

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member and
Shri S.S. Vishwanethra Ravi, Judicial Member**

**I.T.A. No. 476 /KOL/ 2013
Assessment Year: 2005-2006**

**Deputy Commissioner of Income Tax,.....Appellant
Circle-2, Kolkata, Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700 069**

-Vs.-

**M/s. West Bengal Fisheries Corporation Limited,.....Respondent
31, G.N. Block, Sector-V, Salt Lake, Kolkata-700 091
[PAN: AAACW 4382 N]**

&

**C.O. No. 44/KOL/2013
(arising out of ITA No. 476/KOL/2013)
Assessment Year : 2005-2006**

**M/s. West Bengal Fisheries Corporation Limited,.....Cross Objector
31, G.N. Block, Sector-V, Salt Lake,
Kolkata-700 091
[PAN: AAACW 4382 N]**

-Vs.-

**Deputy Commissioner of Income Tax,.....Respondent
Circle-2, Kolkata, Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700 069**

Appearances by:

Shri Girish Sharma, FCA, for the assessee

Shri Sallong Yaden, Addl. CIT, D.R., for the Department

Date of concluding the hearing : July 11, 2016

Date of pronouncing the order : September 7th, 2016

O R D E R

Per Shri P.M. Jagtap, A.M.:

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-I, Kolkata dated 27.12.2012 for the assessment year 2005-06 and the same is being disposed of along with the Cross Objection filed by the assessee being C.O. No. 44/KOL/2013.

2. The assessee in the present case is a Company, which is engaged in the business of Fisheries Project Development. The return of income for

the year under consideration was filed by it on 30.10.2015 declaring total income at 'nil'. In the assessment originally completed under section 143(3) vide an order dated 31.12.2007, the income of the assessee for the year under consideration was determined by the Assessing officer at Rs.77,41,629/- and the same was adjusted entirely against the brought forward business loss of the earlier years. Thereafter the assessment was reopened by the Assessing Officer after recording the reasons and in the assessment completed under section 143(3)/147, the income of the assessee was determined by him at Rs.3,70,35,472/- after making disallowance on account of depreciation on the assets, which had remained in work-in-progress. In the said reassessment, even the brought forward loss of the earlier years was recomputed by the Assessing Officer at Rs.28,45,142/- and after setting off the same, the total income of the assessee was determined by him at Rs.2,88,90,330/-.

3. Against the order passed by the Assessing Officer under section 143(3)/147, an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the validity of the said assessment as well as disputing the action of the Assessing Officer in disallowing its claim for depreciation on the assets that had remained in work-in-progress and recomputing the brought forward loss of the earlier years at a lower figure. After considering the submissions made by the assessee and perusing the relevant material available on record, the Id. CIT(Appeals) did not find merit in the preliminary issue raised by the assessee challenging the validity of the assessment made by the Assessing Officer under section 143(3)/147 and upholding the validity of the same, he decided the preliminary issue against the assessee. The Id. CIT(Appeals), however, found merit in the case of the assessee on the issue relating to its claim for depreciation on the assets, which had remained in work-in-progress and accordingly directed the Assessing Officer to allow full depreciation on the said assets. As regards the issue relating to the determination of

the brought forward losses of the earlier years, the Id. CIT(Appeals) directed the Assessing Officer to verify the working furnished by the assessee from the relevant record and allow the claim of the assessee for set off of the said loss accordingly. Aggrieved by the order of the Id. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal, while the assessee has also filed Cross objection raising a preliminary issue relating to the validity of the assessment made by the Assessing Officer under section 143(3)/147 on the following grounds:-

Grounds in Revenue's appeal:

- (1) *Whether on the facts and in the circumstances of the case, the Id. CIT(A)-I, Kolkata has erred in directing the Assessing Officer to verify and allow the set off of accumulated brought forward loss for the AY 2004-05, although the same duly considered by the AO in the assessment order?*
- (2) *Whether on the facts and the circumstances of the case, the Id. CIT(A)-1, Kolkata has erred in directing the AO to allow full depreciation on the assets which were remain in work-in-progress?*
- (3) *Whether on the facts and the circumstances of the case, the Id. CIT(A)-1, Kolkata has erred in directing the AO to allow arrear depreciation of Rs.2,81,57,369/- although the same was duly debited to the P/L account of F.Y. 2004-05 and not allowable as per I.T. Act?*

Grounds in Cross Objection

"The Id. CIT(Appeals) should have held that the reassessment being on account of change of opinion on the same set of facts on which the original assessment order was made, is devoid of initial and inherent jurisdiction and is a nullity, liable to be struck down on that score".

4. Since the cross objection filed by the assessee raises a preliminary issue relating to the validity of assessment made by the Assessing Officer under section 143(3)/147, the same is being considered and decided first.

5. Apropos this issue, the ld. counsel for the assessee contended that the original assessment for the year under consideration was completed by the Assessing Officer in the case of the assessee under section 143(3) of the Act after verifying all the relevant records including the books of account of the assessee and in the absence of any new information or material coming to the possession of the Assessing Officer, the reopening of assessment on the basis of same records was based on a mere change of opinion, which is not permissible in law. In support of this contention, he relied on the decision of the Hon'ble Supreme Court in the case of CIT -vs.- Kelvinator of India Limited reported in 320 ITR 561 as well as the decision of the Hon'ble Calcutta High Court in the case of Manmohan Kedia -vs.- ITO reported in 344 ITR 187.

6. The ld. D.R., on the other hand, strongly relied on the impugned order of the ld. CIT(Appeals) in support of the revenue's case on this issue and contended that the assessment having been reopened by the Assessing Officer on the new issues, which had not been specifically decided in the assessment originally completed under section 143(3) as evident from the reasons recorded by him, the reopening was in accordance with law.

7. We have considered the rival submissions and also perused the relevant material available on record. In order to appreciate the contention of the ld. counsel for the assessee on the preliminary issue raised in this case challenging the validity of reopening of assessment, it is relevant to refer to the reasons recorded by the Assessing Officer for reopening, which are extracted below:-

"1. During the year the assessee shown net profit to the tune of Rs.58,67,595/- in the P/L A/cs. It was assessed u/s. 143(3) at Rs.7741629/- after adjusting b/f business loss of Rs.2,88,71,747/- from previous year and a loss of Rs.2,11,30,118/- was allowed to be carried forward to next year.

2. On verification of assessment record It is seen that during the year the assessee company had book profit of Rs58,67,595/-. It had no brought forward depreciation loss, No tax was computed u/s 115JB on the book profit of Rs58,67,595/- though there was no b/f depreciation loss If is evident that the assessee company has deliberately avoided computing tax u/s 115JB on the books profit. Therefore, it resulted non levy of tax to the tune of Rs.6,11,892/-.

3. While framing assessment us 143(3) the accumulated b/f loss from previous year was considered to be of Rs.2,88,71,747/- to arrive at loss of Rs.2,11,30,118/- which was allowed to be carried forward to next year. It revealed from the earlier years records that a loss amounting to Rs.40,66,962/- was available instead of Rs.2,88,71,747/-. This resulted in underassessment to the tune of Rs.2,48,04,785/-.

4. As per auditors report capital work-in-progress of Rs. 37660671/- had been capitalized during the year by transferring Rs.30406568/- on account of Engineering Equipment and Rs.7254105/- in building account. The provision as been made in the accounts for arrear depreciation of earlier years and Prior period adjustment a/cs, have been debited by Rs.2,81,57,369/-. Provision for depreciation was not an allowable deduction,

Therefore, an excess depreciation of Rs.2,39.93,843/- was claimed as under:

Assets	Depn. allowable	Depn. allowed	Excess Depn. allowed
Building	7254105		
Engineering	30406568		
Equipment	-----		
	37660673	4163526	28157369
			23993843

Therefore, it is evident that the assessee company deliberately claimed excess depreciation to the tune of Rs.2,39,93,843/- in P&L a/c. resulting underassessment of income to the extent of Rs.2,39,93,843/-.

On the basis of facts narrated above, it has been found that the income of the assessee has escaped assessment for the A.Y. 2005-06 as mentioned above. These discrepancies are found after diligent scrutiny of the records and also the P&L, a/c, and balance-sheet for the A.Y.2005-06.

In view of Provision of section 147 read with explanation 1 and 2 of Sec.147, the assessee has failed to disclose truly and fully all material

facts for the AY 2005-06 Therefore, action u/s.147 read with Sec 148 is required to be taken for which permission u/s.151 is solicited”.

8. A perusal of the aforesaid reasons recorded by the Assessing Officer makes it abundantly clear that the assessment originally completed by him under section 143(3) was reopened by the Assessing Officer on the basis of the same records as was available before him while completing the original assessment under section 143(3) and there was no new tangible material that had come to his possession on the basis of which the assessment was reopened by him. At the time of hearing before us, the ld. D.R. has not disputed this position. The only contention raised by him is that the reopening of assessment by the Assessing Officer was based on altogether new issues, which had not been examined by the Assessing Officer during the course of original proceedings under section 143(3). However, as submitted by the ld. counsel for the assessee, the relevant records including the books of account of the assessee were duly examined by the Assessing Officer during the course of assessment proceedings and only after having satisfied with the same, the claim of the assessee was accepted by him in the assessment completed under section 143(3). The contention raised by the ld. D.R. in this regard, even otherwise runs contrary to the decision of the Hon'ble Calcutta High Court in the case of Debashis Moulik -vs.- ACIT reported in 370 ITR 660, wherein the assessment originally completed under section 143(3) was sought to be reopened by the Assessing Officer on the basis of new facts discovered from the assessment records and it was held by the Hon'ble Calcutta High Court that the assessment was reopened by the Assessing Officer merely on the basis of change of opinion, which was not permissible in law.

9. In the case of CIT -vs.- Kelvinator of India Limited (supra), cited by the ld. counsel for the assessee, it was held by the Hon'ble Supreme Court that after the amendment made w.e.f. 1st April, 1989, the Assessing

Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on a mere change of opinion. It was held that the concept of "change of opinion" must be treated as an in-built test to check the abuse of power and hence the Assessing Officer even after the amendments made in the relevant provisions from April 1, 1989 has the power to reopen an assessment provided there is tangible material to come to the conclusion that there was escapement of income from assessment. Applying the ratio laid down by the Hon'ble Supreme Court in the case of Kelvinator of India Limited (supra) and by the Hon'ble jurisdictional High Court in the case of Debashis Moulik -vs.- ACIT (supra), we hold that the reopening of assessment made by the Assessing Officer in the present case was bad in law as the same was based merely on the change of opinion and the assessment completed by him under section 143(3) read with section 147 in pursuance thereof is invalid and the same is liable to be cancelled. We order accordingly and allow the Cross Objection filed by the assessee.

10. Keeping in view the decision already rendered by us on the preliminary issue while disposing of the Cross Objection of the assessee holding that the assessment made by the Assessing Officer under section 143(3) read with section 147 is to be cancelled being bad in law, all the issues raised in the appeal of the Revenue relating to the additions/disallowances made in the said assessment have become infructuous. We, therefore, do not consider it necessary or expedient to adjudicate upon the same.

11. In the result, the appeal of the Revenue is dismissed, while the Cross Objection of the assessee is allowed.

Order pronounced in the open Court on September 7th, 2016.

Sd/-
(S.S. Vishwanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Accountant Member

Kolkata, the 7th day of September, 2016

Order Pronounced by

Sd/-	Sd/-
(J.M.)	(A.M.)
S.S.V.R.	W.A.

**Copies to : (1) Deputy Commissioner of Income Tax,
Circle-2, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069**

**(2) M/s. West Bengal Fisheries Corporation Limited,
31, G.N. Block, Sector-V, Salt Lake,
Kolkata-700 091**

(3) Commissioner of Income Tax (Appeals)-I, Kolkata;

(4) Commissioner of Income Tax- ,

(5) The Departmental Representative

(6) Guard File

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.