आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'B' BENCH, CHENNAI
श्री वी.दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपीलसं./**I.T.A.No.2112/Chny/2017 & C.O. No. 164/Chny/2017**
[In ITA No.2112/Chny/2017]
(निर्धारणवर्ष / Assessment Year: 2009-10)

The Assistant Commissioner of Income Tax, Non-Corporate Circle-7(1) Chennai-600 034.	Vs	Mr. A.Thiagarajan Plot No.67, Akshya Colony, Padi, Chennai-600 098.
		PAN: AABPT 1461F
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent /Cross Objector)

अपीलार्थी की ओरसे/ Appellant by	:	Mr. G.Johnson, Addl.CIT
प्रत्यर्थीकी ओर से/Respondent by	:	Mr. T.Banusekar, C.A

सुनवाईकीतारीख/Date of hearing	:	04.04.2022
घोषणाकीतारीख /Date of Pronouncement	:	12. 04.2022

आदेश / O R D E R

PER G.MANJUNATHA, AM:

This appeal filed by the Revenue and cross objection filed by the assessee are directed against order of the learned Commissioner of Income Tax (Appeals)-6 Chennai, dated 28.06.2017 and pertains to assessment year 2009-10.

2. The Revenue has raised following grounds of appeal:-

"*1. The order of the learned Commissioner of Income Tax (Appeals) is contrary to the law and facts of the case.*

2.1. The CIT (A) erred in holding that the AO has made any change of opinion.

2.2. The CIT (A) erred in quashing the re-assessment by treating as change of opinion of the new AO. But it cannot be merely said to be change of opinion of the A.O. but application of mind of his superior officers like JCIT and CIT is also there by approving the re-opening proposal.

2.3. The CIT (A) failed to consider the fact that the amount of Rs. 1.5. crores which was paid by the assessee to save him from criminal proceeding has no bearing with his business income of the year and totally penal in nature.

2.4. The CIT (A) erred in following the decision of the Hon'ble Supreme Court in the case of M/s. Kelvinator India Ltd, when no change of opinion could be alleged on a factual situation.

2.5. The CIT (A) omitted to consider the decision of the Hon'ble Supreme Court in the case of ALA firm vs CIT [1991] 189 ITR 285 (SC) which is in favour of the department.

3. For these and other grounds that may be adduced at the time of hearing it is prayed that the order of the learned Commissioner of Income Tax (Appeals) be set aside and that of the Assessing officer be restored.

3. Brief facts of the case are that the assessee was President of M/s.SPB Projects & Consultancy Ltd. He was carrying his own business in consulting and engineering services. The assessee was diverting contracts of the employer company, where he was holding post of President to his own business that ultimately came to the knowledge of employer company. In order to settle dispute with his employer company, the ssessee had entered into settlement agreement to avoid criminal prosecution and as per Memorandum of Understanding dated 03.01.2009 paid a sum of Rs.1.5 crores as compensation and also surrendered 9000 equity shares of the company held by him. The assessee has claimed compensation paid to his employer company as his business expenditure. The case of the assessee has been assessed u/s.143(3) of the Act, on 20.10.2011 and determined total income of Rs.1,51,90,898/- after disallowance of Rs.5,71,168/-. The case has been subsequently reopened u/s.147 of the Income Tax Act, 1961, for the reasons recorded, as per which income chargeable to tax had been escaped assessment and consequently, assessment has been completed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961, dated 30.03.2016 and

determined total income at Rs.3,01,90,898/- by disallowing compensation paid by the assessee to his employer company u/s.37(1) of the Income Tax Act, 1961.

4. The assessee challenged assessment order before the learned CIT(A). Before the learned CIT(A), the assessee has challenged validity of reassessment proceedings on the ground of change of opinion, in light of reasons recorded by the Assessing Officer for reopening of assessment and argued that the Assessing Officer has reopened assessment on the basis of audit objection, which is evident from fact that audit note issued by the Principal Director of Audit- Central, Chennai very clearly stated that as per note not to the assessee, the Assessing Officer has allowed deduction towards compensation paid as expenditure incurred wholly and exclusively for the purpose of business and thus, in absence of any fresh tangible material, reopening of assessment tantamounts to change of opinion. The learned CIT(A), after considering relevant submissions of the assessee and also taken note of note not to the assessee from assessment records opined that reopening of assessment on the basis of audit objection without any fresh

tangible material amounts to change of opinion which is not permissible under the law. The learned CIT(A) has discussed the issue in light of decision of the Hon'ble Supreme Court in the case of CIT Vs Kelvinator of India Ltd (2010) 320 ITR 561 and also the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Hardware Trading Company Ltd. (2001) 248 ITR 673 and held that note 'not to the assessee' from records of the Assessing Officer implied that he had very clearly and definitely formed an opinion on the issue and thus, reopening of assessment on the very same issue in absence of any fresh tangible material amounts to change of opinion. The relevant findings of the learned CIT(A) are as under:-

> *"5.6 On careful consideration of facts and circumstances as above, my findings on the issue are as under:-*
>
> *1. The issue of allowability of expenditure was deliberated in the original assessment proceedings. Specific details were called and examined.*
>
> *2. The Assessing Officer was satisfied with the submissions of the appellant that the expenditure is allowable under Section 37 of the Act as a normal business expenditure. His detailed findings have been*

reproduced from the "Note Not to the assessee as above.

3. From the sequence of events, it is dear that the Audit Objection was the immediate and proximate cause for the initiation of proceedings under Section 147 of the Act.

4. The Assessing Officer has not brought any fresh / tangible material on record to substantiate his 'reasons to believe".

5. The Assessing Officer has not established any specific default on the part of the appellant to fully and / or truly disclose all material facts.

6. A diametrically opposite view has been taken in the order under Section 143(3) read with Section 147 of the Act on the same set of facts, circumstances and evidences.

5.7 The Hon'ble Karnataka High Court in the case of CIT vs Hardware Trading Co. Ltd. reported in [2001] 248 ITR 673 (Kar), held that Assessing Officer's "note on record" implied that he had very clearly and definitely formed an opinion on the issue. The relevant excerpt from the decision of the Hon'ble Karnataka High Court is reproduced as under:

"9. Having summarized the rival contentions and the position in law, the short question that we are required

to address ourselves to is as to whether the decision of the Tribunal is justified or not. The legal position is quite unambiguous and there is no dispute about the fact that while a reopening of assessment is justified under circumstances wherein new or additional material is received which concept again is relatively wide, is in the possession of the Department or brought to its notice at a point of time after the original assessment has been concluded or if there has been a change of law, which has been construed as constituting opinion that could justify the reopening; at the same time the courts have been equally strict with regard to situations wherein, in the absence of any of these factors, a reopening of the assessment is contemplated. There can be no quarrel with regard to the basic preposition that has been canvassed by Mr. Indra Kumar on behalf of the Department but where he has run into some difficulties is with regard to the factual position on the present case. What is coming heavily in his way is the note that has been referred to by the ITO at the stage of reassessment and by subsequent authorities also . This note envisages two positions, the first being that the aspect of whether the amanni of Rs.1,05,000 which comprised the value of the Matador van had come to the notice or the Income-tax Officer or whether it had escaped his attention is required to be assessed. From the note in question, tow things are clear, viz, that his particular

head had come to the attention of the Income-tax Officer when he was finalizing the assessment that he has applied his mind to the contention raised on behalf of the assessee that it could justifiably be transferred to the head of capital and that he has also accepted this position. Undoubtedly, the main contention that has been pressed before us on behalf of the Revenue is that the Income-tax Officer on the earlier occasion had not formed any! opinion and one of the possible justifications for this argument is perhaps the fact that there is no discussion with regard to this head not is there any significant record in the assessment order. That is the main ground on which learned counsel submitted that where the Tribunal upheld the bar on the ground of change of opinion it presupposes the fact that there was an earlier opinion whereas in his submission there was no earlier opinion which was subsequently changed. We have very carefully dissected this argument and we do find that it would be impossible to uphold it for the simple reason that we have on record the note which very clearly indicates that the attention of the officer had been focused to this very head and that despite this having been done he has upheld the contention of the assessee that the amount could be transferred to the head of capital. It is not for us to examine the correctness or otherwise of what had happened hat, the limited observation that this court needs to make is

that the Income tax Officer had very clearly and definitely formed an opinion with regard to this particular head of income as is reflected in the note, and factually it would therefore not be permissible to contend that no opinion had been formed in the first instance. This is the real stumbling block in the way of the Department because this case again is distinguishable from the earlier decision of the Delhi High Court referred to b us wherein the court found that no opinion had been expressed on the first occasion. Furthermore, what we have taken careful cognizance of is the fact that even a meticulous examination of the record before us will indicate that the reassessment was done on the basis of pre-existing material and nothing that had come to the notice or possession of the Department at a subsequent point of time. That is one of the essential ingredients that could justify the reopening of an assessment. Barring the cryptic reference in the record that it subsequently came to the notice of the Department which we have referred to earlier, there is nothing to indicate that there was anything to justify a situation whereby any additional or new information had been received as this has not been set out anywhere. It is clear therefore from the orders before us that this was a simple case wherein the earlier order had been reconsidered/reviewed and that being the position, it would come squarely within a situation

of "change of opinion" which having regard to the well crystallized law on the point is not permissible"

5.8 The Hon'ble Supreme Court of India in the case of CIT vs Kelvinator of India Ltd. 12010] 320 ITR 561 (SC) observed that "one needs to give a schematic interpretation to the words reason to believe' failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot- be per se reason to reopen.... The Assessing Officer has no power to review; he has the power to re-assess Assessing Officer has power to reo pen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment."

5.9 I am of the considered view that the ratio of Hon'ble Supreme Court's decision in the case of Kelvinator of India Ltd. (Supra) is squarely applicable on the facts of appellants case. The issue of allowability of Rs.1.50 cores was analyzed by the Assessing Officer in the original proceedings and a clear and definite view was taken. The findings of the Assessing Officer are unequivocal and categorical in the "Note" left on the assessment records. Further, the Assessing Officer has brought no fresh tangible material on record to underscore his reasons to

believe. It is evident that a new view has been taken on the same set of facts and circumstances and the reason for the change of view is not fresh tangible material, but an audit objection. The action of the Assessing Officer in the reassessment proceedings is nothing but a review of the earlier stand, which is clearly not allowable as per the Law laid down by the Hon'ble Supreme Court in the Kelvinator of India case (supra). In the circumstances, I am in agreement with the views of the id. Authorized Representative that the reassessment proceedings are a mere change of opinion and that there was no valid justification for the initiation of reassessment proceedings The reassessment proceedings therefore stand quashed, and the grounds challenging the validity of reassessment proceedings are allowed."

5. The learned DR submitted that the learned CIT(A) erred in quashing assessment order on the ground of 'change of opinion' without appreciating fact that the Assessing Officer did not apply his mind while completing assessment which is evident from fact that the Assessing Officer has simply allowed expenses claimed by the assessee in the nature of penalty paid for breach of contract as allowable deduction and thus, reopening of assessment on the basis of audit objection

amounts to formation of belief on the basis of fresh tangible material and thus, the learned CIT(A) has erred in quashing reassessment order. The learned DR further referring to decision of the Hon'ble Supreme Court in the case of CIT Vs. PVS Beedies Pvt. Ltd. (1999) 237 ITR 13 (SC) submitted that reopening of assessment on the basis of audit objection is valid, because there is no dispute as to factual error committed by the Assessing Officer has been brought out in the audit note. The learned DR further referring to decision of the Hon'ble Supreme Court in the case of in the case of A.L.A Firm Vs.CIT (1991) 189 ITR 285 submitted that when the Assessing Officer has not formed opinion on the issue, reopening on the basis of subsequent information, being audit objection constituted fresh tangible material and thus, question of change of opinion does not arise.

6. The learned A.R for the assessee, on the other hand, supporting order of the learned CIT(A) submitted that it is well settled principle of law by the decisions of various Courts, including decision of the Hon'ble Supreme Court in the case of Kelvinator of India Pvt.Ltd (supra) that the Assessing Officer

had power to reopen the assessment u/s.147 of the Act, provided the Assessing Officer has reason to believe that income has escaped assessment and there is tangible material to come to the conclusion that there is escapement of income, but mere change of opinion cannot *per se* be reason to reopen the assessment. The learned AR further referring to plethora of judicial precedents submitted that assessment in the present case has been reopened after a period of four years from the end of the relevant assessment year and thus, unless the Assessing Officer points out lapse on the part of the assessee to disclose fully and truly all facts, the Assessing Officer cannot reopen the assessment. Further, present reopening is only on the basis of audit objection, which clearly proves that the Assessing Officer has examined the issue in assessment proceedings which is evident from fact that the Assessing Officer has left a note 'not to the assessee' which clearly shows application of his mind to the facts of the case and thus, in absence of fresh tangible material reopening of assessment amounts to change of opinion, which is not permissible under law. The learned CIT(A), after considering relevant facts has

rightly quashed reassessment order passed by the Assessing Officer and his order should be upheld.

7. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The solitary question that needs to be answered in the given facts & circumstances of the case is whether reopening of assessment is based on reasonable belief of escapement, which suggest escapement of income on the basis of fresh tangible material or mere change of opinion on the issue which has been deliberated upon by the Assessing Officer during the scrutiny assessment proceedings. The facts born out from records clearly indicate that the Assessing Officer has examined issue of compensation paid by the assessee for breach of contract with his employer company and has allowed claim which is evident from fact that the Assessing Officer has left a note 'not to the assessee' in the assessment records as per which, it is clearly evident that the Assessing Officer has applied his mind before allowing claim of the assessee. It is also evident from facts on record that reasons recorded by the Assessing Officer to form reasonable belief of escapement is

based on audit objection, as per which the audit party also noted that as per note 'not to the assessee' from assessment records, the audit party has raised objection on the issue of deduction allowed towards expenses claimed by the assessee. From the above, it is very clear that basis for reopening of assessment is audit objection and further, which is based on note 'not to the assessee' given on assessment records. Except this, there is no fresh tangible material in the possession of the Assessing Officer to form reasonable basis of escapement of income. Therefore, we are of the considered view that once it is noted that basis for reopening of assessment is note 'not to the assessee' available on record, then it is implied that the Assessing Officer had very clearly and definitely formed opinion on the issue and thus, reopening of assessment on the very same issue amounts to change of opinion, which is not permissible under the law.

8. The Hon'ble Supreme Court in the case of Kelvinator of India Ltd.(supra) had laid down very clear ratio, as per which the Assessing Officer had power to reopening assessment, provided there is tangible material to come to the conclusion

that there is escapement of income from assessment. In this case, basis for reopening of assessment is audit objection and further, said audit objection is once again based on note 'not to the assesse'. Since, there is no fresh tangible material, except note 'not to the assessee', with the Assessing Officer to form reasonable belief of the escapement, we are of the considered view that the Assessing Officer had applied his mind to the issue in the original assessment proceedings and has allowed deduction. Therefore, reopening of assessment on the very same issue in absence of any fresh tangible material amounts to clear case of change of opinion, which is not permissible under the law. The learned CIT(A), after considering relevant facts has rightly quashed the assessment proceedings. Hence, we are inclined to uphold findings of the learned CIT(A) and reject grounds taken by the revenue.

9. In the result, appeal filed by the revenue is dismissed.

Cross Objection No.164/Chny/2017:-

10. The assessee has filed cross objection and raised various grounds on merits of the issue. Since, appeal filed by the revenue on the issue of reopening of assessment has been

dismissed, cross objection filed by the assessee becomes infructuous and thus, cross objection filed by the assessee is dismissed as not maintainable.

11. In the result, appeal filed by the revenue and cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 12th April , 2022

Sd/-	Sd/-
(वी. दुर्गा राव)	**(जी. मंजुनाथ)**
(V. Durga Rao)	(G.Manjunatha)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 12th April, 2022

DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.