



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

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

ITA No.311/CTK/2016
Assessment Year : 2009-2010

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

ITA No. 341/CTK/2016
Assessment Year : 2009-2010

DCIT,Corporate Circle 1(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 Saad Kidwai, CIT DR

Date of Hearing : 24/04/ 2018
Date of Pronouncement : 25 /04/ 2018

ORDER

Per N.S.Saini, AM

These are cross appeals filed by the assessee and the revenue against the order of the CIT(A)- -1, Bhubaneswar dated 13.6.2016 for the assessment year 2009-2010.



2. The assessee has challenged the reopening of assessment by taking the following grounds:

"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.

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing & sale of Ferro Alloys like charge chrome/high carbon ferro chrome and ferro silicon. The original assessment u/s.143(3) of the Act was completed on 31.12.2011 at a total income of Rs.246,97,30,469/-. This was revised u/s.154/251 of the Act at Rs.212,65,80,804/- while giving effect order of the CIT(A). Thereafter, the Assessing officer issued notice u/s.148(2) of the Act on 19.2.2014 for reopening of the assessment for the following reasons:

"Further verification of assessment records, it is revealed that as per the information available in the record that the assessee company has incurred and debited an expenditure of Rs.20,057 lakhs towards import expenditure, Rs.93.26 lakhs towards legal consultancy and commission on which no tax was deducted u/s.195(1) would not be eligible for deduction under the head



“profit and gains of business or profession u/s.40(a)(ia) of the I.T.Act, 1961.

Besides the above on verification of assessment record, it has been revealed that the closing stock of chrome ore was 251,977 MT in compliance to the query raised by the AO, that the assessee has submitted the particulars in which the closing balance of chrome ore at 1,83,304 MT. Apparently there was a suppression of closing stock by 68,673 MT”

4. The assessee unsuccessfully contested the reopening of assessment before the CIT(A), who dismissed the grounds of appeal of the assessee for the reason that in the scrutiny assessment completed, applicability of section 195 of the Act on payments made in foreign currency on certain imports and other expenditures and consequential disallowance u/s.40(a)(i) were not considered. The CIT(A) observed that in his opinion, the assessment was not reopened on mere change of opinion. According to him, only if on certain issues, the Assessing Officer has already taken a conscious decision and the same is evident from the assessment order, then initiation of proceedings u/s.147 on the same issue disagreeing with the conclusion of the Assessing Officer would tantamount to change of opinion and not otherwise.

5. Being aggrieved by this order, the assessee is in appeal before us.

6. Ld A.R. of the assessee vehemently argued and submitted that the reopening of assessment on the very same facts which were before the Assessing Officer at the time of assessment proceedings amounts to change of opinion and, therefore, the reopening is bad in law for which he supported his arguments by relying on the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC).



He also relied on the decision of this Bench of the Tribunal rendered in the case of the assessee itself in ITA Nos.47 & 48/CTK/2014 and ITA Nos.73 & 74/CTK/2014 for the assessment years 2007-08 and 2008-09 order dated 25.10.2017 and argued that on the very same set of facts, the Tribunal has cancelled the reassessment order passed u/s.147/143(3) of the Act. He urged that following the same, the assessment order for the year under appeal should also be cancelled.

7. On the other hand, Id D.R. relied on the order of the CIT(A).

8. 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 under appeal, the Assessing Officer has noted as under:

"Further verification of assessment records, it is revealed that as per the information available in the record that the assessee company has incurred and debited an expenditure of Rs.20,057 lakhs towards import expenditure, Rs.93.26 lakhs towards legal consultancy and commission on which no tax was deducted u/s.195(1) would not be eligible for deduction under the head "profit and gains of business or profession u/s.40(a)(ia) of the I.T.Act, 1961.

Besides the above on verification of assessment record, it has been revealed that the closing stock of chrome ore was 251,977 MT in compliance to the query raised by the AO, that the assessee has submitted the particulars in which the closing balance of chrome ore at 1,83,304 MT. Apparently there was a suppression of closing stock by 68,673 MT"

9. 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 31.12.2011 for the assessment year 2009-10 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 Officer prior to completion of assessment u/s.143(3) on 31.12.2011. 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. "

10. The opinion of the CIT(A) is that simply because the Assessing Officer later on formed a belief that in scrutiny assessment, the application of section 195 of the Act on the payments made in foreign currency on certain imports and other expenditure and consequential disallowance u/s.40(a)(i) were not considered and difference in closing stock of chrome ore, 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).

11. Therefore, we set aside the reassessment orders dated 13.3.2015 for the assessment year under appeal and allow the appeal of the assessee.

12. In view of the fact that we have set aside the reassessment order the other grounds of appeal of the assessee on merits of the additions have become infructuous and hence not adjudicated upon,

13. In view of our setting aside the reassessment order in assessee's appeal, the appeal filed by the revenue is dismissed.



14. In the result, the appeal of the assessee is allowed and the appeal of the revenue is dismissed.

Order pronounced in the open court on 25 /04/2018.

Sd/-

sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 25 /04/2018
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