

2012-13 u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 21.11.2019.

2. The first issue in this appeal of assessee is as regards to the order of CIT(A) confirming the action of AO in upholding the reopening of assessment u/s.147 r.w.s. 148 of the Act in violation of first proviso to section 147 of the Act as the original assessment was completed u/s.143(3) of the Act and there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of the assessee for the relevant assessment year. For this, assessee has raised following three grounds:-

1. The learned CIT(A) has erred in upholding the reopening of assessment beyond 4 years when the original assessment was completed u/s.143(3).
2. The learned CIT(A) erred in upholding the reassessment which clearly violated the provisions of the first proviso to section 147 of the Act since the appellant had disclosed fully and truly all material facts necessary for the assessment.
3. The CIT(A) has not considered the fact that the learned Assessing Officer changed his opinion ignoring the Supreme Court ruling in the case of CIT vs Kelvinator of India Ltd.

3. Brief facts are that the original assessment was completed by the AO u/s.143(3) of the Act on 19.12.2014 after making detailed scrutiny of various expenses as claimed by the assessee. Subsequently, the AO issued notice u/s.148 of the Act dated 22.03.2019 after the expiry of 4 years but just at the fag end of the

6th year. The AO for reopening of assessment u/s.147 of the Act recorded the following reasons:-

“The assessee has paid Rs.21,44,215 towards loading sorting expenses and Rs.10,77,899 towards container stuffing charges. The assessee is liable for deduction of TDS u/s.194C. However, there is no evidence for deduction of TDS. In column 27(a) of Form 3CD, there is no mention of deduction of TDS. Since the assessee has not deducted TDS the same is requested to be brought to Tax.

In view of the above, I have reason to believe that the income chargeable to tax has escaped assessment for the AY 2012-13 within the meaning of sec 147 by reasons of the failure on the part of the assessee to disclose fully and truly all matter facts necessary for the assessment for that assessment year and it is fit case for reopening.”

Consequently, the AO disallowed a sum of Rs.21,44,215/- towards loading / sorting expenses and Rs.10,77,899/- towards container stuffing charges, as the assessee has failed to deduct TDS u/s.194C of the Act and thereby invoked the provision of section 40(a)(ia) of the Act, thereby the total disallowance of expenses comes to Rs.32,22,114/-. Aggrieved assessee preferred appeal before the CIT(A).

4. Before CIT(A), the assessee challenged the reopening of assessment but CIT(A) rejected the ground raised by assessee challenging the reopening of assessment and confirmed the action of AO by observing in para 5.6 as under:-

“5.6 I have carefully considered the additional grounds raised by the appellant challenging the reopening of assessment. The appellant has

contended that assessment had been completed u/s.143(3) and four years had expired, hence the reopening was not valid. However, it is seen that the appellant had deducted TDS as per law and hence amount of expenses claimed was liable to disallowance u/s.40(a)(ia) of I.T.Act. This disallowance was required to be undertaken by the appellant on its own and correct income was required to be shown in the IncomeTax Return. As the appellant has not disclosed all material facts necessary for its assessment, truly and fully, the first proviso to section 147 of I.T. Act does not give the appellant immunity from reopening u/s 147 / issue of notice u/s 148 is considered valid and the re-assessment is upheld. The additional grounds raised are rejected and the other grounds are taken up on merit.”

Aggrieved, now assessee is in appeal before the Tribunal.

5. We have heard the Id.Senior DR and gone through the facts of the case. We have gone through the assessment order and the order of CIT(A) and the written submissions filed by the assessee before the CIT(A). We noted from the reasons recorded that the AO took the information from the return of income that the assessee has paid a sum of Rs.21,44,215/- towards loading / sorting expenses and Rs.10,77,899/- towards container stuffing charges but has not deducted TDS u/s.194C of the Act. The AO in the reasons recorded noted that there is no evidence for deduction of TDS as per column 27(a) of the Form No.3CD i.e., audit report filed by the assessee along with the return of income. It means that the assessee has filed the complete details of particulars before the AO and from very return of income the AO has chosen these reasons. We noted that this issue is squarely covered in favour of assessee

assessee and against the Revenue by the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561. The Hon'ble Supreme Court in Kelvinator of India Ltd., *supra*, has considered that there cannot be change of opinion based on the material which was already available with the AO at the time of original assessment. The Hon'ble Supreme Court further held that there should be some tangible material came to the notice of the AO after completion of assessment and on that basis reopening can be done. The Hon'ble Supreme Court observed as under:-

“On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove.

Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

5.1 In the present case, reopening is beyond 4 years and the assessee's case falls under the proviso to section 147 of the Act and there is no failure on the part of the assessee to disclose material facts necessary for its assessment truly and correctly for the relevant assessment year as the assessee has filed details of Rs.21,44,215/- towards loading / sorting expenses and Rs.10,77,899/- towards container stuffing charges. Hence, even otherwise there is change of opinion in view of the decision of

Hon'ble Supreme Court in the case of Kelvinator India Pvt. Ltd., *supra*. Hence, we quash the reopening and allow this jurisdictional issue in favour of the assessee.

6. Since we have allowed the jurisdictional issue, we need not to go in to the merits of the case.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 20th May, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 20th May, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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