



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA Nos 47 & 48/CTK/2014

Assessment Years : 2007-08 & 2008-2009

Indian Metals & Ferro Alloys Ltd., IMFA Building, Bomikhal, Rasulgarh, Bhubaneswar.	Vs.	ACIT, Circle 2(1), Bhubaneswar.
PAN/GIR No. AAACI 4818 F		
(Appellant)	..	(Respondent)

ITA Nos.73 & 74/CTK/2014

Assessment Years : 2007-08 & 2008-2009

ACIT, Circle 2(1), Bhubaneswar.	Vs.	Indian Metals & Ferro Alloys Ltd., IMFA Building, Bomikhal, Rasulgarh, Bhubaneswar
PAN/GIR No. .AAACI 4818 F		
(Appellant)	..	(Respondent)

Assessee by : Shri Sachit Jolly, AR
Revenue by : Shri Kunal Singh, CIT DR

Date of Hearing : 09/10/ 2017
Date of Pronouncement : 25 /10/ 2017

ORDER

Per N.S.Saini, AM

These are cross appeals filed by the assessee and the revenue against the common order of the CIT(A)- -II, Bhubaneswar dated 12.12.2013 for the assessment years 2007-08 & 2008-09.



2. Grounds of appeal taken by the assessee in assessment year 2007-

08 are as under:

"1. That on facts and circumstances of the case and in law, the Commissioner of Income tax (Appeals) ["CIT(A)"] erred in confirming the action of the assessing officer ('AO') in initiating reassessment proceedings under Section 147 of the Income Tax Act, 1961 (**'the Act'**) on mere change of opinion and without there being any valid reason to believe that the income has escaped assessment.

1 .1 That on facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the re-assessment proceedings had been initiated on a change of opinion as the original assessment had been completed under Section 143(3) of the Act after detailed scrutiny and no tangible material had come to the knowledge of the AO thereafter justifying initiation of proceeding under Section 147/148 of the Act.

1.2 That on facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that in the original assessment completed under section 143(3) of the Act, the AO had disallowed certain payments made to non-resident recipients under section 40(a)(i) after detailed scrutiny and, therefore, reassessment proceedings could not have been initiated in respect of a similar issue without any fresh tangible material coming to the knowledge of AO.

1.3 That on facts and circumstances of the case and in law. the CIT(A) erred in confirming the action of the AO in initiating reassessment proceedings under section 147 of the Act on the issue of disallowance under section 40(a)(i) of the Act without appreciating that the AO failed to point out how payments made to various non-resident parties were chargeable to tax in India on which tax was deductible under section 195(1) of the Act.

1.4 That on facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the reassessment proceedings had been initiated by the AO on an erroneous assumption that all payments to non-resident are subject to withholding taxes under section 195 of the Act and. therefore, income had escapement assessment for failure to withhold tax u/s 195(1) r/w 40(a)(i), which is in complete disregard of the decision of Supreme Court in the case of GE India Technology Centre (P) Ltd. v. CIT: 327ITR456.



2. That on facts and circumstances of the case, the CIT(A) having deleted the disallowances made by the AO under section 40(a)(i) of the Act in respect of certain payments made to non-resident recipients which had formed the reasons for initiating reassessment proceedings, erred in confirming the action of the AO in disallowing expenditure of Rs.2,74,44,513/- under section 40(a)(i) of the Act in respect of selling expense commission, without appreciating that the said item of income did not form part of the reasons recorded by the AO for initiating reassessment proceedings under section 147/148 of the Act.

3. Without prejudice, that on facts and circumstances of the case and in law the CIT(A) erred in confirming the action of the AO in disallowing deduction of Rs.2,74,44,513/- under section 40(a)(i) of the Act without appreciating that the said sum was paid to nonresident service providers towards selling commission and, therefore, not chargeable to tax India, and thus the appellant was not required to deduct tax at source on such amount."

3. Grounds of appeal taken by the assessee in assessment year 2008-09 are as under:

"1. That on facts and circumstances of the case and in law, the Commissioner of Income tax (Appeals) ["CIT(A)"] erred in confirming the action of the assessing officer ('AO') in initiating reassessment proceedings under Section 147 of the Income Tax Act, 1961 (**'the Act'**) on mere change of opinion and without there being any valid reason to believe that the income has escaped assessment.

1.1 That on facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the re-assessment proceedings had been initiated on a change of opinion as the original assessment had been completed under Section 143(3) of the Act after detailed scrutiny and no tangible material had come to the knowledge of the AO thereafter justifying initiation of proceeding under Section 147/148 of the Act.

1.2 That on facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in initiating reassessment proceedings under section 147 of the Act on the



issue of disallowance u/s.40(a)(i) of the Act without appreciating that the AO failed to point out how payments made to various non-resident parties were chargeable to tax in India on which tax was deductible under section 195(1) of the Act.

1.3 That on facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the reassessment proceedings had been initiated by the AO on an erroneous assumption that all payments to non-resident are subject to withholding taxes under section 195 of the Act and, therefore, income had escapement assessment for failure to withhold tax u/s 195(1) r/w 40(a)(i), which is in complete disregard of the decision of Supreme Court in the case of GE India Technology Centre (P) Ltd. v. CIT: 327ITR456.

2. 2. That on facts and circumstances of the case, the CIT(A) erred in confirming the action of the AO in disallowing expenditure of Rs.7,24,69,241 /-under section 40(a)(i) of the Act in respect of selling expense commission, without appreciating that the said sum was paid to non-resident service providers towards selling commission and, therefore, not chargeable to tax India, and thus the appellant was not required to deduct tax at source on such amount.

3. That on facts and circumstances of the case and in law the CIT(A) erred in confirming the action of the AO in disallowing deduction of Rs.4,06,77,109/- under section 40(a)(i) of the Act without appreciating that the said sum was paid towards Vendor Managed Inventory (VMI) Charges for discharging cargos from ocean vessels, transportation to and storing of cargos from VMI yard near POSCO works in Pohang, Korea and transportation from VMI yard to POSCO Steel works bay in Pohang. It includes charges towards weighing, sampling, size determination of cargos, inspection of stowage condition of cargos, etc. and, therefore, not chargeable to tax India, and thus the appellant was not required to deduct tax at source on such amount.

4. That the CIT(A) erred on facts and in law in confirming the action of the AO in disallowing deduction of Rs.8,72,14,918/- by invoking section 43B of the Act, without appreciating that the said sum represented deposit of electricity duty in a designated non-lien bank account as per the directions of the Hon'ble Odisha High Court.



4.1 That in holding as aforesaid, the CIT(A) erred on facts and in law in not appreciating that the liability having crystalized and discharged by the appellant. Section 43B of the Act could not have been invoked."

4. The brief facts of the case are that original assessment u/s.143(3) of the Act was completed on 29.12.2010 for the assessment years 2007-08 and 2008-09. The Assessing Officer thereafter recorded the following reasons for reopening of assessment for assessment year 2007-08 as under:

"Later on it is noticed that an amount of Rs.7697.44 lakh has been paid in foreign currency for import expenditure and charged to P&L account for the year ending 31.3.2007 on which no tax was deducted u/s.195(1) of the I.T.Act, thus not to be eligible for deduction in computing the income chargeable under the head "Profits and Gains of Business or profession" u/s.40(a)(ia) of the I.T.Act, 1961. Since the income of the assessee has escaped assessment to the tune of Rs.76.77,44,000/- the case of the assessee for the assessment year 2007-08 is reopened u/s.147 of the I.T.Act, 1961."

5. For the assessment year 2008-09, the Assessing Officer has also recorded following reasons for reopening the assessment:

"Later on it is noticed that

(1) The assessee company has debited Rs. 15,33,71,000/- towards electricity Duty in the P&L Account, but has paid to the Government account and "no lien account" in the ratio 6:14(i.e. 6 parts to the government account of Rs. 4,60,11,000/- and 14 parts to the "no lien' account of Rs. 10,73,59,000/-). Since the assessee had disputed the rate at which electricity duty was demanded by the Government of Orissa before the Hon'ble Orissa High Court, a sum of Rs. 10,73,59,000 was deposited in a designated non lien bank account on the direction of electricity duty debited to the P&L account. As per the provisions of section 43B, the amount would be allowed



as a deduction only when the actual payment is made, notwithstanding the method of accounting followed by the assessee. The deposited made in the no-lien account cannot be regarded as payment of electricity duty to the Govt, of Orissa. Therefore, the amount of Rs. 1073,59,000/- deposited in the no lien account calls for disallowance u/s 43B of the I.T Act, 1961 and added back in total income.

- (2) The amount of Rs. 14789.03 lakh paid towards foreign currency for import and charged to the P& L account for the year ending 31.03.2008 on which no tax was deducted u/s 195(1) would be eligible for deduction in computing the income chargeable under the head " Profit and Gain of Business of profession under section 40(a)(ia) of the I.T Act, 1961. The amount was required to added back to the total income of the assessee company,

As the income of the assessee has escaped assessment by Rs. 1,58,62,62,000-/(Rs. 10,73,59,000/- + Rs. 1,47,89,03,000/-)-the case of the assessee is reopened u/s 147 of the I.T Act ,1961"

6. The Assessing Officer thereafter issued notice u/s.148(2) of the Act on 6.3.2012 for the assessment year 2007-08 and on 5.3.2012 for the assessment year 2008-09 for reopening the assessment.

7. It is the submission of Id A.R. of the assessee that the assessee had imported raw materials worth Rs.6999.60 lakhs, components and spare parts of Rs.697.84 Lakhs from foreign suppliers both aggregating to Rs. 7697.44 lakhs. The said payments were duly disclosed in the audited statement of accounts for the year ended 31`.3.2007 under the head "other additional information". It is further contended that deduction under Section 37 of the Income tax Act is claimed by the assessee only with respect to raw material and components utilized during the relevant



previous year and even though the sum of Rs.7697.44 lakhs which appears in the balance sheet of the assessee is not necessarily claimed as deduction. Depending on the requirement, the raw material and spare parts are utilized and the balance is taken to inventory, which is valued at cost or market value, whichever is lower. Hence, the Assessing Officer erred in alleging that income of Rs.7697.44 has escaped assessment, without appreciating that the aforesaid figure does not form part of the profit and loss account of the assessee for the relevant previous year.

8. Further, it is submitted that remittance made to a non-resident will not necessarily suffer deduction of tax at source under Section 195 of the Income tax Act and failure to withhold will render the payment non-deductible under Section 40(a)(i) of the Act is contrary to the decision of the Hon'ble Supreme Court of India in the case of GE India Technology Centre (P) Ltd. v. CIT: 327 ITR 456 (SC), wherein over-ruling the decision of the Hon'ble Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd.: 320 ITR 209 (Kar), it has been held by the Hon'ble Supreme Court that the provisions of section 195 of the Act are attracted only if the payments made to the non-resident recipient are chargeable to tax in India and hence subject to deduction of tax. The Assessing Officer having failed to demonstrate how the payments to non-resident were chargeable to tax in India, could not have formed the belief that income has escaped assessment.

9. It is further argued that the reassessment proceedings are initiated on a mere change of opinion. It is submitted that the Assessing Officer



issued notice u/s.142(1) of the Act, wherein, various details, documents and information and books of account were called for. Vide notice dated 18.9.2009 at Point No.7, the assessee was required to submit hard copy of annual TDS return filed for financial year 2006-07 together with details of deductees. Further vide Point No.19 to the said notice, the assessee was required to submit details item-wise and party-wise of Energy Transmission Charges of Rs.777.82 lakhs alongwith amount of TDS deducted and paid on the same, conversion fees of Rs.2784.34 lakhs alongwith amount of TDS deducted and paid on the same, Quarrying, raising & other expenses of Rs.2421.30 lakhs alongwith the amount of TDS deducted and paid on the same, and other factory expenses of Rs.541.87 lakhs and export promotion expenses (foreign travelling of Directors) of Rs.99.02 lakhs alongwith tour itinerary of all the Directors, countries visited, period of visit, business meetings held with documentary evidences and export orders obtained as a result of such visits and other selling expenses of Rs.613.00 lakhs. It was therefore, contended that all the materials facts/information which were necessary for framing the assessment were disclosed including the details of import expenditure in foreign currency as per Schedule -O of the audited accounts for financial year 2006-07, therefore, it cannot be said that no opinion was formed by the Assessing Officer during the original assessment proceedings. The original assessment order was passed u/s.143(3) of the Act and the Assessing Officer has disallowed deduction for payments made to non-residents parties amounting to



Rs.78,76,01,837/- u/s. 40(a)(i) of the Act for alleged non-deduction of tax at source.

10. It was further submitted that no new material had come to the knowledge of the Assessing Officer after framing of assessment u/s.143(3) of the Act on 25.3.2013 for assessment year 2007-08, which may afford 'reason to believe' which may afford 'reason to believe' that income of the appellant had escaped assessment. It is clearly evident from the reasons recorded that no new tangible information/material came to the knowledge of the assessing officer subsequent to the conclusion of the original assessment. The reasons recorded by the assessing officer do not even indicate or allege that any fresh information came to the knowledge of the assessing officer warranting exercise of jurisdiction under section 147/148 of the Act.

11. He relied on the decision of Full Bench of the Hon'ble Delhi High Court in the case of **CIT v. Usha International Ltd. 348 ITR 485 (Del)**, wherein, the Hon'ble High Court has held as under:

39. In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the first round/ original proceedings may have examined the subject matter, claim etc, because the aspect or question may be too apparent and obvious. To hold that the assessing officer in the first round did not examine the question or subject matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several



aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment proceedings itself may indicate that the Assessing Officer must have applied his mind on the entry, claim or deduction etc. It may be apparent and obvious to hold that the Assessing Officer would not have gone into the said question or applied his mind. However, this would depend upon the facts and circumstances of each case."

12. It was further submitted that the aforesaid decision of the Hon'ble Delhi High Court was also in line with the decision of the Hon'ble apex Court in **CIT v. Kelvinator of India Ltd.: 320 ITR 561(SC)**. The relevant observations of the apex Court are as under:

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and 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 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. **Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, 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. We 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 reassess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening 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 1st April, 1989, 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. Reasons must have a live link with the formation of the belief."

13. It was further argued that in the present case, the Assessing Officer having examined the issue of disallowance under Section 40(a)(i) in respect of some of the payments to non-residents and also having made a disallowance on that issue, it is presumed that he applied his mind to the material on record and formed an opinion. Therefore, in the absence of any fresh material, the reappraisal of same material to initiate reassessment proceedings tantamounts to change of opinion and hence bad in law.

14. Similarly, it was submitted that in assessment year, **vide** notice dated 25.1.2010, the assessee was required to submit copy of e-return, Copy of audited balance sheet and profit and loss account, tax audit report, copy of original TDS certificate. Again, vide notice dated 22.7.2010, the assessee was required to submit details of commission paid during the year and TDS details thereof, which were filed by the assessee on 11.2.2010. The details of travelling and conveyance, commission under the head "other selling expenses" were filed by the assessee vide letter dated 27.10.2010 & 18.11.2010 respectively. It was further submitted that in respect of the issue of disallowance under Section 43B of the Act, the assessee made adequate disclosure in Schedule I & N at point No. 4 of the annual accounts. The same was also disclosed in director's report forming part of the financial statement.



Therefore, it was the contention that it is clear that apart from reappraisal of the same material i.e. audited accounts and directors report, no fresh material came to the knowledge of the Assessing Officer for initiating reassessment proceedings even in assessment year 2008-09. Further, the Assessing Officer having applied his mind to the same material in the original assessment proceedings, the reassessment proceedings for the Assessment Year 2008-09 also tantamounts to change of opinion and hence, bad in law.

15. We have heard the rival submissions, perused the materials available on record and orders of lower authorities. We find from the copy of recorded reasons for reopening of assessment by issuance of notice u/s.148 of the Act for the assessment year 2007-08, the Assessing Officer has noted as under:

"Later on it is noticed that an amount of Rs.7697.44 lakh has been paid in foreign currency for import expenditure and charged to P&L account for the year ending 31.3.2007 on which no tax was deducted u/s.195(1) of the I.T.Act, thus not to be eligible for deduction in computing the income chargeable under the head "Profits and Gains of Business or profession" u/s.40(a)(ia) of the I.T.Act, 1961. Since the income of the assessee has escaped assessment to the tune of Rs.76.77,44,000/- the case of the assessee for the assessment year 2007-08 is reopened u/s.147 of the I.T.Act, 1961."

16. For the assessment year 2008-09, the Assessing Officer has also recorded following reasons for reopening the assessment:

"Later on it is noticed that



- (1) The assessee company has debited Rs. 15,33,71,000/- towards electricity Duty in the P&L Account, but has paid to the Government account and "no lien account" in the ratio 6:14(i.e. 6 parts to the government account of Rs. 4,60,11,000/- and 14 parts to the "no lien' account of Rs. 10,73,59,000/-). Since the assessee had disputed the rate at which electricity duty was demanded by the Government of Orissa before the Hon'ble Orissa High Court, a sum of Rs. 10,73,59,000 was deposited in a designated non lien bank account on the direction of electricity duty debited to the P&L account. As per the provisions of section 43B, the amount would be allowed as a deduction only when the actual payment is made, notwithstanding the method of accounting followed by the assessee. The deposited made in the no-lien account cannot be regarded as payment of electricity duty to the Govt, of Orissa. Therefore, the amount of Rs. 1073,59,000/- deposited in the no lien account calls for disallowance u/s 43B of the I.T Act, 1961 and added back in total income.
- (2) The amount of Rs. 14789.03 lakh paid towards foreign currency for import and charged to the P& L account for the year ending 31.03.2008 on which no tax was deducted u/s 195(1) would be eligible for deduction in computing the income chargeable under the head " Profit and Gain of Business of profession under section 40(a)(ia) of the I.T Act, 1961. The amount was required to added back to the total income of the assessee company,

As the income of the assessee has escaped assessment by Rs. 1,58,62,62,000-/(Rs. 10,73,59,000/- + Rs. 1,47,89,03,000/-)-the case of the assessee is reopened u/s 147 of the I.T Act ,1961"

17. A perusal of the recorded reasons shows that nowhere it records any fresh tangible information, which came to the notice of the Assessing Officer after completion of assessment under section 143(3) on 30.12.2009 for the assessment year 2007-08 and on 29.12.2010 for the assessment year 2008-09 and before recording of aforesaid reasons. Rather, the recorded reasons show that the reasons have been recorded



based on very same materials which were already available before the Assessing Office prior to completion of assessment u/s.143(3) on 30.12.2009 for the assessment year 2007-08 and on 29.12.2010 for the assessment year 2008-09. It shows that on the basis of very same materials, the Assessing Officer has now formed a different opinion. In our considered view, the above action of the Assessing Officer cannot be sustained. In this connection, it is noticed that the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC) has held that the concept of "change of opinion" must be treated as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. In this context, the observations of Hon'ble apex Court at page 564 are very relevant, which are reproduced as follows:

"Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, 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. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to re-assess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening 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 1st April, 1989, 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. Reasons must have a live link with the formation of the belief. "

18. The opinion of the CIT(A) is that simply because the Assessing Officer later on formed a belief that provisions of section 195(1), (2) & (3) are attracted in respect of a transaction on the basis of the very same materials, which were available before the Assessing Officer at the time of making original assessment will empower the Assessing Officer to reopen the assessment even in absence of fresh tangible material. In our considered view, it is contrary to the above stated decision of Hon'ble Supreme Court in the case of Kelvinator of India Limited (supra).

20. Therefore, we set aside the reassessment orders dated 30.12.2009 for the assessment year 2007-08 and on 29.12.2010 for the assessment year 2008-09 and allow the appeals of the assessee.

21. In view of the fact that we have set aside the reassessment orders for the assessment years 2007-08 and 2008-09, the other grounds of appeal of the assessee on merits of the additions have become infructuous and hence not adjudicated upon,

22. In view of our setting aside the reassessment orders for the assessment years 2007-08 and 2008-09 in assessee's appeals, the appeals filed by the revenue are dismissed.



23. In the result, the appeals of the assessee are allowed and the appeals of the revenue are dismissed.

Order pronounced in the open court on 25 /10/2017.

Sd/-

sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 25 /10/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : /Assessee: Indian Metals & Ferro Alloys Ltd., IMFA Building, Bomikhal, Rasulgarh. Bhubaneswar.
2. The Respondent. /Revenue: ACIT, Circle 2(1), Bhubaneswar.
3. The CIT(A)- II, Bhubaneswar
4. Pr.CIT- II, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack