

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AMRITSAR BENCH, AMRITSAR (SMC)**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

**I.T.A. No. 194/Asr/2018**

Assessment Year: 2011-12

Shivam Enterprises,  
Garhi Gate, Hoshiarpur  
[PAN: AANFS 6665A]

**(Appellant)**

vs. Income Tax Officer,  
Ward-4, Hoshiarpur

**(Respondent)**

Appellant by : Sh. Sachin Malhotra (Adv.)

Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 19.02.2019

Date of Pronouncement: 21.02.2019

**ORDER**

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-1, Jalandhar ('CIT(A)' for short) dated 03.01.2018, partly allowing the assessee's appeal contesting its assessment u/s. 143(3) r/w s. 147 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 21.12.2016 for the Assessment Year (AY) 2011-12.

2. The principal issue arising in the instant appeal is the validity reopening of assessment vide notice u/s. 148 dated 08.02.2016. The assessee assails the same on the basis of it being a 'change of opinion'. Depreciation on trucks and tempos had been allowed in the original assessment u/s. 143(3) dated 25.02.2014 at the rate of 40% (on WDV), i.e., as claimed, on being satisfied that the said vehicles, used for transportation business, are eligible for depreciation at a higher rate. The Assessing

Officer (AO) subsequently recorded reason/s to believe (copy on record) that it is not a case of letting them on hire and, thus, were eligible for depreciation at the general rate of 15%. The same is not a valid ground, being in fact in pursuance of an audit objection. In fact, the reason as recorded is internally inconsistent, indicating lack of application of mind. This is as while at para 1 the AO notes that the assessee is engaged in business of transportation for Ambuja Cement Ltd., at para 2 thereof he states that the assessee was not using its' truck and tempos for hiring purposes, but for his own business of transportation! On a query by the Bench as to whether any query with regard to the rate of depreciation on the said vehicles was raised in the original assessment proceedings, the ld. counsel for the assessee, Sh. Malhotra, would fairly concede it to be not so. Asked about the rate of depreciation on vehicles let on hire, he stated it to be at 30%, at which rate depreciation has in fact been allowed in first appeal vide the impugned order, so that the assessee admits of having no case on the merits of the disallowance *qua* depreciation. On being further asked about the rate at which depreciation on trucks/tempos was being claimed and allowed in the past; there being no change either in the business profile or in the law in the matter, Sh. Malhotra would submit that though no firm answer could be given in the absence of the record, the same would be at 30%, i.e., the rate applicable to the vehicles let on hire. The ld. Departmental Representative (DR) would, on the other hand, argue that the mere fact of depreciation on trucks having been allowed at 40%, without recording any finding as to the same being used for hiring, implies that there was no application of mind by the AO *qua* the aspect of depreciation thereon at the time of the original assessment. How could, therefore, there be a 'change of opinion', i.e., without any opinion being expressed in the first place; the ld. counsel for the assessee himself admitting to no query in its respect having been raised in the assessment proceedings at the time of the original assessment.

3. I have heard the parties, and perused the material on record.

There is little merit in the assessee's stance that the reason to believe escapement of income from assessment could only be on the basis of new material. That the said reason could be derived from the material on record, i.e., the same material which was the subject matter of assessment proceedings, requires no emphasis (refer: *Sewak Ram v. ITO* [2010] 47 DTR 361 (P&H); *Consolidated Photo and Finvest Ltd. v. Asst. CIT* [2006] 281 ITR 394 (Del)). Even the same issue, examined in a different context, would not bar reassessment (*Venus Industrial Corp. v. Asst. CIT* [1999] 236 ITR 742 (P&H)).

At the same time, however, in my view no case for reopening of assessment is made out on the basis of the reason/s recorded. This is as the AO was, without doubt, conscious of the assessee's business of transportation of goods for the principal, Ambuja Cement Ltd., earning transportation income, while framing the original assessment, even as noted at para 1 of the reasons recorded itself. The sole basis for reopening the assessment is that the assessee's vehicles are not being used for hire and, accordingly, entitled to depreciation at the general (lower) rate. If transportation of goods, for which the assessee has entered into a transportation agreement with its' principal, disclosing transportation income, is not income from the business of hiring, what one wonders is? It would be a different matter where the goods transported are the assessee's, and their transport is undertaken toward effecting delivery thereof. In any case of the matter, it would qualify to be a 'change of opinion', which in the instant case has been sought to be introduced by the audit party, a fact emphasized by Mr. Malhotra, which though is largely irrelevant as the condition precedent for reassessment is to be in any case satisfied. True, the depreciation rate in such a case is not 40%, but 30%, as allowed by the Id. CIT(A), but for that to be taken cognizance of the reason/s recorded ought to state so, if only in the alternative. That is, no doubt, even considering it to be a case

of hire income, depreciation on trucks/tempo could not have exceeded 30%. However, the reason/s recorded does not record this fact or state it as the reason for reassessment, for it to be taken into account. Even, therefore, at the time of recording reasons, the AO did not take care to check the rate applicable for hired vehicles, i.e., with reference to the relevant rule and schedule. Even though therefore it is the clear case of a mistake, even as fairly admitted by Sh. Malhotra during hearing, it would not, by itself, translate into a ground for reopening the assessment, the maintainability of which is to be examined strictly on the basis and strength of the reason/s recorded. The Revenue, time permitting, could take steps under rectification proceedings; the assessee's case itself being for allowance of depreciation as applicable for vehicles let on hire, i.e., @ 30%.

The Id. CIT(A) correctly states that the scope of the reassessment under the amended law is wide, so that all that is necessary is that there is a reason to believe that income had escaped assessment. The belief may not be conclusive, but one which a reasonable person could, on the basis of the relevant material, form. There is in the present case, however, no material as to the trucks being not used for hire, with, rather, all the material pointing to the contrary. How could, then, a reason to believe escapement of income from assessment be validated on the basis of the material, even if already on record? It would, as afore-stated, be a different matter if the AO had stated in the reasons recorded that the depreciation rate, even regarding it to be a case of hire, is at 30%, and justify the reopening on that basis.

4. In my considered view, therefore, no case for reopening of assessment is made out on the basis of the reason/s recorded. It is a case of review, impermissible u/s. 147, which is a settled position of law (refer: *CIT v. Kelvinator of India Ltd.* [2010] 320 ITR 561 (SC)). The ensuing assessment is accordingly without

jurisdiction and of no consequence in law. There is accordingly no need to travel to the other grounds of appeal. I decide accordingly.

5. In the result, the assessee's appeal is allowed.

*Order pronounced in the open court on February 21, 2019*

Sd/-

(Sanjay Arora)

Accountant Member

Date: 21.02.2019

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Shivam Enterprises, Garhi Gate, Hoshiarpur
- (2) The Respondent: Income Tax Officer, Ward-4, Hoshiarpur
- (3) The CIT(Appeals)-1, Jalandhar
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T

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By Order