IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI M. BALAGANESH (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 2424/MUM/2018
Assessment Year: 2009-10

M/s Eskays Constructions Private Limited, 16th Floor, B-Wing Mittal Tower-210, Mumbai - 400021 PAN: AAACE1223E	Vs.	The Assistant Commissioner of Income Tax, Central Circle 8(4), Room No. 658, Aayakar Bhawan, M.K. Road, Mumbai – 400020
(Appellant)		**(Respondent)**

Assessee by :	Shri S.C. Tiwari/Ms. Hetal Laghave (ARs)
Revenue by :	Shri Amit Pratap Singh/Mohd. Rizwan (DRs)

Date of Hearing:	25/08/2020
Date of Pronouncement:	28/08/2020

O R D E R

PER RAM LAL NEGI, JM

The assessee has preferred this appeal against the order dated 28.02.2018 passed by the Ld. Commissioner of Income Tax (Appeals) (for short 'the CIT (A)')-50, Mumbai, for the assessment year 2009-10, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against the assessment order passed u/s 147 r.w.s. 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee company engaged in the business of construction and development of real estate, filed its return of income for the assessment year under consideration declaring loss of Rs. 5,53,233/-. The return was processed and assessment order u/s 143(3) of the Act was passed by the AO accepting business loss of Rs. 5,53,230/- claimed by the assessee. Subsequently, the assessment was reopened u/s 147 of the Act on the ground that the assessee has wrongly reduced the value of Nasik property to the extent of the sale consideration of scrap. The assessee opposed

the reopening and contended that since it has purchased the land including plant and machinery in Nasik for a total consideration of Rs. 8,75,00,000/- for the purposes of construction and development, it treated the sale value of scrap as CWIP and reduced the value of property by Rs. 2,52,86,016/-. The AO rejected the contention of the assessee and passed assessment order u/s 143(3) read with section 147 of the Act, determining total income of the assessee at Rs. 2,47,32,790/- after making addition of the value of scrap to the income of the assessee. In the first appeal the Ld. CIT(A) affirmed the action of the AO and upheld the addition. Aggrieved by the said order the assessee is in appeal before this Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:

1. *"The Commissioner of Income-tax (Appeals) [Hon'ble CIT (A)"] erred in confirming the reopening of assessment u/s 147 of the Act, without properly appreciating the fact of the case and laws applicable thereto. On the basis of facts and circumstances of the case and in law, the order passed u/s 143 (3) read with section 147 of the Act ought to be quashed.*
2. *Without prejudice to ground no. 1 above, the Hon'ble CIT (A) has erred in confirming the action of the Ld. AO of assessing the sale of scrap of Rs. 2,52,86,016/- as income of the current year instead of reducing the same from carrying value of Nashik Property on the ground that Nashik property was not inventory or Work-in-progress.*
   On the basis of facts and circumstances of the case and in law, the sale value of scrap ought to be reduced from the carrying value of Nashik Property.
3. *Without prejudice to ground no. 1 & 2 above, the Hon'ble CIT (A) has erred in denying benefit of cost of acquisition of the plant & machinery (sold as scrap), without appreciating the fact that the relevant documents to substantiate cost were already filed by appellant.*
   On the basis of facts and circumstances of the case and in law, the benefit of cost of acquisition of plant & machinery ought to be given to the appellant."

4. The Ld. counsel for the assessee submitted before us that the assessee a builder and real estate developer, purchased land and factory building from Bank of India in an auction under The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act). The assessee sold the scrap lying in the Factory for Rs. 2,52,86,016/- and treating the same as part of capital work in progress (CWIP) reduced the value of property by Rs. 2,52,86,016/-. The AO accepted the action of the assessee in original assessment order passed u/s 143(3) of the Act. In view of the aforesaid facts, the Ld. counsel submitted that the action of reopening is bad in law being change of opinion. The original assessment order was passed on 16.12.2011. There was no fresh evidence/material with the AO to issue notice u/s 148 read with 147 of the Act. The Ld. counsel placing reliance of the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC)*, submitted that the Ld. CIT(A) has wrongly upheld the assessment order passed contrary to the ratio laid down by the Hon'ble Supreme Court in the aforesaid case. The Ld. counsel accordingly submitted that the impugned order is liable to be set aside.

5. On facts, the Ld. counsel submitted that since assessee was not engaged in the business of sale/purchase of scrap, the Ld. CIT(A) has wrongly upheld the action of the AO in treating the same as business income of the assessee. The Ld. counsel further submitted that the facts of assessee's case are different from the facts of the cases relied upon by the authorities below. The Ld. counsel invited our attention to page 41 of the paper book containing financial statements to demonstrate that the fact regarding reduction of value of property to the extent of sale consideration of scrap was brought to the notice of AO by the assessee during the course of original assessment proceeding. The Ld. counsel further invited our attention to page 33 of the paper book, which is the copy of Balance Sheet of the assessee wherein the assessee has reflected the inventories pertaining to the ongoing projects of the assessee including the said assets. The Ld. counsel further submitted that assessee has not claimed any revenue expenditure, therefore the authorities below have

wrongly treated the sale proceeds of scrap as business income of the assessee. Moreover, the assessee had just purchased the land and no construction work had commenced, the Ld. CIT(A) has wrongly upheld the action of the AO in treating said amount as business income of the assessee. The Ld. counsel further placing reliance on the judgment of the Hon,ble Supreme Court in the case of *Apollo Tyres Ltd. vs. CIT (2002) 122 Taxman 562 (SC)* submitted that the AO has no authority to go behind net profit shown in profit and loss account except provided in Explanation to section 115J.

6. On the other hand the Ld. departmental representative (DR) supporting the order passed by the Ld. CIT(A) submitted that since the assessee has not shown the land as inventory, there is no merit in the contention of the assessee that the land was purchased for the purpose of construction. Hence, CIT(A) has rightly confirmed the assessment order passed u/s 143(3) read with 147 of the Act.

7. We have heard the rival submissions of the parties and perused the material on record including the cases relied upon by the authorities below and the cases referred and relied upon by the parties during the course of arguments. Admittedly, the AO has issued notice to the assessee u/s 148 read with 147 of the Act for reopening of assessment order passed u/s 143(3) of the Act on the ground that the assessee has wrongly reduced the value of property by Rs. 2,52,86,016/- and the same should have been offered for taxation in the assessment year under consideration. The contention of the assessee is that the since it is in the business of construction and development of real estate and since no construction had commenced, the authorities below have wrongly held the amount in question is assessable during the assessment year under consideration. Moreover, AO had passed the assessment order u/s 143(3) of the Act after verification of the documents and details filed by the assessee during the assessment proceedings and since no document/details were furnished by the assessee after passing assessment order, there was no tangible material with the AO to reopen the assessment. Therefore, the Ld CIT(A) has wrongly upheld the action of the AO. As pointed out by the Ld.

counsel the Hon'ble Supreme Court in the case of *CIT vs. Kelvinator of India Ltd.* (supra) has held that the assessing officer has power to reopen the assessment, provided there is tangible material to come to the conclusion that there is escapement of income from assessment. The Hon'ble Court has further held that the reasons must have a live link with formation of belief. As pointed out by the Ld. counsel the AO has not referred any tangible material in the reasons recorded for reopening, on the basis of which he formed the belief that the income of the assessee has escaped assessment. Perusal of the copy of the annual statements particularly the pages referred by the Ld. counsel reveal that the AO was aware of the fact that the assessee has reduced the cost of property to the extent of the sale consideration of scrap. Hence, in our considered view, the AO had passed the original assessment order after considering the stand of the assessee. Further the Ld. DR argued in favour of the revenue with regard to addition on merit, however, he relied on the order of the Ld. CIT(A) on the point of reopening.

8. We further do not find merit in the contention of the Ld. DR that the assessee has not shown the Nasik property under current assets in the Balance Sheet. Perusal of Schedule 'F' to the Balance sheet enclosed in the paper book at page 41 reveals that the assessee has reflected the cost of Nasik property at Rs. 68,902,559/-after reducing the value of sale of scrap. Once it is established that the AO has taken a conscious decision on the basis of material placed before him, he cannot review his findings under the garb of reopening. Hence, the Ld. CIT(A) has wrongly endorsed the action of the AO. In our considered view, the action of the AO amounts to change of opinion which cannot be the basis for reopening of assessment passed u/s 143(3) of the Act. We therefore, hold that the impugned order is contrary to the ratio laid down by the Hon'ble Supreme Court in the case of CIT *vs. Kelvinator of India Ltd.(supra),* therefore, the same is liable to be set aside. Hence, respectfully following the ratio laid down by the Hon'ble Supreme court in the aforesaid case we hold that in the present case the AO had no jurisdiction to issue notice u/s 148 read with section 147 of the Act. Accordingly, we decide the legal

ground taken by the assessee in its favour and allow the appeal and set aside the impugned order passed by the Ld. CIT(A).

9. Since we have allowed the appeal of the assessee by adjudicating the legal issue in its favour, the other grounds raised by the assessee on merits have become academic. We therefore, do not deem it necessary to discuss and decide the same.

In the result, appeal filed by the assessee for assessment year 2009-2010 is allowed.

Order pronounced on 28th August, 2020 under rule 34(4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-	*Sd/-*
(M. BALAGANESH)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/08/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**