

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF SEPTEMBER, 2022

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MRS. JUSTICE M.G. UMA

I.T.A NO.71 OF 2017

C/W

I.T.A NO.785 OF 2017

IN ITA No.71 OF 2017

BETWEEN:

ABB INDIA LTD
21ST FLOOR, WORLD TRADE CENTRE
BRIGADE GATEWAY
NO.26/01, DR.RAJKUMAR ROAD
MALLESWARAM WEST
BANGALORE-560 055
REPRESENTED HEREIN BY ITS
COUNTRY TAX MANAGER
MR. JAYANTA CHATTERJEE

...APPELLANT

(BY SHRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

AND:

1. JOINT COMMISSIONER OF
INCOME TAX -LTU
JSS TOWERS
100FT. RING ROAD
BANASHANKARI III STAGE
BANGALORE-560 085

2. COMMISSIONER O F
INCOME TAX-LTU
JSS TOWERS
100 FT. RING ROAD
BANASHANKARI III STAGE
BANGALORE-560 085

...RESPONDENTS

(BY SHRI. K.V. ARAVIND, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE INCOME TAX ACT, 1961 ARISING OUT OF DATED 26.08.2016 PASSED IN ITA NO.1124/BANG/2014, FOR THE ASSESSMENT YEAR 2008-2009 PRAYING TO (A) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW (B) ALLOW THE APPEAL AND SET ASIDE THE ORDER OF THE TRIBUNAL DATED 26.08.2016 PASSED IN ITA NO. 1124/BANG/2014 (ANNEXURE-H); AND (C) PASS SUCH OTHER OR SUITABLE ORDERS AS THIS HON'BLE COURT DEEMS FIT TO PASS ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE AND IN THE INTERESTS OF JUSTICE AND EQUITY.

IN ITA No.785 OF 2017

BETWEEN:

1. THE COMMISSIONER OF
INCOME TAX, JSS TOWERS
BSK III STAGE
BANGALORE-560 085
2. THE JOINT COMMISSIONER O F
INCOME-TAX, LTU
JSS TOWERS, BSK III STAGE
BANGALORE-560 085

....APPELLANTS

(BY SHRI. K.V. ARAVIND, ADVOCATE)

AND:

M/S. ABB INDIA LTD
21ST FLOOR, WORLD TRADE CENTRE
BRIGADE GATEWAY
NO.26/01, DR.RAJKUMAR ROAD
MALLESWARAM WEST

BANGALORE-560 055
PAN;AAACA 3834B

...RESPONDENT

(BY SHRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 07.06.2017 PASSED IN MP NO.44/BANG/2017 (IN ITA NO. 1124/BANG/2014) FOR THE ASSESSMENT YEAR 2008-2009 PRAYING TO 1. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW 2. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BENGALURU IN MP NO. 44/BANG/2017 (IN ITA NO. 1124/BANG/2014) DATED 07.06.2017 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE JOINT COMMISSIONER OF INCOME TAX, LTU, BENGALURU. 3. TO PASS SUCH OTHER SUITABLE ORDERS AS THIS HON'BLE COURT DEEMS FIT TO GRANT IN THE FACTS AND CIRCUMSTANCES OF THE CASE IN THE INTEREST OF JUSTICE AND EQUITY.

THESE ITAs, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 16.08.2022 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **P.S.DINESh KUMAR J**, PRONOUNCED THE FOLLOWING:-

JUDGMENT

These two appeals¹ are presented challenging order dated August 26, 2016 in ITA No.1124/Bang/2014 passed by the ITAT², Bengaluru.

2. Assessee's appeal has been admitted to consider following questions of law:

" (a) the Hon'ble Tribunal was justified in upholding the validity of the re-assessment order insofar as it brings to tax Rs.5,27,66,779/- and Rs.79,12,181/- on reversal of provisions, which was an issue which was already examined by the Assessing Officer in the original assessment proceedings?

(b) the Hon'ble Tribunal was justified in upholding the 1st Respondent's action in bringing to tax the aforesaid amounts on account of reversal of provisions on the ground that the Appellant had failed to prove the nexus between the provisions disallowed suo moto in the earlier years and the reversal of provisions in the assessment year in question when the same was never in dispute before the lower authorities?

¹ ITA No.71/2017 by assessee and ITA No.785/2017 by Revenue

² Income Tax Appellate Tribunal

(c) the Hon'ble Tribunal was justified in holding that the Appellant had failed to prove such nexus when no opportunity was afforded to it to do so?"

3. Revenue's appeal has been admitted to consider the following question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal is right in law in directing the assessing authority to verify whether the amount of provision credited to P&L A/c is out of the provisions disallowed in the year of creation of the provision resulting in reviewing its own order dated 26.08.2016 which is not permissible under the provisions of the Act and when the Tribunal in its original order had categorically upheld the findings of the CIT(A) the assessee had failed to link the provisions reversed with amount of provisions originally created?"

4. We have heard Shri. T. Suryanarayana, learned Senior Advocate for the assessee and Shri. K.V. Aravind, learned Senior Standing Counsel for the Revenue.

5. Brief facts of the case are, assessee, a Public Limited Company filed its return of income

for the A.Y³.2008-09 declaring an income of Rs.795,41,41,782/-. It was processed under Section 143(1) of the Income Tax Act, 1961 ('Act' for short) and subsequently, taken up for scrutiny under Section 143(3) of the Act. On November 16, 2011, the Assessing Officer passed his order under Section 143(3) of the Act.

6. Subsequently, the AO⁴ reopened the assessment for the year 2008-09 under Section 147 of the Act on the premise that during the assessment proceedings for A.Y. 2009-10, assessee had claimed exemption in respect of the Nuclear Power Corporation Limited Tax free bonds under Section 10(23G) of the Act and the said Section was omitted by Finance Act, 2006 with effect from April 1, 2007.

³ Assessment Year

⁴ Assessing Officer

7. On consideration of assessee's reply to the notice under Section 148 of the Act, the AO, vide order dated 19.12.2013 disallowed the claim made under Section 10(23G) of the Act. In addition, the Assessing Officer also proceeded to bring to tax Rs.5,27,67,000/- and Rs.79,12,000/-, which were provisions created and disallowed in the earlier years for non-deduction of tax at source under Section 40(a) of the Act and which were reversed in A.Y. 2008-09, on the ground that the tax in respect of the said amounts were not deducted and paid to the Government.

8. Assessee challenged AO's order in ITA No.45/JCIT-LTU/CIT(A)LTU 13-14 and the CIT(A), vide order dated 30.05.2014, allowed the appeal in part on other aspects, but confirmed the disallowance of deduction on reversal of provision in respect of Rs.5,27,67,000/- and Rs.79,12,000/- .

9. In this appeal we are concerned only with disallowance of deduction on reversal of provision in respect of Rs.5,27,67,000/- and Rs.79,12,000/-.

10. On further appeal, the ITAT, vide order dated August 26, 2016 has dismissed ITA No.1124/Bang/2014.

11. Shri Suryanarayana submitted that:

- the AO reopened the case under Section 147 of the Act for the A.Y.2008-09 on the ground that during the course of assessment for A.Y.2009-10, it was noticed that Section 10(23G) was omitted by the Finance Act, 2006, with effect from 01.04.2007. However, assessee had claimed exemption of interest free tax bonds under Section 10(23G). When the assessment was

reopened, the AO issued notice with regard to the deduction of Rs.5,27,67,000/- and Rs.79,12,000/- under Section 40(a) of the Act. Assessee has submitted its detailed reply on October 5, 2011. The AO has noticed the said reply in the assessment order. However, the AO has disallowed deduction and added back the amount on the ground that it was 'inadvertently' allowed by the AO without verifying the reversal of provision;

- that the assessment was made under Section 143(3) of the Act on 16.11.2011. The AO had called upon for information vide communication dated 04.05.2011 and the same was promptly submitted by the assessee on 05.10.2011. The said explanation has been accepted by

the AO while passing the assessment order on 16.11.2011. Therefore, the reason recorded by the AO in the assessment order under Section 147 of the Act dated 19.12.2013 on the ground that deduction was allowed inadvertently is not sustainable.

12. In substance, Shri Suryanarayana's argument is, the AO had accepted the explanation and passed the assessment order. Therefore, the deductions allowed previously could not be disallowed subsequently on the ground that the same were inadvertently allowed. In support of his case he placed reliance on:

- *Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd*⁵;
- *Commissioner of Income-tax-VI, New Delhi Vs. Usha International Ltd*⁶;

⁵ [2010]187 taxmann. 312 (SC) - Para 4

- *Indian and Eastern News Paper Society Vs. Commissioner of Income-tax*⁷;
- *Assistant Commissioner of Income-tax. Vs. Marico Ltd*⁸; and
- *Dell India (P) Ltd. Vs. Joint Commissioner of Income Tax, LTU, Bangalore*⁹.

13. Shri K.V.Aravind, learned Senior Standing Counsel for the Revenue argued opposing the appeal. He submitted that the AO has recorded that an incorrect claim was made in the computation of income. After verifying the books of accounts, P & L account and Tax Audit Report, the AO came to the conclusion that no reversal had taken place and hence, he has rightly disallowed the deduction and added back the amount.

⁶ [2012]25 taxmann.com 200 (SC) - Para 13 to 15 & 22

⁷ [1979]2 taxmann.com 197(SC) - Para 14

⁸ [2020]117 taxmann.com 244 (SC)

⁹ [2021]123 taxmann.com 468 (Karnataka) - Para 12 to 14

14. We have carefully considered rival submissions and perused the records.

15. Undisputed facts of the case are, before passing the Assessment Order on 16.11.2011 under Section 143(3) of the Act, the AO had sent a questionnaire vide his communication dated 04.05.2011 calling for explanation from the assessee. In response, the assessee submitted its reply on 04.07.2011 and 05.10.2011 and explained that provisions were created with regard to the technical fees for the A.Y.2003-04 to 2007-08 and had not deducted the tax during the respective years and the same was disallowed under Section 40(a) of the Act. Further, assessee did not make any payment and reversed the provision during the year ending March 31, 2008. In substance, assessee's case is, the original provision was not allowed as deduction and therefore reversal of the same cannot be taxed again.

16. Shri. Suryanarayana contended that this explanation was accepted by the AO. However, in the subsequent Assessment Order under Section 147 dated 19.12.2013, the AO has recorded that the amounts of Rs.52,767,000/- and Rs.79,12,000/- were not allowable under Section 40(a) of the Act on the ground that it was inadvertently allowed earlier. He argued that the AO could not have reviewed his earlier decision on that ground.

17. In *Kelvinator India Ltd.*, it is held that post 01.04.1989, the power to reopen is much wider, but the AO has no power to review. The relevant passage reads as follows:

" On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing

Officer to make a back assessment, but in section 147 of the Act [with effect from 1-4-1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confer jurisdiction to re-open the assessment. Therefore, post 1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be base on fulfilment of certain pre-condition and if he concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment."

(Emphasis Supplied)

18. With regard to acceptance of assessee's explanation, Shri. Suryanarayana relied upon *Marico Ltd.* In that case, Revenue's SLP was dismissed by upholding the view taken by the High Court that non-rejection of the explanation in the assessment order would amount to, the AO accepting the view of the assessee. On the same proposition, Shri. Suryanarayana also cited *Usha International Ltd.*¹⁰, wherein, it is held as follows:

"13. It is, therefore, clear from the aforesaid position that:

(1) xxxxx

(2) xxxxx

(3) Re-assessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the

¹⁰ (paras 13, 14 and 15)

assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons."

(Emphasis Supplied)

19. It is also further held that Revenue is not without remedy and it can invoke power under Section 263 of the Act where an AO incorrectly applies the law or comes to a wrong conclusion and income chargeable to tax had escaped assessment. It is further held that initiation of reassessment proceedings will be invalid on the ground of change of opinion.

20. In *DELL India Pvt. Ltd.*, a Full Bench of this Court has held as follows:

" 15. Hence, Apex Court expressly held that the law laid down by a Bench of two Hon'ble Judges of the Apex Court in the case of *Kalyanji Mavji & Co.* (*supra*) was not correct. The Apex Court after noticing the view taken in its earlier decision in the case of *Kalyanji Mavji & Co.* (*supra*) expressly held that an error discovered on reconsideration of the

same material does not give the Income-tax Officer the power to reopen a concluded assessment. "

21. A careful perusal of the re-assessment order and the orders passed by the CIT(A) and the ITAT shows that the same are contrary to the law laid down by the Apex Court as the re-assessment is based on 'change of opinion'. Admittedly, the AO has stated that the issue was 'inadvertently' allowed by him without verifying the reversal of provision. This view amounts to change of opinion and therefore, the reassessment proceedings are invalid. Hence, this appeal merits consideration.

22. In view of the above, the following:

ORDER

(a) ITA No.71/2017 by the assessee is ***allowed.***

(b) The first question of law in assessee's appeal is held in favour of the assessee and against the Revenue. In view of the same, second and third questions do not call for any answers.

(c) In view of our answer to the first question of law in assessee's appeal, the question framed in Revenue's appeal does not merit any consideration and accordingly, ITA No.785/2017 stands ***dismissed***.

No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SPS