

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F", NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.2967/DEL/2013
Assessment Year:2004-05

DCIT Circle 14(1) New Delhi	v.	PSB Industrial (India) Pvt. Ltd. 207, 2 nd Floor, 87, Zamrudpur Greater Kailash Part I New Delhi
		TAN/PAN:AAACP0009M
(Appellant)		(Respondent)

Appellant by:	Shri Atiq Ahmad, D.R.		
Respondent by:	Shri S.D. Ray, Advocate		
Date of hearing:	02	11	2017
Date of pronouncement:	09	11	2017

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Revenue against impugned order dated 28/2/2013, passed by the Id. CIT (Appeals)-XVII, New Delhi for the quantum of assessment passed u/s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 for assessment year 2004-05.

2. The brief facts *qua* the validity of reopening under section 148 as well as on merits, are that the original assessment proceedings were completed under section 147/143(3) on 29/9/2009 at a total income of Rs.53,01,662/- which included addition made on account of ALV of the rented property as well as disallowance under section 14A.

3. Now after expiry of four years at the end of the relevant assessment year, assessee's case has again sought to be reopened on the following "reasons":-

'The return of income was filed on 29.03.2006 showing loss which was processed on 06.12.2006 at the loss of Rs.5,60,840/-. Later on the assessment in the case was completed u/s 147/143(3) of the I. T. Act, 1961 at the total income of Rs. 53,01,662/- on 29.09.2009.

On perusal of record and notes No, 4 to accounts forming part of balance sheet for the period ending 31.03.2004. it is noticed that company, has not earned out any, manufacturing and trading activities during the previous year and has claimed, the expenses amounting to Rs.12,06,777/- in the P & L A/c. Since the assessee has not carried out any business or profession in the year under consideration, the expenses of Rs.12,06,777/- has wrongly been claimed. The Assessing Officer has not examined this issue while completing the assessment and has disallowed the expenses of Rs.6,10,487/- u/s 14A instead of the disallowance of whole expenses claimed by the assessee. Thus, the income to the extent of Rs.5,96,290/- (Rs.12,06,777 - Rs.6,10,487 already disallowed by the AO u/s 14A) has escaped assessment.

On perusal of the record, it has also been noticed that the assessee company has entered into a lease rent agreement with Bank of Punjab Ltd. in connection with its property measuring 10682.83 sq. mts. of Khasra No. 258 & 261 situated at Manesar Road, Gurgaon at rent of Rs.1,00,000/- per year for 25 years. It is further noticed that the assessee company has taken 67 crores interest free deposit from M/s Bank of Punjab Ltd. as security against the above said property. The lessee company has deposited a lump sum amount of Rs.67 crores on which deemed interest amount is

taken in lieu of rent as well as it paid a token amount of Rs. 1 lakh as rent to the assessee company. It is substantiated from the fact that the amount of Rs.67 crores is to be returned to the lessee at the completion of lease period of 25 years without any interest.

The assessee had declared ALV of Rs.1 lakh, which was far below the market rent prevalent at that time. Though, the assessee had been very well compensated by way of interest free huge deposit of Rs.67 crores for 25 years. The assessee failed to include the market value of this huge benefit of interest free deposit which at the normal prevalent rate of 10% per annum worth Rs.6.70 crores per annum. Knowing fully well the legal provisions and the extent of benefit in the form of interest free deposit, yet the assessee chose to declare the market value of its rent at a meager Rs.1 lakh per annum. Even the assessee's own valuer on reference has valued the market value of rent at Rs.75,63,360/- per annum as on 01.04.2005. This huge difference is not the result of any honest difference of opinion about market rent, but the result of a well thought of plan to defraud the revenue by evading the due taxes by consciously reporting an artificially low ALV of a highly valuable property. The Assessing Officer has completed the assessment adopting the ALV Rs. 75.63.360/- per annum without examining the benefit from interest free deposit of Rs.67 crores for 25 years. In fact, the assessee company received excess rent that might reasonably be expected to let from year to year, hence, u/s 23(b) of the I. T. Act, 1961, annual letting value is Rs.6.70 crores instead of Rs. 75,63,360/-.

In view of the above, I have reasons to believe that an income to the tune of Rs.6,00,32,930/- [(5,96,290) + (6,70,00,000 - has escaped assessment in the A.Y. 2004-05. In view of the facts mentioned in para 2 and 4, I am

satisfied that on account of failure on the part of the assessee to disclose truly and fully all the material facts necessary for assessment for the above assessment year, the income chargeable to tax to the tune of Rs.6,00,32,930/- on account of wrong claim of expenses has escaped assessment within the meaning of proviso to section 147 of the I. T. Act, 1961.”

4. So far as first ground taken in the ‘reasons recorded’, it is seen that the Assessing Officer is trying to find out a fault on the part of the Assessing Office that while making disallowance under section 14A, he has not examined the claim of expenses debited to the profit & loss account without appreciating that in the original assessment order, Assessing Officer has applied rule 8D for making disallowance for indirect expenditures. There is no failure ascribed on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Similarly, on the second issue relating to ALV of the property, here again the Assessing Officer in the original assessment order has completed assessment by adopting ALV at Rs.75,63,360/- wherein he has also taken note of interest free deposits of Rs.67 crores. The Assessing Officer now in the “reasons recorded” without ascribing any failure on the part of the assessee, is trying to reopen the case on the ground that this interest free deposit should also be included while determining the market value of the property which, in our opinion, is not correct; *firstly*, for the reason that the Hon'ble jurisdictional High Court in the case of **CIT vs. Moni Kumar Subba** reported in **[2011] 333 ITR 38 (Delhi) Full Bench**, categorically held that notional interest on interest free security deposit cannot be taken as determinative factor to arrive

at the fair rent/lettable value; and *secondly*, once this issue has been examined by the Assessing Officer, then without ascribing any failure on the part of the assessee, the Assessing Officer cannot reopen the case under section 147 in view of the embargo of limitation provided under the *proviso* to section 147.

5. The Id. CIT(A) has duly appreciated this fact in paras 3.1 to 3.6 of the appellate order which, for the sake of ready reference, is reproduced hereunder:-

“3.1. The original assessment was done u/s 143(3) read with 147 on 29.09.2009. The assessment was reopened again on 30.03.2011 and therefore proviso to section 147 is applicable and the same is as follows:

“Provided that where an assessment under sub-section (1) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section(1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

3.2. The proviso makes it explicit that in a case where the assessment was done u/s 143(3) and in which four years have elapsed, the assessment can be reopened only if there is failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The reason for reopening mentioned by the AO superficially mentions this aspect but is not categorical enough to specify the actual failure of the appellant to disclose fully and truly

all material facts necessary for the assessment. Perusal of the reasons recorded above indicates that the present AO is of the view that there was failure on part of the AO who framed the earlier assessment order dated 29.09.2009. There is mention in the reasons recorded that the earlier assessment was completed without examining the aspect of interest free deposit received by the appellant of Rs.67 crores for 25 years. There is also mention that in the earlier assessment order, the AO had not considered that the company had not carried out any manufacturing and trading activity during the year and therefore no expense is to be allowed under business expenses. Therefore, this appears to be a clear case of 'change of opinion'. In this connection, it is pertinent to mention the relevant portion of the original reassessment order dated 29.09.2009 which is as follows:

“3. Assessee had originally shown ALV of property as Rs.1 lakh. However, it has shown ALV of Rs.65,76,835/- in the return filed in compliance to notice u/s 148 of the Act. Assessee was asked to furnish valuation report in respect of annual rental value of the property. Assessee filed Valuation Report of Govt. Approved Valuer on 29.09.2009. As per this Valuation Report ALV of the property was worked out at Rs.76,02,877/-. Thus, there is huge deference in rental value shown by the assessee in its original return, in its return filed in compliance to notice u/s 148 and the one determined by the approved valuer. This issue was discussed with the counsel of the assessee. The ALV shown by the assessee in original return was enhanced by the assessee itself in the return filed by it in compliance to notice u/s 148 of the Act. This was again determined at a different figure by Govt. Approved Valuer. Assessee has not given any basis for showing two different ALVs in the two return whereas the Approved Valuer has determined ALV giving, proper basis for doing, so. Thus, ALV as determined by the Approved

Valuer is being adopted for the computation of assessee's income from house property. ALV of the property as per the Valuation Report of the Govt. Approved Valuer obtained and filed by the assessee itself is Rs.76,02,877/-, which is as the correct ALV of the property instead of Rs. 65,76,835/- as disclosed by the assessee in the return filed in compliance to notice u/s 148 of the Act. Assessee itself has filed a revised computation of its income on 29.09.2009 in which it has shown of the property at Rs.76,02,877/-. Accordingly, income from house property by taking ALV of Rs.76,02,877/- of the property situated at Khandsa Road, Gurgaon.

4. A perusai of assessee's balance sheet reveals that assessee has made investment of Rs.11,46,10,480/- in such assets income from which does not or shall not form part of total income. Assessee has dividend income of Rs.3,91,380/- which is exempt income. The assessee has not attributed any expenditure relating to this exempt income. Investment decisions are important and complicated decisions. These decisions are generally taken at the highest level management. Management of such investments i.e. when to sale and when to buy or when to retain the investment are strategically decided. These investments and income have to be property accounted for. As assessee could not have managed so much investment without the help of its official machinery and expertise of its management, certain part of expenses should have been incurred on these services but assessee, has not disallowed any expenditure relating to income not forming part of total income or exempt income. In view of this situation, I am not satisfied that assessee's claim that no expenditure was incurred in relation to such income is correct. In this regard, assessee was asked to explain why certain part of expenses may not be

disallowed as per provision of section 14A of the Act, read with Rule 8D of the I. T. Rules, 1962. In this regard, assessee agreed that the disallowance of expenses in relation to income not forming part of total income is computed as under:

<i>1. Direct expenses</i>	<i>NIL</i>
<i>2. Interest not attributable to any</i>	<i>NIL</i>
<i>Specific receipt or income</i>	
<i>3. 0.5% of average investment (12,20,97,470*0.5% Rs.6,10,487/-</i>	
<i>Total</i>	<i>Rs.6,10,487/-</i>

5. Thus, a disallowance of Rs.6,10,487/- is made u/s 14A of the Act in respect of expenses relating to income not forming part of total income and added to the assessee's total income."

3.3. It is clear from the above assessment order that the AO had earlier examined the aspect of annual value and the case was reopened by him based on the information received from ITO, Ward 14(4) that in the A. Y. 2006-07 the annual value was determined at Rs.75,63,360/- based on the valuation report of Registered Valuer. With regard to the expenses the AO had disallowed part of the expense u/s 14A of the I. T. Act, 1961. Therefore, the AO in this case is actually reviewing the order of his predecessor though such powers as per the Income Tax Act is only given to the concerned commissioner to pass orders of revision u/s 263/264 of the I. T. Act, 1961. The ground raised by the appellant that the 147 proceedings were initiated on the basis of 'mere change of opinion' is valid. In this connection, it is pertinent to refer to the Hon'ble Supreme Court's decision in the case of M/s Kelvinator of India Ltd. reported in 320 ITR 561. The head note of the above decision is as follows:

“The concept of "change of opinion" on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income-tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989. After the amendment, 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 mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of power. Hence after April 1, 1989, the Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief.”

3.4. *Therefore, it is necessary to look whether there is any tangible material available with the AO while reopening this case. Though in the assessment order the AO mentions the decision of the Hon'ble Punjab & Haryana High Court in the case of M/s K Streetlight Electric Corporation (336 ITR 348), there is no mention of this case law in the reasons recorded by the AO for reopening the earlier assessment order. There is mention in the assessment order that spot enquiries were carried out but the date mentioned is 26.12.2011 which is subsequent to the second reopening and just before the completion of the assessment on 29.12.2011. I have also verified the assessment records and there is no evidence in it of any tangible material available with the AO for reopening this assessment. The only conclusion which can be drawn from the above is that this reopening is only a mere 'change of opinion' and based on the Hon'ble Supreme Court's decision in the case of M/s Kelvinator of India Ltd. such reopening is not permissible.*

3.5. *Even the decision of the Hon'ble Punjab & Haryana High Court in the case of M/s K Streetlight Electric Corporation cannot be applied as the jurisdictional High Court has held in the case of Commissioner of Income-tax v. Moni Kumar Subba & Commissioner of Income-tax v. Miracle Exporters P. Ltd. (333 ITR 38) that notional interest on interest free security is not to be considered for computing annual value. The relevant portion of the above decision is as follows:*

“In the present case, the Assessing Officer added notional interest on the interest free security for arriving at annual letting value. Since that was not permissible, the effect would be that such assessment was rightly set aside by the Commissioner of Income-tax (Appeals) and the Tribunal. Therefore, the orders would not call for any interference. These appeals are, thus, dismissed on this ground. Once we hold this, the very basis adopted by the Assessing Officer to fix annual letting value was wrong and therefore, no further exercise in fact is required by us in these appeals. ”

3.6. *The provisions of section 23(1) clearly states that the annual value of the house property is deemed to be the sum for which the property might reasonably be expected to let from year to year. In the original assessment the AO has calculated the annual value based on the valuation report of the registered valuer. The present reassessment is based on spot enquiries made on 26.12.2011, but the same were not put to the appellant for rebuttal as the assessment was completed on 29.12.2011. In the earlier assessment order, the AO had considered the issue and fixed the annual value while the present AO had fixed annual value based on*

enquiries conducted after six years from the end of the relevant assessment year. The annual value calculated in the original assessment order may be on the lower side but reopening can be done only if tangible material is available in the hands of the AO. In this case, there is no tangible material for reopening and it is only a mere change of opinion. Therefore based on the Hon'ble Supreme Court's decision in the case of M/s Kelvinator of India Ltd. (320 ITR 561) the appellant succeeds in these grounds No. 1 to 13."

6. Such a finding of the Id. CIT (A) is not only correct in facts, but is also in accordance with the provisions of law. Therefore, we do not find any reason to deviate from such a finding and accordingly, the grounds raised by the Revenue are dismissed.

7. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 9th November, 2017.

Sd/-
[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 9th November, 2017

JJ:0611

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