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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decision delivered on: 14.12.2023**

+ **W.P.(C) 11537/2019**

KUEHNE+NAGEL PVT. LTD.

..... Petitioner

Through: Ms Ananya Kapoor with Mr Sumil
Lalchandani, Mr Shivam Yadav and
Mr Vibhu Jain, Advs.

versus

ADDL. COMMISSIONER OF INCOME-TAX, SPECIAL RANGE-
05 & ANR.

..... Respondents

Through: Mr Gaurav Gupta, Sr. Standing
Counsel with Mr Shivendra Singh,
Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

Prefatory Facts:

1. This writ petition concerns Assessment Year (AY) 2012-13.
2. Via the instant writ petition, challenge is laid to the notice dated 12.02.2019 issued by the Assessing Officer (AO) under Section 148 of the Income Tax Act, 1961 [in short, "Act"].
3. Besides this, challenge is also laid to the orders dated 01.07.2019 and 26.07.2019 concerning the objections raised by the petitioner with regard to reassessment proceedings triggered against it.
4. The notice in the writ petition was issued as far back as on 01.11.2019, when six weeks were granted to the respondents to file a



counter-affidavit in the matter. The last opportunity in this behalf was given on 22.05.2023. Once again, further, six weeks were granted to the respondent/revenue to file a counter-affidavit in the matter.

5. As a matter of fact, opportunity on the previous date was given despite the order dated 18.07.2022 noting that respondents were being given a last and final opportunity to file a counter-affidavit, *albeit* within four weeks.

6. Unfortunately, the counter-affidavit has not seen the light of the day.

7. Since the matter has been pending for the past four years, we do not deem it fit to grant further time. We have thus decided to hear the matter, based on the record presently available with us.

Background:

8. For the purpose of adjudication, the following broad facts are required to be noticed:

9. The petitioner had filed its Return of Income (ROI) on 28.11.2012. *Via* the said ROI, the petitioner declared its total income as Rs.57,37,84,404/-. The petitioner's ROI was picked for scrutiny and accordingly, notice dated 08/08/2013 was issued under Section 143(2) of the Act.

10. The record shows that in the course of the assessment proceedings, one of the queries raised concerned the depreciation claimed by the petitioner with regard to the temporary structures. Concededly, the depreciation rate prescribed qua temporary structures is 100%.

10.1 In this behalf, we may note that a questionnaire dated 04.01.2016 was issued to which a reply dated 12.01.2016 was submitted by the petitioner.

11. The petitioner defended its stand with regard to the claim made *qua* depreciation of temporary structure at the rate of 100%.



11.1 Significantly, to enquire into this matter an officer was deputed by the AO to visit the premises of the petitioner and carry out a physical inspection of the subject temporary structure.

12. Evidently, it was only thereafter, that on 15.02.2016, the AO framed an Assessment Order under Section 143(3) of the Act and pegged the petitioner's income at Rs.57,64,22,890/-.

13. The record also discloses that despite the AO having made an enquiry with regard to the claim of depreciation *vis-à-vis* the subject temporary structure albeit before framing the Assessment Order under Section 143(3) of the Act, on 12.01.2017, a notice under Section 154/155 of the Act was served on the petitioner.

13.1 This notice was apparently issued based on an audit objection received from the office of Additional Commissioner of Income Tax Audit-2. It appears that the petitioner submitted several replies concerning the aforementioned notice. In this regard, reference is made to replies dated 23.01.2017, 15.03.2017, 27.03.2017 and 11.05.2017.

14. Although, no formal order was passed dropping the notice issued under Section 154/155 of the Act, matter, in effect became moribund. After more than four years had elapsed since the end of the AY in issue i.e., AY 2012-13, as alluded to above, notice dated 12.02.2019 was issued under Section 148 of the Act concerning the claim of depreciation *vis-à-vis* temporary structure at the rate of 100%.

14.1 The notice, however, did not allege that the petitioner had failed to fairly and truly disclose all material facts.

15. The petitioner, however, in response to the notice, intimated to the AO that the return as originally filed on 28.11.2011 which was revised on 08.03.2014 should be treated as a return in response to the notice issued



under Section 148 of the Act.

16. As regards “Reasons to Believe” recorded by the AO, the petitioner filed its objections on 20.06.2019. Amongst others, one of the assertion made by the petitioner was that this was the case of a change of opinion without any new material coming to the fore. In sum, it was emphasized that reassessment proceedings were barred under the provisions of the first proviso appended to Section 147 of the Act.

16.1 The AO disposed of the objections *via* order dated 01.07.2019 and while disposing of objections, took recourse to Explanation 1 and Explanation 2 (c) (iv) appended to Section 147 of the Act.

17. Since, according to the petitioner, the order dated 01.07.2019 did not constitute a speaking order, a grievance was articulated in that behalf *via* communication dated 02.07.2019. The AO dealt with the same *via* order dated 26.07.2019. In effect, the AO emphasised that the objections filed by the petitioner had been disposed of *via* order dated 01.07.2019.

17.1 It is in these circumstances, that the petitioner approached the court *via* the instant writ petition.

Submissions of Counsel

18. As noticed at the outset, the respondent/revenue, for reasons best known to it, have not filed a counter-affidavit in the matter. Notwithstanding that, we may note that the entire petition is based on the record available with the respondent/revenue concerning the petitioner.

19. In support of the petitioner’s case, submissions were advanced by Ms Ananya Kapoor, whereas on behalf of the respondents, arguments were put forth by Mr Shivendra Singh.

20. Ms Kapoor submitted that the reassessment proceedings were wrongly triggered. It is emphasised that the issue concerning claim of



depreciation vis-a-vis temporary structures at the rate of 100% was raised during the scrutiny-assessment.

20.1 In other words, Ms Kapoor's contention is that this is a clear case of change of opinion.

20.2 Furthermore, it is submitted that since the reassessment proceedings were triggered after four years from the end of the AY in issue, the provisions of the first proviso appended to Section 147 of the Act would also be applicable. The AO could not have triggered reassessment proceedings without fresh material coming to his notice which demonstrated that facts material for assessment were not truly and fairly disclosed by the petitioner.

21. On the other hand, Mr Singh in defence of the impugned action largely relied upon the order dated 01.07.2019 passed by the AO. Based on the said order, it was contended that a conjoint reading of Explanation 1 and Explanation 2 (c) (iv) appended to Section 147 of the Act would show that merely because material evidence could not be elicited and/or discovered by the AO after due diligence, it would not necessarily amount to the disclosure within the meaning of Section 147 of the Act.

22. The submission, in particular, emphasised that Explanation 2 (c) (iv) appended to Section 147 of the Act in no uncertain terms brings to the fore that if it is, *inter alia*, a case of excessive loss of depreciation allowance, then reassessment proceedings can be triggered in a given.

Analysis and Reasons

23. We have heard learned counsel for the parties and perused the record.

24. According to us, the record as made available to us leaves us with no doubt that a specific query was raised with regard to the claim made by the petitioner concerning depreciation *qua* the subject temporary structure. For convenience, the relevant part of the questionnaire and the query raised is



set-forth hereafter:

“Please furnished detailed note on temporary erection on which 100% depreciation is claimed. Prove with evidences the life cycle of these fixed assets. Enclose purchases of such temporary erection. Show cause why these erection should not be treated as part of assessee P & M. It is very important to note here that assessee company does not have any block of assets on account of ‘Building’. The block ‘building’ under bloke of assets concepts has three categories buildings – Residential @5%, building other than residential-10% 80 1A-(4)(i) building @100% and purely temporary erections such as wooden structures @ 100%. In the case of the assessee the nature of these temporary erection is listed as follows which are primarily leasehold improvements in the used premises on which assessee is conducting is business and by no imagination the same can be treated as Purely Temporary in nature as the business of the assessee is ongoing from these premises.

1	Leasehold – DLF Office	1,57,74,297/-
2	Leasehold – Man Airfreight Office	18,04,398/-
3	Leasehold – CCU Office	17,87,500/-
4	Leasehold – Sai Bhara	10,29,400/-
5	Leasehold – MIDRWN (Tyco)	7,21,520/-
6	Leasehold – Mac office	9,54,331/-
7	Leasehold – Hyderabad Add Office	9,65,735/-
8	Leasehold – Work Station	85,000/-
9	Leasehold – M S Computer	2,40,694/-
10	Leasehold – Fix exit door	2,45,053/-
11	Leasehold – Civil interior work	13,17,000/-

It is evident from above that all above expenditure are lease hold improved in leased building taken on rent. The basic nature of these fixed assets is either furniture & fixtures or part of office buildings both carries depreciation rate of 10%. Therefore, show cause why depreciation on above assets should not be restricted to 10% as against 100% claimed by assessee. Perusal of one of bills of such addition provided before CIS kods as “Civil, Interior, Electrical, AC and security System work as 16th Floor, DLF building No.5A, DLF Cyber City, Gurgaon Rs.87,00,000/- of m/s Value Line Interiors Pvt. Ltd. as per DCIT Vs Surface Finishing Equipment (2003) 81 TTJ (Job Trib) 448, 100% depreciation is allowable on temporary wooden structure and tin shed as there are purely temporary erection. The assessee nature of addition are payment and are part of building where assessee is running its operations.”



25. As indicated above, in response to this query, a reply dated 12.01.2016 was submitted to the AO. This reply concerns various other queries as well; however, as far as the issue at hand is concerned, the petitioner took the following stand.

“8. Reasons for 100% depreciation on Temporary Erections

In relation to the above query raised by your goodself, the Assessee would like to state that the addition made to fixed assets on account of temporary erections comprise of purely temporary structures such as wooden structures in the form of partitions, immovable wooden planks. Certain other expenditure such as flooring and carpets, ceilings, paint cost is also capitalized as a part of temporary erection. Such temporary erections are mainly related to the leased building and have no separate use if detached from the leased asset. Such assets are installed in order to make leased premises sufficient for business use of the Assessee. Therefore, the very nature of the asset are 'temporary structure' and according to Appendix 1 of Income Tax Rules, 1962 item No. 4 (purely temporary erections such as wooden structure), are eligible @ 100%.

The expenditure has been treated as capital expenditure as it had been incurred on improving the utility of rented premises i.e. interior decorations and creation of the office atmosphere or organized warehousing space. The expenditure has not resulted in any building coming into existence nor creation of a movable fixed asset. Further, the temporary nature of the assets results from the fact these structures are meant for use by the Assessee for the period of use of the building or warehouse which is rented or leased by the Assessee. The Assessee is neither the owner of the premises nor has it any victim over the temporary erections after completion/ termination of the lease contract as these assets are immovable.

*The Assessee would also like to highlight that certain items of Leasehold expenditure have been categorized by the Assessee as 'Office Furniture' with 10% depreciation rate as these assets are movable and can be used by the Assessee even after the expiry of lease of the building. These leasehold comprise assets such as cupboards, electrical fittings etc. Please refer page 19 of the Form 3CD attached as **Annexure 4**.*

A snippet of the tax audit report is as below:



Office Furniture		
Racking (Meo WH Swaroski)	14.10.2011	761,656.00
Pallet Racking (Bom BSH)	20.12.2011	772,096.00
Racking (Long Span) Decathlon Blr	29.02.2012	3,404,873.00
Racking(Pallet position) Decathlon	29.02.2012	761,758.00
Racking (Schuoco Wh Blr)	20.02.2012	836,164.00
Racking Sloted Angle (Medtronics)	31.01.2012	833,508.00
Racking Sloted Angle (DLF- Bom WH)	01.03.2012	314,160.00
Racking Sloted Angle (DLF- BlrWH)	09.03.2012	308,283.00
Table/Bed	31.10.2011	69,000.00
Rack	31.10.2011	85,000.00
Chair	10.11.2011	10,992.00
Chair / Aluminium Table	05.11.2011	20,250.00
Chair	14.12.2011	7,900.00
furniture	07.12.2011	10,575.00
Chair	19.11.2011	16,719.00
Table/Chair	03.01.2012	68,700.00
Chair	22.02.2012	24,188.00
Table	30.10.2011	24,185.00
2 TABLE	18.01.2012	5,675.00
CIVIL INTERIOR	31.10.2011	168,750.00
Leasehold- CJB office - Furniture	01.10.2011	274,604.00
Leasehold - Bom Additional space - Furniture	09.11.2011	2,057,000.00
Leasehold - Bom Additional space - Electrical Fitting	09.11.2011	500,000.00
Leasehold - Luh New office - Furniture	31.12.2011	166,300.00
Leasehold - Luh New office - Electrical Fitting	31.12.2011	82,600.00
Leasehold- Bom Biwandi wh (BSH) - Electrical Fitting	12.01.2012	643,570.00
Leasehold-Bom BSH WH Electrical	03.03.2012	105,000.00
Leasehold-Bom BSH WH-furniture	03.03.2012	89,550.00
		12,423,056.00

Fork Lift

Further, the Assessee would like to submit that the Hon'ble Madras High court in the case of C.I.T vs. Print Systems and Products 285 ITR 337, has held that assessee was entitled to 100% depreciation in respect of expenses incurred by it on construction of temporary structures in the lease property such as temporary partition , false ceiling painting and walls etc. A copy of the order IS attached as Annexure 5"

26. Besides this, as we have recorded hereinabove, a site visit was also carried out by an official deputed by the AO on 14.01.2016. It was only thereafter that the assessment order dated 15.02.2016 was framed under Section 143(3) of the Act.



27. The reasons to believe is what lends credence to the case of the petitioner. The reasons to believe does not adverted to any fresh material that was available to the AO for triggering reassessment proceedings.

27.1 Once again for convenience, the reasons to believe as recorded by the AO on 05.02.2019 are set-forth hereafter:

“05.02.2019 Reasons for initiation of proceeding u/s. 147 of the I.T. Act in the case of M/s Kuehne Nagel Pvt. Ltd. for the A.Y. 2012-13 (PAN NO. AAACK2676H) - A.Y.: 2012-13-

Assessment in the case of M/s Kuehne Nagel Pvt. Ltd. for A.Y. 2012-13 was completed on 15.02.2016 determining assessed income of Rs.57,64,22,890/-. It is seen from the assessment records that the assessee company has claimed depreciation on Temporary erection @ 100% of Rs. 3,19,19,234/-. On perusal of assessment records, it is found that depreciation has been wrongly claimed by the assessee on temporary erection @ 100% as stated. The same has resulted in an escapement of income.

In view of these observations, reliance is placed on Explanation 1 and Explanation 2 (c) of Section 147 of the Income Tax Act and reproduced as below:-

Explanation-I Production before the Assessing Officer of account of 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 the foregoing proviso.

Explanation 2(c)- where an assessment has been made, but-

(iv) Excessive loss or depreciation allowance or any other allowance under this Act has been computed... ..

In view of the above, I have reasons to believe that the income to the extent of Rs. 3,19,19,234/- for the AY. 2012-13 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961 and it is a fit case for issuance of notice u/s 148 of the I.T. Act, 1961 I.T. Act. Hence, notice u/s 148 is issued to the assessee company for A.Y. 2012-13 with the approval of Ld. Pr. CIT-5, New Delhi.I”

28. Therefore, clearly, while there was no new material available, the AO was pegging his hope on the provisions statute noted therein, which, incidentally also form the basis of the arguments advanced before us by Mr Singh.



29. In our view, this is a case which involves a change of opinion notwithstanding the provision referred to by the AO in his reasons to believe recorded on 05.02.2019.

30. There is no dispute that depreciation on subject temporary structure(s) was claimed by the petitioner. In fact there is no cavil that once a structure is categorized as temporary, the depreciation rate provided under Rule 5 of Appendix I appended to the Income Tax Rules, 1962, is 100% .

31. The arguments advanced by Mr Singh that merely because books of account were made available to the AO and he could have discovered material evidence had he been diligent could not be the reason for not triggering reassessment proceedings against the petitioner, does not find favour with us.

32. This is not a case where an aspect was not in the notice of the AO and that he could have discovered by employing diligence. The issue concerning the claim of depreciation by the petitioner with regard to the subject temporary structure(s) was flagged by the AO. The petitioner submitted its reply along with the relevant details and material. The AO after considering the same, accepted the claim made by the petitioner with regard to the subject temporary structure(s).

33. Likewise, the reliance placed on Explanation 2 (c) (iv) appended to Section 147 of the Act would not in our opinion further cause of the respondent/revenue. The reason we say so is, once it is accepted that the subject structure(s) were temporary no case can be made out that the depreciation allowance claimed was excessive.

34. It is not in dispute that for temporary structures, the prescribed rate of depreciation is 100%.



35. The other aspect of the matter is whether the impugned notice issued under Section 148 of the Act was barred by time.
36. Although, in the reasons to believe the AO has not stated that the petitioner had failed to disclose full and truly all material facts, in our view, this aspect need not detain us in view of the reasons that we have given hereinabove, that is, it is a clear case of change of opinion.
37. The provisions cited before us on behalf of respondent/revenue i.e., Explanation 1 and Explanation 2 (c) (iv) appended to Section 147 of the Act would not be applicable on the facts and circumstances obtaining in the present case.
38. The writ petition is, accordingly, allowed. The impugned notice dated 12.02.2019 and the orders disposing of objections dated 01.07.2019 and 26.07.2019 are quashed.
39. The writ petition is disposed, in the aforesaid terms.
40. Parties will act based on the digitally signed copy of the order.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

DECEMBER 14, 2023/RV

Click here to check corrigendum, if any