IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'A', KOLKATA

[Before Shri P.M. Jagtap, AM & Shri S.S. Viswanethra Ravi, JM]

I.T.A. No. 1532/Kol/2015
Assessment Year 2003-04

Haldia Petrochemicals Ltd.....Appellant
Bengal Eco Intelligent Park (Techno)
Tower 1, Block EM, Plot-3,
Salt Lake City, Sec-V, 3rd Floor,
Kolkata – 700 091
[PAN: AAACH 7360 R]

ACIT, CIRCLE 8 Kolkata,.....Respondent
P-7, Chowringhee Square,
Aayakar Bhawan,
Kolkata - 700069

I.T.A. No. 167/Kol/2016
Assessment Year 2003-04

DCIT, CIRCLE 11(1) Kolkata.....Appellant
P-7, Chowringhee Square,
Kolkata – 700 069

Haldia Petrochemicals Ltd.....Respondent
Bengal Eco Intelligent Park (Techno)
Tower 1, Block EM, Plot-3,
Salt Lake City, Sec-V, 3rd Floor,
Kolkata – 700 091
[PAN: AAACH 7360 R]

Appearances by:
Shri Harakamal Chakravorty, AR appearing on behalf of the Assessee.
Shri Sallong Yaden, Addl. CIT appearing on behalf of the Revenue.

Date of concluding the hearing : March 15, 2018
Date of pronouncing the order : May 18, 2018

ORDER

SHRI P.M. JAGTAP, AM

These two appeals, one filed by the assessee being ITA No. 1532/Kol/2015 and the other filed by the revenue being ITA No.

167/Kol/2016, are the cross-appeals which are directed against the order of Ld. CIT (Appeals) – 16, Kolkata, dated 03.12.2015.

2. The main common issue involved in these appeals relates to the rejection of books of accounts and determination of the income of the assessee from business on estimated basis.

3. The relevant facts of the case giving rise to these appeals are that the assessee is a company which is engaged in the business of manufacturing of power and energy. The return of income for the year under consideration was filed by it on 20.11.2003 declaring its total income at nil. In the assessment originally completed under section 143(3) vide an order dated 13.02.2006, the total income of the assessee was determined by the A.O. at nil after allowing set off of unabsorbed depreciation of Rs. 61,28,25,120/-. Book profit of the assessee-company under section 115JB was computed by the A.O. at Rs. 78,88,21,300/-. The assessment for the year under consideration however was subsequently reopened by the A.O. and a notice under section 148 was issued by him to the assessee on 30.03.2009 after recording the reasons. According to the A.O., the exchange rate gain during the year on foreign currency term loan liability incurred for financing fixed asset had been adjusted by the assessee against the related fixed assets. However, depreciation relating to the block assets viz. 'plant and machinery – others' of Rs. 1,10,08,966/- was not accounted for by the assessee as per the ratio laid down by the Hon'ble Supreme Court in the case of Saharanpur Electricity Supply Co. Ltd. vs CIT 194 ITR 294 resulting in excess amount of depreciation to that extent. In this regard, the explanation offered by the assessee-

company during the course of reassessment proceedings was not acceptable by the A.O. and he proceeded to make a disallowance of Rs. 1,10,08,966/- being excess claim of depreciation made by the assessee in the assessment completed under section 143(3)/147 vide an order dated 21.12.2009.

4. Against the order passed by the A.O. under section 143(3)/147, an appeal was preferred by the assessee before the Ld. CIT(A) challenging the validity of the said assessment as well as disputing the addition made by the A.O. therein on account of disallowance of claim of alleged excess depreciation. The submissions made by the assessee before the Ld. CIT(A) in support of its case on these issues however were not found acceptable by him and upholding the validity of the assessment made by the A.O. under section 143(3)/147, he confirmed the addition made by the A.O. on account of disallowance of excess claim of depreciation. He however deleted the interest of Rs. 10,25,506/- charged by the A.O. under section 234D. Aggrieved by the order of the Ld. CIT(A), the assessee and revenue both are in appeal before the Tribunal.

5. In ground no 1 of its appeal, the assessee has raised a preliminary issue challenging the validity of the assessment order passed by the A.O. under section 143(3)/147 of the Act.

6. The learned counsel for the assessee invited our attention to the relevant portion of tax audit report furnished by the assessee along with return of income in form no 3CD at page 18 of the Paper Book to point out that the amount of foreign currency fluctuation gain

on account of fixed assets which could not be adjusted against the opening written down value of such block of assets because of the same becoming nil during the previous year was treated by the assessee as other income and such treatment was duly disclosed in the tax audit report. He then invited our attention to the requisition dated 18th November, 2005 issued by the A.O. during the course of original assessment proceedings under section 143(3), (copy at page no 160 to 163 of Paper Book) to point out that specific query was raised by the A.O. requiring the assessee to explain as to why the said amount of income was not offered to tax. He submitted that a reply was filed by the assessee vide letter dated December 22, 2005 offering its explanation in the matter and after considering the same, the assessment was originally completed by the A.O. under section 143(3). He contended that all the relevant details in respect of the amount in question thus were fully and truly furnished by the assessee and in the absence of any failure on the part of the assessee to do so, the A.O. was not justified to reopen the assessment beyond a period of 4 years from the end of the assessment year in question. He also invited our attention to the reasons recorded by the A.O. as given on page no 155 and 156 of the Paper Book to show that no such failure was specifically pointed out by the A.O. By relying on the proviso of section 147, he contended that the reopening of assessment made by the A.O. beyond the period of 4 years from the end of the relevant assessment year without pointing out such failure of the assessee is barred by limitation and the assessment made by him under section 143(3)/147 in pursuance of such invalid initiation is liable to the cancelled being bad in law. He also invited our attention to the reasons recorded by the A.O. to point out that there

was no new material that had come to the possession of the A.O. which could form the basis of reopening and since the assessment was reopened by him on the basis of same set of facts and material, the reopening was invalid as the same was based on a mere change of opinion.

8. The learned DR, on the other hand, submitted that even though a query was raised by the A.O. during the course of original assessment proceedings under section 143(3) on the issue in dispute, the reply filed by the assessee was not specific. He contended that the assessee thus had failed to disclose all the facts fully and truly necessary for his assessment and A.O. was fully justified in reopening the assessment after a period of 4 years from the end of the relevant assessment year after pointing out such failure in the reasons recorded. He contended that the decision of Hon'ble Supreme Court in the case of Saharanpur Electricity Supply Co. Ltd. vs CIT 194 ITR 294 is squarely applicable in the facts of the assessee's case and the A.O., therefore, was fully justified in reopening the assessment by relying on the said decision as well as in making the impugned addition to the total income of the assessee.

9. We have considered the rival submissions and also perused the relevant material available on record. The learned counsel for the assessee hads challenged the validity of the assessment made by the A.O. under section 143(3)/147 on two grounds. On firstly, he has contended that there being no new material coming to the possession of the A.O. after the completion of the assessment originally under section 143(3) to show any escapement of income, the reopening is

was based on a mere change of opinion which is not permissible. The second contention raised by him is that there was no failure on the part of the assessee to disclose all the relevant facts fully and truly necessary for his assessment and in the absence of such failure, the reopening of the assessment originally completed under section 143(3) beyond the period of 4 years is barred by limitation as per the first proviso to section 147. In order to consider and appreciate the contention of the learned counsel for the assessee, it is relevant to refer to the reasons recorded by the A.O. for reopening the assessment, which are extracted below:

> *"The assessment in this case was completed under section 143(3) of the Act on 13.02.2006 at NIL income after set off of Brought Forward Unabsorbed Depreciation of Rs. 61,28,25,120/-. Tax was calculated at Rs. 5,568,19,678/- u/s 115JB of the Act. Subsequently, order u/s 251/143(3) was passed on 07.03.2007 at NIL income after set off of brought forward unabsorbed depreciation of Rs. 60,83,72,688/-.*
>
> *On a perusal of Para II(c) of the notes to account it is observed that Exchange Rate Gain during the year of Rs. 3,94,50,665/- on foreign currency term loan liability incurred for financing fixed assets had been adjusted against the related fixed assets. From the depreciation chart (as per I.T. Rules) it is seen that out of total exchange rate gain of Rs. 3,94,50,665/- only Rs. 2,56,89,457/- could be adjusted with the available WDV of fixed assets and the balance exchange rate gain of Rs. 1,37,61,208/- [Exchange Rate Gain for whole of P&M for Rs. 3,80,63,359/- - Exchange Rate Gain for P&M except P&M Others for Rs. 1,88,95,899/- - WDV of P&M others to the extent adjusted for Rs. 54,06,252/-] could not be adjusted due to the fact that WDV of the particular Block of Assets [P&M Others – rate of depreciation 80%] reduced to zero.*
>
> *The assessee claimed depreciation as per I.T. Rules, 1962 in respect of other plant & machinery as shown below:*

Particulars of Assets	WDV as on 01.04.02	Additions during the year	Deductions /adjustments	Balance WDV	Depreciation for the year	WDV as on 31.03.03
Plant and Machinery	5406252	NIL	5406252 exchange rate to the	0	0	0

			extent adjusted			

However, placing reliance on decision in the case of Saharanpur Electric Supply Co. Ltd. vs CIT (1992) reported in 194 ITR 294, even in respect of assets acquired earlier to the relevant previous year, the actual cost of the assets is required to be computed and depreciation allowed in earlier years in respect of such assets should be deducted therefrom.

Keeping the above judicial pronouncement in view, it is seen that during the year, depreciation for Rs. 43,40,11,898/- was allowed but depreciation for the Block of Assets, 'P & M Others' of (-) Rs. 1,10,08,966/- was not accounted for resulting in excess allowance of depreciation in that extent.

Therefore, computation of depreciation in respect of the Block of Assets, 'P & M Others' would be as follows:

Particulars of Assets	WDV as on 01.04.02	Additions during the year	Deductions /adjustments	Balance WDV	Depreciation for the year	WDV as on 31.03.03
Plant and Machinery	5406252	NIL	19167460 exchange rate to the extent adjusted	(-) 13761208	(-)11008966 @80%	(-)2752242

10. A perusal of the reasons recorded by the Assessing Officer shows that the assessment originally completed under section 143(3) vide an order dated 13.02.2006 was reopened by the Assessing Officer on 30.03.2009 i.e. after expiry of 4 years from the end of the relevant assessment year under consideration to bring to tax excess claim of depreciation of Rs. 1,10,08,966/- allegedly made by the assessee which, according to the Assessing Officer, had resulted in escapement of income due to failure of the assessee to disclose all the facts fully and truly necessary for assessment. In this regard, the learned counsel for the assessee has pointed out that a note was given

in the tax audit report furnished by the assessee along with its return of income which read as under:

> *"Rs. 1,37,61,208/- being the amount of foreign currency fluctuation gain on account of fixed asset, which could not be adjusted against the opening written down value of such block of assets, since the same bas become nil during the previous year"*

11. As further pointed out by the learned counsel for the assessee, a specific query was raised by the A.O. during the course of original assessment proceedings under section 143(3) seeking the explanation of the assessee as to why the said amount of exchange gain had not been offered for taxation. In reply, the following explanation was offered by the assessee in writing vide letter dated December 22, 2005:

> *"Schedule VI to the Companies Act, 1956, provides, inter alia, that where the original cost and additions and deductions thereto, relate to any fixed asset which has been acquired from a country outside India, and in consequence of a change in rate of exchange at any time after the acquisition of such asset, there has been an increase or reduction in the liability of the company, as expressed in Indian currency, for making payment towards the whole or a part of moneys borrowed by the company from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the assets (being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect), the amount by which the liability is so increased or reduced during the year, shall be added to or as the case may be, deducted from the cost, and the amount arrived at after such addition or deduction shall be taken to be the cost of the fixed assets.*
>
> *Section 43A of the I.T. Act, 1961 also calls for the same interpretation of exchange fluctuation to be added to or, as the case may be, deducted from the cost of assets."*

12. Keeping in view all these relevant details furnished by the assessee, we find ourselves in agreement with the learned counsel for the assessee that there was no failure on the part of the assessee to furnish fully and truly all the relevant particulars for the purpose of his assessment. The learned DR has contended before us that the explanation offered by the assessee during the course of original assessment proceedings was not specific and it was thus a case of failure of the assessee to furnish fully and truly all the particulars for the purpose of his assessment. He however has failed to point out as to what specific particulars the assessee ought to have furnished in this regard. Even a perusal of the reasons recorded by the A.O. also makes it clear that no such failure on the part of the assessee was specifically pointed out by him. We, therefore, hold that the initiation of assessment proceedings by the A.O. after completion of 4 years from the end of the assessment year under consideration was barred by limitation as per the first proviso to section 147 and the assessment made by the A.O. under section 143(3) / 147 in pursuance of such invalid initiation is liable to be cancelled being bad in law.

13. A perusal of the reasons recorded by the Assessing Officer also makes it abundantly clear that the assessment originally completed by him under section 143(3) was reopened by the Assessing Officer on the basis of the same material as was available before him while computing the original assessment under section 143(3) and there was no new tangible material that had come to his possession on the basis of which the assessment was reopened by him. In the case of CIT vs Kelvinator of India Ltd. 320 ITR 561, Hon'ble Supreme Court has

held that after the amendment made with effect from 1st April, 1989 in the relevant provisions, 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 the mere change of opinion. Explaining further, Hon'ble Apex Court has observed the concept of 'change of opinion' must be treated as in-built test to check the abuse of power and hence the Assessing Officer, even after the amendment made in the relevant provisions from April 1, 1989, has the power to reopen an assessment provided that there is tangible material to come to the conclusion that there was escapement of income from assessment. Applying the ratio laid down by the Supreme Court in the case of Kelvinator of India Ltd. (supra), we hold that the reopening of assessment made by the Assessing Officer in the present case was bad in law as the same was based merely on the change of opinion and the assessment completed by him under section 143(3)/147 in pursuance of thereof is liable to be cancelled being invalid. We accordingly cancel the assessment made by the A.O. under section 143(3)/147 by holding the same to be invalid and allow ground no 1 of the assessee's appeal.

14. As a result of our decision rendered above on the preliminary issue cancelling the assessment made by the A.O. under section 143(3)/147, other grounds raised by the assessee-company in its appeal challenging the addition made by the A.O. in the said assessment as well as the solitary ground raised in the appeal of the revenue challenging the deletion by the Ld. CIT(A) of the interest charged by the A.O. under section 234D have become infructuous. We,

therefore, do not consider it necessary or expedient to adjudicate upon the same.

15. In the result, the appeal of the assessee is allowed while the appeal of revenue is treated as dismissed.

Order Pronounced in the Open Court on 18th May, 2018.

Sd/-	Sd/-
(S.S. Viswanethra Ravi)	(P.M. Jagtap)
(JUDICIAL MEMBER)	ACCOUNTANT MEMBER

Dated: 18/05/2018
Biswajit, Sr. P.S.

Copy of order forwarded to:

1. Haldia Petrochemicals Ltd., Bengal ECO Intelligent Park (Techno), Tower 1, Block EM, Plot-3, Salt Lake City, Sec. V, 3rd Floor, Kolkata – 700 091.
2. ACIT Circle 8 / DCIT Circle 11(1), P-7, Chowringhee Square, Kolkata – 700 069.
3. The CIT(A)
4. The CIT
5. DR

True Copy, By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata