

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “A” BENCH

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER)**

**ITA. No: 955/AHD/2015
(Assessment Year: 2006-07)**

M/s. Kalathia Engineering & Construction Ltd. Kalthia House, 193, Satyagrah Chhavni, Opp. Iscon Mall, S.G. Highway, Ahmedabad	V/S	Dy. Commissioner of Income tax, (OSD)-1, Circle-4, Ahmedabad
(Appellant)		(Respondent)

PAN: AAACK8944N

**Appellant by : Shri M.J. Shah, AR
Respondent by : Shri Keyur Patel, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 07 -02-2018
Date of Pronouncement : 14 -02-2018

PER N.K. BILLAIYA, ACCOUNTANT MEMBER

1. This appeal by the Assessee is preferred against the order of the Ld. CIT(A)-2, Ahmedabad dated 12.02.2015 pertaining to A.Y. 2006-07.

2. The substantive grievance of the assessee read as under:-
1. *The learned C.I.T.(Appeals) has erred in law in holding that the reopening of assessment was valid. Your appellant submits that all details were available on record and no new information was brought on record by learned Assessing Officer. Under the circumstances, the reopening of assessment is bad in law, and therefore, it is submitted that it be so held now and reopening of assessment be cancelled denovo.*
 2. *The learned C.I.T.(Appeals) has erred in rejecting the claim of additional depreciation of Rs.21,81,367/- on new plant and machinery purchased during the year. It is submitted that additional depreciation be allowed u/s.32 of the I.T. Act as claimed, and therefore, reopening of assessment be cancelled now.*
3. Representatives of both sides were heard at length. Case records carefully perused and with the assistance of the ld. counsel, we have considered the relevant documentary evidences brought on record in the form of a paper book in the light of Rule 18(6) of the ITAT Rules.
4. The original return of income was filed on 30.12.006 and the assessment was framed u/s. 143(3) of the Act vide order dated 27.06.2008 by which the assessee was assessed at Rs. 13784470/- on a returned income of Rs. 12400750/-. The completed assessment was reopened and the reasons recorded for reopening the assessment read as under:-

*Regarding : M/s. Kalthia Engineering & Construction Ltd.
Plot No.6, Aditya Bungalows,
Opp. SAL Hospital,
Drive in Road,
Thaltej, Ahmedabad.*

*Asst. year : 2006-07
PAN : : AAACK8944N*

Reasons recorded u/s. 148(2) of the I.T. Act

In this case, the assessee Company engaged in the business of Construction of Roads, Canals etc. had filed its return of income on 30.12.2006 declaring total income of 1,24,00,750/-. Assessment in this case was finalised under section 143(3) of the Act on 27.06.2008 and the income of the assessee was assessed at Rs.1,37,84,470/-.

2. On perusal of case records, it is noticed that during the previous year relevant to A.Y.2006-07, the assessee had claimed total depreciation of Rs.58,78,445/- including depreciation of Rs.57,07,177/- on plant and machinery including new plant & machinery acquired during the previous year. As the assessee is not manufacturing or producing any article or thing, additional depreciation of Rs.21,87,367/- claimed by the assessee is not allowable. The detail of the excess depreciation claimed by the assessee is given below.

WDV	Addition between 01.04.05 and 30.09.05	Sale	Total	Addition between 01.10.05 to 31.03.06	Admissible Depreciation on Sl.No.4	Depreciation on Admissible on Sr.No.5	Total admissible Depreciation
1	2	3	4	5	6	7	8
12779945	4354497	725530	16408912	14192971	2461337 @ 15%	1084473 @ 7.5%	3525810
Depreciation claimed by the assessee					3223407	2483770	5707177
Excess depreciation claimed by the assessee					762070	1419297	2181367

3. In view of the above facts, I have reasons to believe that the assessee has claimed excess depreciation to the tune of Rs.21,81,367/- which has escaped assessment to that extent for the assessment year 2Q06-07 and is required to be reassessed as there was a failure on the part of the assessee to disclose fully and truly all material facts.

Case records are enclosed herewith.

Yours faithfully,
Sd/-
(SUDHENDU DAS)
Deputy Commissioner of Income Tax (OSD)-I,
Circle-4, Ahmedabad

5. The Id. counsel vehemently stated that all the necessary details were filed during the original assessment proceedings and the A.O. has completed the scrutiny assessment after verifying the details furnished. Therefore, reopening the completed assessment after 4 years is bad in law. In support of his contention,

the ld. counsel drew our attention to the notice u/s. 142(1) of the Act (exhibit 89 & 90 of the paper book) and pointed out that the A.O. had asked for the details of additions made to fixed assets along with the copies of bills/vouchers and details of all the deletions made to fixed assets. It is the say of the ld. counsel that to this specific query, the assessee vide reply dated 16.04.2008 (exhibited at pages 94 to 96 of the paper book) has furnished the requisite details. The ld. counsel further stated that after verifying all the necessary details, the assessment was framed u/s. 143(3) of the Act vide order dated 27.06.2008 and the depreciation as per Income Tax Act was allowed.

6. It is true that the assessee has furnished full particulars in respect of the claim of depreciation and the details were verified by the A.O. before framing the assessment u/s. 143(3) of the Act.

7. Section 147 of the Act read as under:-

[Income escaping assessment.

If the Assessing Officer has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) 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 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 under section 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.

8. Strong reliance has been placed on the proviso mentioned hereinabove. A perusal of the afore-stated proviso shows that the A.O. cannot take action under this section after the expiry of 4 years from the end of the relevant assessment year. Unless, the assessee has not disclosed fully and truly all material facts necessary for his assessments for that assessment year. The proviso says “ to disclose fully and truly” the words fully and truly are two limbs and have to be read jointly. The assessee may have disclosed fully all material facts but whether these facts are true have to be considered on the facts of the case in hand.
9. Exhibit at page No. 40 is the statement of depreciation as per Income Tax Rules and the same is as under::

Kalthia Engineering & construction Ltd.

Annexure- 1 TO Form 3CD

Statement of Depreciation as per Income-tax Rules/Act

Sr. No.	Assets	WDV as on 01.04.05	Additon		Deductio n during the year	Total Balance as on 31.03.2006	Depreciation						WDV as on 31.03.2006
			On or Before Sept./ 05	On or After Sept. 05			Normal	Additional Rate	Before Sept.05	Additional Rate	After Sept. 05	Total	
1	Block-1-5% - -- Buildin g	196.015	--	--	--	196.015	9,801	-	-	-	-	9,801	186,214
2	Block-II-10%- -- Furnit ure & Fixture	286,327	217,343	79,216	-	582,886	54,328	-	-	-	-	54,328	528,558
3	Block-	12,779,9	4,354,	14,192	725,530	30,601,883	3,416,9	20%	870,899	10.00%	1,419	5,707,1	24,894,70

	III- 15%--- Mahin eries	45	497	,971			80				,297	77	7
4	Block- IV- 60%--- Comp uters	27,105	71,460	160,00 1	-	258.566	107,139	-	-	--	-	107,139	151,427
Total		13,289,3 92	4,643, 300	14,432 ,188	725,530	31,639,350	3,588,2 48		870,899		1,419 ,297	5,878,4 45	25,760,90 6

10. It can be seen from the aforementioned chart the assessee has claimed additional depreciation on the block of machineries. Section 32 (ia) provides for additional depreciation and the same read as under:-

[(ia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing [or in the business of generation, transmission or distribution] of power], a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause(ii):

11. A perusal of the afore-stated provision shows that the additional depreciation is allowable only when the assessee is engaged in the business of manufacture or production of any article or thing or is in the business of generation transmission or distribution of power. The undisputed fact is that the assessee is engaged in the business of construction of road, canals etc. Therefore, by any stretch of imagination, it cannot be said that the assessee is entitled for the claim of additional depreciation. The assessee may have disclosed full material facts but certainly the facts were not true as per the provisions of the law mentioned hereinabove. As mentioned elsewhere, there are two limbs in the first proviso to Section 147 which are “fully and truly”, and the assessee has to satisfy twin conditions namely (i) there is a full disclosure and (ii) the disclosure is true. At this point, we would like to refer to the provisions of Section 263 of

the Act wherein powers have been given to the Commissioner for revising the assessment order, if the same is found to be erroneous and prejudicial to the interests of the revenue. It is a settled proposition of law that the Commissioner has to be satisfied of twin conditions namely (i) the order of the Assessing Officer is erroneous and (ii) it is prejudicial to the interests of the revenue. If one of them is absent recourse cannot be had to Section 263 of the Act. This proposition has been laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. 243 ITR 83. By the same analogy, the twin conditions of the proviso to Section 147 have to be satisfied by the assessee and if one of them (as the case in hand) is not satisfied the assessment should give way to the re-assessment proceedings.

12. In the original assessment proceedings, the A.O. in his wisdom may have allowed the claim of depreciation but then to mitigate such revenue leakages the legislature has provided for the reopening of the assessment. No doubt the legislature has provided for precaution in the misuse of power for reopening the assessment by providing checks and balances but it cannot be construed that false claims or unlawful claims by the assessee can go away if the reopening in such cases (as the case in hand) is quashed.
13. In our understanding of the facts of the case in hand in the light of the relevant provisions of the Act as discussed hereinabove, it cannot be said that the assessee has disclosed truly all material facts. The claim of additional depreciation was illegal and the A.O. has rightly reopened the assessment to withdraw the additional depreciation of Rs. 21,81,367/-.

14. The assessee has placed strong reliance on three judgments of the Hon'ble Jurisdictional High Court of Gujarat namely:
- (i) Niko Resources Ltd. 229 Taxmann.com86
 - (ii) Siddhi Vinayak Transport 216 Taxmann.com 211
 - (iii) Alfa ICA (India) Ltd. 217 Taxmann.com 129.
15. In the first judgment, the Hon'ble Gujarat High Court has laid down the ratio that the onus is on the assessee to reveal the primary facts and to draw the inferential facts would be the responsibility of the Assessing Officer. Once having revealed from the record that the assessee disclosed full and complete facts and on scrutiny, at the time of original assessment all these details are examined, no change of opinion is permissible. As we have already pointed out that the assessee had not disclosed the true facts relating to its claim of additional depreciation. Knowing fully well that he is engaged in the business of construction of roads, canals etc and definitely not eligible for the claim of additional depreciation. The facts of the case in hand are clearly distinguishable.
16. In the second judgment, the Hon'ble High Court had the occasion to consider the reopening of the assessment on the facts that the assessee had made certain payments without deducting tax at source and subsequently the assessment was reopened to re-examine the said issue on premise that entire expenditure had to be disallowed. Once again the facts are clearly distinguishable on the facts of the case in hand inasmuch as in the present case, the assessee has willfully and intentionally claimed additional depreciation for which he was never entitled for.

17. The third judgment would also do no good to the assessee because in that case the dispute related to the claim for carry forward of unabsorbed depreciation and it was held that there was no failure on part of assessee to disclose truly and fully all material facts. The re-examination of the claim of additional depreciation was held to be bad in law because the A.O. wanted to reexamine the claim of carry forward of unabsorbed depreciation. However, in the present case, the claim itself is illegal and unlawful and therefore it has to be disallowed by reopening the assessment, there is no question of re-examining the claim of additional depreciation because on the face of it, it is bad in law.
18. The Hon'ble High Court of Delhi in the case of Honda Siel Power products Ltd. 340 ITR 53 has held that "material particular" referred to in first proviso to section 147 not only refers to details in return but also to explanations and details furnished during course of assessment proceedings. Therefore, merely because material lies embedded in material or evidence, which Assessing Officer could have uncovered but did not uncover, is not a good ground to deny or strike down a notice for reassessment. It was further held that expression "failure to fully and truly disclosed material facts" also relates to stage of assessment proceedings.
19. In the case in hand, the assessee has not truly disclosed the fact that he is not eligible for the claim of additional depreciation yet he is claiming additional depreciation for which he was never entitled for.
20. Considering the facts of the case in hand, we have no hesitation to hold that the re-assessment of the completed assessment is valid and lawful and deserves to be upheld. Ground no. 1 is dismissed.

21. Ground no. 2 relates to the claim of additional depreciation. As mentioned elsewhere, the assessee is not engaged in the eligible business for the claim of additional depreciation. Nor the ld. counsel seriously contested this ground of this appeal, the same is accordingly dismissed.

Order pronounced in Open Court on 14 - 02- 2018

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER True Copy

Ahmedabad: Dated 14/02/2018

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad