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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1367 OF 2015

The Pr. Commissioner of Income Tax-6 .. Appellant.
v/s.
M/s. Century Textiles and Industries Ltd. .. Respondent.

Mr. A.R.Malhotra with Mr. N.A.Kazi for the Appellant.
Mr. Pankaj Toprani with Ms. Krupa Toprani for the Respondent.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.**
DATE : 3rd April, 2018.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 22.8. 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 22.8.2014 is in respect of Assessment Year 2007-08.

2 Revenue urges the only following questions of law, for our consideration:

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal erred in considering the reopening of the case as bad in law, without appreciating the fact that no opinion has been formed on the issue of allowing deduction u/s 80IC in respect of component of “other income” which was not

derived from industrial undertaking and therefore on this issue on which assessment is sought to be reopened, there was no question of “change of opinion” as held erroneously by the Tribunal and material available on record would form “tangible materials” to constitute “reason to believe” that income has escaped assessment at the time of reopening of assessment ?”

3 Respondent-Assessee is engaged in manufacture of cotton piece goods, denim, yarn, caustic soda, salt, pulp and paper, etc. The Respondent-Assessee had in its return of income claimed deduction of Rs.33.67 Crores under Section 80IC of the Act in relation to its paper and pulp unit on the basis of audit report in form 10CCA. During the scrutiny proceedings, the Assessing Officer raised specific queries with regard to above claim under Section 80IC of the Act which was responded to by the Respondent's letter dated 23.3.2009 and 30.3.2009. The Assessing Officer after considering the entire material on record disallowed the Respondent's claim to the extent of Rs.11.49 Crores out of total claim of Rs.33.67 Crores under Section 80IC of the Act while passing assessment order on 5.5.2009 under Section 143(3) of the Act.

4 Thereafter, on 15.2.2011, a notice under Section 148 of the Act was issued seeking to re-open assessment for the Assessment Year 2007-08. Reasons in support of the notice dated 15.2.2011 as communicated to the Respondent-Assessee reads as under:

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“Return of income for A.Y. 2007-08 has been filed vide acknowledgement dt.31.10.2007 declaring total income under normal provisions at Rs.2,80,37,62,316 and Rs.3,55,48,54,200 u/s. 115JB of the I.T.Act. Assessment u/s. 143(3) has been completed on 5.5.2009 at total income under normal provisions at Rs.3,11,72,96,159/- and book profit at Rs.367,26,75,587/-.

Perusal of records shows that in the assessment order u/s 143(3) dt.5.5.09 for the A.Y.2007-08, excess allowance of deduction u/s 80IC at Rs.4.99 Crores has been made by omitting to exclude the following receipts/incomes which are not derived from the business of the undertaking as per requirement of deduction under section 80IC.

As per Schedule-7

Rent from property	Rs.3,82,878/-
Export Benefits	Rs.84,48,875/-
Insurance and other claims	Rs.45,51,894/-
Miscellaneous Income	Rs.2,54,29,908/-
Provision no longer required	Rs.8,00,304/-

Total:- Rs.3,96,13,659/-

As per Schedule 10

Interest received	Rs.1,03,02,234/-
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Gross Total Rs.4,99,15,893/-

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I, therefore, have reason to believe that income chargeable to tax to the extent of Rs.4.99 Crores has escaped assessment. Issue notice u/s 148 for A.Y.2007-08”

5 Respondent objected to the re-opening of the notice on the ground that the same amounts to change of opinion and therefore without jurisdiction. However, the Assessing Officer rejected the objection and proceeded to complete the assessment for Assessment Year 2007-08 on

22.12.2011 under Section 143(3) read with Section 147 of the Act. In the above order dated 22.12.2001, the Assessing Officer disallowed the claim of deduction under Section 80IC of the Act by further amount of Rs.4.99 Crores. This resulted in enhancement of the Respondent-Assessee's income.

6 Being aggrieved, the Respondent carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By order dated 2.12.2012, the CIT (A) rejected the Respondent's appeal on the issue of re-opening of assessment and confirmed the assessment order dated 22.12.2011.

7 On further appeal, the Tribunal by the impugned order allowed the Respondent-Assessee's appeal. This by inter-alia holding that the Respondent's claim for deduction under Section 80IC of the Act in respect of its paper and pulp unit duly supported by audit report under Section 10CCA of the Act was a subject matter of enquiry by the Assessing Officer in the regular assessment proceedings. This is evident from the fact that queries with regard to the claim of deduction under Section 80IC of the Act were specifically raised by the Assessing Officer and the same were responded to by the Respondent-Assessee. On consideration of the entire material including the response of the Respondent to the queries raised in regular assessment proceedings, the claim for deduction of

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Rs.33.67 Crores under Section 80IC of the Act made by the Respondent-Assessee was reduced by Rs.11.49 Crores.

8 Thus, the impugned order holds that there was a view taken/opinion formed during the regular assessment proceedings. Therefore, this is a case of change of opinion on the part of the Assessing Officer in issuing notice dated 15.2.2011 seeking to re-open assessment for the Assessment Year 2007-08. The impugned order inter-alia placed reliance upon decision of the Supreme Court in **CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561** that “reasons to believe” do not empower the Assessing Officer to reopen an assessment when there is change in opinion. Power to re-open assessment as observed by the Supreme Court is only a power to reassess not to review the order already passed.

9 Mr. Malhotra the learned counsel appearing for the Revenue in support of the appeal states that reopening notice was not on account any change of opinion, as no opinion/view was taken in regular assessment proceedings in respect of the receipts/income not derived directly from the paper and pulp unit. It is pointed out that the Assessing Officer had during the course of the enquiry in the regular assessment proceedings only made enquiries with regard to whether or not articles on which the benefit of Section 80IC of the Act is benefit is claimed, is allowable in in terms of Schedule XIII and Schedule XIV of the Act.

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Therefore, it is submitted that the Assessing Officer was justified in re-opening the assessment by notice dated 15.2.2011. In support reliance is placed upon the decision of this Court in **Export Credit Guarantee Corporation of India Ltd. v. Additional Commissioner of Income Tax [2013] 350 ITR Page 651.**

10 Mr. Toprani the learned counsel appearing for the Respondent-Assessee on the other hand states that the impugned order calls for no interference. This in view of the fact that the Assessing Officer had in the regular assessment proceedings applied his mind to the claim for deduction under Section 80IC of the Act as is evident from the queries raised in respect of the claim for deduction under Section 80IC of the Act.

11 The undisputed position in the present case is that the regular assessment was completed under Section 143(3) of the Act and the re-opening has been issued within a period of four years from the end of the relevant Assessment Year. Thus, the rigour of the first proviso to Section 147 of the Act is not to be satisfied for issue of a reopening notice i.e. failure to disclose all material facts truly and fully necessary for assessment. It is also not disputed that in the regular assessment proceedings, queries were raised in respect of claim under Section 80IC of the Act and the same were responded to by the Respondent-Assessee

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resulting in reduction of claim for deduction under Section 80IC of the Act. In the above facts, it is self evident that the Assessing Officer was conscious of the claim of deduction made by the Respondent-Assessee under Section 80IC of the Act which led to the enquiry. It is for the Assessing Officer to decide the extent and nature of enquiry in respect of claim under Section 80IC of the Act. Therefore, when the Assessing Officer has taken a conscious decision of making enquiry under Section 80IC of the Act then it is not open to him to turn around and claim that certain aspects of the claim under Section 80IC of the Act were not considered by him. It is undisputed as pointed out above, Section 80IC of the Act was a subject matter of enquiry and this resulted in disallowance of Rs.11.49 Crores out of the claim for Rs.33.67 Crores made by the Respondent under Section 80IC of the Act. The decision of this Court in **Export Credit Guarantee Corporation of India (Supra)**, in our view, would have no application to the present facts as in that case admittedly during the regular assessment proceedings, the Assessing Officer has not applied his mind to the issue sought to be raised in the re-opening proceedings. In the aforesaid decision, it was held that the Assessing Officer has ignored relevant material in arriving at an assessment contrary to law. It was also found as a fact in the above case of **Export Credit Guarantee Corporation of India (Supra)** that no query was raised

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during the course of the regular assessment proceedings. Thus, the occasion for the Assessing Officer to apply his mind to the claim by the Respondent-Assessee in that case, did not arise. As against the above in this case the Assessing Officer consciously considered the claim for deduction under Section 80IC of the Act as is admittedly evident from the issues raised during the regular assessment proceedings. This by itself would be evidence of the fact that the Assessing Officer had occasion to apply his mind to the claim for deduction under Section 80IC of the Act during the regular assessment proceedings and had taken a view on the claim of deduction under Section 80IC of the Act.

12 Moreover, we find that the reasons in support of the impugned notice is not premised on the fact that he had not applied his mind to the claim for deduction under Section 80IC of the Act during the regular assessment proceedings in respect of the income/receipts which were not derived from its paper and pulp unit to claim benefit under Section 80IC of the Act. It proceeds to exclude the above income from the claim for deduction on account of omission by the Assessing Officer during the regular assessment proceedings. This is different from non-application of mind to claim for deduction under Section 80IC of the Act. As held by this Court in **Hindustan Lever v. Wadkar (2004) 268 ITR 339**, the reasons in support of the reopening notice has to be read as it is.

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No additions and/or inferences are permissible. Moreover, the power under Section 147/148 of the Act is not to be exercised to correct mistakes made during the regular assessment proceedings.

13 In the above facts, the view taken by the impugned order of the Tribunal is a view in accordance with the decision of the Apex Court in **Kelvinator India (Supra)**. Thus, the question as proposed does not give rise to substantial question of law. Thus, not entertained.

14 Accordingly, the Appeal is dismissed. No order as to costs.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)