

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

श्री डी. करुणाकर राव, लेखा सदस्य, एवं श्री अमित शुकला, न्यायिक सदस्य के समक्ष

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 2036/Mum./2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

Dy. Commissioner of Income Tax
Circle-6(2), Mumbai

..... अपीलार्थी /
Appellant

बनाम v/s

Century Textiles and Industries Ltd.
Circle-6(2), Mumbai

..... प्रत्यर्थी /
Respondent

स्थायी लेखा सं./ Permanent Account Number – AAACC2659Q

आयकर अपील सं. / ITA no. 2181/Mum./2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

Century Textiles and Industries Ltd.
Century Bhavan, Dr. Annie Besant Road
Worli, Mumbai 400 030

..... अपीलार्थी /
Appellant

बनाम v/s

Dy. Commissioner of Income Tax
Circle-6(2), Mumbai

..... प्रत्यर्थी /
Respondent

स्थायी लेखा सं./ Permanent Account Number – AAACC2659Q

राजस्व की ओर से / Revenue by : Shri A.K. Kardam

निर्धारिती की ओर से / Assessee by : Shri Pankaj R. Toprani a/w

Ms. Krupa Toprani

सुनवाई की तारीख /
Date of Hearing – 07.08.2014

आदेश घोषणा की तारीख /
Date of Order – 22.08.2014

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा /
PER AMIT SHUKLA, J.M.

These cross appeals are directed against the impugned order dated 20th December 2012, passed by the learned Commissioner (Appeals)-XII, Mumbai, for the quantum of assessment passed under section 143(3), of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2007-08.

2. In assessee's appeal wherein the assessee has challenged the validity of re-opening of the assessment under section 147, vide ground no.1. Since this issue goes to the root of the matter and challenges the impugned assessment proceedings itself, therefore, this ground is being taken up first.

3. The brief facts qua the validity of the assessment under section 147, are that the assessee is engaged into manufacturing of cotton piece goods, denim, yarn, viscose rayon yarn, viscose tyre cord, caustic soda, carbon-di-sulphide, sulphuric acid, salt and by products, cement, pulp & paper, etc., and it also renders engineering services and engaged in floriculture business. It has filed its return of income under normal provisions of the Act at ₹ 280,37,62,316 and book profit of ₹

355,48,54,200, under section 115JB, on 31st October 2007, under section 139(1). The assessee's case was selected for scrutiny and in pursuance thereof, assessment order under section 143(3), was passed on 5th May 2009 at an income of ₹ 311,72,96,159, under normal provisions. In the return of income, the assessee had claimed deduction under section 80IC, of ₹ 33,67,42,837, in respect of paper and pulp unit on the basis of audit report in form 10CCA. During the course of the assessment proceedings, the Assessing Officer has raised specific queries regarding claim made under section 80IC, in response to which the assessee had filed detail submissions vide letter dated 23rd March 2009, and then again on further query the assessee vide letter dated 30th March 2009, clarified and substantiated its claim. After considering the entire submissions and material placed on record, the Assessing Officer partly accepted the assessee's claim and had disallowed ₹ 11,49,09,114, from the total claim of ₹ 33,67,42,837, under section 80IC, besides making other additions / disallowances in his order dated 5th May 2009, passed under section 143(3). Against the said assessment order, the assessee preferred an appeal before the learned Commissioner (Appeals) and also raised the issue of claim of deduction disallowed by the Assessing Officer under section 80IC. The learned Commissioner (Appeals), after detail discussion, confirmed the said disallowance vide order dated 24th March 2010.

4. After the aforesaid proceedings, the assessment so completed has been sought to be re-opened, vide notice dated 15th February 2011, issued under section 148, on the following "reasons recorded".

"Return of income for A.Y. 2007-08 has been filed vide acknowledgement dt. 31.10.2007 declaring total income under normal provisions at ₹ 2,80,37,62,316 and ₹ 3,55,48,54,200 u/s 115JB of the I.T. Act. Assessment u/s 143(3) has been completed on 05.05.2009 at total income under normal provisions at ₹ 3,11,72,96,159 and book profit at ₹ 367,26,75,587.

Perusal of records shows that in the assessment order u/s 143(3) dt. 05.05.09 for the A.Y. 2007-08, excess allowance of deduction u/s 80IC at ₹ 4.99 crores has been made by omitting to exclude the following receipts / incomes which are not derived from the business of the undertaking as per requirement of deduction under section 80IC.

<u>As per Schedule-7</u>	
Rent from property	₹ 3,82,878
Export Benefits	₹ 84,48,875
Insurance and other claims	₹ 45,51,894
Miscellaneous Income	₹ 2,54,29,908
Provision no longer required	₹ 8,00,304
Total:-	₹ 3,96,13,659
<u>As per Schedule 10</u>	
Interest received	₹ 1,03,02,234
Gross Total	₹ 4,99,15,893
	=====

I, therefore, have reason to believe that income chargeable to tax to the extent of ₹ 4.99 crores has escaped assessment. Issue notice u/s 148 for A.Y. 2007-08."

5. In response to the notice, the assessee filed detail objection before the Assessing Officer on the ground that the same is based on "change of opinion", as no new material has come into record with regard to claim for deduction made under section 80IC and, therefore, it amounts to review of the earlier assessment order. Various case laws were also relied upon. However, the Assessing Officer vide letter dated 28th October 2011, has rejected assessee's objection after relying upon the decision of the Hon'ble Andhra Pradesh High Court in K.C.P. Limited v/s ITO, [1984] 146 ITR 284 (A.P) and the decision of the Hon'ble Delhi High Court in Consolidated Photo Finvest Ltd. v/s ACIT, [2006] 281 ITR 394 (Del.). After rejecting the assessee's objection, he proceeded to complete the assessment after disallowing the claim of deduction under section 80IC, by further sum of ₹ 4,99,15,893, vide order dated 22nd December 2011, passed under section 147 / 143(3). As a result, the assessed income was enhanced to ₹ 316,72,12,050, under normal provision. Again before the learned Commissioner (Appeals), the assessee challenged the validity of re-assessment on the ground of "change of opinion" after relying heavily upon the decision of the Hon'ble Supreme Court in CIT v/s Kelvinator of India Ltd. [2010] 320 ITR 561 (SC). The assessee's submissions in this regard has been incorporated by the learned Commissioner (Appeals) from Pages-4 to 6 of the appellate order. The learned Commissioner (Appeals) rejected

the assessee's contention mainly on the ground that incorrect and excess deduction has been claimed by the assessee and wrongly allowed by the Assessing Officer in the original assessment proceedings and, therefore, the assessment has been re-opened validly under section 147. While coming to this conclusion, he has heavily relied upon the Explanation-2 to section 147. He also referred to the decision of the Hon'ble Punjab & Haryana High Court in *Jawand Sons v/s CIT*, [2010] 326 ITR 39 (P&H). His detail finding in this regard has been dealt from Page-12 to 17 of the appellate order.

6. Before us, the learned Counsel for the assessee drew our attention to the computation of income and the claim of deduction under section 80IC, which was duly supported by an audit report under section 10CCA. He also drew our attention to the details of other income which was given in the Balance Sheet of Century Pulp & Paper unit as given in Schedule-VII. He submitted that not only this, the Assessing Officer has also raised specific queries with regard to the claim made under section 80IC and thereafter, has even disallowed part of the claim, which was also the subject matter of appeal before the learned Commissioner (Appeals). Once the Assessing Officer in the original assessment proceedings, has applied his mind on the material placed on record and then again subject matter of scrutiny by the

learned Commissioner (Appeals), then without any fresh material coming into record re-opening under section 147 cannot be made, as it amounts to "*change of opinion*", which is not permissible in law. He submitted that even from the perusal of the "*reasons recorded*", it can be seen that the Assessing Officer has mentioned "*perusal of records shows that in the assessment order under section 143(3) dated 5.5.2009, for A.Y. 2007-08, excess allowance of deduction u/s 80IC at ₹ 4.99 crores had been made*". This goes to show that the Assessing Officer has sought to re-open the case for reviewing the earlier assessment order so as to make further disallowance. Such a review is not permissible as held by the Hon'ble Supreme Court in Kelvinator of India Ltd. (supra). Thus, he submitted that the entire proceedings have been rendered void. On the issue of "*change of opinion*", he also relied upon the decision of the Hon'ble Jurisdictional High Court in Asteroids Trading and Investments P. Ltd. v/s DCIT, [2009] 308 ITR 190 (Bom.).

7. The learned Departmental Representative, on the other hand, submitted that in the original assessment order, the Assessing Officer has wrongly allowed the claim of deduction under section 80IC on "*other income*", which is admittedly not allowable in view of the provisions of section 80IC, as the other income cannot be held to be

derived from the industrial undertaking. Once the Assessing Officer has failed to examine the claim from this perspective, then it cannot be held that he has formed an opinion on this issue. Such an omission by the Assessing Officer in the original assessment order cannot preclude the Assessing Officer for re-opening the assessment under section 147, if it falls within the period of four years from the end of the relevant assessment year. He thus strongly relied upon the reasoning given by the learned Commissioner (Appeals) in the impugned order.

8. We have heard the rival contentions, perused the relevant findings of the authorities below and the material available on record on the issue of validity of re-opening under section 147. Admittedly, in this case, the assessee along with the return of income, has made a claim for deduction under section 80IC with regard to its Century Pulp & Paper unit. Such a claim of deduction under section 80IC, were duly supported by the audit report under section 10CCA. From the records, it is evident that during the course of the original assessment proceedings, the Assessing Officer has raised queries with regard to the claim of deduction under section 80IC, not once but twice. In an elaborate manner, the assessee has duly responded to such query and filed replies before the Assessing Officer as mentioned in the forgoing paragraph. After considering the entire claim of the assessee, the

Assessing Officer has reduced the claim of deduction under section 80IC, by allowing the claim in respect of profits attributable to paper and the deduction relating to profits attributable to sale of pulp was denied. Thereafter, the matter had travelled up to the first appellate authority, wherein the learned Commissioner (Appeals) had upheld the disallowance of claim of deduction under section 80IC. After having completed the assessment in the aforesaid manner, the assessment has been sought to be re-opened for further disallowance of claim of deduction under section 80IC, on the ground that the claim of deduction was wrongly allowed on other income relating to the said unit. From the perusal of the "*reasons recorded*", it is seen that the Assessing Officer is referring to the earlier assessment order passed under section 143(3) dated 5th May 2009. There is no whisper about any fresh material or information coming on record to show that any income chargeable to tax has escaped assessment. The entire "*reasons*" seems to be based on the premise that the Assessing Officer has wrongly allowed the claim of deduction under section 801IC. Such a premise has to be seen from the angle, whether the Assessing Officer during the course of assessment proceedings has examined the issue of claim of deduction under section 80IC, or not. As stated above, the Assessing Officer had raised detail query and also invited assessee's submissions on the various aspects of claim of deduction under section

80IC. Not only this, in the original assessment order, the Assessing Officer has discussed this issue which is running into five pages and thereafter has reduced the claim of deduction of ₹ 11,49,09,114, as against the assessee's claim for ₹ 3,36,74,837. Such an order was also subject matter of the scrutiny by the learned Commissioner (Appeals) which has been confirmed. Thus, it cannot be held that the Assessing Officer had not formed any opinion while examining the claim of deduction under section 80IC.

9. It is now a trite law that "*change of opinion*" preclude the reopening of the assessment, whether within or outside the four years' limit from the end of the relevant assessment year. The Hon'ble Supreme Court in *Kelvinator of India Ltd. (supra)*, has held that there is conceptual difference between power to review and power to re-assess. The Assessing Officer has though power to re-assess but no power to review and if the concept of "*change of opinion*" is removed, then in the garb of the re-assessment, review of earlier orders would take place. The "change of opinion" is in-built test to check the abuse of power by the Assessing Officer. Thus, in such cases, the Assessing Officer can re-open the case only when there is "*tangible material*" coming on record having direct bearing with the escapement of income. The "*reason to believe*" must have live link nexus with the formation of

the belief. The "*reason to believe*" as contemplated under section 147, does not mean to acquire jurisdiction of re-opening the case for reviewing the earlier order passed by the Assessing Officer, which has been done after application of his mind and expressing his opinion. The Assessing Officer, under section 147, cannot sit as a reviewing authority on the order passed by the earlier Assessing Officer to re-examine the subject matter which has been duly considered by the Assessing Officer, de-hors any new material having live link nexus with the income escaping assessment. The Assessing Officer cannot re-open the case even though he comes to a conclusion that earlier opinion expressed by the Assessing Officer was not correct. If in the earlier order, the Assessing Officer on a particular issue has formed any opinion, then the main provision of section 147, precludes the re-opening of the assessment. The reason to believe cannot be for reviewing of earlier order as it will lead to arbitrary exercise of power by the Assessing Officer to re-open the case under the grab that the earlier opinion expressed was not correct view. Thus, on the facts of the present case, we are of the opinion that the "*reasons recorded*" by the Assessing Officer is purely based on "*change of opinion*" de-hors any tangible material coming into record. Thus, in view of the law laid down by the Hon'ble Supreme Court in Kelvinator of India Ltd. (supra), the notice dated 15th December 2011, under section 148, and

consequent assessment order dated 22nd December 2011, passed under section 147 / 143(3), is held as void as the "reasons recorded" are based on "change of opinion" and do not clothe the Assessing Officer with jurisdiction to re-open the assessment. Consequently, the assessment order is quashed and the impugned order appealed against is set aside. Ground no.1, is thus allowed.

10. Since we have already quashed the assessment being without jurisdiction under section 147, therefore, other grounds raised by the assessee have become purely academic. Even the issue raised in the Departmental appeal have also become academic and, hence, the departmental appeal is dismissed as infructuous.

11. परिणामतः निर्धारिती की अपील स्वीकृत की जाती है एवं राजस्व की अपील खारिज की जाती है ।

10. In the result, assessee's appeal is allowed and Revenue's appeal is dismissed.

आदेश की घोषणा खुले न्यायालय में दिनांक: 19th August 2014 की गई ।
Order pronounced in the open Court on 19th August 2014

Sd/-

डी. करुणाकर राव

लेखा सदस्य

D. KARUNAKARA RAO
ACCOUNTANT MEMBER

Sd/-

अमित शुक्ला

न्यायिक सदस्य

AMIT SHUKLA
JUDICIAL MEMBER

मुंबई MUMBAI, दिनांक DATED: 19th August 2014

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

- (1) निर्धारिती / The Assessee;
- (2) राजस्व / The Revenue;
- (3) आयकर आयुक्त(अपील) / The CIT(A);
- (4) आयकर आयुक्त / The CIT, Mumbai City concerned;
- (5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
- (6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy

आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury

वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai