

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 31ST DAY OF JULY 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

I.T.A.No.58/2012

BETWEEN:

1. Commissioner of Income Tax, (Appeals)-I
Central Revenue Buildings,
Queens Road,
Bengaluru – 560 001.
2. The Deputy Commissioner of Income Tax,
Circle-1(3),
Bengaluru.

...Appellants

(By Mr. E.I. Sanmathi, Adv.)

AND:

M/s. GMR Holdings Pvt. Ltd.
No.25/1, Skip House,
Museum Road,
Bengaluru – 560 025.

...Respondent

(By Mr. K.S. Ramabadrn, Adv.(Absent))

This I.T.A is filed U/s.260A of I.T. Act, 1961, arising out of the order dated 31.10.2011 passed in ITA No.1006/Bang/2010, for the assessment year 2003-04, praying to i) formulate the substantial questions of law stated therein; ii) set aside the common appellate order passed by the ITAT, 'A' bench, Bengaluru in ITA No.1006/Bang/2010 dated 31.10.2011, as sought for in this appeal, in the interest of justice and equity.

This I.T.A. coming on for Final Hearing this day, **Dr. Vineet Kothari J.** delivered the following:-

JUDGMENT

Mr.E.I. Sanmathi, Adv. for Appellants- **Revenue**
Mr.K.S. Ramabadran, Adv. for
Respondent – **Assessee (Absent)**

1. Revenue has filed this appeal raising purported substantial questions of law under Section 250-A of the Income Tax Act, 1961 arising from the order of learned Tribunal dated 31.10.2011 in ITA No.1006/Bang/2010 for the Assessment Year 2003-

2004 M/s.GMR Holdings Pvt. Ltd., vs. The Deputy
Commissioner of Income Tax, Bengaluru.

2. The learned Tribunal has held in favour of the assessee in the impugned order that re-assessment proceedings under Section 147/148 of the Income Tax Act, 1961 for the A.Y. 2003-2004 could not be undertaken on a mere change of opinion or audit objection raised by the internal auditors of the Department. The Tribunal further held that the income from 'Dividends on Shares' could not be taxed by the assessing authority under the head 'Income from other sources' as the business of the assessee itself was that of investing in shares and securities and therefore, it was taxable as business income.

3. The learned Tribunal has also held that the business loss of the assessee was set-off against the capital gains earned by the assessee during the said

year and therefore, one of the reasons given for re-assessment/reopening of assessment that the said business loss was not set-off against capital gains of the assessee was found to be factually incorrect.

4. The relevant finding of the Income Tax Appellate Tribunal in the impugned order dated 31.10.2011, is quoted below for ready reference:

*“16. In the present case, the AO only after having the **objection by the audit party issued the notice u/s.148 of the Act** and in the reasons recorded, he **nowhere stated that income of the assessee escaped assessment**, he simply stated that the dividend income, interest income and other income were to be classified as income under the head ‘income from other sources’. However, in the preceding year as well as subsequent year and even while framing the original assessment for the year under consideration, the aforesaid incomes were treated as business income while framing*

assessment u/s. 143(3) of the Act and the AO not given any reason to deviate from the said view while issuing the notice u/s. 148 of the Act. Assuming there was some mistake in the assessment order dated 30.12.05 and income if any had been taken under a wrong head, that mistake could have been rectified by issuing notice u/s. 154 of the Act, however the reopening of the assessment by issuing the notice u/s. 148 of the Act could have been done only when there was escapement of income. In the present case, the AO nowhere stated that the income of the assessee escaped assessment and it was in his knowledge that income escaped assessment by fault of the assessee. In our opinion, a mere change of opinion is not sufficient to issue notice u/s.148 of the Act for reassessing the income by invoking the provisions of section 147 of the Act.

17. In the present case, another objection taken by the AO in the reasons recorded for reopening the assessment is that the assessee had not set off business loss against the capital

gains, which is contrary to the provisions of the Act. In our opinion, the said observation of the AO is totally wrong because the assessee had set off the business loss against the income from capital gain and the provisions contained in section 71(2) of the Act clearly stipulates that the loss must be set off against the income, if any, assessable for that assessment year under any head of income including the head 'capital gains', whether short term capital gain or long term capital gain. The said provision reads as under:

"71 (2) Where in respect of any assessment year, the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee has income assessable under the head "Capital gains", such loss may, subject to the provisions of this Chapter, be set off against his income, if any, assessable for that assessment year under any head of income including the head "Capital gains" (whether relating to short-term

capital assets or any other capital assets).”

In view of the above, we are of the considered view that the second objection of the AO in the reasons recorded for reopening the assessment u/s. 147 of the act is totally wrong.”

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21. *In the present case also, the AO issued notice u/s. 148 of the Act, only after the audit party raised certain objections, therefore reopening was not valid in view of the ratio laid down in the aforesaid referred to cases. As regards the initiation of the proceedings for the reassessment u/s. 147 of the Act on the basis of change of opinion, the Hon’ble High Court of Delhi (Full Bench) in **CIT, Delhi v. Kelvinator of India Ltd. [2010] 187 Taxman 312 (SC)** held as under:*

“In the event it is held that by reason of section 147 if the ITO exercises its jurisdiction for initiating a proceeding for reassessment only upon mere change of opinion, the same may be held to be unconstitutional. Section 147 does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceeding upon his mere change of opinion.”

The aforesaid case has been affirmed by the Hon’ble Supreme Court as reported in [2010] 187 Taxman 312 SC wherein it has been held as under:

“Prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under two conditions viz., if (a) the ITO had reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his

assessment for that year, income chargeable to tax had escaped assessment for that year, or (b) the ITO had in consequence of information in his possession reason to believe that income chargeable to tax had escaped assessment for any assessment year. The 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, those conditions are given a go-by and only one condition has remained, viz., where the Assessing Officer has reason to believe that income has escaped assessment, the section confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which 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 re-open. One 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 re-assess, but the reassessment has to be based on fulfillment of certain preconditions and if the concept of ‘change of opinion’ is removed, as contended on behalf of the department, then in the garb of reopening 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, the Assessing Officer has power to re-open, provided there is ‘tangible material’ to come to the conclusion that there is escapement of income from assessment. Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament

not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However on receipt of representations from the companies against omission of the words 'reasons to believe', the Parliament re-introduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer."

22. *Recently, the Hon'ble Delhi High Court in the case of CIT v. Modipon Ltd. in ITA No.533 of 2011 by following the aforesaid referred to judgment of the Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd. 320 ITR 561 (SC) has held vide order dated 21.3.2011 as under:*

"4. It is not in dispute that the re-assessment proceedings were initiated by the AO on the basis of tax audit report filed by the assessee in Form No.3CD and on the basis of information

available in the Profit and Loss account. There was no reference to any new material by the AO which had come into his possession after the completion of original assessment under section 143(3) of the Act. It is also a matter of record that before initiating re-assessment proceedings by issuing notice under Section 148 of the Act, the AO had initiated proceedings under Section 154 of the Act for the same reasons and proceedings initiated under Section 154 were dropped by him after the issuance of notice under Section 148 and were thus pending on the date of initiation of the re-assessment proceedings. In these circumstances, the Tribunal while setting aside the reassessment proceedings relied upon the Full Bench Judgment of this Court in the case of Kelvinator of India Ltd. (supra) and quoted the following passage from the said judgment:

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5. *Various other judgments are also referred to by the Tribunal in support of its aforesaid view.*

6. *In these circumstances, we do not find any substantial question of law that would arise for consideration in this appeal. The appeal is devoid of any merit and is accordingly dismissed.”*

23. *We therefore, by keeping in view the ratio laid down by the various Hon'ble Courts in the aforesaid referred to cases, are of the view that in the present case reopening u/s. 147 of the Act by the AO on the basis of change of opinion was not justified.*

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30. *In view of the aforesaid discussion, reopening u/s. **147 of the Act by issuing notice u/s. 148 was not justified because firstly, the AO nowhere mentioned in the reasons recorded that the income escaped assessment** and the view taken by the AO*

while framing the original assessment u/s. 143(3) of the Act vide order dated 30.12.2005 was in consonance with the view taken in the preceding as well as succeeding year. The said view in respect of dividend income and interest income which were treated as business income was in consonance with the view taken in the preceding as well as succeeding year wherein the assessment was also framed u/s. 143 (3) of the Act. Secondly, the reopening was made on the basis of objection of the audit party and no independent application of mind was there by the AO. Furthermore, the second limb of reasons recorded by the AO that no loss for the same assessment year was adjusted against the long term capital gains was contrary to the factual matrix. Therefore, considering the totality of the facts as discussed in the former part of this order and in view of the various judicial pronouncements mentioned hereinabove, we are of the considered view that the notice issued u/s. 148 of the Act for reopening the assessment u/s. 147 of the Act in the present case was not justified. In that view of the matter, the

reassessment framed by the AO on the basis of invalid notice is set aside.

31. *Since we have decided the legal issue relating to reopening u/s. 147 of the Act in favour of the assessee and reassessment order framed on the basis of notice under section 148 is set aside, no findings are given on the other grounds raised by the assessee on merits.”*

5. Having heard the learned counsel for Revenue, we are satisfied that no substantial question of law arises in the present case requiring our further consideration in the matter. Learned Tribunal has arrived at reasonable and sustainable findings based on relevant materials and after citing several judgments of other High Courts as well as Hon'ble Supreme Court discussing the grounds on which such re-assessment/reopening can be undertaken and when cannot be undertaken, on the basis of mere audit

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objection raised by the internal auditors of the Department.

6. In view of this, there is no merit in the present appeal filed by the Revenue. Hence, it is liable to be dismissed. Accordingly, the appeal is **dismissed**.

Copy of this order be sent to the Respondent-Assessee forthwith.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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