

आयकर अपीली यअधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.No.44/Viz/2013
(निर्धारण वर्ष/Assessment Year:2006-07)

Dy.CIT, Circle-2(1)
Vijayawada

[PAN :ADAPC2488D]

Vs. C.D.V. Subba Rao
LR of Late C.D.S. Prakasa Rao
Prop.Prakash Arts,
Museum Road
Governorpet
Vijayawada
[PAN : ADKPC7450P]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से/ Respondent by

: Shri R.S.Aravindakshan, DR
: Shri G.V.N.Hari, AR

सुनवाई की तारीख / Date of Hearing : 06.06.2018

घोषणा की तारीख/Date of Pronouncement : 04.07.2018

आदेश /ORDER

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the revenue against the order of the
Commissioner of Income Tax (Appeals), Vijayawada vide

I.T.ANo.315/CIT(A)/VJA/2011-12 dated 16.11.2012 for the assessment year 2006-07.

2. The assessee is an individual deriving income from house property, business and income from other sources filed his return of income for the A.Y.2006-07 on 31.10.2006 declaring total income of Rs.78,25,450/- and the agricultural income of Rs.3,15,450/-. The case was selected for scrutiny and the assessment was completed u/s 143(3) accepting the income returned. Later on, the assessee Mr.C.D.S.Prakasa Rao has expired and the assessment was reopened by issuing notice u/s 148 on 31.03.2011 having reason to believe that income chargeable to tax had escaped assessment and the assessment was completed on total income of Rs.3,17,12,953/-. The Assessing Officer(AO) made the addition of Rs.3,06,54,982/- representing the unpaid service tax u/s 43B of the I.T.Act. After completion of the original assessment, the assessee has expired, hence the AO has issued the notice u/s 148 in the name of Shri C.D.V.Subba Rao, the legal heir. Subsequently, the notice was issued in the name of Shri C.D.S.Prakasa Rao and the assessment was also completed in the name of Shri C.D.S.Prakasa Rao who has already expired.

3. Aggrieved by the order of the AO, the assessee went on appeal before the Ld.CIT(A) and challenged the order of the AO both on technical grounds as well as on merits. The assessee challenged the validity of the issue of notice on dead person and also the reopening of assessment. The Ld.CIT(A) has verified the assessment records and found that the notice u/s 148 was issued in the name of Shri C.D.V.Subba Rao, the Legal heir of Late Shri C.D.S.Prakasa Rao, thus held that the grounds raised by the assessee with regard to the issue of notice u/s 148 in the name of dead person was false and accordingly dismissed the assessee's appeal on this ground. With regard to the validity of reopening of assessment u/s 147, the assessee submitted before the CIT(A) that there was no fresh information or material which has come to the notice of the AO for reopening of the assessment, thus argued that assessment was reopened merely on change of opinion, hence invalid. The Ld.CIT(A) agreed with the view of assessee that reopening of assessment was made on change of opinion and accordingly quashed the notice issued u/s 148. The Ld.CIT(A) relied on the decision of CIT Vs. Kelvinator India Ltd. 320 ITR 561(SC) and the decision of Hon'ble Delhi High Court in the case of CIT Vs. Kelvinator India Ltd. 256 ITR 1(Del.).

4. Aggrieved by the order of the Ld.CIT(A), the revenue has taken up the matter before the Tribunal and raised the following grounds :

- a. The Ld. CIT(A) erred both in law and in facts of the case.
- b. The Ld. CIT(A) ought to have not held that there is change of opinion. The A.O. has not called for the details regarding the payment of service tax and there is no finding either positive or negative arrived at during the course of original assessment proceedings.
- c. Reliance is placed on the following judicial pronouncements.
 - (i) ALA Firm vs CIT (Mds) 102 ITR 622
 - (ii) Ess Kay Engineering Co. (P) Ltd vs CIT (SC) 247 ITR 818
 - (iii) Revathy C.P. Equipments Ltd. Vs. DCIT & Ors (Mad) 241 ITR 856(W) EMA India Ltd. Vs ACIT(All) 30 DTR 82
- d. The Ld. CIT(A) ought to have not struck down the reassessment proceedings as it transpires from the record that the liability of service tax is not allowable u/s 436 of the Act and on this tangible material available on record only, the AO formed a belief that income chargeable to tax has escaped assessment,
- e. The Ld. CIT(A) failed to note that in the case of assessee income chargeable to tax has been under assessed which falls under sub clause (i) of clause (c) of explanation 2 to section 147 of the Act.
- f. Any other ground that may be urged at the time of hearing.

5. During the appeal hearing, the Ld.DR submitted that the Ld.CIT(A) has erred in quashing the notice issued u/s 148. The Ld.DR further argued that within 4 years time limit it is enough if the AO is having reason to believe that income chargeable to tax has escaped assessment as held by Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P.

Limited 291 ITR 500 (SC). In this case, the assessment is reopened as the AO has observed that there was outstanding amount of unpaid service tax under the head sundry creditors, which required to be brought to tax and the AO has omitted to examine the issue at the time of original assessment. Though the AO has noted the decision of Hon'ble Kolkata High Court in the case of CIT Vs. Associated Pigments Ltd. 71 Taxman 244 (Cal.), the AO merely taken support of the decision to fortify his belief, but not relied on the decision of Hon'ble Kolkata High Court for reopening the assessment. Plain reading of the reasons recorded clearly shows that the AO has formed a belief that the expenditure grouped under sundry creditors is covered by section 43B of I.T. Act and not allowable expenditure, hence had a belief that the income had escaped the assessment. Therefore, argued that the AO has not committed any error in reopening the assessment. The Ld. DR further argued that the assessment is reopened on the basis of audit objection and as held by Hon'ble Supreme Court in the case of CIT Vs. P.V.S. Beedies Pvt. Ltd. 237 ITR 13 SC, the audit party is entitled to point out factual error or omission in the assessment and reopening of assessment on the basis of factual error pointed out by audit party is permissible under law. The Ld. DR further relied on the decision of Hon'ble Delhi High Court

in the case of Dalmia Brothers (P.) Ltd. Vs. CIT, 16 taxmann.com 336 (Delhi).

6. On the other hand, the Ld.AR argued that reopening of assessment was made merely on the change of opinion. There was no fresh information or fresh material available to the AO to form the belief to hold that the income has escaped assessment within the meaning of Section 147 of I.T.Act. The Ld.AR further argued that the case law relied upon by the Ld.DR is distinguishable on the facts of the assessee's case. In the case of CIT Vs. PVS Beedies (supra) Hon'ble Supreme Court held that the audit party is entitled to point out a factual error or omission in the assessment, whereas in the instant case, the AO reopened the assessment merely relying on the decision of Hon'ble Kolkata High Court which is a legal issue. The Ld.AR submitted that, on legal issue, the assessment cannot be reopened on the basis of audit objection. Hence, argued that the reopening of assessment is nothing but a mere change of opinion, thus the Ld.CIT(A) has rightly set aside the assessment and quashed the notice and no interference is called for in the order of the Ld.CIT(A).

6.1. The Ld.AR further submitted that the framing the assessment in the name of dead person is invalid and required to be quashed. The Ld.AR argued that the assessment cannot be made on a dead person who is no more in existence. The Ld.AR relied on the decision of Hon'ble Delhi High Court in the case of CIT-III Vs. Dimension Apparels (P.) Ltd. 52 taxmann.com 356 (Delhi), decision of Hon'ble ITAT Kolkata, 'D' Bench in the case of Dy.CIT, CC-4(4), Kolkata Vs. Mani Square Ltd. in (2017) 88 taxmann.com 77 (Kolkata -Trib), and the decision of Hon'ble Karnataka High Court in the case of CIT, (Central Circle), Bangalore, Vs. Intel Technology India (P.) Ltd. (2015) 57 taxmann.com 159 (Karnataka).

7. On the other hand, the Ld.DR argued that in the instant case, the notice u/s 148 was issued in the name of legal heir Sri.C.D.V.Subba Rao. Subsequently, by mistake notice u/s 143(2) was issued in the name of Sri.C.D.S.Prakasa Rao(Expire person) and the assessment was also completed in the name of C.D.S.Prakasa Rao. However, final show cause notice was issued on 14.12.2011 correctly in the name of Sri C.D.V. Subba Rao, Legal Heir of Sri C.D.S. Prakasa Rao. The Ld. DR further argued that the legal heir of the assessee responded to the notice issued and

understood the purpose and intention of issue of notice and the assessment proceedings. Having complied with the terms and conditions of issue of notice u/s 143(2) and subsequent proceedings, the assessee cannot challenge the validity of assessment made u/s 143(3). The mention of the name of the dead person in the assessment order is a mere clerical error and no injustice is caused to the assessee and the same is curable mistake u/s 292B of I.T.Act. The Ld.DR relied on the decision of Hon'ble ITAT in the case of Gautam Paul Vs. ACIT, Circle Agartala in I.T.A Nos. 31-37/Gau/2017 dated 01.11.2017 for the assessment year 2007-08 to 2013-14 and also the decision of Hon'ble Supreme Court in the case of Sky Light Hospitality LLP Vs. ACIT (2018) 92 taxmann.com 93 (SC). The Ld.DR further submitted that the Ld.CI(A) dismissed the assessee's ground on this issue and the assessee has neither challenged the order of the Ld.CIT(A) nor filed cross objections, hence, the assessee cannot raise the objection at this stage with regard to the validity of assessment in the impugned appeal.

8. We have heard both the parties and perused the material placed on record. At the outset, we take up the issue of validity assessment made on a dead person first. In this case, the revenue has filed the appeal, but the

assessee has neither filed cross objections nor filed the appeal against the order of the Ld.CIT(A). Hence, the Ld.DR argued that the assessee cannot object the validity of the assessment without there being an appeal or cross objections filed by the assessee. On the other hand, the Ld.AR argued that the assessee is having right to defend the case as per Rule 27 of IT Rules which is having a bearing on the issue, even though no appeal is filed or agitated the issue in appeal. The ITAT Delhi Bench in the case of ITO Vs. Jyoti Global Pvt. Ltd. (1010) 29 CCH 0929 held that Rule 27 stipulates that respondent even if not filed any appeal before the ITAT, he can support the order impugned in the appeal by the appellant on any of the grounds which has been decided against him. For ready reference, we extract para No. 5 and 6 of the relevant part of the order of the Coordinate Bench cited supra which reads as under:

“5. We have duly considered the rival contentions and gone through the record carefully. Rule 27 of ITAT Rules, 1963 has a direct bearing on the controversy, therefore, it is salutary upon us to take cognizance of this rule. It reads as under:

“The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him”.

6. This rule clearly stipulates that respondent even if not filed any appeal before the ITAT, he can support the order impugned in the appeal by the appellant on any of the grounds which has been decided against him. Meaning thereby that if any jurisdictional issue decided against the assessee and relief granted to it on merit, then defending that order of the Learned CIT(Appels), the respondent can plead that the issue decided against it was to be decided in its favour. Therefore, the assessee can contend that Learned CIT(Appels) has erred in not adjudicating the ground in respect of reopening of assessment.

8.1. Further, the Hon'ble ITAT Mumbai 'I' Bench in the case of Dy.CIT Vs. IIT Investrust Ltd. (2011) 45 SOT 0001 considered similar issue and held in favour of the assessee. For ready reference, we extract relevant paragraph of the order of the Coordinate Bench in para No.8 which reads as under :

8. We have heard the learned representatives and the records perused. We are in agreement with the plea of the learned counsel for the assessee that he can support the ultimate decision of the CIT(A) on a ground decided against the assessee i.e. on the question of allowance of deduction as bad debt. Rule 27 of the ITAT Rules permits the assessee to raise the issue of allowability of the claim of bad debt before the Tribunal though he did not succeed on this issue before the CIT(A) and no appeal was filed before the Tribunal against the decision of the CIT(A).

8.2. Similar view is expressed by the Hon'ble 3rd member in ITAT Mumbai 'D' Bench in the case of Dy.CIT Vs. Bifora Watch Co. Ltd. The decision of Hon'ble High Court of Gujarat in the case of Dahod Sahakari Kharid Vechan Sangh Ltd. Vs. CIT 282 ITR 0321 supports the view that the assessee is entitled to defend his case under Rule 27 on the issues decided by the CIT(A) against him. For ready reference, we extract para Nos. 17 to 19 of the Hon'ble High Court which reads as under :

"17. In case a party having succeeded before CTT(A) opts not to file cross-objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof which was against the respondent. The Tribunal has, in the present case, unfortunately drawn such an inference which is not supported by the plain language employed by the provision.

18. If the inference drawn by the Tribunal is accepted as a correct proposition, it would render r. 27 of the Tribunal Rules redundant and

nugatory. It is not possible to interpret the provision in such manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and an interpretation which makes other connected provisions otiose has to be avoided Rule 27 of the Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said rule cannot be taken away by the Tribunal by referring to provisions of s 253(4) of the Act. The Tribunal was, therefore, in error in holding that the finding recorded by the CIT(A) remained unchallenged since the assessee had not filed cross-objections.

19. *Accordingly, the second question (proposed question No. 3) is answered in the negative i.e., in favour of the assessee and against the Revenue."*

8.3. In the instant case, the CIT(A) decided the issue of framing assessment on a dead person against the assessee and struck down the notice issued by the AO. Therefore, the assessee was not aggrieved, hence no appeal was filed. The revenue has filed appeal against the CIT(A) order, therefore, the assessee has raised objection with regard to the validity of assessment on a dead person. Even though assessee has not challenged the CIT(A) order, we are of the considered opinion that the assessee is entitled to defend his case and support the order of the Ld.CIT(A) under Rule 27 of IT Rules as held by the Hon'ble High Court of Gujarat in the case of Dahod Sahakari Kharid Vechan Sangh Ltd. Vs. CIT (supra), other case laws of ITAT cited supra also supports the argument of the Ld.AR.. Hence, we reject the objection of the revenue with regard to the assessee's challenge of validity

of framing assessment on a dead person, and answer in favour of the assessee and proceed to decide the issue of validity of the assessment.

9. In this case, the assessee was expired and the AO had issued the notice u/s 148 and initiated reassessment proceedings on legal heir Sri D.V.Subba Rao correctly. Subsequently, scrutiny notice was issued on Sri C.D.S. Prakasa Rao, the dead person and the assessment was framed on him. In response to the notice, issued u/s 148, the legal heirs of the assessee have responded to the notice issued and for the subsequent notice of hearing also, the legal heir of the assessee has responded and filed objections for making the assessment. However, legal representative of the assessee did not raise any objection for the notice issued u/s 143(2) dated 1.7.2011 in the name of dead person, and filed the necessary information which was considered by the AO. Subsequently on 14.12.2011, the AO had issued the show cause notice in the name of legal heir which was served on the legal heir of the assessee on 14.12.2011 who responded without raising any objection. The AO in the process has given sufficient opportunity to the assessee. Though the hearing notice was given in the name of dead person, the assessee has not objected but understood the intent and purpose of issue of notice and cooperated with the assessment proceedings.

Therefore, it is evident that framing the assessment in the name of a dead person is nothing but a clerical error which is a curable mistake u/s 292B of I.T.Act. Similar issue has come up before the ITAT Kolkata Bench in the case of Gautam Paul Vs. ACIT, Circle Agartala (supra) and the coordinate bench held that it is a curable mistake and there is no jurisdictional defect. The Hon'ble ITAT, Kolkata relied on the decision of the Hon'ble Punjab and Haryana High Court in the case of Smt.Swarna Kanta Vs, CIT 176 ITR 291 (P&H). For ready reference, we extract relevant paragraph of the order of the Coordinate Bench of Kolkata in the case of Gautam Paul Vs. ACIT, Circle Agartala (supra) which reads as under :

*7.3.1. We find that the provisions of section 292B of the Act reads as follows:-
Return of income, etc., not to be invalid on certain grounds.*

292B. No return of income, assessment notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of Income, assessment, notice, summons or other proceeding - is in substance and effect in conformity with or according to the intent and purpose of this Act.

7.3. 2. We find that the Hon'ble Delhi High Court in the aforesaid case had held that jurisdictional defect cannot be cured u/s 29213 of the Act In the instant case, Late Motilal Paul expired on 18 7 2014 , i.e during the pendency of the assessment proceedings. Thereafter fresh notices were issued in the name of the legal heir Shri Gautam Paul, who also participated in the entire assessment proceedings and filed written submissions and assessments were completed only based on the written submissions filed by the legal heir. Hence we find that the Ld AO had

correctly exercised the jurisdiction on the legal heir Shri Gautam Paul and issued notices to him and completed the assessments based on the information and explanations given by Shri Gautam Paul We hold that the Ld AO had not committed any jurisdictional defect in the instant case so as to get into the question of whether the same is curable or not in terms of section 292B of the Act. Hence the reliance placed by the Ld AR on this decision does not advance the case of the assessee.

7.4. We find that the reliance placed by the Ld DR on the decision of the Hon 'ble Punjab & Haryana High Court in the case of Smt Swaran Kanto vs CIT reported in (1989) 176 JTR 291 (P&H/) squarely supports the case of the revenue and the facts of the assessee herein. It was held that -

3.The situation would have been different if the JTO had not impleaded the legal heir and if he had not given any hearing to the legal heir In that event, it could have been said that the order was passed on the deceased Since, the legal heir was impleaded and she was being heard, it could not be said that the order was passed on the deceased The order will be deemed to have been passed on the person who was heard In the instant case, the legal heir was being heard by the ITO through her representative. The AAC has proceeded on the assumption that the order was passed on the dead person.

From the facts of the case, it is clear that the order was not passed against the dead person. No doubt, an order passed on a dead person is null and void but in the case in hand, order was not passed on the dead person but on the legal heir of the deceased We agree with the departmental representative that merely by virtue of mistake the name of the deceased was written at the top of the assessment order. It is simply a - clerical error which has no adverse effect on the proceedings within the meaning of section 292B.

4. We are of the opinion that the Tribunal came to the correct conclusion. There is clearly a clerical error or omission in the heading of the assessment order. The correct description of the assessee to be reduced in the heading against item No. 2 should have been Sain Doss Aabbi deceased through Smt.Swaran Kanto legal heir. It has to be seen whether order, could be read to mean, to the aforesaid effect on the peculiar facts of this case. Section 159 of the Act relates to liability' of the legal representative, of the deceased assessee According to section 159(2)(a), any proceedings taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the death of the deceased and for completing the proceedings by virtue of section 159(2)(c), the provisions thereof were applied accordingly. Sub-section (3) of section 159 further provides that the legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee Therefore, the deceased is an original assessee and the legal representative becomes the deemed assessee

for the purposes of completion of the proceedings and for recovery of any tax from the estate of the deceased in the hands of the legal representative. The ITO followed the procedure correctly as provided by section 159 and completed the proceedings.

5. Section 154 authorises the income-tax authority, referred to In section 116 of the Act, to rectify any mistake apparent from the record and amend the order accordingly The slight mistake, if any, could be rectified under this provision. The law framers were not satisfied with this provision alone and inserted section 292B of the Act, which came into effect from 1-10-1975 It, inter alia provided that assessment made in pursuance of any of the provisions of the Act shall not be invalid nor deemed to be invalid merely by reason of any mistake, defect or omission in the assessment if the assessment is in substance and effect inconformity with or according to the intent and purpose of the Act As already noticed, the entire proceedings were conducted after death of the original assessee in accordance with law After death the legal representative is also deemed to be assessee Therefore the title of the order, which was not happily worded would not make the assessment order invalid as was sought to be declared by the AAC. The Tribunal was fully justified in restoring the order of the assessment in exercise of its powers under section 292B. (Underlining supplied by us)

6. The learned counsel for the assessee has cited some cases to support the order of the MC but none of those cases is close or relevant to the facts of this case, and therefore, it would be futile to notice or discuss them.

7. For the reasons recorded above, we answer the question in the affirmative, that is, in favour of the revenue and against the assessee but with no order as to costs.

We find that the facts of the instant case and the facts before the Hon'ble Punjab & Haryana High Court supra are one and the same and the ratio laid down thereon would be squarely applicable herein. Respectfully following the said decision, we hold that the assessments for the Asst Years 2007-08 to 2012-13 u/s 153A / 144 of the Act and for the Asst Year 2013-14 u/s 144 of the Act have been validly framed and accordingly the grounds raised by the assessee are dismissed.

9.1. Hon'ble Supreme Court in the case of Sky Light Hospitality LLP Vs. ACIT (supra) held that reassessment notice issued in the name of erstwhile company despite the company ceasing to exist as it had been converted into

LLP would not invalidate the reassessment proceedings as wrong name mentioned in the said notice which was merely a clerical error which could be corrected u/s 292B of I.T.Act. The Hon'ble Supreme Court's decision in the case of Sky Light Hospitality LLP Vs. ACIT (supra) supports the view that wrong name given in the notice is merely a clerical error which could be corrected u/s 292B of I.T.Act and assessee's case is covered by the decision of ITAT in the case of Gautam Paul Vs. ACIT, Circle Agartala,(Supra).In the instant case the legal heir was given sufficient opportunity and he has submitted the required information. Hence, we hold that mentioning the name of the assessee, a dead person, on the assessment order is a mere clerical error which is curable u/s 292B of I.T.Act, since the notice was issued correctly in the name of legal heir. Accordingly, we set aside the order of the Ld.CIT(A) and uphold the assessment made by the AO, on this issue and reject the objections raised by the assessee.

10. The next issue in appeal of the revenue, is related to the validity assessment made u/s 147of I.T.Act. In this case, as observed from Ld.CIT(A) order, the AO has reopened the assessment basing on audit objection raised by the revenue audit party. Therefore, the Ld.CIT(A) has

struck down the notice issued u/s 148 and held that the AO has reopened the assessment without any material, except the opinion of the third party which is based on the material on record. The revenue's case is that the issue of unpaid service tax was not verified by the AO in the original assessment and did not form any opinion. The issue of the allowability of unpaid service tax u/s 43B is an issue of fact but not the issue of law. Therefore, the revenue's case that AO not being formed any opinion at the time of original assessment, there is no change of opinion is valid and sustainable. The assessee's case is that the AO has reopened the assessment on the basis of audit information and also on the basis of the decision of Hon'ble Kolkata High Court in the case of CIT Vs. Associated Pigments Ltd (supra), thus it constitutes change of opinion, hence the reassessment is invalid and the CIT(A) has rightly struck down the notice issued u/s 148.

10.1. In this case, the AO has recorded the reasons for reopening the assessment as under :

"It was noticed that an amount of Rs.3,06,54,982/- of Service tax is payable which is shown as liability by grouping it under 'sundry creditor'. As per provisions of section 43B of I.T.Act it is not an allowable expenditure. It forms part of income of assessee irrespective of fact that whether it is claimed as expenditure by debiting it to profit & loss account or not as can be seen from decision rendered in case of C..I.T. Vs. Associated Pigments Ltd. (1973) 71

Taxman 244(Cal.). Therefore, the taxable income to the extent of Rs.3,06,54,982/- has escaped assessment.”

10.2. Plain reading of the reasons recorded by the AO shows that the service tax was shown in the liabilities grouping under sundry creditors which is to be disallowed u/s 43B of I.T.Act., and not an allowable expenditure. Thus, the AO formed the belief that the income chargeable to tax, has escaped assessment and accordingly issued the notice u/s 148 of I.T.Act. Though the AO has mentioned decision of CIT Vs. Associated Pigments Ltd. (supra) in the reasons to take the support, the AO has not relied on the decision of Associated Pigments Ltd., for forming the belief. The verification of original assessment order passed u/s 143(3) shows that the AO has not examined the issue at the time of making the assessment u/s 143(3) on 31.12.2008. The Ld.DR also submitted that the AO has not verified the issue at the time of original assessment. The Ld.AR did not furnish any evidence to establish that the AO has examined the issue at the time of making the original assessment u/s 143(3). Thus, it is clear that the AO has not examined the issue and taken a stand regarding the allowability of unpaid service tax which was grouped under the head sundry creditors. From the above, it is established that the AO has not formed any opinion at the time of original assessment, hence it cannot be called as change of

opinion. As per the CIT(A) order, the issue has come to the notice of the AO because of audit objection. The Ld.DR relied on the decision of CIT Vs. P.V.S.Beedies Pvt. Ltd.(supra) and argued that audit objection is a source of information for reopening of the assessment on issue of fact. The Ld.AR contended that since, the AO has formed the belief on the basis of the decision of Hon'ble Kolkata High Court in the case of CIT Vs.Associated Pigments Ltd. (supra), the issue is not a factual issue and the same is issue of law, and accordingly argued that the case law of Hon'ble Supreme Court in the case of CIT Vs. P.V.S.Beedies Pvt. Ltd.(supra) has no application in this case. As discussed earlier in this order, the AO formed a belief of escapement of income because of the expenditure relating to unpaid service tax is not allowable expenditure u/s 43B of I.T.Act. The AO has merely taken the support of the CIT Vs.Associated Pigments Ltd. (supra), but not reopened the assessment on the basis of the decision of Hon'ble High Court of Kolkata in the case of Associated Pigments. Therefore, the issue raised in the assessment for reopening is the issue of fact but not the issue of law. Hence, we hold that the decision of Hon'ble Supreme Court in the case of CIT Vs. P.V.S.Beedies Pvt. Ltd.(supra) is squarely applicable in the case of the assessee. Further, the Honb'ble Delhi High Court in the case

of Dalmia Brothers (P.) Ltd. Vs. CIT, has held that reopening of assessment is valid on the basis of audit objection as per the information available on records. For ready reference, we extract relevant paragraph No.8 of the order of the Hon'ble Delhi High Court which reads as under :

"8. The facts of the case are very peculiar and unusual. The Assessing Officer in the original assessment proceedings had asked the petitioner to furnish complete details/confirmations in respect of sundry creditors amounting to Rs, 1,66,37,402/-. The petitioner had submitted confirmations in respect of creditors amounting to Rs. 1,13,53,344/- and the balance amount of Rs. 52,84,058/- remained unconfirmed. The Assessing Officer in the original assessment order, which has been quoted in paragraph 2 of the decision dated 26th September, 2011, made an addition of Rs. 19,86,551/- under Section 41 (1) but not in respect of other unconfirmed creditors of Rs. 32,97,507/-. This was a factual lapse, which was pointed out in the audit objection and then examined by the authorities. This factual lapse was found to be correct and, therefore, reassessment proceedings were initiated. Initiation of the reassessment proceedings has been held to be proper in view of the decision of the Supreme Court in CIT V. PVS Beedies (P.) Ltd [1999]237 ITR 13/103 Taxman 294 and the Delhi High Court in News Light Trading Co. v. CIT [2002] 256 ITR 391 / [2001] 117 Taxman 741."

10.3. The Ld.CIT(A) relied on the decision of Kelvinator India Ltd., wherein, Hon'ble Apex Court held that reopening of assessment on change of opinion is not permissible. As per the discussion made in this order, we have already held that, the AO has not verified the issue and did not form any opinion, thus there is no change of opinion. Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers P. Limited (supra) held that for reopening the assessment within four years belief of the AO is sufficient.

For ready reference, we extract relevant part of the decision of Hon'ble Supreme Court which reads as under :

16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [\[1991\] 191 ITR 662](#), for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction *ITO v. Selected Dalurband Coal Co. (P.) Ltd.* [\[1996\] 217 ITR 597 \(SC\)](#); *Raymond Woollen Mills Ltd. v. ITO* [\[1999\] 236 ITR 34 \(SC\)](#).

17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls

within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

18. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

Therefore, we hold that there is no change of opinion in the assessee's case and the action of the AO in reopening the assessment is upheld. Accordingly, we set aside the order of the CIT(A) and uphold the reopening of assessment.

11. In this case, the Ld.CIT(A) has not decided the issue on merits, since he has struck down the notice issued u/s 148. Therefore we remit the matter back to the file of the Ld.CIT(A) to decide the issue on merits.

12. In the result, appeal of the revenue is allowed for statistical purpose.

The above order was pronounced in the open court on 4th July, 2018.

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER** लेखा सदस्य/**ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 04.07.2018

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

L.Rama, SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee - Dr.C.H.S.Srinivas, D.No.17-1-17, Opp.KGH, Maharani-peta, Visakhapatnam
2. राजस्व/ The Revenue –The Income Tax Officer, Ward-1(4), Visakhapatnam
3. The Pr.Commissioner of Income Tax-1, Visakhapatnam
4. The Commissioner of Income Tax(Appeals)-1, Visakhapatnam
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM