

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 2730/AHD/2016

(Assessment Year: 2010-11)

(Virtual Court Hearing)

Rajlaxmi Polymers Pvt Ltd, 5024,World Trade Centre, Near Udhna Darwaja, Ring Road, Surat-395002 PAN : AABCR 1210 M	Vs	Income Tax Officer, Ward -2 (1)(1), Surat,
Assessee		Revenue
Assessee by	Sh. Sapnesh Sheth CA/AR	
Revenue by	Ms. Anupma Singla Sr DR	
Date of hearing	17/12/2020	
Date of pronouncement	21/12/2020	

Order under section 254(1) of Income-tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of Income-tax Act (Act) is directed against the order of the learned Commissioner of Income Tax (Appeals)-2, Surat, [in short “learned Commissioner (Appeals)”] dated 14.07.2016 pertaining to Assessment Years (AYs) 2010-11.
2. Brief facts of the case as gathered from the order of lower authorities are that the assessee is a company engaged in the business of trading of Chemicals. The assessee filed its return of income for assessment year 2010-11 on 25th September 2010, declaring total income of

₹13,53,539/-. The return of income was selected for scrutiny. The assessing officer after issuing statutory notices and seeking certain information completed the assessment under section 143(3) on 7th February 2013 by making certain disallowances. Subsequently, the assessment was reopened under section 147 of the income tax Act. The assessing officer before issuing notice under section 148 dated 26th September 2014, recorded the following reasons;

“1. In this case, the assessee filed its ROI on 25. 09. 2010 declaring total income at ₹ 13,53,539/- the assessment under section 143(3) of IT Act, 1961 was completed on 07. 02. 2013 determining total income of ₹ 13,94,350/-. On verification of records, it is noticed that in Schedule- 17 of P & L A/c, the assessee company has debited ₹ 15,65,210/- on account of sales promotion. It was further noticed from the ledger of sales promotion that gold in quantity of 970 grams valued at ₹14,67,100/- was purchased from Hem Raj. However the assessee company had not incurred any expenditure on further process of said purchased gold for making of any item or coins. In view of provision of section 37(1) the same was in the nature of capital expenditure and not allowable as revenue expenditure. Therefore, the same was required to be disallowed and added back to the assessee’s total income. Section 37(1) provides that any other expenditure not specifically covered by section 30 to 36 of the IT Act and which is not in the nature of capital expenditure or personal expenses of the assessee is to be allowed as a deduction, if it is laid out or expended wholly and exclusively for the purpose of business or profession. Since

the expenses are for purchase of raw gold, without any expenses for making charges for any item and coins, which is also not reflected in the balance sheet, the same is to be considered expenses for personal nature, the same is not allowable u/s 37(1) of the IT Act.

2. In view of the above facts, I have reason to believe that expenditure to the tune of ₹ 14,67,100/- was required to be disallowed under section 37(1) of the IT Act. Therefore, income to the tune of ₹ 14,67,100/- has escaped assessment for AY 2010-11 by reason of failure on the part of assessee. Therefore, the case is required to be reopened under section 147 of the IT Act. Accordingly, notice under section 148 is issued with the due approval of Jt. CIT, Range-4 Surat.”

3. On service of notice under section 148, the assessee filed its letter on 15th October 2014, stating therein that return filed on 25th September 2010 be treated as written in response to the notice under section 148. The assessing officer noted that reasons recorded for reopening was communicated to the assessee on 9th February 2015, as recorded in para 4 of the assessment order. The assessing officer in para 5 of the assessment order recorded that in show cause notice dated 6th July 2015, the assessee filed its letter dated 21st July 2015 of seeking time and on 28th July 2015, the assessee filed detailed reply to the show cause notice. The contents of reply of assessee is extracted in para 5 of the assessment order. In the reply the assessee *inter alia* stated that quantity of gold purchased by the assessee is 870 gms and

not 970 gms, the assessee furnished the copy of invoices of purchase. On the expenses issue, the assessee stated that they have not incurred any expenses on further process of gold for making any item or coins. The assessee specifically contended that they purchased gold coins from Ham Raj and that there cannot be any further expenses left to be incurred. The assessee also furnished the confirmation /certificate from the seller about supply of gold coin of various denominations. It was further explained in the reply that no valid reason to presume that said gold is raw gold and not gold coins. The supplier of gold coins certified that an item sold by him is gold coin and the price includes labour charges for making gold coins. The assessing officer in paragraph 5.1 of the assessment order recorded that the reply of assessee was not found tenable to him because, the bills of the gold purchased by assessee do not show that gold coins have been purchased by the assessee, which simply shows weight of the gold and the certificate issued by the supplier is backdated and does not show any weight and number of gold coins sold. On the basis of the aforementioned observation the assessing officer disallowed sale promotion expenses of ₹ 14,67,100/- in the assessment order passed under section 143(3) read with section 147 on 26th August 2015.

4. Being aggrieved the assessee filed its first appeal before learned Commissioner (Appeals). Before learned Commissioner (Appeals), the assessee challenged the validity of reopening as well as quantum of addition. The assessee specifically stated that during the original assessment the assessee furnished ledger copy of sale promotion expenses, along with photo copy of invoices of gold coins on 22nd January 2013. The photo copy of letter dated 22nd January 2013 and copy of ledger accounts and copy of sale promotion expenses were furnished. The assessee also stated that Audit team on examination of the invoices of gold coin opined that said invoices were purchased of gold and since the appellant company has not incurred any separate labour expenses for making gold coins, the said purchase of gold would be a capital expenditure and the same should be disallowed in view of section 37(1) of the income tax Act. The assessee also stated that on service of notice under section 148, the assessee requested for reasons recorded. The reasons recorded were not supplied to the assessee immediately; however the same were supplied only on 9th February 2015. On receipt of reasons recorded, the assessee filed their detailed reply explaining that assessee has not incurred any separate labour expenses for making gold coin and reiterated that they had purchased gold coins and not gold. And in support of their

contention, a certificate from vendor was also furnished. The assessee also provided gold rates prevalent during the relevant period, showing that they have paid more than the prevalent market rate value as they had purchased the coins and not the gold.

5. The learned Commissioner (Appeals), after considering the submission of assessee upheld the action of assessing officer on reopening as well as on addition on account of disallowance of sale promotion expenses. The learned Commissioner (Appeals) while affirming the action of assessing officer on reopening held that assessee not raised objection against the reopening during the assessment proceedings and it was raised during the appellate stage, which is devoid of merit. Section 147 authorised the assessing officer to assess or reassess income chargeable to tax if it has escaped from the assessment. The expression escaped assessment means that income for a particular assessment year went unnoticed by the assessing officer and because it has not been noticed by assessing officer for any reason. On merit learned Commissioner (Appeals) held that invoices issued by seller only mentions the total weight of the gold in grams and no denomination and the weight breakups is given. The certificate dated 20.07.2015 mentions that the seller had sold coins of different denominations to the assessee between 25.09.2009 to 07.01.2010,

but, the breakups of purity and weight is not given. During the appellate proceedings, the assessee was asked to provide breakups of denomination, purity and weight, however, the assessee failed to provide such details and evidences. On his above referred observation the learned Commissioner (Appeals) also confirmed the additions. Further aggrieved, the assessee has filed present appeal before the Tribunal. The assessee has raised following grounds of appeal;

(1) Learned Commissioner (Appeals) erred in law and on facts in confirming reopening of assessment based on audit objection ignoring fact that in a proceeding under section 143(3) of the Act full details along with evidences were submitted and after considering submission of the assessee assessment order was passed. Learned Commissioner (Appeals) ought to have cost the assessment proceedings initiated on audit objection as there is no failure on the part of assessee to disclose true and full disclosure of the fact. It be so held now.

(2) Learned Commissioner (Appeals) erred in law and on facts in confirming addition of ₹ 13,94,350/-debited under the head of sales promotion expenses ignoring documentary evidences submitted by the appellant. Learned Commissioner (Appeals) ought to have allowed the expenses considering it as business expenditure under section 37 of IT Act. It be so held now.

6. We have heard the submission of learned authorised representative (AR) of the assessee and the learned senior department representative (DR) for the revenue and have gone through the orders of authorities

below. The learned AR of the assessee submits that initially assessment was completed under section 143 (3) on 7th February 2013. Thereafter, notice under section 148 was issued on 26th September 2014 by recording reasons that sales promotion expenses required to be disallowed as assessee purchase gold and not incurred any further processing charges and thus, the same represent capital expenditure. The learned AR of the assessee submits that notice under section 148 is not valid. The issuance of notice under section 148 was based on 'change of opinion'. During the course of original assessment proceedings, the assessee furnished all details with regard to sale promotion expenses vide reply dated 21st January 2013, in response to the specific question raised by assessing officer in the notice dated 15th January 2013, issued during the original assessment proceedings. The assessee also furnished details of sale promotion expenses by filing ledger accounts along with relevant proof. The assessing officer was fully satisfied about the sale promotion expenses. The information relating to claim of sale promotion expenses was very much available in the record and once considered in the original assessment proceeding and no disallowance was made, thus issuance of fresh notice under section 148 for making disallowance of sale promotion expenses by holding it as capital

expenditure of personal expenditure clearly tantamount to 'change of opinion'. As no information was available with the assessing officer after completion of assessment under section 143 (3). The assessing officer has not made any reference to any such new information or material, which subsequently came into his possession, thus notice under section 148 cannot be issued on the basis of mere change of opinion. In support of his submission the learned of the assessee relied upon the decision of Hon'ble Supreme Court in case of Kelvinator of India Ltd (320 ITR 561 SC).

7. In alternative submission the learned AR of the assessee submits that during the reassessment proceeding the assessee vide its letter dated 28th July 2015 raised objection against the reopening, on the ground that the reopening is proposed to be done on the basis of 'Audit objection' and that the relevant information relating to sales promotion expenses was already submitted in the original proceedings on 22nd January 2013, the copy of letter dated 22nd January 2013 is placed on record. It was submitted that learned Commissioner (Appeals) erred in observing in the appellate order that no such objection was made by assessee during the assessment proceeding.
8. The learned AR for the assessee submits that the assessing officer did not passed any speaking order for disposing of the objection of the

assessee, which is contrary to the decision of Hon'ble Apex Court in GKN Drivesafts (India) Ltd versus ITO (259 ITR 19 SC).

9. In third alternative submission the learned AR of the assessee submits that it is clearly evident from perusal of reasons recorded that assessing officer himself was not sure for making the disallowance. At one place he recorded that expenses is of capital nature, whereas on other place in same para it is noted that expenses are of personal nature. Thus, it is evident that reopening of assessment is on the basis of Audit objection and the same is not valid in view of the decision of Hon'ble Supreme Court in CIT Vs Lucas TVS Ltd (249 ITR 306 SC) and Gujarat High Court in Adani Export Vs DCIT (240 ITR 224 Guj). The learned AR for the assessee thus prayed that notice under section 148 may kindly be held to be invalid and consequent assessment order framed under section 147 may also be quashed being *void ab initio*.

10. On the merit of case the learned AR for the assessee of submits that the disallowance of sale promotion is not sustainable because the assessee has filed complete details during the reassessment proceeding, including the certificate from supplier certifying that he has sold gold coins to the assessee. It was also explained to the assessing officer that as gold coin are purchased, there is no question

of incurring any processing charges. After receipt of those details no further enquiry was made from the assessee. The expenses incurred by assessee on sale promotion were never doubted. The assessing officer only dispute that expenses was of capital nature. Before the learned Commissioner (Appeals), the assessee further filed complete details including the prevailing rate of gold, invoices from the seller. The assessee is in the business of chemical trading and sales promotion is required as a routine business expenses in the course of business. The genuineness of expenses claimed in the Audited accounts stand justified and no disallowance was called for. The observation of learned Commissioner (Appeals) that assessee could not furnish breakup of various coins, denomination, purity, weight etc cannot be basis for confirming the disallowance as such details were never called during the original or reassessment proceeding and that it was after 6 year from the date of transaction, which was next to impossible for assessee. The learned AR for the assessee prayed that even on merit the assessee is liable to be succeeded.

11. On the other hand learned DR for the revenue supported the order of lower authorities. The learned DR for the revenue submits that the assessee has not filed specific objection against the reopening. The assessee vide its letter dated 28th July 2015 for the first time

furnished the required reply. The assessee has not followed the mandated procedure as per the decision of Hon'ble e Supreme Court in GKN Driveshaft (India) ltd (supra), thus the assessee at this stage cannot submit that objection of assessee was not disposed of. The assessing officer has considered the submission of assessee, filed in reply to the show cause notice, the contents of which is correctly recorded in para 5 of the assessment order. During the original assessment the assessing officer has not examined the issue of sale promotion expenses as there is no reference in the assessment order. The assessment was reopened within the four-year from the end of relevant assessment year. The learned DR for the revenue further submits that learned Commissioner (Appeals) in para 6 of the impugned order has clearly held that the objection if any filed by assessee were beyond the time limits fixed under section 124(3) of the Act. The submissions of learned AR for the assessee that reopening is not valid are misplaced. The case laws relied by him is not applicable on the facts of the present case. On merit the learned DR for the revenue submits that the assessee failed to furnish the breakup of various coins with regard to denomination, purity and weight of coins, even during the appellate stage or at the reassessment stage despite the opportunity given by assessing officer. Thus, the assessee failed to

substantiate its contention either before the assessing officer or before learned Commissioner (Appeals), thus, the lower authorities were justified in making addition of sale promotion expenses.

12. We have consider the rival submission of both the parties and gone through the orders assessment under section 143(3) dated 7th February 2013 and under section 143(3)/ 147 dated 26.08.2015. we have also deliberated on various case laws relied by the parties and the lower authorities in their orders. We have also perused the reasons recorded by assessing officer and the contents of the notice under section 148 dated 26th September 2014. The assessing officer while recording the reasons noted that on verification of records, he noted that in Schedule- 17 of Profit & Loss accounts, the assessee company had debited ₹ 15,65,210/- on account of sales promotion. It was further noted from the ledger of sales promotion that gold in quantity of 970 grams valued at ₹14,67,100/- was purchased from Hem Raj, the assessee company had not incurred any expenditure on further process of said purchased gold for making of any item or coins. In view of provision of section 37(1) the same was in the nature of capital expenditure and not allowable as revenue expenditure. Thus, the assessing officer made his belief that in absence of process of gold into coins the expenses claimed was required to be disallowed.

From the contents of reasons there is no dispute on facts that the assessing officer found all relevant information from the material available on record. No new information came to his notice of assessing officer besides the information already on record. The learned AR for the assessee vehemently submitted before Tribunal that in the course of original assessment proceedings, the assessing officer raised specific question in the notice dated 15th January 2013 about the sale promotion expenses, the assessee furnished all details with regard to sale promotion expenses vide reply dated 21st January 2013. The assessing officer was fully satisfied about the sale promotion expenses. The information relating to claim of sale promotion expenses was very much available in the record and once considered in the original assessment proceeding and no disallowance was made, thus issuance of fresh notice under section 148 for making disallowance of sale promotion expenses by holding that it as capital expenditure of personal expenditure clearly tantamount to 'change of opinion'. We have seen that in the notice dated 15th January 2013, copy of which is filed, the assessing officer raised specific question vide Sr. No. 2 "Furnish copy of account of the following expenses with proof: (i) Sales Promotion expenses: Rs.15,65,210/-". The assessee vide its reply dated 22.01.2013 filed details of the sales promotion

expenses with documentary evidences consisting the ledger account from the period 01.04.2009 to 31.03.2009 and the copy of invoices from seller Hemraj. No further notice on account of sales promotion expenses was raised by assessing officer. It is also matter of fact that there is no reference in the original assessment about the examination of expenses of sales promotion expenses. In our view, if the assessing officer called any specific information relating to sales promotion expenses or in connection thereto, it is reasonable to presume that he had considered the material filed before him as well as the material called for by him before making the assessment order. Had the assessing officer not considered the material filed before him originally there would be no question of his seeking information in relation thereto. It is logical therefore, to presume that he had considered the material in relation to which he sought not further information. It would equally follow that the assessing officer would also have considered the information furnished pursuant to such question raised by him. It is reasonable therefore, to presume that the assessing officer had applied his mind to the reply and the evidences filed by assessee on the issue. At the same time we are not inclined to presume otherwise that is negligence or indifference on the part of assessing officer in such circumstances. Thus, in view of the aforesaid

factual discussions, the reopening on the same issue, which has been raised, examined by assessing officer in original assessment, further no new material has come in the knowledge to the assessing officer, is mere change of opinion, which cannot *per se* be reason to reopen as held by Hon'ble Apex Court in CIT Vs Kelvinator of India Ltd (supra). Hence, we hold that the reopening by assessing officer under section 147 in recording the reasons were mere change of opinion. Once it is held that action of the assessing officer is based on change of opinion, all subsequent action thereto is *void ab initio*. Thus, the learned AR for assessee succeeded in his first and primary submission on ground No.1 of the appeal.

13. Considering the facts that we have allowed the ground No. 1 on the first and primary submissions of learned AR for the assessee, therefore, discussions on other alternative submissions and on merit of the case have become academic. In the result the appeal of the assessee is allowed.

Order pronounced on 21 December 2020 as per Rule 34(5) of Income tax (Appellate Tribunal) Rules 1963.

Sd/-
(DR. ARJUN LAL SAINI)
ACCOUNTANT MEMBER
Surat, Dated: 21/12/2020
Self/ author

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

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