that a mere change of opinion cannot form the basis for reopening of assessment.



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The Assessing Officer after having resisted the audit wing report/point, stating that there is no material much less tangible material for reassessment and secondly that the claim of depreciation was examined closely and allowed after appreciation of law and also making it clear that reassessment/revisit on the above issue would fall within the realm of change of opinion, the action of the assessing officer in proceeding to make the reassessment is thus unsustainable.

III. Opinion need not be expressed – For applying the limitation of change of opinion with regard to power of reassessment:

There was a faint attempt by the learned counsel for the Respondent to suggest that for the restriction of change of opinion on power of reassessment to apply the original order of assessment must disclose that the issue sought to be re-opened was dealt with and finding rendered on the same during the assessment. In other words, it is submitted that for an assessment to be considered as a result of change of opinion it was necessary that in the original assessment it must be dealt with expressly and finding rendered thereon. The above submission is unsustainable, inasmuch as even the Assessing Officer, while responding to the Audit had made it clear, that the audit objection constitutes change of opinion. In any view, the above question need not detain us for long as it is well settled that once a query is raised during the assessment



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proceedings and an assessee submits its reply/responds to it and assessments are completed thereafter. It follows that the said issue has been considered by the Assessing Officer and the mere fact that the assessment order may not contain reference / discussion with regard to the same would not dilute or take away the fact that the issue was in fact examined and decided upon by the assessing officer, thus a revisit/reassessment on such issues would constitute change of opinion which is impermissible. In this regard, it may be relevant to refer the judgment of Bombay High Court in the case of ***Aroni Commercial Ltd., vs. Deputy Commissioner of Income-Tax and Another*** reported in **[2014] 362 ITR 403 (Bom)**, the relevant paragraph is referred to as under:

"12. The power to reassess cannot be exercised on the basis of mere change of opinion. If all the facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the assessing officer Section 147 and 148 does not permit reassessment are not possible. The power under sections 147 and 148 cannot be exercised to correct errors/mistakes on the part of the assessing officer while passing the original order of assessment. There is sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under section 147 and 148 only on satisfaction of the jurisdictional requirements."

Further, the Hon'ble High Court also held that once a query is raised during

the assessment proceedings and the assessee has replied to it, it follows that the



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query raised was a subject of consideration of the assessing officer while completing the assessment. It is not necessary that an assessment order should contain reference and / or discussion to disclose its satisfaction in respect of the query raised. Therefore, the entire proceeding for reopening the assessment had emanated only on account of change of opinion on the part of the assessing officer.

a) CIT vs. Usha International Limited [2012] 25 taxmann.com 200 (Delhi (FB)).

The Full Bench of the Hon'ble Delhi High Court had held that "reassessment proceedings will be invalid in case an issue or query is raised and answered by assessee in original assessment proceedings and the assessing officer does not make any addition in the assessment order."

b) Aroni Commercials Ltd., vs. Deputy Commissioner of Income-Tax and Another reported in **[2014] 362 ITR 403 (Bom).**

“16. Be that as it may, even if one examines the audit report dated September 29, 2011, from the internal audit department, it would be noticed that the basis of the audit report is the interpretation/inference drawn by the auditors from the accounts submitted by the petitioner to the Department during the course of its assessment proceedings. The reasons, as indicated in the audit report, are similar to the reasons as set out in the grounds for reopening the assessment by the Assessing Officer. Neither the



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audit report nor the ground for reopening assessment disclose any tangible material for the purpose of reopening the assessment but relies upon opinion/inferences drawn by the internal audit department on the existing material and these inferences/opinion differ from the one drawn by the Assessing Officer while passing the assessment order dated October 12,2010. Tangible material would mean factual material and not inference/opinion on material already in existence and considered during the assessment proceedings. This is not a case of any new fact being available by virtue of the internal audit which could lead to a reasonable belief that income chargeable to tax has escaped assessment. The internal audit report dated September 29, 2011, is an opinion/inference on facts, i.e., the accounts and, therefore, would not be tangible material to reopen an assessment.”

(emphasis supplied)

IV) Audit Objections – relevance in making re-assessments: -

(i) That the impugned reassessments are admittedly made on the basis of Audit objections.

(ii) To appreciate the relevance of audit objections in an assessment proceedings, it may be necessary to bear in mind the following settled legal principles:

a) Assessment proceeding is quasi-judicial in nature.

b) The status of an internal audit report is primarily to serve as a check over the arithmetical accuracy of computation of income and determination of tax

and intended to remove mistakes before the records are submitted to the



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Comptroller and Auditor General of India.

iii) The audit by the Comptroller and Auditor General of India is intended to ensure and examine sufficiency of the rules and the procedures prescribed for the purpose of securing an effective check on assessment, collection and allocation of revenue.

iv) It is relevant to note that the Audit Manual cautions stating that the Audit Department should not in any way substitute itself for the Revenue Authorities in the discharge of statutory duties/obligations. It is settled that audit does not possess nor vested with authority to review the judgment exercised or the decision taken in individual assessments by the officers entrusted with such duties. The object of the audit is not qua a particular assessment but with reference to the general procedure adopted in the manner of assessment and to suggest modifications/changes with a view to ensure that loopholes are plugged. Any attempt by the Audit to instruct the Officer of the decision/conclusion which he ought to arrive at in an individual case, would be abdication of authority by the Assessing Officer and usurping the functions of assessments of a quasi-judicial Officer viz., Assessing Authority by the Audit, which is clearly impermissible. As a matter of fact, provisions of the Internal Audit Manual, makes the above clear as evident from the following extracts from the Audit Manual:



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judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure..... It is, however, to forming a general judgment rather than to the detection of individual errors of assessment, etc., that the audit enquiries should be directed.

The detection of individual errors is an incident rather than the object of audit.”

The above extract would show that the audit is never intended to substitute the role of an assessing authority and any such attempt would amount to usurping the functions of the assessing authority, which is impermissible. Keeping the above principle in mind, let us examine/test the content of the Audit report and the tenor of the instructions given by the audit to the assessing officer, which forms the basis of the impugned orders of assessment.

13. The following sequence of events as obtained from RTI with regard to the Audit Objection and the exchange of correspondence pursuant thereto between the assessing officer/Department and Audit, is relevant, to appreciate as to how the Audit has cast its shadow/influence rather imposed its views on the assessing officer in framing the impugned assessment:-

a. A reading of the Audit point/objection would reveal that the audit objection was made primarily on the basis that the DVN would not constitute

“commercial right” but only relates to profit generation and thus, the claim of



depreciation on DVN ought to be withdrawn. The following extracts of the Audit are relevant:

"The assessee had stated it had paid a consideration towards vendor and dealer network and goodwill based on the valuation carried out by an independent valuer.

<i>The value of vendor network as per 'a' valuation</i>	<i>Rs.1,63,96,03,802</i>
<i>Value of dealers</i>	<i>Rs.1,36,42,60,000</i>
<i>Network as per 'a' valuation</i>	<i>Rs.3,00,38,63,803</i>

The above were treated as intangible asset and 25% depreciation was claimed to an extent of Rs.750965951.

It is pointed out in audit, that above items does not come under assets mentioned in intangible assets category. Intangible assets are know-how, patents, copyrights, trademarks, licences, franchises or any other business on commercial rights of similar nature.

Vendor network or dealer network is not in nature of any commercial rights under intangible assets. Further it was noticed from the IT file of HMIL where BTA copy was available, it was just on list of business concern who were dealer and vendor with whom M/s.HMIL Ltd is having business relationship. Further it was confirmed from the balance sheet of CI publishers there was no value for the goodwill on dealer network and vendor work. The assessee himself had taken difference in value between consideration and network of CCP as goodwill and dealer/vendor network. The value of Vendor network and dealers can only be



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related to profit generation and no commercial right can said to be existing.

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The depreciation claimed on Dealers network and vendor network was to be withdrawn."

b. In response to the Audit Report, the Assessing Officer/department placing reliance on the judgment of the Delhi High Court in the case of Areva submitted that DVN is a valuable asset and intangible and it would constitute a "commercial right". It was further submitted by the Assessing Officer that the fact that the seller does not assign a value, will have no bearing on the claim of depreciation as would be evident from the communication of the DCIT/Respondent. The communication of the DCIT/Respondent is extracted below for ready reference:-

" In reply, the Department stated that the decision of Delhi High Court in the case of Areva T&D is squarely applicable to assessee. The dealer vendor network is definitely a valuable asset. By the acquire the same the assessee got an up and running business and avoided gestation period and hence, treated as intangible asset as 'commercial right'. The fact that seller did not assign any value will not affect assessee claim."

Despite the above view being expressed by the Assessing Officer, the audit point was reiterated, stating that DVN would not constitute a commercial right and thus the claim of depreciation cannot be accepted.



c. Importantly, the Assessing Officer had stated vide letter dated 05.12.2013 which was forwarded by the Additional Commissioner vide communication dated 09.12.2013, that it may not be permissible to assume jurisdiction to make a reassessment on the basis of the audits view for the following reasons:

- i. That the Audit view was unacceptable to the assessing officer.
- ii. That there was no new/tangible material provided in the Audit which necessitates a revisit of the depreciation dealt with in the assessment made under Section 143.
- iii. In the circumstances the exercise of power of reassessment would be on mere change of opinion which is impermissible and thus requested that the audit objection may not be pursued further. The following extracts from the communication of the assessing officer would make the above position clear:

‘‘3. Though no valuation is given for goodwill and Dealer & Vendor Network in the hands of seller(Hyundai Motors India Limited), the difference in value of the assets(fixed assets, current assets, less current liabilities) and the purchase consideration paid, which comes to Rs.380,67,93,802 can entirely be apportioned towards goodwill as per the decision of Hon’ble Supreme Court in the case of Smifs Securities Limited (cited above). Out of this sum of Rs.380.67 crores, the assessee had apportioned Rs.300,38,63,802 towards Vendor & Dealer Network, based on a Independent Valuer’s Report. During the course of assessment proceedings for assessment year 2008-09 which



was the first year of claim of depreciation on such intangible assets, the Assessing Officer has accepted this valuation. There is no finding by the Audit party nor any material evidence available to show that the valuation is erroneous. Mere suspicion about the valuation by the Audit party cannot be a ground for revisiting the entire issue.

10.1. During the course of assessment proceedings, placing reliance on the aforementioned provisions of the Act and judicial precedent, the Assessee has submitted that the actual cost for acquisition of the dealer and vendor network and goodwill is the actual cost/consideration paid by the Assessee. Accordingly, depreciation shall be allowable on the same under section 32(i)(ii) of the Act.

11.As submitted in detail, the Assessing Officer, being a quasi-judicial authority had taken a conscious decision to allow the assessee's claim of depreciation on intangible assets, which is further supported by the judicial decisions of the Apex Court of this country. Any further review of this order based on a different interpretation (as per Audit's view and which is not accepted by the Department) would only tantamount to change in opinion and not permissible in law.

14. From the above exchanges, the following position emerges:

a. The Audit has expressed its views/opinion that DVN is not a “commercial right” and thus, the allowance of depreciation by the assessing officer was erroneous and thus ought to be withdrawn. This clearly amounts to trenching on the powers of assessment vested with the assessing officer.

b. In the view of the assessing officer, there is no new or tangible material necessitating or enabling the exercise of powers of reassessment.



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c. The assessing officer was of the view, in no uncertain terms that it would tantamount to reassessment on change of opinion which is impermissible.

15. Having examined the limitation of the audit objection in matters of assessment/reassessment and the exchange between the assessing officer and Audit, we find that the Department/Assessing Officer has been making attempts consistently to convince the audit (which they need not) of the need to settle the objections as the assessing officer was of the view that the claim of depreciation claimed by the assessee and allowed in the assessment proceeding does not require a reassessment / revisit and secondly, the Assessing Officer was of the view that exercise of power of reassessment after having extended the benefits of depreciation on applying its mind to the fact and law as to the nature of right under DVN would constitute change of opinion which is again impermissible.

16. We find rather strangely that the Assessing Officer, who had in no uncertain terms made it clear to the Audit of the circumstances, viz., change of opinion, which in its view would render exercise of the powers of reassessment bad and beyond the powers conferred on it, has thereafter proceeded to exercise the power of reassessment and complete the assessment in line with the audit objection, importantly, the objection of the Assessing Officer to the Audit



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Proposal is pending consideration and no final opinion is expressed by the Audit on the objections raised by the Assessing Officer.

17. In any view, it appears that the audit objection in the present case is in excess of its jurisdiction inasmuch as it has decided on the legality of depreciation on DVN. In other words rather than furnishing new tangible material to the assessing officer and leaving it open to the assessing authority to decide for itself whether the circumstances and the material warrant reassessment, has instead issued directions which are more in the nature of direction/ command as to the manner in which the reassessment and the claim of depreciation ought to be dealt with by the Assessing Officer. The audit report's view on a question of law is at variance/disagreement with that of the assessing officer who is conferred with the jurisdiction to make the assessment. The expression of opinion or evaluation of law and its bearing on assessment by the Audit in our view is in excess of its jurisdiction. The opinion of the Audit on a question/evaluation of law would not, rather cannot be the basis for reopening. More so, when admittedly the assessing officer was of the view that it has already examined the issue of depreciation during the course of assessment under Section 143(3) of the Income Tax Act, 1961, which we are afraid, is impermissible.

18. We have seen that the audit both Internal as well as by the Comptroller and Auditor General is not the Authority conferred with the jurisdiction to make



an assessment which falls within the exclusive jurisdiction / domain of the assessing officer. Any attempt by an external agency other than the assessing officers would amount to entrenchment on the powers of assessment/reassessment vested exclusively under the statute on the assessing officer. In other words, it clearly amounts to transgression and usurping of powers vested with the assessing authority by a body/ unit not vested with the power of assessment/reassessment as in the present case, by the audit which is impermissible.

19. The function of the audit is essentially executive in nature, while the function of the assessing officer and his power to make an assessment are essentially quasi judicial in nature. One may also have to bear in mind that the executive cannot trench upon the powers of a quasi judicial authority for permitting to do so may result in subverting the scheme of quasi-judicial function of making assessment / reassessment, which is impermissible.

20. In this regard, it may be relevant to refer to the following judgments of the Hon'ble Supreme Court:

a) ***Indian & Eastern Newspaper Society v. CIT***, (1979) 4 SCC 248,

wherein, after setting out the functions and nature of audit, it was clarified that

<https://www.mhcoj.gov.in/> the function of audit is essentially executive and cannot be attributed with the



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powers of supervision over the quasi judicial functions of assessment. The following extract would make the said position clear:

“11..... Whether it is the internal audit party of the Income Tax Department or an audit party of the Comptroller and Auditor-General, they perform essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi-judicial acts of income tax authorities. The Income Tax Act does not contemplate such power in any internal audit organisation of the Income Tax Department; it recognises it in those authorities only which are specifically authorised to exercise adjudicatory functions. Nor does Section 16 of the Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971 envisage such a power for the attainment of the objectives incorporated therein. Neither statute supports the conclusion that an audit party can pronounce on the law.....”

(emphasis supplied)

b) Commissioner of Income-Tax v. Hackbridge-Hewitt & Easun Ltd.,

1985 SCC OnLine Mad 294:

“14.....The question of ascertaining the average amount of capital employed in the business during any computation period for the purpose of relief under s. 84 is dealt with by rule 19(5). There is obviously difference of opinion between the ITO and the Audit Department as to the true meaning and content of rule 19(5). By the audit note, the Audit Department wanted the ITO to construe rule 19(5) according to the construction placed by the Audit Department. It is, therefore, clearly a case where an error of law is sought to be pointed out to the ITO, and, in our view, this case would be squarely covered by the decision in Indian

<https://www.mhc.tn.gov.in/judicial> **and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC).”**



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(emphasis supplied)

c) **Commissioner of Income-Tax v. Lucas T.V.S. Ltd., 1996 SCC OnLine**

Mad 880:

“8.....Therefore, the assessee claimed deduction under section 35(1)(iv) with regard to the entire expenditure amounting to Rs. 6,03,632. In the original assessment, the Income-Tax Officer allowed the entire expenditure, as though it was incurred only during the assessment year under consideration. The audit party pointed out that under section 35(1)(iv) read with section 35(2), only the expenditure incurred for the construction of the building in that assessment year alone can be allowed as deduction and the expenditure incurred in the previous assessment year cannot be allowed in the present assessment year. As per the decision of the Supreme Court in Indian and Eastern Newspaper Society v. CIT, [1979] 119 ITR 996, an audit opinion in regard to the application or interpretation of law cannot be treated by the Income-Tax Officer as information for reopening the assessment under section 147(b) of the Act......The opinion expressed by the audit party would go to show that they have pointed out to the Income-Tax Officer that he failed to apply the provisions contained in section 35 of the Act to the facts arising in this case. This would amount to pointing out the law and the interpretation of the provisions contained in section 35, which is clearly barred by the decision of the Supreme Court in Indian and Eastern Newspaper Society v.CIT, [1979] 119 ITR 996, for reopening the assessment under section 147(b) of the Act.....”

(emphasis supplied)

d) **Commissioner of Income-Tax v. Assembly Rooms, 1998 SCC OnLine**

Mad 1473



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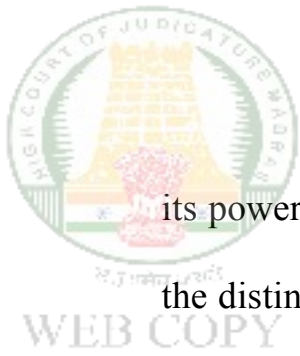
“9...The Appellate Tribunal, after perusal of the audit report, held that the report of the audit involved the interpretation of the law on a disputed point involving application of the decision of the Supreme Court to the facts of the case and we are, therefore, of the view that the Income-tax Officer was not justified in reopening the assessment on the basis of the report of the audit party. We, therefore, hold that the Appellate Tribunal was justified in holding that the reopening of the assessments in the instant case was not valid.”

e) Commissioner of Income-Tax v. E.I.D. Parry (India) Ltd., 1996 SCC.

OnLine Mad 946

“8.If the Revenue audit party points out the law and the legal position to be followed by the Income-tax Officer in the reassessment proceedings, then that would not constitute information under section 147(b) of the Act.....”

21. Apparently, it is in view of the above reason that the Hon'ble Supreme Court way back in 1979, in Indian and Eastern News Paper Society, put the issue beyond any pale of doubt by holding that the opinion on law rendered by an audit party cannot be the basis for exercising the power of reassessment. Evaluation of law and its bearing on the assessment must be directly and solely done by the assessing officer. The audit party can furnish information which leads the assessing officer to realise the need for reassessment. In other words, the information / material provided by the audit or any external agency must give



its power of reassessment. However, the information cannot be the realisation. If the distinction between the two is lost sight, there is a grave danger of powers of reassessment being usurped by external agency and abdication of its quasi judicial function/power by the assessing officer, both of which are impermissible and would prove fatal to the validity of any proceedings which suffers from the above vice.

V. Impugned order – not an exercise of power of reassessment in “good faith”.

The sequence of events and the exchange of communication between the Respondent and the Audit would reveal that the Respondents have not exercised their power in “Good Faith”. The power of reassessment has been exercised for purposes which are extraneous. The order of reassessment appears to be a manifestation of colourable exercise of power by the Assessing authority which vitiates the entire proceedings. The assessing officer, who after indicating that the Audit Report, does not enable the exercise of powers of reassessment as no new material is furnished and more importantly having expressed the view that in the circumstances it would tantamount to exercise of power of reassessment on change of opinion, has without any change in circumstance, proceeded to make the reassessment which is not in “good faith” rather indicative of exercise of power for purposes alien/foreign to the purpose for which such power was



judgments:

i) State of Punjab v. Gurdial Singh [(1980) 2 SCC 471 : AIR 1980 SC 319]

“9.....The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated:

(emphasis supplied)

ii) Ravi Yashwant Bhoir v. Collector [(2012) 4 SCC 407 : AIR 2012 SC 1339],

“47. ... ‘Legal malice’ or ‘malice in law’ means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for ‘purposes foreign to those for which it is in law intended.’ It means conscious violation of the law to the prejudice of another; a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorised purpose constitutes malice in law.”

(emphasis supplied)

VI: Absence of finding – failure on the part of the assessee to fully and



truly disclose material facts and invoke extended period - impermissible:

Before we conclude, we find that for the assessment year 2008-09, the reassessment is beyond four years, whereas, the same with regard to assessment year 2009-10 is within four years. We intend to make it clear that the law with regard to reopening of assessment is well settled by the courts as could be seen from the foregoing discussion. The power of Assessing Officer under Section 147 r/w.148 is classified into two parts primarily rather solely based on limitation as under:

- a) Reopening of assessment within a period of four years from the end of the relevant assessment year; and
- b) Re-opening of assessment beyond the period of four years from the end of the relevant assessment year.

22. The common jurisdictional requirement for reopening of assessment both within and beyond four years, has to be on the basis of "reason to believe" which cannot be on the basis of mere change of opinion. In addition to the above which is a restriction common to exercise powers of reassessment both within and beyond four years, with regard to cases of reassessment falling under clause(b) i.e beyond four years from the end of the relevant assessment year,

there must be a failure on the part of the assessee to disclose fully and truly all



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material facts necessary for assessment during the original assessment proceedings. We find that the jurisdictional fact to invoke the extended period is failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. A finding on the above aspect is a sine qua non/condition precedent/pre-requisite for invoking the extended period. Absence of such finding, while invoking the extended period, may prove fatal. The order of assessment for the year 2008-09 suffers from this additional infirmity.

a) **Commissioner of Income-Tax v. Schwing Stetter India P. Ltd., 2015.**

SCC OnLine Mad 13868 : (2015) 378 ITR 380 at page 382,383,389:

.....

12. For the purpose of assumption of jurisdiction under section 147 of the Income-tax Act, the officer must have reason based on the materials that there has been an income escaping assessment, which warranted assumption of jurisdiction under section 147 of the Income-tax Act. A perusal of the assessment order shows that the Assessing Officer had not mentioned that there are materials for escapement of income. The Assessing Officer also did not record any reason that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

(emphasis supplied)

b) ***EL FORGE Ltd. v. Income Tax, 2012 SCC OnLine Mad 3768***

“2.Therefore, according to the Assessing Officer, as the assessee was not entitled to deduction under Chapter VIA of the Income Tax Act, the assessment was reopened under Section 147 of



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the Income Tax Act by issuance of notice under Section 148 of
the Income Tax Act.....

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7. The facts of the case show that there was no denial of the fact that the assessee had disclosed the details as regards the carry forward of the losses as well as the income computed and all these details were very much there before the Assessing Officer; that there is no denial of the fact that there was no failure on the part of the assessee in disclosing the facts necessary for assessment and that there is no such allegation that the escapement of income was on account of the failure of the assessee in not disclosing fully and truly all material facts. In the circumstances, applying the Supreme Court decision referred to above, we have no hesitation in accepting the plea of the assessee that the assumption of the jurisdiction beyond four years is hit by limitation as provided under Section 147 proviso. Even though, on the merits of the assessment, the assessee's case has to fail, yet, on the limited question as regards the jurisdictional time limit as provided for under Section 147 of the Income Tax Act, the assessee is entitled to succeed. Since limitation is the fundamental aspect of the assessment, we have no hesitation in setting aside the order of the Tribunal, thereby allowing the appeal.”

(emphasis supplied)

The reassessment order for the Assessment Year 2008-09 also suffers from the infirmity of not rendering any finding of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment which would also vitiate the proceedings.



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23. In the light of the above conclusion, we do not propose to examine the matter on merit as the exercise of power of reassessment under Section 147 of the Act is bad for want of jurisdiction and thus unsustainable. It is well-settled that Court would be loathe in interfering with matters of reassessment where there is alternate remedy by way of statutory appeal. There are atleast in two circumstances which has been carved out as an exception to the above, self-imposed limitation namely:

- a. If the order is shown to be made in violation of principles of natural justice.
- b. If the order is bad for want of jurisdiction.

The impugned proceedings falls within the above exception as it is bad for want of jurisdiction thereby warranting interference.

24. For all the above reasons, we set aside the order of the learned Single Judge and the orders of reassessment dated 31.12.2014 for the assessment years 2008-09 and 2009-10 passed by the Assessing Officer. Accordingly, the writ appeals stand allowed. No costs.

[R.M.D., J.]

[M.S.Q., J.]

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Speaking/Non-Speaking Order
ssn/nst/lm



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R. MAHADEVAN, J.
and
MOHAMMED SHAFFIQ, J.

ssn/ nst/ lm

To

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Chennai-600 101.

**Pre-Delivery Judgment in
W.A. Nos.1203 and 1204 of 2015**

01.09.2022