आयकर अपील य अ धकरण, ''ए'' यायपीठ, चे नई

IN THE INCOME-TAX APPELLATE TRIBUNAL 'A' BENCH, CHENNAI

ी ए. मोहन अलंकामणी, लेखा सद य एवं ी धु वु आर.एल रे डी, याि यक सद य के सम

Before Shri A. Mohan Alankamony, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./**I.T.A.No.1262/Mds/2016**

नधार ण वष/**Assessment Year:2009-10**

M/s. Indira Industries, No. 6, SIPCOT Industrial Complex, Ranipet 632 403, Tamil Nadu.	Vs.	The Assistant Commissioner of Income Tax, Circle 1, Vellore.

[PAN: AAAFI2440N]

(**Appellant**)		(R**espondent**)
अपीलाथ क ओर से / Appellant by	:	Shri G. Seetharaman, C.A.
यथ क ओर से/Respondent by	:	Shri AR.V. Sreenivasan, JCIT
सुनवाई क तार ख/ Date of hearing	:	28.12.2017
घोषणा क तार ख /Date of Pronouncement	:	18.01.2018

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the ld. Commissioner of Income Tax (Appeals) 13, Chennai dated 29.02.2016 relevant to the assessment year 2009-10. Besides challenging reopening of assessment, the assessee also contested disallowance of interest income claimed to be qualified for exemption under section 10B of the Income Tax Act, 1961 [ñActòin short].

2. Brief facts of the case are that the assessee is engaged in the business of manufacturing of industrial noise control equipments. The assessee filed its return of income on 30.09.2009 admitting an income of ضي1,40,15,768/-. The return filed by the assessee was processed under section 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued on 14.08.2010 and duly served on the assessee. After examining the details filed by the assessee, the assessment under section 143(3) of the Act was completed on 14.12.2011. In the computation, the assessee has shown net income at ضي27,90,44,721/- and claimed deduction in toto under section 10B of the Act. The Assessing Officer noticed from the profit and loss account that the interest earned on fixed deposits of ضي42,98,709/- was credited to profit and loss account and the said interest income was claimed as exemption under section 10B of the Act. Since the interest income earned by the assessee on fixed deposits, which does not qualify for deduction under section 10B of the Act, the Assessing Officer believed that the said interest income escaped assessment, which is to be taxed under the head ñincome from other sourcesò Accordingly, by recording the reasons for escapement of income under section 147 of the Act, the Assessing Officer issued notice under section 148 of the Act on 05.09.2012 and served on the assessee. Notice under section 142(1) of the Act was also issued on 22.01.2014. Since there was no response from assesseeôs side, an exparte proposal under

section 144 of the Act was given on 06.02.2014 against which the AR of the assessee filed a letter on 13.02.2014 stating that the return of income already furnished on 30.09.2009 may be treated as the return in response to the notice under section 148 of the Act dated 05.09.2012. Thereafter, notice under section 143(2) of the Act dated 13.02.2014 was issued and served. In response to the notice, the AR of the assessee filed a letter on 26.02.2014 & 17.03.2014 stating that the impugned interest was earned on accounts kept with the bank for obtaining the Foreign Bank Guarantee for the 100% export-oriented unit of the firm. But for this, the firm could have exported its goods and earned revenue. It was also submitted that the fixed deposits were not made out of surplus funds available with the assessee. Since the deposits are inextricably connected with the export activity, the same should be treated as profits derived by the EOU from the export of articles or things. However, the Assessing Officer has not accepted the submissions of the assessee and by rejecting the claim of deduction under section 10B of the Act, the interest income was brought to tax under the head ó*income from other sources*ô

3. The assessee carried the matter in appeal before the ld. CIT(A) and challenged assessment made under section 143(3) r.w.s. 147 of the Act as well as disallowance of interest income claimed under section 10B of the Act.

3.1 With regard to reopening of assessment, after considering the submissions of the assessee, the ld. CIT(A) confirmed the assessment order passed under section 143(3) r.w.s. 147 of the Act.

3.2 On being aggrieved, the assessee is in appeal before the Tribunal and the ld. Counsel for the assessee has vehemently contended that reopening of assessment under section 147 of the Act is bad in law since the assessment order passed under section 143(3) of the Act was reopened merely based on change of opinion and the Assessing Officer has no new tangible material to reopen the assessment under section 147 of the Act. The assessee furnished true and complete particulars of income in the original return of income filed on 30.09.2009 and thus, the ld. Counsel for the assessee prayed that the reassessment order passed under section 143(3) r.w.s. 147 of the Act should be quashed. On the other hand, the ld. DR strongly supported the orders of authorities below.

3.3 We have heard both sides, perused the materials available on record and gone through the orders of authorities below. In this case, admittedly, the assessee has furnish true and complete particulars of income during the course of original assessment proceedings, and after verification of details furnished by the assessee, the assessment was completed under section 143(3) of the Act. Subsequently, the Assessing Officer noticed that the interest income earned by the assessee on fixed deposits does not qualify

for deduction under section 10B of the Act, he believed that the said interest income escaped assessment, which is to be taxed under the head ñincome from other sourcesò Accordingly, by recording the reasons for escapement of income under section 147 of the Act, the Assessing Officer issued notice under section 148 of the Act for reopening of assessment within the time prescribed in the Income Tax Act.

3.4 In the case of *Kalyanji Mavji & Co. v. CIT* [1976] 102 ITR 287 (SC), after exhaustively examining the issue, the Hon'ble Supreme Court, rendered its judgment in the context of section 34(1)(b) of the 1922 Act, which is *pari materia* with the extant provision (section 147) are as under:

> *"Section 34(1)(b) would apply to the following categories of cases:*
>
> *(1) where the information is as to the true and correct state of the law derived from relevant judicial decisions;*
>
> *(2) where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income Tax Officer;*
>
> *(3) where the information is derived from an external source of any kind: such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment; and*
>
> *(4) where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record or the facts disclosed thereby or from other enquiry or research into facts or law.*
>
> *Where, however, the Income Tax Officer gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, section 34(1)(b) would have no application."*

Subsequently, doubts were expressed with regard to proposition (2) afore-stated by the Hon'ble Court by its larger Bench in *Indian & Eastern Newspaper Society v. CIT* [1979] 119 ITR 996 (SC) in-as-much as the same also allowed reassessment in case of change of opinion, which, clearly, could not be as the Assessing Officer has no power to review his order. The Apex Court, per its larger bench decision in *A.L.A. Firm v. CIT* [1991] 189 ITR 285 (SC), again reviewed the matter and clarified that the proposition (2) in *Kalyanji Mavji & Co's* case (supra) was indeed widely expressed, as it would also include cases in which the Income Tax Officer, having considered *all the facts and law*, arrived at a particular conclusion, yet initiates proceedings on a reappraisal of the same material which had been considered earlier and in light of the same legal aspects to which his attention had been drawn earlier, and comes to a conclusion that an item of income, which he had consciously left out from the earlier assessment should have been brought to tax. In other words, the proposition (2) is to be read with caveat that it does not allow a change of opinion, i.e., a reappraisal of the same material/aspect of the matter in the absence of a change in law (pg. 298). In the present case, we find that admittedly, there has been a failure on the part of the Assessing Officer to consider the computation of income filed by the assessee during the course of original assessment. But, the same cannot, by itself, stop him from considering the same to form a reason to believe an escapement of income. Reference in this context is

also drawn to *Explanation 1* to section 147 of the Act, which clarifies that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by him will not amount to disclosure within the meaning of the provision. We clarify that this as, without doubt, the interest income shown in the computation of income, sought to be brought to tax in the reassessment proceedings, was available with the Assessing Officer at the time of the original assessment, though has not been considered by him, at least in its relevant part. The issue of consideration of an aspect of the matter and formation of opinion in its respect, it may be appreciated, is essentially a matter of fact, the law only barring a change of opinion. Where, therefore, there is a live and clear nexus between the said information and the reasons to believe escapement of income, formed on that basis, the assumption of jurisdiction to reassess cannot be called into question as was sought to be canvassed before us. Thus, we hold that the entire reassessment in this case is valid and therefore, the reopening of assessment is upheld. Thus, the ground raised by the assessee is dismissed.

4. With regard to the disallowance of interest income, it was the submission of the ld. Counsel for the assessee that since the assessee is in the business of industrial fabrication where the contract of executions runs into several months, the assessee was required to give bank (performance)

guarantees in favour of its customers once the sale is made by the assessee to cover warranties. It was further submitted that the assessee was sanctioned a Bank Guarantee facility of ضي9 crores and as per the terms and conditions of the sanction of the State Bank of India, the assessee is required to maintain (i) 25% margin on the outstanding bank guarantees upto ضي9 crores, (ii) 100% margin for guarantees in excess of ضي9 crores. Against the margin monies kept with the Bank, the assessee has earned an interest income of ضي42,98,710/-. The assessee, being a 100% EOU unit included the aforesaid interest income as a part of the õprofits of the undertakingò and included the same for the deduction under section 10B of the Act. The ld. Counsel vehemently argued that the interest received on margin money deposited with the Bank is incidental to the business and, as such, must be considered as eligible for exemption under section 10B of the Act. He further submits that the interest is not earned on account of any surplus or idle funds kept with the bank as deposit, but is pertaining to the deposit retained by the bank, while providing guarantee and prayed that the assessee should be allowed to claim deduction under section 10B of the Act.

5. Per contra, the ld. DR strongly supported the orders of authorities below and submitted that independent income derived by the assessee cannot be said to be derived from the manufacture or production of articles or things by the eligible industrial undertaking. In this connection ld. DR

relied upon the decision of Hon'ble Madras High Court in the case of CIT v. Menon Impex (P.) Ltd. 259 ITR 403(Mad).

6. We have heard both sides, perused the materials available on record and gone through the orders of authorities below. The interest earned on fixed deposits of ضي42,98,709/- was credited to the profit and loss account and claimed exemption under section 10B of the Act. This being an interest income earned on fixed deposits, which does not qualify for deduction under section 10B of the Act, the Assessing Officer brought the same to tax. The ld. CIT(A) sustained the disallowance made by the Assessing Officer. After considering the submissions of the ld. Counsel for the assessee, we are of the considered opinion that the above issue is squarely covered against the assessee by the decision in the case of CIT v. Menon Impex (P.) Ltd. (supra), wherein the Hon'ble Jurisdictional High Court has held as under:

> *"Section 10A of the Act provides that the profits and gains derived by an assessee from an industrial undertaking to which that section applies shall not be included in the total income of the assessee. The Supreme Court in the case of Cambay Electric Supply Industrial Co. Ltd. v. CIT [1978] 113 ITR 84 has held that the words "derived from" are narrower in scope than the words "attributable to".*
>
> *In the case of CIT v. Sterling Foods [1999] 237 ITR 579, the Supreme Court observed that: "the word 'derive' is usually followed by the word 'from' and it means: 'get, to trace from a source; arise from, originate in, show the origin or formation of'". It was pointed out that unless the source of the income is from an industrial undertaking, such income cannot be regarded as "derived from" industrial undertaking. It was held that the income derived from sale of import entitlements could only be said to be the export promotion scheme and not the industrial undertaking. It was also observed by the court that where nexus between profits and gains and the industrial undertaking*

was not direct, but incidental, such income could not have been regarded as having been derived from industrial undertaking.

In this case the interest received by the assessee was on deposits made by it in the banks. It is that deposit which is the source of income. The mere fact that the deposit made was for the purpose of obtaining letters of credit which letters of credit were in turn used for the purpose of the business of the industrial undertaking does not establish a direct nexus between the interest and the industrial undertaking."

In the circumstances, respectfully following the decision of the Hon'ble jurisdictional High Court, referred to supra, the ground raised by the assessee stands dismissed.

7. As was raised before the ld. CIT(A), the assessee also raised another plea that the interest expenditure on loans borrowed to make deposits be allowed as deduction against the interest income.

8. We have examined the issue. There is no dispute with reference to assessee earning interest income but adjusting against interest expenditure. The issue of having direct nexus with the borrowings has not been examined by the Assessing Officer at all. In case the assessee has utilised the borrowed funds for earning the interest income to that extent, the interest has to be given set off to the interest paid on the borrowed funds. It was the contentions of the assessee that the interest is not earned on account of any surplus or idle funds kept with the bank as deposit, but is pertaining to the deposit retained by the bank, which was originally borrowed for the purpose of 10B unit. This aspect requires examination by the Assessing Officer and

in case there is direct nexus with the earning of interest income with that of the borrowals, then, only net interest can be brought to tax or adjusted in the 10B unit. Therefore, we restore the issue to the file of the Assessing Officer to examine the nexus aspect of the earning of interest income on borrowed funds, specifically borrowed for the purpose of 10B unit and decide the issue in accordance with law after allowing an opportunity of being heard to the assessee. The assessee is free to raise the contentions as raised before us and the Assessing Officer is directed to examine the facts and law before deciding the issue. Accordingly, this ground of appeal is allowed for statistical purposes.

9. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on the 18th January, 2018 at Chennai.

Sd/-	Sd/-
(A.MOHAN ALANKAMONY)	(DUVVURU RL REDDY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 18.01.2018
Vm/-

आदेश क□ □□ितिलप अ□ेषत/Copy to: 1. अपीलाथ□/Appellant, 2.□□यथ□/ Respondent, 3. आयकर आयु□त (अपील)/CIT(A), 4. आयकर आयु□त/CIT, 5. □वभागीय □□ितिनध/DR & 6. गाड□फाईल/GF.