

OD-4

ITA/71/2018
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-III, KOLKATA
VS
M/S. WEST BENGAL FISHERIES CORPORATION LTD.

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 21st May 2024.

Appearance:

Mr. Soumen Bhattacharjee, Advocate
Ms. Doyel Dey, Advocate
... for the appellant.

Mr. Ananda Sen, Advocate.
Mr. Sabysaschi Mandal, Advocate
... for the respondent.

1. Heard Sri Soumen Bhattacharjee, learned junior standing counsel for the appellant and Sri Ananda Sen, learned advocate for the respondent/assessee.
2. This appeal was under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act, 1961') has been preferred by the revenue praying to setting aside the order dated 7.9.2016 in ITA No.476/Kol/2013 (Assessment Year 2005-06) (Deputy Commissioner of Income Tax vs. West Bengal Fisheries Corporation Ltd.) and the cross-objection No.44/Kol/2013 (Assessment Year 2005-06) (West Bengal Fisheries Corporation Ltd. Vs. Deputy Commissioner of Income Tax) passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata.

3. This Court admitted the appeal on the following substantial question of law :

“Whether finding of the Tribunal that the assessment involved in this appeal was reopened by the Assessing Officer merely on the basis of change of opinion was perverse or not, having regard to the factual background of the case and in particular the reasons for which the assessment was reopened ?”

Facts :

4. Briefly stated facts of the present case are that the original assessment order under Section 143(3) of the Act, 1961 for the Assessment Year 2005-06 was passed by the Assessing Officer which is reproduced below:

“1. The assessee company submitted its return of income on 16.11.2004 declaring total income at NIL which was duly processed U/s. 143 (1).

The case was selected for scrutiny as per guidelines of C.B.D.T. and notice u/s. 143 (2) was issued on 21.04.2006. Notice u/s. 142 (1) was issued and served upon the assessee on 14.06.2007.

The case was represented by Shri Gopal Chandra Biswas, Manager-Finance and a/r of the assessee company.

2. Assessee has debited an amount of Rs. 18,74,034/ in the profit and Loss account. However, the Balance Sheet shows a depreciation of Rs. 3, 00,33,116/- Assessee was requested to produce the details of deprecation along with basis of calculation for the depreciation claimed for computation of income. Assessee furnished the same chart of calculation as was attached with the return of income reflecting an amount of Rs. 18,74,034/- as shown in the Profit & Loss account. The rates and the basis of calculation is not at all clear and specific in this chart and does not match either the criteria of Company's Act, 1956 or that of the Income Tax Act, 1961.

It is also not clear as to whether the written down value of the assets are rightly reflected as the rates employed for calculation of depreciation do not subscribe to any specified rate chart.

Hence, in the absence of proper coherence of facts and any satisfactory explanation for lack of application of the correct rates for computation of depreciation, the entire amount of depreciation computed incorrectly at Rs. 18,74,034/- is disallowed and added back to the total income of the assessee.

The total income of the assessee is computed as below:

Net profit as per P/L a/c. Rs. 58,67,595/-

Add:

*Depreciation disallowed as per Rs. 18,74,034/-
Discussion above*

Net Profit Rs. 77,41,629/-

Less:

Accumulated loss

Brought forward from

Previous Year

Rs. 2,88,71,747/-

Loss to be carried forward for

Rs.(-) 2,11,30,118/-

Next year

Tax, thereon

NIL

Assessed u/s. 143 (3) as above

Please issue Demand Notice and copy of the order to the assessee.

(MONALISA PAL MUKHERJEE)

Income Tax Officer

Ward-2 (3), Kolkata”

5. As stated by learned counsel for the respondent assessee, a notice dated 23.03.2010 under Section 147/148 of the Act, 1961 for the assessment year 2005-06 was issued by the assessing officer to the respondent assessee to reopen the aforesaid assessment. After reopening, the assessing officer passed reassessment order dated 21.12.2010 assessing

the respondent assessee to tax. Aggrieved with the reassessment order, the respondent assessee preferred an appeal No.348/CIT(A)-I/C-2/10-11 before the Commissioner of Income Tax (Appeals) – I, Kolkata, which was partly allowed by the CIT(A) on merits by its order dated 27.11.2012 and the point taken by the respondent assessee challenging the jurisdiction for reassessment on the ground of “change of opinion” was rejected.

6. Aggrieved with the aforesaid order of CIT(A), the revenue filed the afore-noted appeal before the ITAT and the respondent assessee filed the afore-noted cross-objection. The ITAT allowed the cross-objection of the respondent assessee and dismissed the appeal of the revenue on account of lack of jurisdiction due to “change of opinion” by the assessing officer for initiating proceedings under Section 147 of the Act, 1961. The ITAT further observed in the impugned order that since cross-objection has been disposed of on the preliminary issue of jurisdiction, therefore, the appeal of the revenue relating to additions/disallowance made in the reassessment order, has become infructuous. Aggrieved with the order of the ITAT, the revenue has filed the present appeal.

Submissions

7. Learned counsel for the revenue submits that as per the original assessment order, the respondent assessee has disclosed a net profit of Rs.58,77,595/-, to which, a sum of Rs.18,74,034/- was added on account of disallowance on depreciation and thus the net profit came to

Rs.77,41,629/-. The loss carried forward by the assessee from previous year was Rs.2,88,71,747/- and after adjusting the aforesaid net profit, the loss carried forward for the next year was Rs.2,11,30,118/-. In the admitted facts of the case, the respondent assessee was liable to tax under Section 115JB of the Act, 1961. Therefore, it was clearly a case of non-application of mind. Therefore, the Tribunal has committed a manifest error of law to hold otherwise. The impugned order of the ITAT is patently erroneous and illegal and the finding recorded on the question of jurisdiction, is perverse.

8. Learned counsel for the respondent assessee submits that entire facts and figures were before the assessing officer during the course of original assessment proceedings under Section 143(3) of the Act, 1961 and as such, after due application of mind, the assessing officer has assessed to tax the respondent assessee and as such, the proceedings initiated by the assessing officer against the respondent assessee under Section 147 of the Act, 1961 was based on “change of opinion”, which has been rightly set aside by the ITAT. Reliance is placed upon a recent judgment of this Court dated 06.05.2024 in ITA No.1 of 2014 [CIT, Kolkata – II, Kolkata v. M/s. Kesoram Industries Limited].

Discussion and Finding

9. We have carefully considered the submissions of learned counsel for the parties and perused the paper.

10. Before we proceed to consider rival submissions of learned counsel for the parties, it would be appropriate to reproduce Section 115JB of the Act, 1961 as applicable for the assessment year 2005-06:-

“Special provision for payment of tax by certain companies.

115JB. (1) *Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one-half per cent].*

(2) *Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):*

Provided that while preparing the annual accounts including profit and loss account,-

- (i) *the accounting policies;*
- (ii) *the accounting standards adopted for preparing such accounts including profit and loss account;*
- (iii) *the method and rates adopted for calculating the depreciation,*

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956):

Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,-

- (i) *the accounting policies;*
- (ii) *the accounting standards adopted for preparing such accounts including profit and loss account;*
- (iii) *the method and rates adopted for calculating the depreciation,*

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

Explanation.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by-

- (a) the amount of income-tax paid or payable, and the provision therefor; or
- (b) the amounts carried to any reserves, by whatever name called [, other than a reserve specified under section 33AC]; or
- (c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or
- (d) the amount by way of provision for losses of subsidiary companies; or
- (e) the amount or amounts of dividends paid or proposed; or
- (f) the amount or amounts of expenditure relatable to any income to which section 10 [(other than the provisions contained in clause (23G) thereof)] or section 10A or section 10B or section 11 or section 12 apply,

if any amount referred to in clauses (a) to (f) is debited to the profit and loss account, and as reduced by-

- [(i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to the profit and loss account:

Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation or Explanation below the second proviso to section 115JA, as the case may be; or]

- (ii) the amount of income to which any of the provisions of section 10 [(other than the provisions contained in clause (23G) thereof)] or section 10A or section 10B or section 11

or section 12 apply, if any such amount is credited to the profit and loss account; or

[(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Explanation.—For the purposes of this clause,-

(a) the loss shall not include depreciation;

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil; or]

(iv) the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or

(v) the amount of profits eligible for deduction under section 80HHE computed under sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or

(vi) the amount of profits eligible for deduction under section 80HHF computed under sub-section (3) of that section, and subject to the conditions specified in that section; or

(vii) the amount of profits of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 1772 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

(3) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A.

(4) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the Explanation below sub-section (2) of section 288, certifying that the book profit has been computed in accordance with the provisions

of this section along with the return of income filed under sub-section (1) of section 139 or along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of section 142.

(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.]”

11. Section 115JB of the Act, 1961 starts with a non obstante clause and provides that where, in the case of an assessee, being a company, the income tax payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the first day of April, 2001, is less than seven and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income tax at the rate of seven and one-half per cent.
12. As per Explanation to Section 115JB of the Act, 1961, for the purposes of this Section, “book profit” means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2) which shall be increased by the amounts referable in clauses (a) to (f) if debited in the profit and loss account and the book profit shall be reduced by the amounts falling under clauses (i) to (vii) to the aforesaid Explanation.
13. It is evident from bare reading of the original assessment order passed by the assessing officer under Section 143(3) of the Act, 1961 that there was a book profit of Rs.58,67,595/- but the assessing officer has not

considered it at all for computation of tax under Section 115JB of the Act, 1961. In other words, there is absolutely no whisper in the assessment order with regard to the tax liability of the respondent assessee under Section 115JB of the Act, 1961 on the admitted facts of the case, resulting in complete non-application of mind and total absence of formation of any opinion with regard to the tax liability of the respondent assessee under Section 115JB of the Act, 1961.

14. Under the circumstances, the assessing officer issued notice to the respondent assessee under Section 147 of the Act, 1961 after recording four reasons for reopening of assessment, which have been reproduced by the ITAT in paragraph 7 of the impugned order. The reason Nos.1 and 2 recorded by the assessing officer relate to the liability of the respondent assessee under Section 115JB of the Act, 1961 and escapement of tax to the tune of Rs.6,11,892/-. The third reason recorded by the assessing officer was that the loss available in the previous year was Rs.40,66,962/- but the carried forward loss has been taken by the assessing officer at Rs.2,88,71,247/-. The fourth reason recorded by the assessing officer was with regard to the excess depreciation of Rs.2,39,93,843/-.
15. The ITAT has allowed the cross objection of the assessee on the preliminary issue of jurisdiction of the assessing officer for reassessment under Section 147 of the Act, 1961 that the reassessment proceeding was based on change of opinion. The findings recorded by the ITAT in

this regard in paragraphs 8, 9 and 10 of the impugned order are reproduced below:-

"8. A perusal of the aforesaid reasons recorded by the Assessing Officer makes it abundantly clear that the assessment originally completed by him under section 143(3) was reopened by the Assessing Officer on the basis of the same records as was available before him while completing the original assessment under section 143(3) and there was no new tangible material that had come to his possession on the basis of which the assessment was reopened by him. At the time of hearing before us, the ld. D.R. has not disputed this position. The only contention raised by him is that the reopening of assessment by the Assessing Officer was based on altogether new issues, which had not been examined by the Assessing Officer during the course of original proceedings under section 143(3). However, as submitted by the ld. counsel for the assessee, the relevant records including the books of account of the assessee were duly examined by the Assessing Officer during the course of assessment proceedings and only after having satisfied with the same, the claim of the assessee was accepted by him in the assessment completed under section 143(3). The contention raised by the ld. D.R. in this regard, even otherwise runs contrary to the decision of the Hon'ble Calcutta High Court in the case of Debashis Moulik vs. ACIT reported in 370 ITR 660, wherein the assessment originally completed under section 143(3) was sought to be reopened by the Assessing Officer on the basis of new facts discovered from the assessment records and it was held by the Hon'ble Calcutta High Court that the assessment was reopened by the Assessing Officer merely on the basis of change of opinion, which was not permissible in law.

9. In the case of CIT vs. Kelvinator of India Limited (supra), cited by the ld. counsel for the assessee, it was held by the Hon'ble Supreme Court that after the amendment made w.e.f. 1st April, 1989, the Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on a mere change of opinion. It was held that the concept of "change of opinion" must be treated as an in-built test to check the abuse of power and hence the Assessing Officer even after the amendments made in the relevant provisions from April 1, 1989 has the power to reopen an assessment provided there is tangible material to come to the conclusion that there was escapement of income from assessment. Applying the ratio laid down by the Hon'ble Supreme Court in the case of Kelvinator of India Limited [supra] and by the Hon'ble jurisdictional High Court in the case of Debashis Moulik -vs.- ACIT (supra), we hold that the reopening of assessment made by the

Assessing Officer in the present case was bad in law as the same was based merely on the change of opinion and the assessment completed by him under section 143(3) read with section 147 in pursuance thereof is invalid and the same is liable to be cancelled. We order accordingly and allow the Cross Objection filed by the assessee.

10. Keeping in view the decision already rendered by us on the preliminary issue while disposing of the Cross Objection of the assessee holding that the assessment made by the Assessing Officer under section 143(3) read with section 147 is to be cancelled being bad in law, all the issues raised in the appeal of the Revenue relating to the additions/disallowances made in the said assessment have become infructuous. We, therefore, do not consider it necessary or expedient to adjudicate upon the same."

16. From the facts as noted above, we find that while passing the original assessment order, the assessing officer has neither formed any opinion regarding tax liability of the respondent assessee under Section 115JB nor noticed the provisions of Section 115JB nor applied his mind for liability to tax of the respondent assessee under Section 115JB. Thus, the original assessment order, in so far as the liability to tax under Section 115JB is concerned, was non-speaking and cryptic in nature and therefore, it is difficult to attribute to the assessing officer that he formed any opinion regarding tax liability of the respondent assessee under Section 115JB.
17. In paragraph 20 of the judgment in M/s. Kesoram Industries Limited (supra) this Bench has summarized the law on "reason to believe" and "change of opinion" as under:-

"20. The law laid down in the judgments referred above, leaves no manner of doubt that:-

(a) The assessing officer under Section 147 of the Act, 1961 has the power to re-assess any income which escaped assessment to tax for any assessment year subject to the

provisions of Sections 148 to 153. The power to reassess under Section 147 of the Act, 1961 has been incorporated so as to empower the Assessing Authorities to re-assess any income on the ground which escaped his knowledge.

(b) The words "**reason to believe**" suggest that the belief must be bona fide and must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. His vague feeling that there might have been some escapement of income from assessment is not sufficient. The reasons for the formation of the belief must be based on tangible material and must be based on a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular assessment year. In other words, such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. If the grounds for formation of "reason to believe" are of an extraneous character, the same would not warrant initiation of proceedings under Section 147 of the Act, 1961.

(c) If, there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of income of the assessee has escaped assessment, it can take action under Section 147 of the Act, 1961. If the grounds taken for initiating reassessment proceedings under Section 147 of the Act, 1961 are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. The belief must be held in good faith and should not be a mere pretence.

Change of Opinion

- (f) Reassessment of income under Section 147 of the Act, 1961 cannot be made on change of opinion. The words "change of opinion" implies formulation of opinion and then a change thereof. If the Assessing Officer has earlier made assessment for the same

*Assessment Year **expressing an opinion of a matter either expressly or by necessary implication** then on the same matter, a reassessment proceedings for the alleged escapement of income from assessment to tax, cannot be initiated as it would be a case of "change of opinion". **If the assessment order is non-speaking, cryptic or perfunctory in nature, then it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If the assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment.***

18. Applying the settled position of law on facts of the present case on the question of "change of opinion" as discussed above, we hold that the original assessment order under Section 143(3) of the Act, 1961 is totally silent on liability of the assessee to tax under Section 115JB of the Act, 1961. He neither noticed the provisions of Section 115JB nor formed any opinion with regard to liability to tax of the assessee on book profit. The assessment order was non-speaking and cryptic. Therefore, reassessment proceedings initiated by the assessing officer under Section 147 of the Act, 1961, is not based on change of opinion. The finding of the ITAT in the impugned order to hold that the reassessment proceedings initiated by the assessing officer was based on change of opinion, is perverse and unsustainable in law.
19. We also find that the ITAT has not decided the appeal of the revenue on merit with regard to the income which allegedly escaped assessment to tax.

20. For all the reasons aforestated, the impugned order dated 07.09.2016 in ITA No.476/Kol/2013 for the assessment years 2005-06 is hereby set aside and appeal is restored before the ITAT. The cross objection no.44/Kol/2013 filed by the respondent/assessee is dismissed. Substantial question of law is answered in favour of the revenue and against the assessee. The ITAT is directed to decide the aforementioned ITA/476/Kol/2013 on merit, in accordance with law, expeditiously preferably within four months from the date of production of a certified copy of this order, after affording reasonable opportunity of hearing to the parties, without being influenced by any of the observations made in the body of this order touching the merits of the case in appeal before the ITAT. The appeal of the revenue (ITA/71/2018) is **allowed** to the extent indicated above.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)