IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 06.7.2020	Delivered on 13.7.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal No.353 of 2016

(heard through video conferencing)

The Commissioner of Income Tax, Chennai ...Appellant

Vs

M/s.Neyveli Lignite Corporation Ltd., Neyveli-607801. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 23.9.2015 made in ITA.No.254/Mds/2015 on the file of the Income Tax Appellate Tribunal, Madras 'A' Bench for the assessment year 2008-09.

For Appellant : Mrs.R.Hemalatha, SSC

For Respondent: Mr.Raghavan Ramabadhran &
Ms.G.Janane for
M/s.Lakshmi Kumaran Associates

JUDGMENT

T.S.SIVAGNANAM,J

This appeal by the Revenue is directed against the order dated 23.9.2015 passed by the Income Tax Appellate Tribunal, Madras 'A' Bench (hereinafter called the Tribunal) in ITA.No.254/Mds/2015 for the assessment year 2008-09.

2. We have elaborately heard Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the appellant - Revenue and Mr.Raghavan Ramabadhran and Ms.G.Janane, learned counsel appearing for the respondent – assessee.

3. The appeal has been admitted on 06.6.2016 on the following substantial question of law :

> "*Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that reopening of assessment was bad in law ?"*

4. The respondent – assessee filed their return of income for the assessment year in question on 20.9.2008 declaring an income of Rs.14,26,99,69,690/-. The return was processed under Section 143(1) of the Act. Thereafter, the case was selected for scrutiny and a notice under Section 143(2) of the Act was issued, which culminated in an order under Section 143(3) of the Act dated 28.12.2010 returning a total income of Rs.16,02,04,51,970/-.

5. By notice dated 28.3.2013 issued under Section 148 of the Act, the Assessing Officer reopened the assessment under Section 147 of the Act stating that the income escaped assessment since the assessee claimed depreciation on block of assets – water supply and drainage at 15% and the said asset was shown separately and not in the plant and machinery. The decision of the Hon'ble Supreme Court in the case of ***CIT Vs. Gwalior Rayon Silk Manufacturing Company Limited [reported in 196 ITR 149]*** and the decision of the Delhi High Court in the case of ***CIT Vs. Modi Industries Limited [reported in 197 ITR 517]*** were referred to and it has been stated that in those decisions, the depreciation on water supply and drainage should be restricted to 10% only and that in fact, some of the items of additions under this block viz., raw water storage, construction masonry drain from the toe, etc., were all civil works and were, as such, eligible for depreciation only at the rate of 10% under the head 'buildings'.

6. According to the Assessing Officer, the restriction of depreciation to 10% was for a small portion of the block of assets and 5% on Rs.32.20 lakhs was to be disallowed and this had resulted in short computation of disallowance of depreciation. Therefore, in the assessment order passed under Section 143(3) of the Act, income had

escaped assessment within the meaning of the provisions of Section 147 of the Act.

7. The assessee objected to the reopening stating that it was a change of opinion. However, the objection was rejected vide order dated 12.8.2013. Thereafter, the Assessing Officer proceeded to complete the assessment and disallowed the excess depreciation vide order dated 31.1.2014. Aggrieved by that, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-LTU, Chennai-1 by filing ITA.No.28/13-14. The appeal was allowed by order dated 14.11.2014. Challenging the same, the Revenue preferred an appeal before the Tribunal and it was dismissed by order dated 23.9.2015, which is impugned in this appeal.

8. Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the Revenue has pointed out that the re-assessment done by the Assessing Officer was not a change of opinion because it pertains to escapement of assessment, which would include depreciation allowance also, that the question of change of opinion would not apply, that the case of the assessee being one where the assessment was reopened within four years, the First Proviso to Section 147 of the Act will have no application and that therefore, the theory of change of opinion can never be applied to the instant case.

9. In support of her contention, the learned Senior Standing Counsel appearing for the Revenue has referred to the following decisions :

> *(i) of the Hon'ble Supreme Court in the case of* ***CIT Vs. Sun Engineering Works Private Limited [reported in (1992) 64 Taxman 442];***
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> *(ii) of the Division Bench of the High Court of Gujarat in* ***Aquagel Chemicals Private Limited Vs. ACIT [reported in (2013) 35 Taxmann.com 611];*** *and*
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> *(iii) of the Hon'ble Supreme Court in the case of* ***Girilal & Co. Vs. ITO, Mumbai [reported in (2016) 75 Taxmann.com 172].***

10. It is further submitted by the learned Senior Standing Counsel appearing for the Revenue that the CIT(A) as well as the Tribunal erred in referring to the decision of the Hon'ble Supreme Court in the case of ***CIT Vs. Kelvinator of India Ltd. [reported in 320 ITR 561],*** which would have no application, as the assessee's case was a case of reopening within four years and that the question of change of opinion will not arise.

11. The learned counsel appearing for the respondent – assessee submits that the decision of the Hon'ble Supreme Court in the case of ***Kelvinator of India Ltd.,*** will squarely apply to the facts of the present case and that the said decision does not make any distinction with regard to escaped assessment or under assessment. According to the learned counsel, the common thread is that the Assessing Officer should have reasons to believe and that such reasons cannot be merely based on change of opinion. It is further submitted that the decision relied upon by the Assessing Officer in the order rejecting the objections for reopening namely ***Bawa Abhai Singh Vs. DCIT [reported in (2001) 117 Taxman 12 (Delhi)]*** was considered and overruled in the Full Bench decision of the Delhi High Court in the case of ***Kelvinator of India Ltd. [reported in 256 ITR 1], as confirmed by the Hon'ble Supreme Court in the decision reported in 320 ITR 561.***

12. It is further submitted by the learned counsel for the respondent – assessee that on facts, the very same reasons were put against the assessee during the assessment under Section 143(3) of the Act and the assessee had given their reply. Thereafter, the assessment was completed and subsequently, the notice under Section 263 of the Act dated 31.10.2012 was issued wherein one of the issues

related to depreciation claim, for which, the assessee submitted their reply and that the Commissioner of Income Tax, LTU passed the order dated 21.2.2013 dropping the proceedings. It is thereafter the notice under Section 148 of the Act came to be issued for the very same reasons and therefore, it is a clear case of change of opinion. It is also submitted by the learned counsel for the respondent – assessee that even in cases where reopening is done within four years, it cannot be done based on change of opinion.

13. We have carefully considered the above contentions of the learned counsel on either side.

14. The original assessment was completed under Section 143(3) of the Act by order dated 28.12.2010. Among various issues, one of the issues pertains to 'disallowance of excess depreciation on building'. The Assessing Officer pointed out that it has been observed from the income tax depreciation statement submitted by the respondent - assessee that it had claimed depreciation at 15% on the water supply and drainage instead of treating the same under the block 'building'. Therefore, the assessee was directed to show cause and explain as to why the claim of depreciation on water supply and drainage should not be restricted to 10% based on the decision of the Delhi High Court in the case of ***Modi Industries Limited*** and the

decision of the Hon'ble Supreme Court in the case of ***Gwalior Rayon Silk Manufacturing Company Limited.*** The assessee submitted their reply stating that on verification of the asset addition, it was found that the non productive asset for the value of Rs.32.20 lakhs was erroneously included under water supply and electrical footing and that since the value of such items was very less when comparing the total asset addition, the depreciation claim might be permitted.

15. The Assessing Officer considered the reply given by the respondent – assessee and the claim of excess rate of depreciation on the non productive assets to the tune of Rs.32.20 lakhs was restricted to 10% instead of 15%. Accordingly, the excess depreciation claimed by the respondent – assessee to the tune of Rs.1,61,000/- was disallowed and added to the total income of the current year. Subsequently, the Commissioner of Income Tax, LTU issued the notice dated 31.10.2012 under Section 263 of the Act. There were two issues and here, we are concerned with the second issue wherein the Commissioner stated that the assessee claimed income tax depreciation on the block of assets – water supply and drainage at 15% instead of eligible depreciation at the rate of 10%. However, the depreciation was restricted to 10% only on a small portion of the asset i.e on the value of non productive asset instead of applying such rate

of depreciation on the entire block.

16. The assessee submitted their reply dated 30.11.2012 stating that during the assessment under Section 143(3) of the Act, the Assessing Officer classified the asset value at Rs.34,19,617/- as non productive asset and restricted the depreciation to 10% and that all other assets blocked under the water supply and drainage blocks were related to productivity.

17. After receiving reply from the assessee, the Commissioner of Income Tax, LTU, by order dated 21.2.2013, ordered that the proceedings initiated under Section 263 of the Act for the assessment year 2008-09 on 31.10.2012 were dropped. After about a month, the Assessing Officer issued the notice dated 28.3.2013 under Section 147 of the Act stating that he had reasons to believe that the assessee's income chargeable to tax for the assessment year 2008-09 escaped assessment within the meaning of Section 147 of the Act.

18. The assessee, by letter dated 16.4.2013, requested to furnish reasons for reopening.

19. By reply dated 16.7.2013, the reasons were furnished stating that the assessee claimed income tax depreciation on block of assets – water supply and drainage at 15% and that the asset was shown as a separate block of assets and was not included in the plant

and machinery by the assessee in the income tax depreciation statement. It has been further stated that in the scrutiny assessment under Section 143(3) of the Act, it was held that based on the decision of the Delhi High Court in the case of ***Modi Industries Limited*** and the decision of the Hon'ble Supreme Court in the case of ***Gwalior Rayon Silk Manufacturing Company Limited,*** the depreciation on water supply and drainage should be restricted to 10% and in fact, some of the items of additions under this block were only civil works that were eligible for depreciation only at 10% under the head 'buildings'. It has also been stated that the depreciation was, however, restricted to 10% only on small portion of the block of assets namely value of non productive asset to the tune of Rs.32.20 lakhs, the depreciation was restricted to 10% and an amount of Rs.1,61,000/- was disallowed. It has been further stated that having taken a stand in the assessment order that 'water supply and drainage' was eligible for depreciation at 10% as applicable to buildings, such rate of depreciation should have been applied on the entire block of water supply and drainage and should not be restricted only to a small portion of the asset. Therefore, the Assessing Officer stated that there was short computation of disallowance of depreciation in the assessment order under Section 143(3) of the Act and that he had

reasons to believe that income eligible to tax escaped assessment and accordingly, the assessment needed to be reopened under Section 147 of the Act.

20. The assessee submitted their reply dated 31.7.2013 objecting to the reopening firstly contending that it was a clear case of change of opinion, that there was no new material and that in the assessment order under Section 143(3) of the Act, specific disallowance was made after scrutinizing the list of assets. The assessee relied upon the decision of the Hon'ble Supreme Court in the case of ***Kelvinator of India Limited*** and another decision of the Hon'ble Supreme Court in the case of ***ACIT Vs. ICICI Securities Primary Dealership Limited [reported in 24 Taxman 310].*** Without prejudice to the jurisdiction point, which was canvassed and on merits also, the assessee submitted a reply.

21. The Assessing Officer rejected the contention of the respondent – assessee and pointed out that it was not a case of change of opinion and that the decisions of the Hon'ble Supreme Court in the case of ***Kelvinator of India Limited*** and ***ICICI Securities Primary Dealership Limited*** would not have any application.

22. ***For arriving at a decision, we need to take note of the following paragraphs in the Full Bench decision of the Delhi***

High Court in the case of Kelvinator of India Limited (reported in 256 ITR 1) :

"16. Section 147 of the Act as it stands w.e.f. 1st April 1989 reads as follows:

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under Sub- section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the

assessed to make a return under Section 139 or in response to a notice issued under Sub- section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

17. The scope and effect of newly substituted Section 147 w.e.f. 1st April 1989 by Direct Tax Laws (Amendment) Act, 1987 as subsequently amended by the Direct Tax Laws (Amendment) Act, 1989 w.e.f. 1st April 1989 as also of Sections 148 to 152 have been elaborated in the departmental Circular No. 549 dated 31st October 1989, which is as under:

"Income escaping assessment:

7.1 Simplification of the provisions relating to assessment or reassessment of income escaping assessment (Section 147) - Under the old provisions of Section 147 of the Income-tax Act, separate Clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed, as follows:-

(i) Clause(a) empowered the Income-tax Officer to assess or reassess the income escaping assessment, if he had reason to

believe that income had escaped assessment on account of omission or failure on the part of the assessed to file a return of income for an assessment year or to disclose fully and truly all material facts necessary for assessment for that year.

(ii) Clause (b) empowered the Income-tax Officer to reopen an assessment, notwithstanding the fact that there had been no omission or failure, as mentioned in Clause (a), on the part of the assessed if the Income-tax Officer, on the basis of information in his possession, had reason to believe that income had escaped assessment for the relevant assessment year.

Since under the new scheme of assessment (refer to para 5.1 of these Explanatory Notes), introduced by the Amending Act, 1987, returns filed will now be accepted as such and passing of assessment orders will not be necessary, it follows that in the majority of cases there would not be any application of mind by the Assessing Officer after the returns are filed, unless the case is picked up for scrutiny and a regular assessment order is passed under Section 143(3). The Amending Act, 1987, has, therefore, rationalized the

provisions of Section 147 and other connected sections to simplify the procedure for bringing to tax the income which escapes assessment, especially in non-scrutiny cases. Thus, the Amending Act, 1987, has substituted a new Section 147 which contains simplified provisions as follows:-

(i) Separate provisions contained in Clauses (a) and (b) of the old section have been merged into a single new section, which provides that if the Assessing Officer is of the opinion that income chargeable to tax for any assessment year has escaped assessment, he can assess or reassess the same after recording in writing the reasons for doing so.

(ii) The requirements in the old provisions that the Income-tax Officer should have "reason to believe" or "information" in possession before taking action to assess or reassess the income escaping assessment, have been dispensed with.

(iii) The existing legal interpretation that once an assessment has been reopened, any other income that has escaped assessment and comes to the notice of the Assessing Officer subsequently during the course of proceedings under this section can also be included in the assessment, has been

incorporated in the new section itself.

(iv) A proviso to the new section provides that an assessment, which has been completed under Section 143(3) or 147, i.e. a scrutiny assessment, can be reopened after the expiry of 4 years from the end of the relevant assessment year only if income has escaped assessment due to the failure on the part of the assessed to file a return of income or to disclose fully and truly all material facts necessary for his assessment.

7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression "reason to believe" in Section 147.- A number of representations were received against the omission of the words "reason to believe" from Section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression "has reason to believe" in place of

the words "for reasons to be recorded by him in writing, is of the opinion". Other provisions of the new Section 147, however, remain the same.

7.3 Deemed cases of income escaping assessment (Explanation 2 to Section 147)- Under the old provisions of Explanation 1 to Section 147, income chargeable to tax was deemed to have escaped assessment if it had been under-assessed or assessed at too low a rate or if any, excessive relief or loss or depreciation allowance had been allowed. The new provisions in this respect, as contained in Explanation 2 to new Section 147, are more elaborate and cover those cases where assessments have been completed (called as scrutiny cases) as well as those cases where no assessments have been completed (called as non-scrutiny cases). Thus, the new Explanation 2 to the section clarifies that the following shall be deemed to be cases of income escaping assessment:-

(i) Where no return of income has been furnished by the assessed, although the total income is above the taxable limit.

(ii) Where a return of income has been furnished, but no assessment has been made (i.e. in a non-scrutiny case)- if the assessed is

found to have understated his income or claimed excessive loss, deduction, allowance or relief in the return.

(iii) Where an assessment has been made (i.e. in a scrutiny case)- if income chargeable to tax has been under-assessed or assessed at too low a rate or if any excessive relief or loss or depreciation allowance or any other allowance under this Act has been allowed."

18. From a bare perusal of the provisions contained in Section 147 of the said Act, as it stood up to 31st March 1989, it is evident that to confer jurisdiction under Section 147 of the Act two conditions were required to be satisfied viz.; (i) the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either; (a) omission or failure on the part of the assessed to make a return of his income under Section 139 or (b) omission or failure on the part of the assessed to disclose fully and truly all material facts necessary for his assessment for that year. The afore-mentioned requirements of law must be held to be conditions precedent for invoking jurisdiction of the Assessing

Officer to re-open the assessment under Section 147 of the said Act. It is trite that both the conditions afore-mentioned are cumulative. It is also a well settled principle of law that, in the event, it is found that any of the said two conditions is not fulfilled the notice issued by the Assessing Officer would be wholly without jurisdiction. The expression "reason to believe" finds place both in Clause (a) and (b) of Section 147 of the Act. Sub-section (2) of Section 148 of the Act mandates that before jurisdiction under Section 147 of the Act is invoked by the Assessing Officer he is to record his reasons for doing so or before issuing any notice under Section 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the assessment officer could re-open a completed assessment. Since assessment has been re-opened on 20th April 1990, Section 147 as amended w.e.f. 1st April 1989 would apply."

23. On a reading of the above extracted paragraphs, it is evidently clear that the Assessing Officer, to reopen the assessment, should have reasons to believe that any income chargeable to tax escaped assessment for any assessment year. The reason to believe has to be recorded by the Assessing Officer, which is the basis to

proceed further.

24. In the earlier paragraph, we have pointed out about the scrutiny assessment under Section 143(3) of the Act, the query raised by the Assessing Officer, the reply given and the decision taken thereon. In fact, the reasons for issuing the notice under Section 147 are identical to the query raised by the Assessing Officer in the proceedings under Section 143(3) of the Act, for which, the assessee gave an explanation, which was accepted by the Assessing Officer and the claim of excess rate of depreciation was restricted to non productive assets alone. For the very same reasons, the Commissioner issued the notice dated 31.10.2012 under Section 263 of the Act. The respondent – assessee submitted their reply dated 30.11.2012, after which, the proceedings were dropped by order dated 21.2.2013.

25. The learned Senior Standing Counsel appearing for the appellant - Revenue may be right in stating that there cannot be estoppel on the part of the authorities to invoke their power under Section 263 of the Act.

26. We wish to clarify that we do not say that it is a case of estoppel as there can be no estoppel against a statute. But, what we wish to point out is that the issue cannot be permitted to be raised more than once. Not stopping with that, upon change of officer, the

Department, once again, issued notice dated 28.3.2013 to reopen the assessment and in that notice, a finding was rendered that the relevant portion of the order under Section 143(3) of the Act was restricted and the Assessing Officer stated that the restriction of depreciation to 10% only to a small portion of the block of assets was incorrect. In fact, this was the very same reason, which was posed to the respondent - assessee in the proceedings under Section 143(3) of the Act. Therefore, it is evidently clear that reopening was a case of change of opinion.

27. The learned Senior Standing Counsel appearing for the appellant - Revenue has drawn our attention to Explanations 2(c) (iii) and (iv) to Section 147 of the Act. It is her submission that where an assessment has been made, but such income has been made the subject of excessive relief under the Act or excessive loss or depreciation allowance or any other allowance under the Act has been computed, the Authority is entitled to reopen an assessment under Section 147 of the Act and the question of change of opinion does not arise.

28. A bare reading of Section 147 of the Act will clearly show that in all contingencies of reopening, the Assessing Officer should have reasons to believe that income chargeable to tax escaped

assessment. If the very same reasons were the subject matter of the proceedings under Section 143(3) of the Act or the proceedings under Section 263 of the Act, once again, for the very same reasons, the power under Section 147 cannot be invoked and having done so, the CIT(A) as well as the Tribunal were right in coming to the conclusion that the reopening was bad in law.

29. The decision of the Hon'ble Supreme Court in the case of ***Sun Engineering Works Private Limited*** may not assist the case of the Revenue, as it was much prior to the amendment, which came into force from 01.4.1998. The decision of the Hon'ble Supreme Court in the case of ***Girilal & Co.,*** pertains to the value of a plot and the Court found that the information can be of no help to the assessee, as the Assessing Officer was not expected to go through the said information available in the valuation report for the purpose of ascertaining the actual construction of the plot. This decision is clearly distinguishable on facts.

30. Thus, by applying the decision of the Full Bench of the Delhi High Court in the case of ***Kelvinator of India Ltd.,*** as confirmed by the Hon'ble Supreme Court in the decision reported in ***320 ITR 561*** where the case pertains to an assessment before 01.4.1989 or thereafter, mere change of opinion cannot confer jurisdiction upon the

Assessing Officer to initiate proceedings under Section 147 of the Act, we hold that the judgment under appeal does not call for interference.

31. Accordingly, the above tax case appeal is dismissed and the substantial question of law framed for consideration is answered against the Revenue. No costs.

13.7.2020

Index : Yes
Internet : Yes

To
The Income Tax Appellate Tribunal, Madras 'A' Bench.

RS

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