

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

आयकर अपील सं/ I.T.A. No. 1210/Mum/2020
(निर्धारण वर्ष / Assessment Year: 2011-12)

Merck Performance Materials Pvt. Ltd., (Formerly known as Chemtreat Composites India Pvt. Ltd.) Godrej One, Pirojsha Nagar, Eastern Express Highway, Vikhroli (East), Mumbai- 400079 PAN : AABCC5609B	बनाम/ Vs.	The Assistant Commissioner of Income Tax – 15(2)(2), Mumbai, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी) / Respondent)

For the Appellant/Assessee: Arati Vissanji
For the Respondent/Revenue: C.T. Mathews

सुनवाई की तारीख / Date of Hearing : 03.02.2022
घोषणा की तारीख /Date of Pronouncement : 13.04.2022

आदेश / O R D E R

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Assessee has challenged the order dated, 02.12.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-24, Mumbai (hereafter referred to as 'the CIT(A)'] under Section 250 of the Income Tax Act, 1961 (hereafter referred to as 'the Act'), whereby the Ld. CIT(A) had dismissed the appeal against the Assessment Order, dated 29.12.2017, passed under Section 143(3) read with Section 147 of the Act.
2. The Assessee has raised the following grounds:
 - "1. *In the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that:*
 - 1.1 *The AO had applied his mind before issuing the Notice u/s. 148 though however he has done so on the basis of "Audit Objection" and further*

holding that the Ld. AO had reopened the assessment on the basis of the relevant material for formation of reasonable belief for escapement of income.

- 1.2 He was satisfied that there was tangible material before the AO for formation of reasonable belief for escapement of income and therefore assessment was required to be upheld and further erred in holding that there was no illegality in reopening the assessment u/s. 147 of the Act.*
 - 1.3 The deduction u/s. 10B of the Income Tax Act, 1961 was not required to be granted without setting off the carried forward losses and depreciation of the earlier year of the units / business.*
 - 1.4 Not following the judgment of the Hon. Supreme Court in case CIT vs. Yokogawa India Limited (391 ITR 274) wherein it has been held that the business losses of non-eligible units cannot be set-off against the profits of the units eligible for deduction u/s. 10A / 10B of the Act.*
 - 1.5 Holding that the Ld. AO was right in placing reliance on the CBDT Circular No. 7/DV/2013 dated 16 July, 2013 and that despite the judgment of the Hon. Supreme Court (supra), was required to set off losses of the earlier years for allowing deduction of an eligible unit u/s. 10A / 10B of the Act and thereby not granting deduction of Rs.99,00,000/- thereunder.*
3. *It is humbly prayed that the reliefs as prayed for hereinabove and/or such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted."*
4. The brief facts of the case are that the Appellant filed the original return of income on 30.01.2011 declaring total loss of INR 42,80,859/- and Book Profits of INR 99,08,000/- under Section 115JB of the Act. The original return of income filed by the Appellant was processed under Section 143(1) of the Act. The Appellant, however, filed a revised return of income on 28.09.2012 declaring 'Nil' income under normal provisions of the Act after claiming the set-off of brought forward losses, and declaring Book Profits of INR 1,00,53,106/- under Section 115JB of the Act.

5. The revised return filed by the Appellant was picked up for detailed scrutiny and vide order, dated 28.02.2014, assessment was framed on the Appellant under Section 143(3) of the Act. The income of the Appellant was assessed at INR 1,00,53,106/- under the provisions of Section 115JB of the Act as total income under the normal provisions of the Act at 'Nil'. In the assessment framed, the Assessing Officer allowed deduction of INR 99,00,000/- under Section 10B of the Act.
6. Thereafter, on 23.03.2017 notice under Section 148 of the Act was issued to the Appellant by Assistant Commissioner of Income Tax-15(2)(2), Mumbai after 'Reasons for belief that income has escaped' were recorded by Assistant Commissioner of Income Tax – 15(1)(2), Mumbai. In response to the same, the Appellant filed return on 12.04.2017 and raised objections to reopening of assessment which were rejected by the Assistant Commissioner of Income Tax – 15(2)(2), Mumbai vide order dated 18.10.2017. The re-assessment proceedings culminated into passing of Assessment Order, dated 29.12.2017, under Section 143(3) read with Section 147 of the Act whereby deduction under Section 10B of the Act was computed at 'Nil' (after setting of earlier year losses), and the brought forward losses were computed at INR 1,13,66,000/- (being brought forward losses of INR 2,12,66,000/- reduced by the deduction of INR 99,00,000/- claimed by the Appellant). Thus, the Assessing Officer rejected the contentions raised by the Appellant challenging the validity of re-assessment proceedings as well as Assessee's claim on merits. Being aggrieved, the Appellant preferred appeal before CIT(A). However, the CIT(A) confirmed the Assessment Order and dismissed the appeal. The Appellant/Assessee is now in appeal before us against the order passed by CIT(A).
7. The Ld. Authorised Representative for the Assessee appearing before us submitted that in the present case assessment was framed under Section 143(3) of the Act vide, order dated 29.12.2017. The re-assessment proceedings under Section 147 of the Act have been initiated after the expiry of 4 years from the end of relevant Assessment Year without there being any tangible material, merely on account of change of opinion based upon

Revenue Audit Objection. She further submitted that there was no failure on the part of the Assessee to disclose truly and fully all materials facts. In addition, the Ld. Authorized Representative submitted that the person recording the reasons for reopening assessment was not the assessing officer who issued the notice. Further, she submitted that satisfaction has been recorded, and approval has been granted under Section 151(1) of the Act in a mechanical manner. She relied upon the judgments of the jurisdictional High Court and Supreme Court to support the case. On merits, she submitted that deduction has been correctly claimed by the Appellant before setting of earlier years losses of INR 2,12,66,000/- in accordance with the judgment passed by the Hon'ble Supreme Court in the case of CIT vs. Yokogawa India Limited :391 ITR 274 (SC). In reply, the Ld. Departmental Representative submitted the Assessing Officer had reasons to believe that income has escaped assessment. The contention of the Appellant that there was no tangible material is incorrect. Notice under section 148 of the Act was issued after recording reasons and obtaining necessary approvals under Section 151 of the Act. The reasons were provided to the Appellant and the objections raised by the Appellant were rejected. He relied upon the orders passed by the Assessing Officer and the CIT(A) to support his case. On merits, the Ld. Departmental Representative submitted that the AO as well as CIT(A) have correctly concluded that deduction claimed by the Appellant is to be computed after setting off the brought forward losses of earlier years by relying upon Circular No. 7/DV/2013 issued by Central Board of Direct Taxes.

8. We have perused the record and considered the rival contentions. While the Appellant has raised multiple contentions, we note that in Ground No. 1.1 and 1.2 the Appellant has challenged the re-assessment proceedings on the ground of absence of tangible material for forming reasons to believe that income has escaped assessment. Ground No. 1.3, 1.4 and 1.5 pertain to the merits of the addition/disallowance made in the re-assessment proceedings. We would first deal with the issue of validity of the re-assessment proceedings which goes to the root of the matter.

9. We find that in case of the Appellant, the assessment for the relevant assessment year was framed under Section 143(3) of the Act vide order dated 28.02.2014. Income under normal provisions of the Act was computed at 'Nil' after allowing deduction as claimed by the Appellant in the revised return filed on 30.11.2011. It is admitted position that notice under Section 148 of the Act, dated 23.03.2017, has been issued after the expiry of 4 years from the end of relevant assessment year. The reasons were recorded by the Assistant Commissioner of Income Tax, Circle 15 (1)(2), Mumbai, while notice under Section 148 of the Act, dated 23.03.2017, was issued by Assistant Commissioner of Income Tax, Circle 15(2)(2), Mumbai. Vide letter dated 14.08.2017, the Appellant was provided copy of reasons for reopening the assessment, and was informed that Assistant Commissioner of Income Tax, Circle 15(2)(2), Mumbai had jurisdiction over the case of the Appellant. The relevant extract of reasons recorded for reopening assessment recorded reads as under:

“ In this case, the return of income for A.Y. 2011-12 has been filed by the assessee on 30.11.2011 declaring total income of Rs.42,80,859/- and book profit of Rs. 99,08,000/-. The assessment was completed u/s 143(3) on 28.02.2014 assessing the total income at Rs. Nil after allowing deduction u/s 10B and setting off of unabsorbed depreciation. As the tax payable under the provisions of 115JB is higher than the tax payable under normal provisions, the income was assessed under the provisions of section 115JB of the I.T. Act.

2. It is seen from the record that the assessee had computed Nil income after claiming deduction of Rs.99,00,000/- u/s 10B before setting of earlier losses of Rs.2,12,66,000/-.

3. In view of the above facts, I have reason to believe that income chargeable to tax to the extent of Rs. 99,00,000/- has escaped assessment for AY 2011-12 by the failure on the part of the assessee to furnish the correct particulars of facts necessary for assessment.

4. Since, more than 4 years have elapsed from the end of the relevant assessment year, the case is covered u/s 149 r.w.s. 151 of the I.T. Act. Therefore, approval to issue notice u/s 148 may be granted, as

*required under proviso to Section 151(1) of the I.T. Act, 1961.”
(Emphasis Supplied)*

10. The reasons recorded clearly state that deduction as claimed by the Appellant was allowed in the assessment completed under Section 143(2) of the Act on 28.02.2014 and therefore, opinion was formed by the Assessing Officer on this issue in favour of the Appellant. The Assessing Officer recording reasons, however, formed a belief that the income has escaped assessment as the Appellant had computed/claimed deduction before setting off brought forward losses. Neither the reasons recorded nor the Assessment Order, dated 29.12.2017 passed under Section 143(3) read with section 147 of the Act refer to any other material or information that gave cause to the Assessing Officer to revisit the record. It is only on perusal of letter, dated 16.11.2016, addressed by ITO (Hqs) -15, Mumbai to the Joint Commissioner of Income-Tax, Range 15(1), Mumbai, placed at page 70 of the paper book filed by the Appellant on 15.11.2021, shows that the notice under Section 148 of the Act was issued as remedial action in response of the audit objection raised in the case of the Appellant. It was the Revenue Audit Objection which resulted in examination of record by the Assessing Officer who upon such examination formed a belief that income has escaped assessment as deduction has been computed/claimed by the Appellant before setting off brought forward losses. The basis of this belief is the legal interpretation adopted by the Audit Party. Accordingly, the belief formed by the Assessing Officer is nothing but a change of opinion of the Assessing Officer on re-examination of the same material/facts. In the present case there is no tangible material. Paragraph 2 of the reasons recorded clearly states *“it is seen from record”*. Also, there is no failure on the part of the Appellant to disclose truly and fully all material facts necessary to frame assessment. The fact that the Appellant has claimed deduction and there were brought forward losses was disclosed in the return of income. All the primary facts were disclosed by the Appellant in the return of income and/or the assessment proceedings under Section 143(3) of the Act.

11. The jurisdiction High Court, in the case of *Commissioner of Income Tax (LTU) vs. Reliance Industries Ltd. (2016) 382 ITR 574* relied upon by the Authorised Representative of the Appellant, has held as under:

“11. So far as failure to disclose fully and truly all facts are concerned, it is noticed from the reasons recorded that its basis for issuing the reopening notice is the records of the Assessee in possession of the Assessing Officer during regular assessment proceedings. It is noticed from those records that the Assessee had claimed excess profits in respect of its power generating units. The obligation of the Assessee under the Act is only to disclose primary facts necessary for assessment. The application of law and the determination of the market value of the electricity sold by the eligible units under Section 80-IA to the other units of the Respondent - Assessee is a subject matter of enquiry by the Assessing Officer while passing an order under Section 143(3) of the Act in regular assessment proceedings. Thus, there is no failure on the part of Respondent to disclose truly and fully all material facts which would warrant reopening of an assessment.” (Emphasis Supplied)

12. The jurisdiction High Court, in the case of *3i Infotech Ltd. vs. Assistant Commissioner of Income Tax (2010) 329 ITR 257* also relied upon by the Authorised Representative of the Appellant, has held as under:

“12. The record before the Court, to which a reference has been made earlier, is clearly reflective of the position that during the course of the assessment proceedings the assessee had made a full and true disclosure of all material facts in relation to the assessment. As a matter of fact, it would be necessary to note that the notice to reopen the assessment on the first issue is founded entirely on the assessment records. There is no new material to which a reference is to be found and the entire basis for reopening the assessment is the disclosure which has been made by the assessee in the course of the assessment proceedings. In Cartini India Ltd. v. Addl. CIT [2009] 314 ITR 275 (Bom.), a Division Bench of this Court has observed that where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to the Assessing Officer to reopen the assessment based on the very same material with a view to take another view. The principal which has been enunciated in Cartini India

Ltd.'s case (supra) must apply to the facts of a case such as the present. The assessee had during the course of the assessment proceedings made a complete disclosure of material facts. The Assessing Officer had called for a disclosure on which a specific disclosure on the issue in question was made. In such a case, it cannot be postulated that the condition precedent to the re-opening of an assessment beyond a period of four years has been fulfilled." (Emphasis Supplied)

13. On application of the principles enunciated by the jurisdictional High Court in the above cases to the facts of the present case it becomes clear that the re-assessment proceedings have been initiated in violation of provision of section 147 read with section 148 of the Act. The reasons to belief that income has escaped assessment is not based upon any tangible material and is a result of change of opinion arising from re-appreciation, triggered by audit objection, of the material/facts disclosed by the Appellant and forming part of the record.
14. In view of the above, we hold that the reassessment proceedings for the Assessment Year 2011-12 have been initiated in violation of the provision of section 147 of the Act. Accordingly, we reverse the order of CIT(A) and set aside the assessment order dated 29.12.2017 passed under Section 143(3) read with section 147 of the Act. Ground No. 1.1 and 1.2 raised by the Appellant/Assessee are allowed. Ground No. 1.3, 1.4 and 1.5 pertaining to the merits of the additions made in the re-assessment proceedings are disposed of as being infructuous.
15. The present appeal by the assessee is party allowed for statistical purposes.

Order pronounced on 13.04.2022.

Sd/-
(Shamim Yahya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 13.04.2022
Alindra, PS

आदेश की 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