IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No.5083/DEL/2010
Assessment Year 2005-06

M/s. Neel Metal Products Limited 601, Hemkunt Chamber Nehru Place New Delhi	Vs.	Dy. Commissioner of Income Tax Circle-13(1), New Delhi
TAN/PAN: AABCN6304Q		
(Appellant)		(Respondent)

Appellant by:	Shri Salil Aggarwal, Senior Advocate Shri Shailesh Gupta, Advocate Shri Madhur Aggarwal, Advocate		
Respondent by:	Shri Anuj Garg, Sr.DR		
Date of hearing:	19	03	2024
Date of pronouncement:	21	03	2024

O R D E R

PER PRADIP KUMAR KEDIA-AM:

The captioned appeal is directed against the first appellate order of the Commissioner of Income Tax (Appeals)-XVI, New Delhi ('CIT(A)' in short) dated 21.03.2010 arising from the assessment order dated 18.12.2009 passed by the Assessing Officer (AO) under Section 143(3) r.w. Section 147 of the Income Tax Act, 1961 (the Act) concerning AY 2005-06.

2. As per the grounds of appeal, the assessee has raised several grounds which read as under:

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals), CIT(A) is bad, both in the eyes of law and on facts.

2. On the facts and circumstances of the case, the learned CIT(A) has erred, both on the facts and in law, in confirming the action of the AO in disallowing depreciation amounting to Rs. 13,91,447/- on electrical installations.

3. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the action of the AO in disallowing depreciation amounting to Rs. 72,559/- on UPS.

4. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the action of the AO in disallowing expenditure of Rs. 35,69,931/- on account of technical

assistance/know-how, treating the same as intangible asset."

3. The assessee has also raised the additional ground of appeal whereby the jurisdiction assumed under Section 147/148 has been challenged. The additional ground raised by the assessee read as under:

> *"Additional Ground No.1. That the impugned assessment so framed is bad in law and on facts, in as much as, the initiation of proceedings under section 147 of the Act, and further completion of assessment under section 143(3)/ 147 of the Act was without satisfying the statutory pre- conditions as envisaged in aforesaid section and was without jurisdiction and was liable to be quashed, as such."*

4. The prayer for admission of additional ground noted above which are not set-forth in the memorandum of appeal is being admitted for adjudication in terms of Rule 11 of the Income Tax [Appellate Tribunal] Rules, 1963 owing to the fact that the objections raised in the additional ground are legal in nature for which relevant facts are stated to be emanating from existing records.

5. The grounds of appeal raised by the assessee are two fold.

(i) Challenge to assumption of jurisdiction under Section 147/148 of the Act.

(ii) Challenge to the action of the AO in making certain additions/ disallowances on merits in pursuance of assumption of jurisdiction under Section 147 of the Act.

6. When the matter was called for hearing, the ld. counsel for the assessee at the outset adverted to the additional ground and voiced objection to the assumption of jurisdiction and contended that such jurisdiction under Section 147 has been assumed without meeting the prerequisites ordained in Section 147 and r.w. Section 148 of the Act.

7. Since the challenge to the legality of reopening being jurisdictional one and goes to the root of the whole controversy, it will be appropriate to adjudicate this aspect of the appeal first.

8. The reasons recorded under Section 148(2) of the Act being germane to the adjudication of jurisdictional issue, are reproduced hereunder:

Reasons of Reopening the case of M/s Neel Metal Products P. Ltd. u/s 147 of the IT Act for Asstt. Year- 2005-06

Return of income in this case was filed on 29-10-2004 declaring income of Rs.9,45,38,599/- Return of income was processed u/s. 143(1) of the IT Act on 22-09-2006.

On perusal of the assessment records, an amount of Rs.47,59,908/- has been incurred in foreign currency under the head "Technical assistance/know how" but the same has not been capitalized by Assessee and claimed as revenue expense. Section 32 of the IT Act provides that with effect from 1998, the know-how, copy right, trade-mark, license, franchises or commercial rights are intangible assets, and therefore, depreciation @ 25% is applicable and 75% of Rs. 47,59,908/- i.e. Rs.35,69,931/- is disaliowable. Assessee has also claimed depreciation @ 60% on UPS and printers etc. and depreciation @ 25% on electrical installations whereas the UPS and printers cannot be treated as computer and applicable rate of depreciation should be 25% applicable in the case of plant and machinery and 15% on electrical fittings.

In view of the above facts I have reason to believe that the income chargeable to tax has escaped assessment for AY 2003-04.

Issue notice u/s. 148 of the IT Act.

Assistant Commissioner of Income Tax,
Cir-13(1), New Delhi

9. The contentions of the assessee on purported lack of jurisdiction on the touchstone of Section 147 are broadly outlined hereunder:

(i) The reasons recorded makes it ostensibly clear that AO has acted in a mechanical manner without giving reference to any relevant material to derive belief on the alleged escapement of income. The existence of relevant material is a pre-condition for holding belief in the reasons recorded. The belief fostered although subjective in nature must trigger from reasons which are objective in nature and need to be based on something tangible and substantive. The plea of escapement thus could not have been made in the instant case in the absence of any objective material.

(ii) The reasons recorded firstly alleges incorrect claim of technical assistance / know-how as revenue expenditure instead of capital expenditure.

(a) The ld. counsel contends in this regard that the capitalization of expenditure and claim of depreciation thereon would *inter alia* depend upon ownership and other host of factors. The assessee is having mere access to

such technical assistance / knowhow. The depreciation claim, stated to be permissible in the reasons recorded, is incorrect in the absence of any element of ownership in such technical assistance.

(b) The second limb of reason talks about excessive claim of depreciation of 60% on UPS and printers. In this regard, the ld. counsel submits that such assertions in the reasons are incorrect yet again in the light of the judgment of the Hon'ble High Court in the case of CIT vs. BSES Yamuna Powers Ltd., ITA No.1267/2010 judgment dated 31st August, 2010. The Hon'ble High Court in that case held that computer accessories and peripherals such as printers, scanners and server etc. form an integral part of the computer system and therefore, such accessories and peripherals are entitled to depreciation at accelerated rate of 60%. Hence, 'belief' in the point is founded on wrong application of law.

(c) As regard third limb of reason alleging incorrect depreciation claim @25% on electric installations as against 15% eligible on electrical fittings, the ld. counsel yet again pointed out that such belief on escapement has been entertained *dehors* the facts on record. The assessee has claimed such electrical installation as part of 'plant and machinery' and such issue depends on case to case basis having regard to the facts of that case. There can be no straight jacket formula on the point.

(iii) The AO has failed to assign the quantum of escapement.

(iv) The AO as per the recorded reasons has held 'reason to believe' towards escapement on chargeable income qua A.Y. 2003-04 whereas the subject assessment year in question relates to Assessment Year 2005-06. The ld. counsel submits that the reasons recorded has to be read in verbatim and cannot be modified or supplemented or corrected on a later stage in the appellate proceedings.

10. The ld. counsel thus submits that the reasons recorded under Section 148(2) for assumption of jurisdiction under Section 147 of the Act are without legal foundation and consequently the jurisdiction stands vitiated and the consequent re-assessment proceedings *void ab initio*.

11. The Ld. DR for the Revenue, on the other hand, relied upon the reasons

recorded and submitted that, in the instant case, powers under Section 147 has been invoked with reference to intimation drawn under Section 143(1) of the Act. No regular assessment was carried out earlier under Section 143(3) of the Act. Consequently, the burden placed on the Revenue under Section 147 is on a far lower pedestal. The return filed by the assessee itself depicts defects giving rise to the reasons recorded resulting in the escapement. The AO has proceeded under Section 147 based on the assertions made in the return of income which are in the realm of *prima facie* belief on the material available or disclosure made in the return filed.

11.1 What the law requires is holding *prima facie* belief based on relevant material and if the belief so formed is found, in the course of the re-assessment proceedings, to be incorrect, the allegation towards escapement may be dropped at a later stage but however assumption of jurisdiction under Section 147 cannot be assailed at this stage.

11.2 As regards the wrong mention of assessment year in the reasons, the ld. DR submitted that the heading of the reasons recorded clearly states Assessment Year 2005-06 and the wrong mention of assessment year in the body of reasons recorded is only a typographical human error.

12. We have carefully considered the rival submission on the preliminary issue towards assumption of jurisdiction.

13. The AO has alleged that the assessee has wrongly claimed revenue expenditure on account of expenses incurred towards technical assistance / knowhow which are in the nature of capital expenditure. No reference to any material has been provided in this regard. Such expenditure can both be capital expenditure as well as revenue expenditure depending upon the facts of each case. The determination of nature of such expenditure is governed by the facts of each case. Therefore, such belief towards escapement cannot be derived in an abstract manner. In the absence of any factual matrix available in the reasons recorded, such 'reasons to believe' are in the realm of 'reason to suspect' which is not permissible in law. To this extent, the reasons recorded do not support the requirement of law. Similarly, the claim of depreciation at an accelerated rate on UPS and printers etc. being accessory to computer, are eligible for accelerated rate as held by the Hon'ble Delhi High Court in the

case of *BSES Yamuna (supra)*. Therefore, no case of escapement can be made out on this score.

14. We now advert to the third limb of the alleged escapement towards appropriate rate of depreciation on electric fittings. Whether the electric fittings are integral part of plant and machinery or independent thereof, is again a question of fact and the answer to such question would vary from case to case. The underlying facts are not available and therefore, merely because the assessee has applied the rate applicable to plant and machinery while claiming depreciation, this will not *ipso facto* give reason to believe towards escapement. Thus, the reasons recorded on all the three points has no leg to stand in the eyes of law.

15. Coupled with this, the AO has clearly formed 'reason to believe' on escapement qua Assessment Year 2003-04. Such mistake cannot be rectified at this stage. The 'reason to believe' must necessarily relate to the Assessment Year 2005-06 in question which is found absent in the present case.

16. Thus, we see merit in the plea of the assessee towards lack of jurisdiction under Section 147 of the Act.

17. In this view of the matter, the consequent re-assessment order framed under Section 147 r.w. Section 143(3) in question is bad in law. In the absence of valid jurisdiction conferred under Section 147, the consequent re-assessment order is thus liable to be quashed and set aside.

18 Having held so, there is no warrant to look into the aspects of merit raised in the impugned ground of appeal.

19. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 21/03/2024

Sd/- **Sd/-**

[KUL BHARAT] **[PRADIP KUMAR KEDIA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

DATED: **/03/2024**

Prabhat