IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.221/M/2022
Assessment Year: 2012-13

M/s. Ultra Tech Cement Ltd., Ahura Centre, B wing, 2nd Floor, Mahakali Caves Road, Andheri(E), Mumbai-400093 **PAN: AAACL6442L**	Vs.	Jt. Commissioner of Income Tax, Central Circle -1(4), Room No.902, 9th Floor, Pratishtha Bhavan, Old CGO Annexe, Maharishi Karve Road, Mumbai- 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri. Nitesh Joshi, A.R. &
Shri Sumit Jain, A.R.

Revenue by : Shri. Alok Kumar, CIT DR

Date of Hearing : 08. 05. 2023
Date of Pronouncement : 03. 08. 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Ultra Tech Cement Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 08.12.2021 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2012-13 on the grounds inter-alia that :-

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [CIT(A)] erred in confirming the order passed by the learned Dy. Commissioner of Income-tax, Central Circle 1(4) Mumbai (DCIT) under section 143(3) rw.s. 147 of the Income-tax Act, 1961 (IT Act).

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming that the reassessment was validly carried out by DLd. CIT(A)despite the following:

-Four years had elapsed from the end of relevant assessment year and having disclosed fully and truly all material facts necessary for assessment, no reassessment proceedings is permissible under the law

-No fresh facts or new material has been brought on record evidencing escapement of income;

-Reassessment based on same set of facts as existing in the original assessment, is nothing but mere change of opinion which is not permitted;

-Review of own assessment order is not permissible in the reassessment proceedings;

-Reassessment proceedings based on audit objection is not sustainable.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by DLd. CIT(A)in respect of the deduction claimed by appellant (being successor to amalgamating company) amounting to Rs.27,05,29,884 u/s 35DD of the IT Act pertaining to the amalgamation expenses incurred by the amalgamating company. The Learned CIT(A) erred in not appreciating that there is no restriction u/s 35DD for claiming such expenses and upon amalgamation, puRsuant to the scheme approved by Hon'ble High Court, all assets and liabilities including any unexpired tax claim of amalgamating company were succeeded by appellant Company and appellant Company becomes eligible/ liable (as the case may be) for the same.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by the learned DLd. CIT(A)in respect of expenditure incurred by the appellant, for the purpose of assisting him in carrying out business operation (i.e. sourcing of raw material which are revenue in nature), amounting to Rs.12.71,92,162 on installing assets/contributing for installing assets on the premises of third party for which it does not get any owneRship.

5. Without prejudice to above, and in the alternative the learned CIT(A) ought to have directed the learned DLd. CIT(A)to allow depreciation on expenditure treated as capital in nature and erred in not adjudicating this separate ground raised by the appellant.

The Appellant Company craves leave to add, alter, amend or delete the aforesaid grounds of appeal from time to time and upto the date of hearings."

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are: the assessee being a public limited company is into manufacturing and trading and sale of cement filed its return of income for the year under consideration declaring total income at Rs.2284,05,32,680/-, there after filed revised return at total income of Rs.2283,30,74,150/-. On the basis of search and seizure operation carried out under section 132 of the Income Tax 1961 (for short 'the Act') at the premises of Aditya Birla Management & Corporation Pvt. Ltd. on 16.10.2013 notice under section 153C of the Act was issued on the assessee for A.Y. 2008 – 09 to 2013-14 including the year under consideration. In response to the notice issued under section 153C the assessee declared total income at Rs.2283,30,74,150/-. Assessing Officer (AO) accordingly framed the assessment vide order dated 29/03/2016 under section 153C read with 144C(3) read with section 143(3) of the Act. Against the assessment order assessee went in appeal before the Ld. CIT(A) who has given part relief to the assessee. Then assessee as well as Revenue have filed the appeal before the Tribunal which was disposed of vide order dated 14/12/2021.

3. However in the meantime the AO by recording reasons for reopening issued notice under section 148 of the Act, copy of which was provided to the assessee. The objections filed by the

assessee were disposed of by the AO. After considering the contentions and submissions raised by the assessee the AO proceeded to frame the assessment by making different additions/ disallowance of deductions framed the assessment under section 143(3) read with section 147 of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Ground No.1 & 2

6. Undisputedly assessment was reopened in this case after a period of 4 years i.e. from the end of assessment year 2012 – 13 and as such proviso to section 147 of the Act is applicable and twin conditions are required to be fulfilled for the AO to assume the jurisdiction under section 148 of the Act inter-alia that the AO should have reason to believe that any income chargeable to tax has escaped assessment in the case of assessee for the year under consideration; and that such income has escaped assessment due to failure of the assessee to file a return or disclose fully or truly all material facts necessary for assessment. It is also not in dispute that the AO as well as Ld. CIT(A) have not brought on record any

fact/evidence to prove that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

7. Before proceeding further we would like to extract the relevant part of the reasons recorded for ready perusal as under:

> *"In effect the Assessee Company i.e. UCL has claimed apportioned amortized expenditure of Rs.27.05 crores relating to the demerger of SCL from GIL, and further expenditure incurred for amalgamation of SCL with UCL, after two years.*
>
> *Section 35DD of the Act, was inserted by the Finance Act, 1999 (which is effect from 01/04/2000) to provide for amortization of expenditure incurred for the purpose of amalgamation and demerger. It reads as under:-*
>
> *<u>Amortisation of expenditure in case of amalgamation or demerger</u>*
>
> *35DD (1) Where an assessee, being an Indian company, incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.*
>
> *(2) No deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) under any other provision of this Act.*
>
> *A plain reading of the provision of the above Section of the Income Tax Act, 1961, provides for any expenses incurred towards amalgamation or demerger shall only be available to the Assessee company which actually incurs these expenses on this account and it is not available to the successor company, like 35D of the Income Tax Act, 1961, wherein such eligibility has been expressly provided for By contrast, in the provisions of Section 35DD of the Income Tax Act, 1961, there is a complete absence of provision for such benefit. Therefore, by applying the Principles of General Clauses Act, until and unless provided for specifically by the Act, the absence of such provisions, disentitles the Assessee Company to avail the benefit on this account.*
>
> *In the instant case under consideration, the expenses claimed as allowable u/s 35DD of the Act, are inclusive of the expenses incurred by M/s SCL for the purpose of its demerger from M/s GIL. Therefore, the assessee's claim of deduction to the extent of Rs.27,05,29,884/- is*

not correct and accordingly not allowable u/s 350D of the Act, for the following two reasons;-

iii) The expenses to, the tune of Rs.27,05,29,884/- (being 1/5 of the demerger expenses) were incurred by M/s SCL
iv). The said expenses were incurred by M/s SCL for the purpose of its demerger from M/s GIL.

In light of the scope set out in the provisions of 35DD of the Income Tax Act, 1961, M/s. SCL which has ceased to exist consequent upon its merger with the Assessee company, the demerger expenditure incurred by the SCL towards its demerger from M/s GIL, two years prior to the amalgamation, does not survive statutorily to enjoy the benefits allowable u/s 35PD of the Act. Thus, the assessee has availed undue deduction u/s 35DD of the Income Tax Act, 1961, in respect of this amount of Rs. 27,05,29,884/, in contravention to the specific provisions of section 35DD of the Income Tax Act, 1961, thereby causing escapement of income to that extent.

It is further observed from the assessment records that the assessee, from its computation of total income, has deducted an amount of Rs.12,71,92,162/- being Revenue Expenditure The assessee has capitalized the aforesaid expenditure in its books of accounts, however, the same is claimed us Revenue Expenditure stating that the concerned assets are not owned by it.

As per the provision of Section 37 of the Act, any expenditure (not being expenditure of the nature described in Section 301to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purpose of the business or profession are allowed.

Thus, the assessee has availed undue deduction of Rs.12,71,92,162/- in contravention to the provisions of section 37 of the Income Tax Act, 1961, thereby causing escapement of income to that extent.

Although the documents/material, suggesting escapement of income, were available on records at the time of completion of assessment u/s 143(3) r.w.s 153C of the Act, the same were remained to be examined by the AO. Therefore, the case can be reopened on the basis of the materials available on record which are suggesting escapement of income. In this regard, reliance can be placed on the order dated 11/08/2017of the Hon'ble ITAT pronounced in the case of M/s Mahyco Seeds Limited in this case, similar issue has came up for adjudication before the Hon'ble ITAT and the Hon'ble ITAT upheld the action of the AO of reopening the assessment proceedings stating that "though the assessee claims to

have furnished necessary details before the AO at the time of original assessment, the records clearly indicate that the AO has not examined the issue of deduction claimed towards stamp duty paid on 'demerger of units which shows non application of mind by the AO to the facts in the right-perspective: of specific provisions of section 35DD of the Act. Therefore, we are of the considered view that there is no merit in the contention of the assessee that reopening is made on the basis of mere change of opinion. Though the assessee has relied upon a plethora of judgments in support of its arguments, all the judgments referred to by the assessee, are rendered under different facts. In most of the cases, the issue has been either examined by the AO in the original assessment proceedings or the assessee has fully disclosed all material facts necessary for completing the assessment. In this case," on perusal of the facts, we find that the assessment order is silent on the application of mind by the AO to the correct facts in the light of the specific provisions of section 35DD of the Act. Therefore we are of the view that it is not a case of mere change of opinion and hence, we reject the legal ground raised by the assessee.

Further, Hon'ble Bombay High Court in the case of Indian Hume Pipe Company Limited v/s ACIT [(2012) 348 ITR 0439] has elucidated that, for the purpose of First Proviso to Section 147 of the Income Tax Act, 1961.

Full and true disclosure of material facts u/s 148 means disclosures must be full and true and cannot be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with AO.

Further, information, based on enquiries carried out by the investigation wing of Kolkata have revealed that the assessee company has had transaction Rs. 19 Crores with one Knight Deal Trade Pvt. Ltd. during the relevant financial year i.e. 2011-12. The amount of Rs. 19 Crores is sham transaction through its (KD Pvt. Ltd) bank account with Axis Bank (No. 910020025208354).

Enquiries relating to the business activities if any by the above entity and its associated entities have shown that this company Knight Dealt Trade Pvt. Ltd. is a company amongst various/numerous other companies & firm related and controlled by a group of persons who are common authorized signatories of these entities and these entities through their Bank Account are involved in facilitating and managing high value transaction which are in incongruous with their income returned.

This being so, specific enquiries relating to their business activities being supply of building materials have established that these transaction are not supported by any bills/voucher. It is

therefore concluded that these companies are involved in providing only accommodation entries.

Hence, I have reason to believe that the transaction of the assessee company, being of Rs. 19 Crores is an entry takes/given give color legitimacy for a non business transaction resulting in escapement of income to that entered.

Therefore, in view of the above stated facts, I have reasons to believe that income to the tune of Rs.58,77,22,046/ has escaped assessment within the meaning of the provisions of section 147 of the Act, for AY 2012-13 due to the failure on the part of the assessee to make the full and true disclosure of material facts."

8. The crux of the reopening of assessment is additions are not made for deduction claimed by the assessee under section 35DD and that the assessee has made a claim towards expenditure incurred on assets not owned. The Ld. A.R. for the assessee contended that all the necessary materials to prove the aforesaid issues were made available before the AO in order to conclude the original assessment and drew our attention towards the notes to computation for original as well as revised return available at page 1 to 24 filed with original return and 25 to 30 filed along with revised return.

9. We have perused the notes to computation filed with original as well as revised return available at page 1 to 24 and 25 to 30 wherein complete detail of working and explanation of claim made as deduction under section 35 DD of the Act and has also brought on record expenditure incurred by Samrudhi Cement Ltd. (SCL) in relation to demerger from Grasim Industries Limited (GIL) which has been claimed as deduction by the assessee company (since SCL amalgamated with UTCL).

10. We have also perused the notice issued by the AO available at page 31 to 39 of the paper book along with detailed reply filed by the assessee available at page 40 to 50 of the paper book. In the notice (supra) AO has raised specific query relating to the claim made in return in respect of the assets not owned which is extracted for ready perusal as under:

> *"It is observed from your computation of income that you have claimed exemption for 'Expenditure capitalized in the Books but claimed as revenue expenditure as the concerned assets are not owned by the Company' of Rs.12,71,92,162/-. Please submit details of said expenditure showing where the same have been debited and also substantiate the allow ability of the same as revenue expenditure."*

11. In reply to the aforesaid query raised by the AO assessee has given the details available at page 40 to 50 of the paper book, the relevant part thereof is extracted for ready perusal as under:

> ***"Expenditure for assets not owned by the assessee Company***
>
> *1. For the purpose of its business, on certain occasions the assessee Company has to incur certain expenditure which results in coming into existence of a capital asset for which the assessee Company does not get the ownership. It is purely due to business expediency that the assessee Company has to incur such expenditure.*
>
> *2. As these expenditure are laid out wholly and exclusively for the purpose of the business of the assessee Company and since it does not result into any ownership of assets in favour of the assessee Company, the same has been claimed as revenue expenditure as per the provisions of section 37(1) of the Income Tax Act ('IT Act')."*

12. In annexure A the assessee has duly given the details of assets not owned by the assessee which is also extracted for ready perusal as under:

Details of assets not owned

Sr. No	Unit Name	Description	Amount (Rs.)	Purpose
1.	Aligarh Cement Works	Exp. incurred on setting up of Fly ash handling system at Harduaganj Thermal power station (Unit 8),Kasimpur	12,41,03,703/-	The main object behind setting up of Fly ash handling system is collection of Fly ash generated from thermal power plants of the U.P. Rajya Vidyut Utpadan Nigam Ltd

				(UPRVUNL). Fly ash is used as a raw material in the cement manufacturing process. With the Fly ash handling system the assessee ensure regular supply of this essential raw material. **(Copy of agreement is attached herewith and marked as Annexure-B)**
2.	Aditya Cement Works	Exp. incurred on approach road at Fly ash handling system at Suratgarh super thermal power station Unit 6 (SSTPS)	20,29,228/-	The assessee along with other consortium members, has installed the Fly ash handling system at SSTPS for sourcing the uninterrupted supply of the Fly ash from said facility. Assessee has incurred the additional misc. expenses on approach road etc. at the said facility in the year under consideration.
3.	Arakkonam Cement Works	Exp. incurred on MCC panel up gradation at Fly ash handling system at North Chennai thermal power station (NCTPS)	10,59,230/-	The assessee has installed the Fly ash handling system at NCTPS for securing the uninterrupted supply of fly ash from the said facility. During the year assessee has incurred additional exp. on MCC panel up gradation and installing AC of 2 Ton at the said facility.
		Total	**12,71,92,162/-**	

13. When we examine the contentions raised by Ld. A.R for the assessee that there was no failure on the part of the assessee to file a return or disclose fully and truly all material facts necessary for assessment in the light of the aforesaid queries raised and reply filed, irresistible conclusion can be drawn that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In other words entire facts/documents/evidence required for examining the issues were available on record during the assessment proceedings and no new materials have come on record after completion of the original assessment.

14. It is settled principle of law that when there is no failure on the part of the assessee to furnish fully and truly all material facts qua its claim on which reassessment proceedings are initiated, reopening of assessment is illegal, bad in law and void ab-inotio.

15. So for question of not applying the mind by AO as contended by Ld. D.R. for the Revenue is concerned, "Although documents and letters in respect of deduction claimed u/s 35DD, appears to have been filed by the appellant before the Assessing Officer and therefore may be available on the record of the Assessing Officer at the time of completion of the assessment u/s 143(3) of the Act, however, the same were remained to be examined by the Assessing Officer at the time of assessment u/s. 143(3) of the Act and as such there was no application of mind with respect of these documents by the AO at the time of completion of the original assessment" are ex-facie not sustainable because of the fact that materials put-forth before the AO pursuant to the query raised and entire audited reports have been examined by the AO while examining the claim of the assessee. So it cannot be said that AO has not applied his mind.

16. Honourable Bombay High Court while deciding the identical issue in case of Titanor Components Limited vs ACIT (2011) 60 DTR 273 (Bombay) held that to proceed in such like situation for the purpose of reopening the AO is required to bring on record the failure on the part of the assessee to disclose fully and truly all material facts otherwise AO is not empowered to initiate the opening under section 147 of the Act.

17. Honourable Bombay High Court in case of Sun-n-Sand Hotels Pvt. Ltd. vs. ACIT WP(L) No.1043 of 2022 while deciding the identical issue also held as under:

> *"22. In the present case, the petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment. They were carefully scrutinized and figures of income as well as*

deduction were carefully reworked by the Assessing Officer. In fact, in the reasons for reopening, there is not even a whisper as to what was not disclosed. In our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but this is a case wherein the assessment sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation and deduction under Section 80-IA of the Act. In our view, the same is not permissible."

18. So in view of the matter in the instant case the AO as well as Ld. CIT(A) has sailed to build up the case of the assessee that such and such material facts necessary for completion of the assessment were not truly and fully disclosed by the assessee and as such reopening in this case is not sustainable in the eyes of law being void ab-initio. Furthermore the Ld. A.R for the assessee contended that even during the assessment proceedings AO has duly applied his mind on the documents/materials brought on record during the assessment proceedings. When we examine para 2 of the reasons recorded it is category mentioned by the AO that "on examination of the assessment record it is seen that the deduction of Rs.45,04,25,465/- claimed under section 35DD of the Act is comprised of Rs 17.99 crore relating to amalgamation of SCL with the assessee company and Rs 27.05 crores rates to the one fifth amortized expenditure for D merger from M/s. Grasim Industries limited (GIL) in the assessment year 2011-12".

19. So when the AO while recording the reasons has gathered all the facts from the assessment record itself it is difficult to believe the contention of the Ld. D.R. that the complete material was not brought before the AO and he has not applied his mind. So when

the AO has not laid his hands on any new material post original assessment reopening is nothing but change of opinion.

20. In these circumstances it is settled principle of law that "change of opinion" is not permissible under the garb of reopening under section 147/148 of the Act. Honourable Supreme Court of India in case of CIT vs Kelvinator of India Ltd (2010) 320 ITR 561 (SC) held that there is a difference between power to review and power to re-assess under section 147 of the Act and that AO had no power to review and that if the concept of "change of opinion" was removed then in the garb of reopening of assessment review would take place. Relevant part of the judgment is extracted for ready perusal as under:

> *"….The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition 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 1-4-1989. 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 live link with the formation of the belief."*

21. So in view of the matter ground Nos. 1 & 2 are determined in favour of the assessee.

22. In view of the fact that reopening made by the AO by initiating proceedings under section 147/148 of the Act has not withstood the judicial scrutiny and the assessment framed has been held to be not sustainable, rest of the grounds raised by the assessee on merits have become academic, hence not decided. So appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 03.08.2023.

Sd/-	**Sd/-**
(S RIFAUR RAHMAN)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 03.08.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench
//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.