

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 2026/2010

CIT Appellant

Through Mr. Amol Sinha, Sr. Standing Counsel, Mr. Deepak Anand, Jr. Standing Counsel, Mr. Anshum Jain and Mr. Rahul Kochar, Advocates.

versus

USHA INTERNATIONAL LTD Respondent

Through Mr. Ajay Vohra and Mr. Somnath Shukla, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

O R D E R

03.07.2013

1. This appeal which relates to Assessment year 2001-02 has a chequered history.

The following substantial question of law was framed on 10.01.2012:

?Whether the Income Tax Appellate Tribunal was justified in holding that the jurisdictional pre-conditions for reopening under Section 147 of the Income Tax Act, 1961 are not satisfied in the present case??

2. Arguments were heard and vide order dated 23.04.2012, the following four questions of law were referred for decision by a Full Bench.

(i) What is meant by the term 'change of opinion'?

(ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?

(iii) Whether the bar or prohibition under the principle 'change of opinion' will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?

(iv) Whether and in what circumstances Section 114(e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion??

3. The Full Bench, vide decision dated 21.09.2012, opined as under:

6. The questions of law at serial Nos. 1 to 3 referred to the Full Bench are inter-connected. They deal with the term and facets of the term 'change of opinion'. The expression 'change of opinion' postulates formation of opinion and then a change thereof. In the context of Section 147 of the Act it implies that the Assessing Officer should have formed

an opinion at the first instance, i.e., in the proceedings under Section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.

7. The word "opinion" is derived from the latin word "opinari" which means "to believe", "to think". The word "opinion" as per the Black's Law Dictionary means a statement by a Judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. Advanced Law Lexicon by P. Ramanatha Aiyar (3rd Edition) explains the term "opinion" to mean "something more than mere retaining of gossip or hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question". An opinion is a conviction based on testimony.. they are as a result of reading, experience and reflection?.

8. In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection to use the words in Law Lexicon by P. Ramanatha Aiyar. Question of change of opinion arise when an Assessing Officer forms an opinion and decides not to make an addition or holds that the assessee is correct and accepts his position or stand.

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24. Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognized. Failure to make full and true

disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus in cases of reopening after 4 years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when re-assessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does not apply, the re-assessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, re-assessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this; when proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.

25. Thus if a subject matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and therefore, it is the case of ?change of opinion?. When at the first instance, in the original assessment proceedings, no opinion is formed, principle of ?change of opinion? cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion.

26. In 3i Infotech Ltd. Vs. Assistant Commissioner of Income Tax and Others (2010) 329 ITR 257 (Bom.) it was observed that producing voluminous record before the Assessing Officer does not absolve the assessee and the assessee cannot be heard to say that if the Assessing Officer were to conduct a further inquiry, he would have come into possession of material evidence with the exercise of due diligence. Assessments can be complex and require examination of several subject matter, claims, entries or deductions. The Assessing Officer inspite of best efforts or intention can miss out and not examine and go into a subject matter, claim, entry or deduction. An assessee cannot contend or state that in the reams and plethora of papers, notes and entries, entry, a statement was made, or claim or entry was explained and the principle of better be-ware applies. When a subject matter, entry, claim or deduction remains hidden or unexamined by the Assessing Officer, be it for any reason, it is not a case of change of opinion.

27. The aforesaid observations in paragraphs 23 to 26 have not to be read in isolation but are to be read with caveat set out in paragraph 39 below. Whether or not the Assessing Officer had applied his mind and examined the subject matter, claim etc. depends upon factual matrix of each case. The Assessing Officer can examine a claim or subject matter even without raising a written query. There can be cases where an aspect or question is too apparent or obvious to hold that the Assessing Officer did not examine a particular subject matter, claim etc. The stand and stance of the assessee and the Assessing Officer in such cases are relevant.

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39. In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any

written query but still the Assessing Officer in the first round/ original proceedings may have examined the subject matter, claim etc, because the aspect or question may be too apparent and obvious. To hold that the assessing officer in the first round did not examine the

question or subject matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment.

4. R.V. Easwar, J has recorded his separate minority opinion on certain aspects and issues.

5. In the present case the original assessment order under Section 143(3) was passed on 30.01.2004, making two additions on account of disallowances of Rs.40,000/- and Rs.10,17,216/- to the disclosed income of Rs.6,92,16,132/-. Subsequently, the Assessing Officer recorded reasons for reopening and issued notice under Section 148 of the Act dated 30.05.2005. Reassessment order dated 29.09.2006 was passed making an addition of Rs.1,73,00,000/- on account of consideration received from Daikin Shriram Air Conditional Pvt. Ltd. for transfer of exclusive distribution rights of the air conditioners and water coolers.

6. The assessee did not succeed in the first appeal but the Tribunal quashed the reassessment proceedings on the ground that it was a case of change of opinion.

7. Reasons recorded by the Assessing Officer for reopening of assessment read:-

?It is from the Notes of accounts that assessee has received a sum of Rs.173 lakhs as consideration for the transfer of exclusive distribution rights of AC and water cooler. The amount was credit by assessee to the capital reserve A/c and was not treated as income for the year.

The amount was chargeable under the head CG being t/f of distribution rights. The Assessing Officer while completing the assessment has also not added the amount of CG and taxed accordingly,

In view of the above, I have reason to believe that amount of Rs.173 lakhs being CG has escaped assessment. Notice u/s 148 issued.?

8. The audit objection raised by Sr. Audit Officer as per his report dated 10.02.2005 are also relevant and the same is reproduced below:

?U/s 45(1) of the Income Tax Act, 1961 any profit or gains arising from the transfer of a capital asset effected ? in the previous year, shall be chargeable to income tax under ?Capital gains? and shall be deemed to be the income of the previous year in which transfer took place. Further sec. 2(14) defines a capital asset as property of any kind held by the assessee. This includes not only tangible asset but also intangible rights.

Income tax assessment in case of above assessee for the assessment year 2001-02 was completed in January, 2004 at an income of Rs.7,02,73,350/- after scrutiny. Audit scrutiny revealed that as per notes to account, the assessee received a sum of Rs.173 lakhs as consideration for the transfer of exclusive distribution rights of Air conditioner and water cooler. The amount was credited by the assessee to capital reserve account of the assessee and was not treated by assessee as income for the year. This amount was chargeable under the head capital gains being transfer of distribution rights. Non inclusion of this amount in assessee?s total income has resulted in income amounting to Rs.173 lakhs escaping assessment with consequent short levy of tax by Rs.39,09,800/- @ 20% +

13% SC ? being tax on capital gains). Reply to above audit memo may please be furnished.

9. Before the Tribunal, the counsel for the respondent assessee had submitted as under:-

4. It is submitted by the Ld. Counsel of the assessee that this receipt was disclosed by the assessee in its balance sheet and the same was included in the capital reserve being addition in the present year and the same is properly disclosed in the balance sheet in Schedule-2 which is available on page No.68 of the paper book. It is also submitted in the Notes on accounts also, proper disclosure was made in Note No.10 which is also available on page No.76 of the paper book. It is pointed out that in the said note, it was clearly stated that a sum of Rs.173 lakhs received from M/s Daikin Shriiram Air Conditioning Pvt. Ltd. as consideration for the transfer of exclusive distribution rights of air conditioner and water cooler has been credited to Capital Reserve A/c. It is also pointed that although there was no query raised by the Assessing Officer in the course of original assessment proceedings and there is no observation of the Assessing Officer in the original assessment order dated 30.1.2004 but still this reopening is on mere change of opinion which is not valid and in support of this contention reliance was placed on the Full Bench judgment of Hon?ble Delhi High Court rendered in the case of CIT vs. Kelvinator of India Ltd. as report in 256 ITR 1.

10. Tribunal in para 9 of their order, accepted the plea of the respondent assessee observing:-

?9. From the above reasons recorded by the Assessing Officer u/s 147 and also the audit objection, it is seen that there is no mention of any fresh material or fresh judgments behind the reasons recorded by the Assessing Officer to hold that he has reason to believe that the impugned

amount of Rs.173 lakhs of capital gain has escaped assessment. In the reasons recorded by the Assessing Officer, he is referring to Notes of accounts and nothing else. These notes of accounts were available before the Assessing Officer at the time of original assessment also. Now, the question is as to whether in the present case, the reopening is on mere change of opinion or not. In our humble opinion, in the present case, the reopening is based on mere change of opinion which is not valid. Our view is based on this factual aspect that no fresh material has come to the notice of the Assessing Officer for holding this belief that income

has escaped assessment. In the reasons recorded by him, he has referred only to notes of accounts and nothing else. The judgment of Hon'ble jurisdictional High Court rendered in the case of Kelvinator of India Ltd. (supra) is squarely applicable in the present case and as per this judgment in the facts of the present case, the reopening is not valid. In the case of Kelvinator of India Ltd. (supra), it was the submission of the counsel of revenue that the reopening cannot be faulted as the same was based on information derived from the tax audit report.

The relevant para of this judgement being para No.22 and 23 are reproduced below:

22. We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of re-assessment cannot be faulted as the same, was based on information derived from the tax audit report. The tax audit report has already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself.?

23. We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under sec.147. The said submission is fallacious. An order of assessment can be passed either in terms of sub section (1) of sec.143 or sub section (3) of section 143. When a regular order of assessment is passed in terms of the said sub section (3) of sec.143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceedings without anything further, the same would amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong.

For the reasons aforementioned, we are of the opinion that answer to the question raised before this Bench must be rendered in the affirmation, i.e. in favour of the assessee and against the revenue. No order as to costs.?

11. Paras 22 and 23 of the decision of the Full Bench of Delhi High Court in CIT vs. Kelvinator of India Ltd., (2002) 256 ITR 1 (Del.) were considered and examined by the Full Bench and in the majority opinion dated 21.09.2012 written by one of us (Sanjiv Khanna, J), it has been opined thus-

21. In order to appreciate and understand the said observation, it is necessary to examine the facts of the said case. The assessment year in reference was 1987-88 but the reopening notice was issued on 20th April, 1990 after the amended Section 147 was applicable. Original return filed on 29th June, 1987 was revised on 5th October, 1989, along with a letter

explaining why the return was being revised. In the letter the assessee had explained and submitted that rent of Rs.1,76,000/- and depreciation of Rs.66,441/- should be allowed in terms of Section 30 and 32 of the Act. This was the reason for revising the return and these facts were specifically brought to the notice of the Assessing Officer who did not, in the original assessment order, make any disallowance or addition on the said account except Rs.91,485/- which was disallowed as submitted in the revised computation. The assessee in support of the revised computation had relied on judgment of Bombay High Court in CIT vs. Chase Bright Steel Ltd. (No. 1) [1989] 177 ITR 124 (Bom.). On behalf of Revenue, it was contended and submitted that the assessment order did not contain or have any discussion on the issue and therefore, there same was rendered without application of mind. It was submitted, relying upon the decision of Gujarat High Court in Prafful Chunni Lal Patel vs. Makwana (M.J.) CIT (ASST.) [1999] 236 ITR 832 (Guj.), that reassessment was permissible as the assessment order itself was silent and an erroneous order was passed.

22. In the last paragraph quoted above, the Full Bench rejected the submission that reassessment proceedings would be justified if the assessment order is silent or does not record reasons or analysis of material on record. This, the Revenue had propounded, would show non application of mind by the assessing officer. It was held that the said submission was fallacious. Full Bench explained that when an assessment order was passed under Section 143(3), a presumption could be raised that the order was passed after application of mind. Reference was made to clause (e) to Section 114 of the Indian Evidence Act, 1872. The contention if accepted would give premium to the authority exercising quasi-judicial function to take benefit of its own wrong i.e. failure to discuss or record reasons in the assessment order. The aforesaid observations have been made in the context and for explaining the principle of change of opinion. The said principle would apply even when there is no discussion in the assessment order but where the Assessing Officer had applied his mind. A wrong decision, wrong understanding of law or failure to draw proper inferences from the material facts already on record and examined, cannot be rectified or corrected by recourse to reassessment proceedings. Assessee is required to disclose full and true

material facts and need not explain and interpret law. Legal inference has to be drawn by the Assessing Officer from the facts disclosed. It is for the Assessing Officer to understand and apply the law. In such cases resort to reassessment proceedings is not permissible but in a given case where an erroneous order prejudicial to the Revenue is passed, option to correct the error is available under Section 263 of the Act.?

12. We have already quoted paragraphs 24 to 27 in the majority opinion above and the same are also relevant. The assessee before the Tribunal had accepted that no query was raised by the Assessing officer in the original assessment proceedings, yet the tribunal accepted that it was a case of mere change of opinion as no fresh material had come to the

notice of Assessing Officer. There is no other discussion or elucidation in the order of the Tribunal. The Tribunal therefore had misunderstood the observations made under Paras 22 and 23 by the Full Bench of Delhi High Court in Kelvinator of India Ltd (supra).

13. Learned counsel for the respondent/assessee during the course of hearing before us, has filed a paper book, which includes a copy of the agreement dated 01.05.2000, balance-sheet and questionnaire dated 13.08.2003 written by the Assessing Officer to the respondent/assessee during the course of the original assessment proceedings. It is submitted that the assessee's case is covered by para 39 of the majority opinion.

14. We have considered the said contention but find that the Tribunal had not examined and gone into the said question/aspect. This may have happened as the stand taken by the assessee before the Tribunal was different, but was accepted, as is apparent from the paras 4 and 9 of the impugned order, which have been quoted above. The Tribunal has, therefore, not examined and considered the factual matrix of the present case in the light of ratio and reasons given by the majority opinion in the order dated 21.09.2012. Accordingly, while answering the question of law mentioned above in favour of the appellant/revenue, we remand the

matter to the Tribunal for fresh adjudication and decision on the submissions made by the respondent/assessee relying upon para 39 of the said order.

15. Respondent assessee will also be entitled to raise other contentions, if any, challenging validity of reassessment proceedings or reassessment order on merits, if required and necessary. Of course it is open to the Revenue to contest the submissions/pleas.

16. Before we end, we must record and reject one submission made by the respondent/assessee to the effect that the Full Bench Decision dated 21.09.2012 overrules the Full Bench Decision of the Delhi High Court in the case of Kelvinator of India (supra) and therefore should not be treated as valid and binding. The contention is fallacious. In the order dated 21.09.2012, the majority opinion has explained and elucidated upon the observations made in the case of Kelvinator of India (supra) and has not overruled or taken a different view or ratio. It has not held that the view taken by the Full Bench in Kelvinator of India (supra) is incorrect or contrary to law. It was in these circumstances that the majority opinion did not deem it appropriate to refer the matter to a larger bench.

17. Learned counsel for the respondent has referred to ?Pradeep Chand Parija vs. Pramod Chandra? (2002) 254 ITR 99. The said judgment in view of the observations made in paragraph 16 above is not applicable and in fact supports the majority decision and opinion recorded in the order dated 21.09.2012.

18. The appeal is disposed of. No costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.