

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई  
IN THE INCOME-TAX APPELLATE TRIBUNAL 'A' BENCH, CHENNAI  
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष  
Before Shri V. Durga Rao, Judicial Member &  
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./I.T.A. No.722/Chny/2020  
निर्धारण वर्ष/Assessment Years: 2014-15

The Deputy Commissioner of  
Income Tax, Circle 1(1),  
No. 44, Williams Road, Cantonment,  
Trichy 620 001.

Vs. M/s. Raja Transports,  
No. 34, Trichy Main Road,  
Ariyalur 621 704.  
**[PAN:AAEFR4385H]**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./I.T.A. No.619/Chny/2020  
निर्धारण वर्ष/Assessment Years: 2014-15

M/s. Raja Transports,  
No. 34, Trichy Main Road,  
Ariyalur 621 704.

Vs. The Deputy Commissioner of  
Income Tax, Circle 1(1),  
Trichy 620 001.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Department by : Shri AR V Sreenivasan, Addl. CIT  
Assessee by : Shri S. Sridhar, Advocate &  
: Shri N. Arjunraj, CA

सुनवाई की तारीख/ Date of hearing : 07.12.2022  
घोषणा की तारीख /Date of Pronouncement : 22.02.2023

**आदेश /O R D E R**

**PER V. DURGA RAO, JUDICIAL MEMBER:**

Both the cross appeals filed by the Revenue as well as assessee are directed against the order of the Id. Commissioner of Income Tax (Appeals) 1, Trichy, dated 19.03.2020 relevant to the assessment year 2014-15.

2. Both the appeals filed by the Revenue and the assessee are delayed by 28 days and 18 days respectively in filing the appeal due to outbreak of Covid-19 pandemic and accordingly, the delay in filing the appeals by the Revenue and the assessee are condoned and admitted for adjudication.

3. Facts are, in brief, that the assessee is in the transport contract business and filed its return of income for the assessment year 2014-15 on 24.11.2014 declaring total income of ₹.69,95,190/-. The return filed by the assessee was selected for scrutiny to examine the expenses claimed by the assessee in the profit and loss account. The Assessing Officer issued notice under section 143(2) of the Income Tax Act, 1961 ["Act" in short] dated 09.09.2015 and the same was served on the assessee on 16.09.2015. In response to the notice under section 143(2) of the Act issued by the Assessing Officer, the assessee has submitted all the details in respect of the expenses claimed by the assessee. After examining the details filed by the assessee, the assessment was completed under section 143(3) of the Act dated 26.10.2016 by accepting the returned income of ₹.69,95,190/-.

4. Subsequently, the assessment was reopened under section 147 of the Act by issuing notice under section 148 of the Act. The Assessing

Officer has recorded the reasons for reopening of assessment and the same are reproduced as under:

*The assessee firm claimed expenditure under 'other expenses' to the tune of ₹.14,82,97,365/- which includes payment of hire charges for ₹.14,78,95,505/-. Upon perusal of the assessment records, it is seen that the firm has not deducted TDS on the payment of hire charges as per Sec. 194C of the Income Tax Act and it has not obtained Form 15-I for non deduction of tax.*

*Further, in Column 34.a (Whether the assessee is required to deduct or collect tax as per the provisions of Chapter XVII-B or Chapter XVII-BB) and 34.b (Whether the assessee has furnished statement of tax deducted or collected within the prescribed time?) of the Audit report 44 AB, the assessee marked 'No' and 'Not applicable' respectively. Since there is no evidence to claim that the assessee is not liable to deduct tax at source as required by the provisions of Sec. 194C, the entire claim of hire charges of ₹.14,78,95,505/- has to be disallowed as per provisions of Sec. 40(a)(ia) of the Income-tax Act.*

*Hence, I have a reason to believe that the entire claim of hire charges has escaped assessment on account of non deduction of TDS within the meaning of Clause (c)(iii) of the explanation 2 to Sec. 147 of Income tax Act. Hence, it is requested that the JCIT may accord necessary approval to initiate the proceedings to reopen assessment u/s. 147 of the Income-tax Act."*

5. After reopening of assessment, the Assessing Officer has observed that the assessee has made payment of hire charges to the tune of ₹.14,78,95,505/- without deducting TDS. Hence, as per section 194C of the Act, 30% of ₹.14,78,95,505/- i.e., ₹.4,43,68,652/- was disallowed under section 40(a)(ia) of the Act and added to the total income of the assessee. Accordingly, the assessment was completed under section 143(3) r.w.s. 147 of the Act dated 30.12.2019. The assessee filed an appeal before the Id. CIT(A) questioning the validity of reopening of

assessment under section 147 of the Act. The Id. CIT(A) quashed the reopening of the assessment.

6. Aggrieved, the Revenue carried the matter in appeal before the Tribunal. The Id. DR has submitted that the Assessing Officer, at the time of assessment under section 143(3) of the Act has not examined the application of TDS provisions and therefore, the assessment was reopened on the basis of audit objection and also submitted that the audit objection was relating to non-deduction of TDS, which is legal issue and therefore, the reopening is valid.

7. On the other hand, the Id. Counsel for the assessee has submitted that the issue has been considered by the Assessing Officer under section 143(3) of the Act and now it is amounting to change of opinion and submitted that there is no legal issue involved in this case and only factual matter is involved as the Assessing Officer has examined all the facts.

8. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the assessee is engaged in transport contract business and in the return filed by it, the assessee made claim of expenses of ₹.14,78,95,505/-. The

Assessing Officer has asked the assessee to explain large other expenses claimed in the profit and loss account and the AR of the assessee has filed a letter dated 07.10.2016 stating that “the assessee firm is doing transport contract for transporting Gypsum, cement to Cement companies. During the financial year 2013-14, hire charges received is ₹.16,01,75,684/- and hire charges paid is ₹.14,78,95,505/-. Since there is no separate column for this expenditure in the return of income, the same was included as other expenses but shown separately in the said column”. After examining all the documents and details produced by the assessee and ITS details, the assessment was completed under section 143(3) of the Act dated 26.10.2016. From the above assessment order passed by the Assessing Officer, we find that the Assessing Officer has called for explanation in respect of the expenses claimed by the assessee and the assessee has submitted all the details and the Assessing Officer, subsequently noted that “after examining all the documents and details produced by the assessee and ITS details the assessment is completed u/s 143(3) of the Income-tax Act by accepting the income returned”. Therefore, it has to be concluded that in the original assessment under section 143(3) of the Act, the Assessing Officer has examined all the details and passed the assessment order. Therefore, again reopening of assessment under section 147 of the Act

based on the audit objection, we are of the considered opinion that it is clear case of change of opinion, which is not permissible under law as per the judgement of the Hon'ble Supreme Court in the case of CIT v. Kelvinator India Limited 320 ITR 561 (SC).

8.1 In similar circumstances, the Hon'ble Madras High Court in the case of TANMAC India v. DCIT [2017] 78 Taxmann.com 155 (Madras) [TCA No. 1426 of 2007] has considered an identical issue and by following the decision of the Hon'ble Supreme Court in the case of CIT v. Kelvinator India Ltd. (supra), the Hon'ble Jurisdictional High Court has held that "what is sought to be done by the re-assessment, ought to have been achieved by scrutiny assessment proceedings. Having not done so, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material". The relevant portions of the judgement of the Hon'ble Madras High Court are reproduced as under:

*"10. Let us now see the sequence of events that have transpired in this case. The Assessee filed a return of income pursuant to which, an intimation dated 01.12.1998 under section 143(1) (a) of the Act was issued. The provisions of Section 143(2) require that if the Assessing Officer considered it necessary or expedient to ensure that the Assessee has not understated income, claimed excessive loss or underpaid tax in any manner, the assessment is to be subject to further scrutiny, a notice under section 143(2) is liable to be issued and the assessment completed on or before 31.03.2001. This was not done in the present case. Subsequently, a notice under section 148 has been issued on 09.12.2002 under section 148 of the Income Tax Act taking advantage of the now extended limitation of four years to re-assess income on the basis of the same materials that were available with the authority as part of the record.*

*11. The phrase 'reason to believe' in Section 147 relates to such other new or tangible material as may have come to the knowledge of the Assessing Officer*

*pursuant to the original proceedings for assessment. The Supreme Court in the case of Commissioner of Income Tax Vs. Kelvinator of India [2010] 320 ITR 561 / 1867 Taxmann 312 states thus in the context of the 'belief' that should form the basis for a re-assessment.*

*'We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review, he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.'*

12. *If the Assessing Officer, after issuing intimation u/s. section 143(1) does not to issue a notice u/s.143(2) of the Act to initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the Assessing Officer, to re-assess income on the basis of stale material, already on record. If, we thus keep in the mind, the above fundamental requirement of Section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of the re-assessment, but of review. The reasons make it abundantly clearly that the reassessment is sought to be initiated on the basis of the return of income and the enclosures which were available with the Assessing Officer since 02.11.2018 and0 which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.03.2001, prior to issue of notice u/s.148. The notice under section 148 dated 09.12.2002 is thus an arbitrary exercise of power and a review of proceedings impermissible in law."*

8.2 In the present case also, when there was no fresh material available with the Assessing Officer for harbouring a doubt that income had escaped assessment, the reopening of assessment was purely based on change of opinion. Considering the landmark judgement of the Hon'ble Supreme Court in the case of CIT v. Kelvinator India Ltd. (supra) as well as the judgement of the Hon'ble Jurisdictional High Court in the

case of TANMAC India v. DCIT (supra), the assessment order passed under section 143(3) r.w.s. 147 of the Act dated 30.12.2019 is liable to be quashed. The Id. CIT(A) has also, by following various judgements annulled the assessment framed under section 147 of the Act and thus, we find no reason to interfere with the order passed by the Id. CIT(A). Accordingly, the ground raised by the Revenue is dismissed.

8.3 In so far as argument of the Id. DR on the issue of audit objection is concerned, we find that the audit objection on a point of law may constitute fresh information for reopening of assessment. However, if the audit objection on factual issue and, where, the audit party has quantified escapement, then, definitely, it does not constitute information for reopening of assessment. In this case, if we go by audit note issued by the audit party, it points out disallowance of 40(a)(ia) of the Act for non-deduction of TDS, in our opinion, the said observations of the audit party is on a factual matrix and no legal position is involved. Therefore, the argument of the Id. DR in light of certain judicial precedents are not tenable.

8.4 So far as case law relied on by the Id. DR on the decision of the Hon'ble Madras High Court in the case of Smt. A. Sridevi v. ITO in Writ Appeal No. 2563 of 2018 & C.M.P. Nos. 20763 & 20766 of 2018 dated

03.12.2018, we have gone through entire facts of the case and find that the issue involved in that case has no application to the facts of the present case in hand.

9. So far as appeal in I.T.A. No. 619/Chny/2020 filed by the assessee is concerned, the assessee has disputed that the Id. CIT(A) has not decided the issue on merits. Once the Id. CIT(A) has annulled the assessment order passed under section 143(3) r.w.s. 147 of the Act, it is mere academic to adjudicate on merits. Accordingly, the appeal filed by the assessee is dismissed.

10. In the result, both the appeals filed by the Revenue and the assessee are dismissed.

Order pronounced on 22<sup>nd</sup> February, 2023 at Chennai.

Sd/-  
(G. MANJUNATHA)  
ACCOUNTANT MEMBER

Sd/-  
(V. DURGA RAO)  
JUDICIAL MEMBER

Chennai, Dated, 22.02.2023

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/ Respondent,  
3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR &  
6. गार्ड फाईल/GF.