

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

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri A.T. Varkey, Judicial Member**

**I.T.A. Nos. 1346 & 1347/KOL/2015
Assessment Years: 2006-2007 & 2007-2008**

Deputy Commissioner of Income Tax,.....Appellant
Circle-5(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, 3rd Floor
Kolkata-700 069

-Vs.-

M/s. Coal India Limited,.....Respondent
Coal Bhawan,
10, Netaji Subhas Road,
Kolkata-700 001
[PAN: AABCC 3929J]

Appearances by:

Md. Usman, CIT, D.R., for the Appellant

Shri Amit Patni, FCA. & Smt, Puja Agarwal, ACA, for the Respondent

Date of concluding the hearing : December 04, 2018

Date of pronouncing the order : December 07, 2018

O R D E R

Per Shri P.M. Jagtap, Vice-President (KZ):-

These two appeals filed by the Revenue are directed against two separate orders both dated 15.09.2015 passed by the Id. Commissioner of Income Tax (Appeals)-8, Kolkata and since the solitary issue raised therein relating to the validity of re-assessment made by the Assessing Officer is common, the same have been heard together and are being disposed of by a single consolidated order.

2. First we take up the appeal of the Revenue for A.Y. 2006-07 being ITA No. 1346/KOL/2015, wherein the following grounds are raised by the Revenue:-

(1) That the ld. CIT(A) has erred in annulling the order u/s 147 basing on 1st proviso to section 147 and proviso to sub-section (1) to section 151, which is not based on facts and circumstances of the case.

(2) That the ld. CIT(A) has erred in not considering the decision of the Hon'ble Supreme Court in the case of Sun Engineering Works P. Ltd., reported in 198 ITR 297.

(3) That the issue of addition in the reassessment order u/s 147 has not been considered by the ld. CIT(A) in the judgment.

3. The assessee in the present case is a Public Sector Enterprises, which is engaged in the activities of mining and extraction of coal as also in managing the coal mining industry in the nationalized sector. The return of income for the year under consideration was filed by it on 14.11.2006 declaring total income of Rs.244,19,98,000/-. In the assessment originally completed under section 143(3) vide an order dated 11.12.2008, the total income of the assessee was determined by the Assessing Officer at Rs.605,55,75,000/- after making certain additions/disallowances. Thereafter the Assessing Officer found on further verification of records that there was escapement of income of the assessee from the assessment for the year under consideration. He accordingly reopened the assessment after recording the reasons and issued a notice under section 148 to the assessee on 05.08.2011. Meanwhile the appeal filed by the assessee against the order originally passed by the Assessing Officer under section 143(3) came to be disposed of by the ld. CIT(Appeals) vide his order dated 21.10.2009 and effect to the said order was given by the Assessing Officer vide order dated 30.04.2009. Thereafter the reassessment was completed by the Assessing Officer under section 147/143(3) vide an order dated 25.03.2013, wherein an addition of Rs.200,30,56,000/- was made by the Assessing Officer to the total income of the assessee by treating the interest income received on deposits with scheduled banks as "income from other sources" instead of business income thereby disallowing the claim of the

assessee for set off of brought forward business loss against the said interest income.

4. Against the order passed by the Assessing Officer under section 147/143(3), an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the validity of the said assessment as well as disputing the addition of Rs.200,30,56,000/- made by the Assessing Officer therein and after considering the submission made by the assessee as well as the material available on record, the Id. CIT(Appeals) found merit in the contention raised on behalf of the assessee that the re-opening of assessment originally completed under section 143(3) beyond a period of four years without there being any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment was bad-in-law by virtue of the 1st proviso to section 147. He further held that initiation of re-assessment proceedings under section 147/148 was also bad-in-law as the prior sanction of the concerned authority as required under the proviso to sub-section (1) of section 151 was not obtained. He accordingly annulled the assessment made by the Assessing Officer under section 147/143(3) vide his appellate order dated 15.09.2015. Aggrieved by the order of the Id. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

5. The Id. D.R. relied on the reasons recorded by the Assessing Officer in support of the revenue's case that the re-opening of assessment was in accordance with law and the Id. CIT(Appeals) was not justified in annulling the same. The Id. Counsel for the assessee, on the other hand, contended that the assessment originally completed by the Assessing Officer under section 143(3) was reopened by the Assessing Officer after the expiry of four years from the end of the relevant assessment year without pointing out that the income of the assessee had escaped assessment as a result of the failure of the assessee to furnish fully and truly all material facts necessary for his assessment. He contended that

the reopening of assessment by the Assessing Officer beyond a period of four years without pointing out such failure on the part of the assessee thus was bad-in-law being barred by limitation as per the 1st proviso to section 147 and the assessment made by the Assessing Officer under section 147/143(3) in pursuance thereof was rightly annulled by the Id. CIT(Appeals) being invalid.

6. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the assessment originally completed under section 143(3) for A.Y. 2006-07 was reopened by the Assessing Officer on 05.08.2011 after recording the following reasons:-

“On further verification of records, it is revealed that business income of the assessee included interest of Rs.20,030.56 lakhs. As per income tax, interest on fixed deposit accounts with schedule Bank was on income under the head “income from other sources” with which B/F business loss was not allowable to be set off u/s 72(1). This mistake in computation of income led to a under assessment of income”.

7. As per the proviso to section 147, where an assessment has been made for the relevant assessment year under section 143(3), no action shall be taken by the AO under section 147 after expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year inter alia by reason of the failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that assessment year. In the present case, the assessment originally completed under section 143(3) for AY. 2007-08 was reopened by the AO on 05.08.2011 i.e. after expiry of four years from the end of the assessment year under consideration and it was therefore incumbent upon the AO as per the first proviso to section 147 to point out that any income chargeable to tax had escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. A

perusal of the reasons recorded by the AO however shows that no such failure on the part of the assessee was pointed out by him as envisaged in the first proviso to section 147. We, therefore, find merit in the contention of the learned counsel for the assessee that the reopening of assessment by the AO was barred by limitation and the assessment made by the AO under section 147/143(3) in Pursuance thereof was liable to be cancelled being invalid as rightly held by the Id. CIT(Appeals). We, therefore, uphold the impugned order of the Id. CIT(Appeals) on this issue and dismiss the appeal of the Revenue for A.Y. 2006-07.

8. Now we shall take up the appeal of the Revenue for A.Y. 2007-08 being ITA No. 1347/KOL/2015, wherein the following grounds are raised:-

(1) That the Id. CIT(A) has erred in annulling the order u/s 147 by treating the same being 'mere change of opinion' ignoring the decision of the Full Bench of Delhi High Court in the case of CIT -vs.- Usha International Limited.

(2) That the Id. CIT(A) has erred in not considering the decision of the Hon'ble Supreme Court in the case of Sun Engineering Works P. Ltd. reported in 198 ITR 297.

(3) That the issue of addition in the reassessment order u/s 147 has not been considered by the Id. CIT(A) in the judgment.

9. In the assessment originally completed under section 143(3) vide an order dated 14.12.2009, the total income of the assessee was determined by the Assessing Officer at Rs.553,79,34,548/- as against the total income of Rs.205,15,88,000/- declared by the assessee in its return of income. The assessee preferred an appeal against the order of the Assessing Officer passed under section 143(3) before the Id. CIT(Appeals) and vide his appellate order dated 06.06.2010, the Id. CIT(Appeals) disposed of the same. The appeal effect to the said order was given to the assessee on 02.08.2010 determining the total income of the assessee at

Rs.205,61,87,822/-. Thereafter the Assessing Officer on further verification of records found that there was escapement of income of the assessee from assessment for the year under consideration. He accordingly reopened the assessment and issued a notice under section 148 after recording the reasons. In pursuance to the said reopening, the reassessment was made by the Assessing Officer vide his order dated 25.03.2013 passed under section 147/143(3) of the Act, whereby he determined the total income of the assessee at Rs.441,81,22,822/- after making the following additions:-

1.	Interest on Bank Fixed Deposit treated as income from other sources	Rs.230,82,71,000/-
2.	Interest accrued on VRS loan	Rs.1,76,58,000/-
3.	Disallowance under section 36(1)	Rs.3,60,06,000/-

10. Against the order passed by the Assessing Officer under section 147/143(3), an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the validity of the said assessment as well as disputing the addition made by the Assessing Officer therein and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) found merit in the contention raised on behalf of the assessee that the re-opening of assessment made by the Assessing Officer on the basis of same material, which was already available on record was bad-in-law as the same was based merely on a change of opinion. He accordingly annulled the assessment made by the Assessing Officer under section 147/143(3) of the Act vide his appellate order dated 15.09.2015. Aggrieved by the order of the Id. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

11. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the assessment originally completed under section 143(3) was reopened by the Assessing Officer after recording the following reasons:-

"(1) On Scrutiny of records, it is revealed that assessee computed his total Income to the tune of Rs.205,61,87,822/- which included income from business of Rs.202,86,77,822/- after set off of brought forward business loss of Rs.53,26,37,298/- for A/Y 2002-03 and income from House property of Rs.275,10,000/-. Record also further revealed that business income of the assessee included interest of Rs.23082.71 lakhs received from deposits accounts with scheduled banks (deposits of Rs.363727.68 lakhs as on 31/03/2007).

Now as per Income Tax Act. Interest on fixed deposit accounts with scheduled banks was an income under the head "Income from other sources" with which brought forward business loss was not allowable to be set off u/s.72(l). Therefore, there was a mistake in computation of Income and led to under assessment of income of the assessee.

(2) Scrutiny of serial No.10.1 of schedule M (notes on accounts) revealed that recognition of revenue in respect of interest claim amounting to Rs.6811.78 lakhs and Apex Charges amounting to Rs.1210.00 lakhs attributable to Bharat Coking Coal Ltd. (BCCL) and recognition Of Rs.176.58 lakhs attributable to interest for the year on VRS loan to Eastern Coalfields Ltd. (ECL) in the year's account had been deferred although VRS loan had been squared up by ECL to the assessee company on 31/03/2007.

Now from the assessment order it was revealed that though interest claim amounting to Rs.6811.78 lakhs and Apex charges amounting to Rs.1210.00 lakhs attributable to the BCCL were added back by the department, interest amounting to Rs.176.58 lakhs on VRS loan attributable to the ECL was not added back.

As the assessee company was following mercantile system of accounting the income accrued in the form of interest on VRS loan during the year was required to be accounted for in the A/Y 2007-08 relevant to the year 2006-07. Omission resulted in underassessment of income by Rs.176.58 lakhs with consequential tax effect of Rs.80,01,358/-.

(3) From the schedule 15 of P/L A/cs and computation of income by the assessee, it revealed that doubtful advance was written off for Rs.360.06 lakhs during the year being not paid by ECL during the period of 5 years from the date of expenditure incurred by the assessee on behalf of ECL.

As per section 36(1)(vii) of I. T. Act any bad debt or part thereof is written off as irrecoverable subject to the provision of section 36(2) and section 36(2) (i) states- that no such deduction shall be allowed unless such debt or part thereof has been taken into account" in computing the income of the

assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year or represents money lent in the ordinary course of the business of banking or money lending which is carried on by the assessee.

In the instant case, the debt was never taken into account in the P/L a/cs or in computing the income of the assessee. During the year itself there was on addition of debt amounting to Rs.717.75 lakhs which was neither accounted for in the P/L A/cs nor in computing income of the assessee. Again, assessee was neither a banking institution nor a money lender. Assessee simply created a fund from its own contribution and incurred expenditure on behalf of its subsidiary (ECL) from that fund to be recovered only after the mining activities in the block of ECL was projectised and implemented by the ECL which was again contingent in nature.

Therefore, allowance of debt of Rs.360.06 lakhs u/s.36(1)(vii) was irregular which was required to be disallowed. Omission resulted in underassessment of income by Rs.360.06 lakhs with consequential tax effect of Rs.163,15,409/-.

12. 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 completing 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 find ourselves in agreement with the Id. CIT(Appeals) 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 thereof was liable to be cancelled being invalid. We accordingly uphold the impugned order of the Id. CIT(Appeals) on this issue and dismiss the appeal of the Revenue for A.Y. 2007-08.

13. In the result, both the appeals of the Revenue are dismissed.
Order pronounced in the open Court on December 07, 2018.

Sd/-

Sd/-

(A.T. Varkey)
Judicial Member

(P.M. Jagtap)
Vice-President (KZ)

Kolkata, the 7th day of December, 2018

Copies to : (1) ***Deputy Commissioner of Income Tax,
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Premises No. 04, MAR, Plot No. AF-III,
Action Area-1A,
Kolkata-700 156***

(3) ***Commissioner of Income Tax (Appeals)-8, Kolkata,***
(4) ***Commissioner of Income Tax- ,***
(5) ***The Departmental Representative***
(6) ***Guard File***

By order

***Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata***

Laha/Sr. P.S.