IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.285 OF 2013

Commissioner of Income Tax -11 ... Appellant
Vs.
M/s.Jet Speed Audio Pvt.ltd. ... Respondent

Mr.P.C.Chhotaray with Ms.Padma Divakar, for the Appellant-Revenue.

Mr.Satish Mody i/b. Ms.Aasifa Khan, for the Respondent.

CORAM : M.S.SANKLECHA & G.S.KULKARNI, JJ.

DATE : 28th JANUARY, 2015

P.C. :

1. This appeal by the Revenue under Section 260A of the Income Tax Act,1961 (Act) challenges the order dated 22.6.2012 passed by the Income Tax Appellate Tribunal (Tribunal).

2. This appeal relates to Assessment Year 2005-06. The following questions of law have been proposed by the Appellant-Revenue for our consideration:-

> "(A) Whether, on the facts and the circumstances of the case, the Tribunal was justified in cancelling the re-assessment order passed under Section 147 and holding the same as bad in law ?

(B) Whether, on the facts and the circumstances of the case, the Tribunal was justified in holding that it was a case of change of opinion when the Assessing Officer had not expressed any opinion during the regular assessment proceeding ?

(C) Whether, on the facts and the circumstances of the case, the Tribunal was justified in holding that the issue of notice under Section 148 after the issue of under Section 154 is bad in law ?"

3. The respondent - Assessee had filed a return of income for Assessment Year 2005-06 declaring total income of Rs.83.34 lakhs. The Assessing Officer during the assessment proceedings inquired of the respondent - Assessee the details of its bad debts and also justification for the same. The respondent – Assessee filed a detailed chart as called for indicating therein interalia that an amount of Rs.1.35 crores is the outstanding loan with M/s.LA Cream Finance Ltd. The Assessing Officer being satisfied with the justification of the bad debts made by the respondent – Assessee and passed the assessment order on 12.12.2007 assessing the respondent – Assessee to an income of Rs.1.12 crores. This without disturbing the bad debts claimed.

4. Thereafter, a notice dated 24.11.2009 was issued by the Assessing Officer seeking to rectify the Assessment Order dated

12.12.2007. The rectification was on the basis that an amount of Rs.1.35 crores written off as bad debts was in fact a capital loss and could not be considered to determine income. The respondent – Assessee objected to the notice. However, the Assessing Officer has not yet passed any order on notice issued under Section 154 of the Act.

5. Pending the disposal of rectification notice under Section 154 of the Act, the Assessing Officer on 1.7.2010 issued a notice under Section 148 of the Act seeking to reopen the assessment for the Assessment Year 2005-06. The reasons as recorded at the time of issuing reopening notice are handed across the Bar by Mr.Chhotaray, learned Counsel for the Revenue are as under:-

> " On perusal of assessment records relating to Assessment Year 2005-06, following discrepancy has been noted:
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> "The assessment of M/s.Jet Speed Audio Pvt.Ltd. for the assessment year 2005-06 was completed after scrutiny in December,2007, determining Rs.1,12,87,910/- income. The assessee company has debited to profit and loss account of the relevant previous year on account of Rs.1,50,59,720/- as a debt. The assessee has written off the loan amounting to Rs.1,35,00,000/- which was includes in bad debts. Since the expenditure incurred was capital loss it should have been treated as capital loss and needs to be added back to the taxable income.

Omission to do so has resulted in under assessment of income of Rs.1,35,00,000/-."

In view of the above, I have reasons to believe that income has been under assessed in so far as written off the loan amounting to Rs.1,35,00,000/- which was included in bad debts for Assessment Year 2005-06.

Proceedings u/s.147 is initiated by issuing of notice u/s.148."

6. The respondent objected to the reopening notice under Section 148 of the Act. However, without prejudice the respondent also submitted on merits that as they were principally in money lending business, they were entitled to write off of the loan of Rs.1.35 crores. The Assessing Officer did not accept the respondent's objection both on reopening as well as on merits and passed order under Section 143 read with Section 147 of the Act on 21.12.2010 and assessing the petitioner to an income of Rs.2.47 crores.

7. In appeal, the Commissioner of Income Tax (Appeals) upheld the order of the Assessing Officer both on the reopening notice under Section 148 of the Act as well as addition of Rs.1.35 crores by treating the same as capital loss and not as bad debts. On further appeal, the Tribunal by the impugned order allowed the respondent – Assessee's appeal on the

following grounds:-

> "(a) At the time of original assessment proceedings a specific query was raised by the Assessing Officer with regard to the claim for bad debts as the same was responded to by the respondent. The Assessing Officer being satisfied concluded the assessment by order dated 12.12.2007. Thus, the reopening notice is based on mere change of opinion and therefore, not valid;
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> (b) No tangible material has been brought on record to indicate necessity for change of opinion; and
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> (c) As notice under Section 154 of the Act for rectification was yet awaiting disposal, the notice for reopening under Section 148 is bad in law."

QUESTIONS (A) & (B)

8. The grievance of the Revenue with regard to the impugned order so far as change of opinion is concerned, is that the Assessing Officer had acted upon on audit objection which has been received by him. Thus, there was tangible material available for issuing notice for reopening of the assessment. It is further submitted that merely because the Assessing Officer does not deal with a particular issue in the original assessment proceedings, it would not prohibit the Revenue from issuing reopening

notice, otherwise provisions of Section 147 and 148 would be rendered redundant. Mr.Chhotaray, learned Counsel for the Revenue relied upon various decisions including the decision of the Supreme Court in the case of "*Kalyanji Mavji & Co. Vs. Commissioner of Income Tax, West Bengal II, (102 ITR 287)*", the decision of Delhi High Court in the case of "*New Light Trading Co. Vs. Commissioner of Income Tax, (256 ITR 391)*", and the decision of this Court in the case of "*Dr.Amin's Pathology Laboratory Vs. P.N.Prasad, Joint Commissioner of Income Tax & Ors (No.1), (252 ITR 673)*".

9. We find that the impugned order of the Tribunal has rendered a finding of fact on the basis of material before it, in particular the fact that during original assessment proceedings a query was made with regard to the same issue which was responded to by the respondent - Assessee and on satisfaction of the same, the Assessing Officer had passed an assessment order. Therefore, reopening of assessment on an issue in respect of which a query was raised and responded to by the assessee would amount to a change of opinion. The tangible material being urged before us by Mr.Chhotaray, is the audit objections received by the Assessing Officer. However, as would be clear from the reasons reproduced hereinabove, there is no mention of any tangible material in the reasons recorded for issuing reopening notice under Section 148 of the Act. Thus, we find no fault with

the findings of the Tribunal that there is no tangible material mentioned in the reasons recorded by the Revenue which would warrant a different opinion being taken then which was taken when the original order of assessment was passed. It is a settled position in law that a reopening notice can be sustained only on the basis of grounds mentioned in the reasons recorded. It is not open to the Revenue to add and/or supplement later the reasons recorded at the time of issuing reopening notice.

10. Mr.Chhotaray, learned Counsel for the Revenue urged on merits of the Revenue's case to charge Rs.1.34 crores allowed as bad debts, has to be appropriately brought to tax as capital loss. We pointed out to Mr.Chhotaray, learned Counsel for the Revenue that the scope of the present proceedings is only with regard to reopening notice under Section 148 of the Act and we are not dealing with the merits of the assessibility of the income alleged to have escaped assessment. On this Mr.Chhotaray submitted that the issue which he seeks to urge is that merely because the Assessing Officer has been careless in bringing to tax a particular amount which is chargeable to tax, the Revenue should not be precluded from issuing notice under Section 148 of the Act. This submission of Mr.Chhotaray overlooks the facts that power to reopen is not a power to review an assessment order. At the time of passing assessment order, it expected of the Assessing Officer that he will apply mind and pass an order.

An assessment order is not a mere scrap of paper. To accept the submission of Mr.Chhotaray, would mean to negate the well settled position in law as stated by the Supreme Court in the case "*CIT Vs. Kelvinator of India Ltd., [(2002) 256 ITR 1 (Delhi)(FB)]"* that the concept of 'change of opinion' brought in so as to have in built test to check abuse of power. In view of the above, we find no substance in the submissions raised by Mr.Chhotaray.

11. The decisions cited by Mr.Chhotaray, learned Counsel on behalf of the Revenue in support of his submissions that oversight in passing assessment order will give Assessing Officer jurisdiction to issue notice, placed heavy reliance upon the case "Kalyanji Mavji & Co." (supra). However, on the above aspect it has been held to be no longer good law by the subsequent decision of the Supreme Court in the case of "*Indian and Eastern Newspaper Society Vs. Commissioner of Income Tax, New Delhi, (119 ITR 996)*" wherein the Supreme Court has observed thus:-

> "Now, in the case before us, the ITO had, when he made the original assessment, considered the provisions of S.9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The revenue contends that it is open to him to do so, and on that basis to reopen the assessment under s.147(b). Reliance is placed on Kalyanji Mavji & Co. V. CIT (1976) 102 ITR 287

(SC), where a Bench of two learned Judges of this court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the ITO must fall within S.34(1)(b) of the Indian I.T.Act,1922. It appears to us, with respect that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kumar Kamal Singh V. CIT (1959)35 ITR 1 (SC), CIT V. A.Raman and Co. (1968)67 ITR 11 (SC) and Bankipur Club Ltd. V. CIT (1971) 82 ITR 831 (SC) and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji & Co. V. CIT (1976) 102 ITR 287(SC) suggesting the contrary do not, we say with respect, lay down the correct law."

(emphasis supplied)

12. The aforesaid view on the above proportion has been reiterated by the Apex Court in *A.L.A.Firm vs Commissioner of Income Tax 183 ITR 285* wherein the Court held that change of opinion where opinion was formed earlier does not give the Assessing Officer jurisdiction to reopen an

assessment. The Apex Court interalia on the above issue held as under:

> "Even making allowances for this limitation placed on the observations in Kalyanji Mavji (1976) 102 ITR 287 (SC) the position as summarised by the High Court in the following words represents, in our view the correct position in law (at p.620 of 102 ITR) :
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> > "The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income tax Officer subsequent to the original assessment. If the income Tax Officer had considered and formed an opinion on the said material in the original assessment itself then he would be powerless to start the proceedings for reassessment. Where, however the Income Tax Officer had not considered the material and subsequently came by the material from the record itself, the such a case would fall within the scope of section 147 (b) of the Act" (emphasis supplied)

13. The decision of Delhi High Court in the case "*New Light Trading Co.*"*(supra)* does not indicate what reasons were recorded for issuing notice of reopening therein. In the present case the reasons as recorded by the Assessing Officer and reproduced hereinabove clearly indicate that there was no tangible material adverting to the reasons recorded for issuing reopening notice. Similarly the decision of this Court in the case "*Dr.Amin's Pathology Laboratory*" (supra), it has been observed that if any item has escaped from assessment which otherwise is includible within the

assessment and the Assessing Officer notices it subsequently by his own investigation or by reason of some information received by him, one cannot say that it constitutes change of opinion. In the present facts during original proceedings itself this issue was investigated by the Assessing Officer by raising specific query with regard to bad debts of Rs.1.35 crores. Consequently, this is not a case where this information has been noticed by the Assessing Officer subsequently in the assessment proceedings. In view of the above, in our opinion, none of the three decisions are applicable in the present facts.

14. In view of the above, questions (A) and (B) as raised by the Revenue for our consideration do not give rise to any substantial questions of law as the findings of the Tribunal that there has been change of opinion in issuing impugned notice, is a finding based on the facts and same has not been shown to be perverse. Accordingly, questions (A) and (B) are dismissed.

15. So far as question (C) is concerned, this Court has admitted identical issue in Income Tax Appeal no.268 of 2013 (CIT Vs. M/s.Yasmin Texturing Pvt.Ltd.) as well as in Income Tax Appeal No.1011 of 2011 (CIT Vs. Mahinder Freight Carriers) rendered on 28.1.2013. However, the admission of this question would be academic as on merits of reopening, we have found no fault with the impugned order of the Tribunal.

Accordingly, we see no reason to entertain the question (C) as proposed by the Revenue. Accordingly, question (C) is dismissed.

16. Appeal dismissed. No order as to costs.

(*G.S.KULKARNI, *J.) ***(*M.S.SANKLECHA, *J.)***