$~

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

Date of decision: December 08, 2011

\+ W.P.(C) 7313/2010

RRB CONSULTANTS AND ENGINEERS PVT LTD..... Petitioner

Through: Mr. S.Krishnan with
Mr. Nishank Singh, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. Kamal Sawhney, Sr. Standing Counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

RRB Consultants and Engineers Pvt. Ltd. now known as Eco RRB Infra (P) Ltd. has filed the present writ petition for issue of writ of certiorari for quashing of notice dated 26.3.2010 issued by Deputy Commissioner of Income Tax, the respondent herein, under Section 148 of the Income Tax Act, 1961 (Act, for short). The petitioner has also prayed for quashing of order dated 28.9.2010 passed by the respondent dismissing their objections to the re-opening of assessment under Section 147/148 of the Act.

2. The petitioner is engaged in the business of consultancy in renewable and non-conventional sources of energy and also has income from power generation. Petitioner has set up demonstration units of Wind Energy Generators (WEGs) in Tamil Nadu. These WEGs began generating electricity and the electricity so generated was sold to the State Electricity Board. The petitioner it is admitted had been claiming benefit under Section 80IA of the Act in respect of income earned from power generation from the assessment years 2000-2001 onwards.

3. For the assessment year 2003-04, the assessee had filed its return of income on 25.11.2003 and thereafter assessment order under Section 143(3)(c) of the Act was passed on 30.1.2006. The assessee was allowed deduction under Section 80IA to the extent of Rs.1,17,71,062/-.

4. It appears that there was an audit note/objection. The copy of the said audit note has not been placed on record and is also not available on the original file/record produced by the Revenue before us. However, reference to the audit note/objection is made in the counter affidavit.

5. After the audit note/objection, the Assessing Officer recorded the following reasons before issue of notice under Section 148 of the Act:-

> "11. Reasons for the belief that income has escaped assessment:

During the year the assessee filed its return of income for A.Y. 2003-04 declaring an income of Rs. 1,10,17,156/- wherein the assessee company has claimed deduction u/s 80IA of Rs. 1,18,71,062/- (1,22,78,960 – 4,07,898). The case was completed u/s 143(3) of I.T. Act. at an income of Rs. 1,11,17,200/- wherein the claim u/s 80IA of Rs. 1,17,71,062/- (1,22,78,960 – 5,07,898) was allowed to the assessee company.

A perusal of records reveals that the main source of income of the assessee company is earning commission by sale of wind mills from its principal. This is substantiated by the company itself vide submission filed on 10th Jan. 2006 during assessment proceedings, wherein it has been submitted that the power plant has been set up as a demonstration unit. The purpose of the demonstration unit is to convince the prospective buyers for purchasing WEGs. This implies that this undertaking has not been set up for power generation and therefore not eligible deduction u/s 80IA.

The deduction under clause (IV) sub-section 4 of section 80IA is available to the assessee who is in the business of generation and distribution of power. Further, section 80IA (5) states that for the purpose of determining the quantum of deduction u/s 80IA(1). The same has to be computed as if such eligible in the only source of income of the assessee during the year, which is not in the case of assessee company. Thus the assessee has failed to disclose all material facts truly and fully that were necessary for assessment. Here it is relevant to mention the explanation 1 in section 147 that states that "production before the AO of account books or other evidence from which material evidence could with the diligence have discovered by the AO will not necessarily amount to disclosure with the meaning of the foregoing proviso.

> In view of above facts, I have reason to believe that income chargeable to tax amounting to Rs.1,17,71,082/- has escaped assessment in the case and the same is to be brought to tax under section 147/148 of the I.T. Act. Sanction for issue of notice u/s 148 as prescribed u/s 151, to re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to the notice subsequently during the course of assessment proceedings, may kindly be accorded."

6. As the reasons were recorded after the four years of the end of the assessment years the Assessing Officer also took approval of the Jurisdictional Commissioner, which was granted on 26.3.2010.

7. The learned counsel for the petitioner submits that the jurisdiction pre-conditions for issue of re-assessment year under Section 148 prescribed under Section 147 are not satisfied in the present case. It is stated that the issue of deduction under Section 80IA was examined at the time of original assessment and when assessment order dated 30.1.2006 was passed. Secondly, it is submitted that in the present case proviso to Section 147 is applicable and, therefore, re-assessment proceedings can be initiated, if there was failure or omission on the part of the assessee to disclose material facts. It is stated that in the present case material facts were disclosed at the time of original assessment.

8. We find merit in the contentions raised by the petitioner. As per the

original assessment records, the Assessing Officer vide notice dated 20.12.2004 had asked the petitioner to submit a note on admissibility of deduction under Section 80IA in respect of power generation unit and give complete evidence in this regard. The assessee was asked to file separate balance sheet, profit and loss account for the claim under the said section. The original records for the assessment year 2003-04 reveal that the assessment order for the first year i.e. 2000-01 in which the claim for Section 80IA was examined and allowed and is placed on the record. In the assessment order for the assessment year 2000-01 it is recorded that the petitioner continues to derive income from consultancy and power generation which was claimed to be exempt under Section 80IA. The assessee, thereafter, submitted a letter dated 22.11.2005 giving details of power generation income. This letter is available on the assessment records and the relevant portion reads as under:-

> "**5. Details of Power Generation Income Rs.12278960/-.**
>
> The monthly details of Power generation income HTSC wise are enclosed herewith. The assessee has availed a deduction of Rs. 11871062/- in it's computation of income after deduction incidental expenses of Rs. 407898/- on account of Insurance of Wegs amounting to Rs. 169243/- and Repair and Maintenance of Wegs amounting to Rs. 238655/-.

> The said expenses have been deducted in view of the stand taken by your predecessor vide Ass. Order for the year 2000-01.
>
> However, the assessee, operating in India as technical consultant of Vestas Danish Wind Technology A/S, Denmark, in the field of wind energy, had been claiming above expenses from it's composite income, in earlier years, on the grounds that it had installed wind electric generators to demonstrate and promote sales of wind electric generators in India and earn commission thereon.
>
> However, as the version of assessee is under appeal, the assessee without prejudice to its claim has computed its income as per above said version of the department."

9. Thereafter, the assessee has filed another letter dated 10.01.2006 which goes into 12 pages. Substantial portion of the letter deals with the claim under Section 80IA and the computation. In the said letter the assessee has specifically mentioned and stated as under:-

> "The assessee during the course of it's business came across a lot of enquiries about the functioning, generating and other technical aspects of wind electric generators. Since the concept of wind turbine was new in India, and as such, considerable amount of finance was required to be invested in it's purchase by the prospecting buyers, they wanted to have a detailed information about the product. They also wanted to know as to how, the Vestas product was a better bargain over other manufacturer' product, in terms of it's yield and life.

The assessee company thought it fit to install it's own turbines to demonstrate them to it's prospecting buyers, which was also very much within the main objects as defined in the Memorandum of Association of the Company.

The installation of the above said demo units resulted positively, as this step yielded rich dividends to the assessee, resulting into much enhanced income thereafter. There is also no denying a fact, that the assessee's basic and original source of income is earning commission on the sale of wind electric generators, and there is a clear cut nexus between the above said expenditure incurred (which relates to business promotion activity of the assessee) and the purpose of business carried on by the assessee. Hon'able Delhi High Court in CITV Dalmia Cement (B) Ltd. (2002) 254 ITR 377 (Delhi) observing the importance of nexus between the expenditure and the purpose of business remarked in it's judgment that once it is established that there was nexus between the expenditure and the purposed of business, the Revenue cannot decide how much is reasonable expenditure, and as such no businessman can be compelled to maximize his profits – The judgments followed in this regards were CITV Walchand and Co. P. Ltd. (1967) 65 ITR 381 (SC). J.K. Woolen Manufactures VC IT (1969)72 ITR 612 (SC), Aluminum Corporation of India Ltd. VC IT (1972) 86 ITR 11 (SC) and CIT V Panipat Woolen and General Mills Co. Ltd. (1976) 103 ITR 66 (SC)."

10. In this letter it is repeatedly emphasized that the petitioner had legitimate claim to claim benefit under Section 80IA on installation of the

"demo" WEGs which had resulted in a separate business activity and income was earned from sale of electricity generated by the WEGs. It was pointed out that installation of the "demo" WEGs turned out to be an advantageous proposition and the revenue earner for the petitioner. It became a source of business income earned by the petitioner. It was stated in this letter as under:-

> "It is rather blessing in disguise, that the demo wind electric generators also yields income by way of power generation to the assessee, which is an advantageous proposition not only to the assessee, but also to the revenue in long run. As such, the assessee like all other business expenses is justifiably entitled to claim expenses incurred on demo wind electric generators from its principal sources of income i.e. Consultancy fee provided in the field of wind electric generators itself. As mentioned above it is only an added advantage that with the installation of wind electric generator, a new industrial unit giving a different sources of income from business by way of power generation has emerged, which incidentally enjoys tax holiday to a certain period under section 80-1A."

11. The Assessing Officer thereafter passed an assessment order dated 30.1.2006 and has specifically dealt with the claim of deduction under Section 80IA in respect of power generation income produced from WEGs. The Assessing Officer went into the question whether the computation of

deduction under the said section was not proper and reduced the said claim. The petitioner thereafter filed an appeal before the CIT (A) and it has been held that the deduction under Section 80IA as claimed by the petitioner company in the return should be allowed. It is, therefore, clear from the aforesaid facts that at the time of original assessment the question whether or not the assessee was not entitled to deduction under Section 80IA was specifically considered and examined by the Assessing Officer. The assessee was asked to give details and justify the deduction under the said section.

12. It is now well settled that the Assessing Officer cannot re-open assessment on issues which have been examined and considered at the time of original assessment. The Supreme Court in the case of ***Commissioner of Income Tax v. Kelvinator of India Ltd***., (2010) 320 ITR 561 (SC) has held as under:

> "On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the 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 reopen the assessment. Therefore, post-1st April, 1989, power to reopen 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 reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening 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, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

13. In the present case, the assessee has not failed or omitted to disclose material facts either deliberately or intentionally. On the other hand, full and true information and details were furnished and given during the course of the original assessment proceedings. The relevant and germane facts were truly and fully disclosed. As per the case of the Revenue, the Assessing Officer made an error of judgment and did not form a proper legal opinion. A wrong legal inference was

drawn from the facts stated by the assessee and on record. Once primary facts have been disclosed then, it is for the Assessing Officer to draw proper legal conclusion and apply the provisions of the statute. In the present case, it is not alleged that any fact or factual detail was embedded in the evidence/books of accounts which the Assessing Officer could have uncovered but had failed to do so. The letter written by the assessee dated 10th January, 2006, spelt out and in categorical terms had stated truly and fully the material facts. Nothing remained to be discovered or unearthed.

14. This being the position the jurisdiction pre-conditions required for re-opening of the assessment order are not satisfied in the present case.

15. The writ petition is allowed, notice of certiorari is issued quashing the notice dated 26.3.2010 and order dated 28.9.2010. No order as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

DECEMBER 08, 2011
mm