

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JM AND SHRI RAJESH KUMAR, AM**

आयकर अपील सं./I.T.A. No 1790/Mum/2013  
(निर्धारण वर्ष / Assessment Year: 2006-07)

Dy. Commissioner of Income Tax Circle 3(1), Room No.607, Aayakar Bhavan, Mumbai-400 020.	<b>बनाम/ Vs.</b>	M/s. Tata Steel International (India) Ltd., (Formerly known as Corus International India Pvt. Ltd.), 503-504, Raheja Chambers, 213, Backbay Reclamation, Nariman Point, Mumbai-400 021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCC 5436D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

C.O. No 104/Mum/2014  
(निर्धारण वर्ष / Assessment Year: 2006-07)

M/s. Tata Steel International (India) Ltd., (Formerly known as Corus International India Pvt. Ltd.), 503-504, Raheja Chambers, 213, Backbay Reclamation, Nariman Point, Mumbai-400 021.	<b>बनाम/ Vs.</b>	Dy. Commissioner of Income Tax Circle 3(1), Room No.607, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCC 5436D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri J. Saravanan
प्रत्यर्थी की ओर से/Respondent by	:	Shri Nishit Gandhi

<b>Date of Hearing</b>	:	15/12/2015
<b>Date of Pronouncement</b>	:	22/01/2016

आदेश / ORDER

PER RAJESH KUMAR, A. M.:

This appeal by the revenue is directed against the order dated 16/01/2013 of Commissioner of Income Tax (Appeals)-7, Mumbai (Hereinafter called as the CIT(A)) for assessment year 2006-07. The assessee has raised the following grounds of appeal:

1. *“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in annulling the reopening of assessment u/s 115WG of the I.T. Act without appreciating the fact that there was no change of opinion and the AO had the reason to believe that value of fringe benefits to the tune of Rs.2,66,000/- had escaped assessment resulting into short levy of tax.”*
  2. *“The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.”*
2. The only issue raised in the ground no.1 is against the annulling the reopening of assessment u/s 115WG of the IT Act on the ground of change of opinion by ignoring the reason to believe that value of fringe benefits of Rs.2,66,000/- had escaped assessment. The brief facts of the case are that the assessee company filed its return of Fringe Benefit Tax (FBT) on 22/11/2006 showing taxable value of the fringe benefit at Rs.14,10,695/-. The case of the assessee was selected under scrutiny and notice u/s 115WE(2) dated 12.10.2007 was issued and served upon the assessee. The ld. AO after carrying out due verification determined taxable value on fringe benefits at Rs. 14,10,695/- by

framing the assessment u/s 115WE(3) of the Act vide order dated 01.12.2008.

Later on the case was reopened and notices u/s 115WH of the IT Act was issued on

30.03.2011. The reasons recorded for reassessment are as under.

*“In this case, the assessment was completed u/s 115WE(3) on 01.12.2008, assessing the total value of Fringe Benefits at Rs.14,10,695/-*

*On perusal of the records, it is observed that the assessee has claimed deduction of Rs.2,66,000/- being contributions towards superannuation fund of employees. However, the FBT has not been paid on the said amount by the assessee. During assessment proceedings also, the Assessing Officer did not charge FBT on the said amount.*

*In this regard, it is pertinent to mention here that as per Sec.115wb(1)(c), ‘Fringe Benefits’ means any consideration for employment provided by way of any contribution by the employer to an approved superannuation fund for employees.*

*In view of the above, I have reason to believe that the Value of Fringe Benefits to the tune of Rs.2,66,000/- has escaped assessment, resulting into short levy of tax.*

*Therefore, the assessee’s case is hereby reopened for reassessment u/s 115WG of the I.T. Act, 1961 for A.Y.2006-07.”*

3. The AO rejected the submissions of the assessee which is incorporated at para 04 of the assessment order and the assessment was framed u/s 115WE(3) r.w.s. 115WG of the I.T. Act vide order dated 30.03.2011 by adding contribution towards superannuation fund of Rs.2,66,000/- thereby determining the value of fringe benefits at Rs.16,76,695/-.

4. The Id. CIT(A) allowed the appeal of the assessee by holding as under:

*4.4 Having considered the AO's order as well as the appellant AR's submission, I find that the reopening of the assessment by the AO was not correct on two fold, first that the information which was the basis of reopening of the assessment was already available on record. It is evident from the reasons recorded by the AO, that the AO took note of the facts for reopening of the assessment from the appellant's original return of income, which was filed. The said return of income was annexed with its balance sheet and tax audit report. Subsequent to that, even I find that the jurisdictional High Court in the case of Purity Techtexile Pvt. Ltd. Vs. ACIT reported in 325 ITR 459 has held that the reopening of the assessment based on the audit objection cannot be held to be justified. Secondly, I find that the fringe benefit tax on the said contribution towards superannuation fund has been paid by the appellant company in the A.Y. 2007-08 on actual payment and hence there are no encashment of fringe benefits which have escaped assessment. In addition to this, I also take note of the observation made by the jurisdictional High Court in Para-7 of its order of Writ Petition of 430/2012 referred as above which is extracted herein below:*

*“However as submissions were made on other issues also we are examining It is a settled position in law that where assessment sought to be reopened is before the expiry of four years from the end of the relevant assessment year, then in*

*such cases the power to reopen an assessment is very wide. However, even though such a power is very wide yet such a power would not justify a review of the assessment order already passed. The Supreme Court in the matter of the Commissioner of Income tax v. Kelvinator (India) Ltd., reported in 320 ITR Page 561 has observed that the power to reassess is conceptually different from a power to review. The Assessing Officer under the said Act has only power to reassess on fulfillment of certain precondition namely, he must have reason to believe that income has escaped assessment and that there must be tangible material to come to the conclusion that there is an escapement of income from assessment, The Apex Court cautioned that in the garb of reopening an assessment review should not take place. This court following the apex Court in the matter of Cartini India ltd. v. Addl. CIT reported in 314 ITR 275 has also held that even where assessment is ought to be done within four years from the end of the relevant assessment year, there must be reason to believe that income has escaped assessment and such reason to believe should not be on account of mere change of opinion. Therefore, where facts have been viewed during the original proceeding and an assessment order has been passed then in such cases, reopening of an assessment on the same facts without anything more would be a review and not permitted under the garb of reassessment. This would be a mere change of opinion in the absence of any tangible material and is not sufficient to assume jurisdiction to issue*

*the impugned notice. In fact, our court in the matter of Idea Cellular Ltd. v. Deputy Commissioner of Income tax reported in 301 ITR 407 has held that once all the material with regard to particular issue is before the assessing Officer and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him. Further, as observed by the full Bench of Delhi High Court in the matter of CIT v. Kelvinator of India Ltd. reported in 256 ITR 1, when the entire material is placed before the Assessing Officer at the time of original assessment and he passes an assessment order under section 143(3) of the Act a presumption can be raised that he applied his mind to all the facts involved in the assessment."*

*4.5. Taking note of all the facts available on record, I have no hesitation to hold that the reopening the assessment was completely incorrect and hence the reopening of the assessment by the AO is held to be bad in law. Accordingly, the reassessment order passed by AO is annulled. Hence, appellant's this ground of appeal is allowed.*

5. The Id. DR submitted before us that the assessment of fringe benefits was rightly reopened u/s 115WG of the I.T. Act as the contribution towards superannuation fund had escaped the assessment and prayed for setting aside the order of the CIT(A) and upholding the order of the AO. Per contra, the Id. AR

submitted before us that the Id. AO could not reopen already completed assessment merely on the ground of change of opinion. There must be 'reason to believe' that fringe benefit had escaped the assessment. The Id. Counsel further submitted that though powers conferred u/s. 115WG of the Act (which is pari materia to section 147 of the Act) which could not be exercised mechanically or arbitrarily.

6. The Id. Counsel further argued that at the time of original assessment the Id. AO after considering all the material on record and explanations/replies of the assessee came to final conclusion that contribution towards superannuation fund was not part of the value of fringe benefit and therefore on the same material the AO could not change his opinion to assume jurisdiction to reopen the assessment. Thus, it is clear that no new information/material had come into possession of the AO and therefore it was a case of change of opinion which was not permissible under the Act. It was also submitted before us that the assessee had duly disclosed all facts qua Contribution to Superannuation Fund in the Financial Statements – Schedule 9 - Notes to the Accounts – 5 – Managerial Remuneration, Tax Audit Report – Appendix IV. Specific query was also raised by the AO vide question no 10 of the FBT Annexure to furnish the details of contribution made during the year on behalf of all the employees towards superannuation fund and also ask to provide the details in respect of employees for whom contribution was made towards

approved superannuation fund which was replied vide letter dated 25-09-2008. The

ld. Counsel relied on the following decisions in support of the assessee's case:-

- (i) CIT vs. Kelvinator of India Limited (2010) 320 ITR 561 SC
- (ii) B. J. Services Company Middle East Ltd. and others vs. DDIT dated 20 August, 2011 (Uttarakhand High Court)
- (iii) Siemens Information System Ltd. vs. ACIT (2007) 295 ITR 333 (Bom)
- (iv) ACIT vs. Rajesh Jhaveri Stock Brokers P. Ltd (2007) 291 ITR 500 (SC)
- (v) Eveready Industries India Ltd. vs. JCIT [2000]-243 ITR 540 (Gau.)
- (vi) Bawa Abhai Singh vs. Dy. CIT [2002]-253 ITR 83 (Del.)

And ultimately, prayed for upholding the order of the first appellate authority which was perfect and as per law.

7. We have heard the rival submissions and perused the material on record. We find from the records, orders of authorities below that the issue of contribution to superannuation fund was duly considered by the AO at the time of framing the assessment u/s 115WE(3) of the Act by raising specific query which was replied vide letter dated 25-09-2008 which is reproduced as under:

*“In reply to the above notice filed on September 25, 2008, the Appellant had disclosed the details in relation to Superannuation Fund as under:*

<i>Point No</i>	<i>Provisions</i>	<i>Reply in relation to SAF</i>
<i>11</i>	<i>Section 43B</i>	<i>Amounts as on March 31,2006 - Rs.2,66,000/- Amounts paid before filing return – Rs.2,65,684/- Disallowance in Computation of Total Income – Rs.316/-</i>
<i>30</i>	<i>FBT</i>	<i>During the year under consideration, the company made a provision in the books towards the contribution to be made to the SAF for Rs.2,66,000/-. The said contribution/payment was made to the SAF during the following financial year i.e. 2006-07 and thence, the FBT on the same was paid in the financial year 2006-07. The details of contribution to be made to the SAF are enclosed at <b>Annexure II.</b></i>
<i>Annexure 11</i>	<i>List of employees</i>	<i>Details of Contribution to be made to the Superannuation Fund – Rs.2,65,583/-</i>

8. Thus, the AO has reopened already completed assessment qua fringe benefit on the basis of old material which was before him at the time of framing original assessment. We, therefore, of the considered view that such reopening based on the material which was considered by the AO at the time of passing the original assessment is bad in law and we, therefore, find no infirmity or see any reason to interfere in the order of the CIT(A) which is passed after following ratio laid down in the case of CIT vs. Kelvinator of India Limited (2010) 320 ITR 561 SC (supra) and various other orders as stated in para 4.3. In view of the above facts we do not

find any merit in the case of the revenue and therefore the appeal of the revenue is dismissed. The AO is directed accordingly.

9. In view of our decision in ITA No. 1790/Mum/2013 dismissing the appeal of the revenue, the C.O. filed by the assessee in C.O. 104/Mum/2014 has become infructuous.

In the result, the revenue's appeal is dismissed.

*Order pronounced in the open court on 22<sup>nd</sup> January, 2016*

Sd/-  
(Saktijit Dey)

न्यायिक सदस्य / Judicial Member

Sd/-  
(Rajesh Kumar)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :22.01.2016

Ps. Ashwini Gajakosh

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**