आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई। **IN THE INCOME TAX APPELLATE TRIBUNAL** **'A' BENCH: CHENNAI** **श्री एबी टी. वर्की, न्यायिक सदस्य एवं** श्री **एस. आर. रघुनाथा,** लेखा सदस्य **के समक्ष** **BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND** **SHRI S.R.RAGHUNATHA, ACCOUNTANT MEMBER**		
आयकर अपील सं./**ITA No.1403/Chny/2023** निर्धारण वर्ष**/Assessment Year: 2009-10**		
The ITO, Corporate Ward-3(1), Chennai.	**v.**	M/s. Salcomp Manufacturing-India Pvt. Ltd., Nokia Telecom SEZ, SIPCOT Industrial Park-Phase-III, Sriperumbudur, Chennai-602 105.
		[**PAN: AAJCS 7988 P**]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
Department by	:	Shri Nilay Baran Som, CIT
Assessee by	:	Shri S. Muralidhar, FCA & Shri J. Prabhakar, FCA
सुनवाईकीतारीख/Date of Hearing	:	06.08.2024
घोषणाकीतारीख /Date of Pronouncement	:	09.10.2024

आदेश **/ O R D E R**

PER ABY T. VARKEY, JM:

This is an appeal preferred by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)/NFAC, (hereinafter in short "the Ld.CIT(A)"), Delhi, dated 01.09.2023 for the Assessment Year (hereinafter in short "AY") 2018-19 [mistakenly typed as AY 2018-19, but **Form 36** states it is in respect of **AY 2009-10**].

2. At the outset, the Ld.AR of the assessee pointed out the following more typographical errors in the impugned order of NFAC:

> a) The Assessment year was incorrectly stated as AY 2018-19, instead of AY 2009-10.
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> b) The Appeal number was incorrectly stated as NFAC/2017- 18/10078735, instead of CIT (A), Chennai-15/10139/2016-17.
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> c) The date of the order appealed against was incorrectly stated as 23- 11-2021 instead of 31-3-2016.
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> d) The Section under which the order appealed against was passed, was incorrectly stated as 143(3) read with sec 144C, instead of Sec 143(3) read with sec 147.
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> e) The date of institution of appeal was incorrectly stated as 22-12- 2021, instead of 28-4-2016.

3. The Ld.DR couldn't controvert the aforesaid mistakes that is seen on the face of the impugned order; and taking judicial notice of the fact that the impugned order emanates from the re-assessment order passed by the AO u/s.147 of the Income Tax Act, 1961 (hereinafter in short 'the Act') dated 31.03.2016 (which pertains to **AY 2009-10**) in the assessee's own case and the date of institution of appeal was correctly taken note in the impugned order as 28.04.2016 and the date of order appealed by the assessee has been correctly stated as 31.03.2016; and also taking note of the fact that assessee has preferred rectification application u/s.154 of the Act before the Ld.CIT(A) to rectify the aforesaid mistakes, we proceed to adjudicate the grounds of appeal raised by the Revenue.

4. The Revenue has raised the following grounds:

1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case?

2. Whether the CIT (A) was right in quashing the reopening proceeding by holding that AO did not have fresh materials for reopening the assessment. Hence there is change of opinion in this case?

3. Whether CIT (A) erred in not following the order of the follow the decision of Supreme Court in the case of CIT Vs. P.VS. Beedies (P.) Ltd., wherein it was held that reopening of case on basis of factual information given by Audit is valid?

4. Whether the CIT (A) erred in not considering the Deeming clause of escapement under the provisions of clause (c) of explanation 2 to the section 147 of the Act, that gives vide scope for reopening has not been considered by the CIT (A) at all?

5. Whether the CIT(A) erred in not considering the provisions explanation 1 to the proviso to the section 147 of the Act, which clearly states that production before the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure within the meaning of the forgoing proviso?

6. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Ld. CIT(A) be set aside and that of the Assessing Officer be restored.

5. From the perusal of the aforesaid grounds raised by the Revenue, it is discernable that the Revenue is assailing the action of the Ld.CIT(A) allowing the legal issue in favour of the assessee (i.e. the AO didn't have the jurisdiction to re-open the original assessment framed u/s.143(3) of the Act after four years from the end of the assessment year merely on "*change of opinion*").

6. The brief facts are that the assessee company had furnished its return of income (RoI) for AY 2009-10 on 28.09.2009 and declared total income at ₹ 'NIL' and current year loss of ₹ 34,76,38,735/-. Subsequently, the assessee company filed revised RoI on 25.03.2011 declaring total income of ₹ 'NIL' and current year loss of ₹42,39,61,662/-.

Later, the case was taken up for scrutiny by issuance of notice u/s.143(2) of the Act on 19.08.2010 and it is noted that several notices u/s.142(1) of the Act with questionnaire were issued to the assessee and thereafter, the AO referred the international transactions to the TPO, who after enquiry didn't suggest any adjustment on those issues; and after hearing the assessee, the AO noted that the assessee during assessment proceedings had filed revised computation of income wherein, the loss was determined to the tune of ₹42,21,21,274/- and the assessment was completed by him (AO) accepting the income as per the revised statement of loss i.e. at ₹42,21,21,274/- by assessment order u/s.143(3) of the Act dated 13.02.2023. Thereafter, the AO had issued the impugned notice u/s.148 of the Act on 30.03.2015 conveying his desire to re-open the assessment; and pursuant to that, the assessee requested for *reasons recorded* by the AO to re-open the assessment; and pursuant to such a request, the AO furnished copy of reasons recorded for re-opening on 24.08.2015 (refer Page Nos.2-4 of the Paper Book). Since the legal issue regarding re-opening of assessment has been raised, we need to examine the same and go through the "*reasons recorded*" by the AO to re-open the original assessment framed u/s.143(3) of the Act, which is reproduced as under:-

> "The assessee filed Return of Income for A.Y 2009-10 originally on 28.09.2009 declaring loss of Rs.42,39,61,662/- During the course of assessment, assessee filed a revised statement of total income wherein the loss was reduced to Rs.42,21,21,274/- and this was accepted in the scrutiny assessment completed u/s.143(3) on 13.02.2013

Subsequently, it is seen that:

> (1) The profit and loss A/c of the assessee shows a sum of Rs. 34,14,85,854/- debited under the head "Foreign exchange loss". Details of such claim was given as a separate statement during the course of assessment proceedings as per which sum of Rs. 8,27,12,030/- is towards unrealized exchange loss on restatement of ECB loan". Out of this assessee itself has disallowed only a sum of Rs.57,92,637/- representing "Unrealized exchange loss restatement of ECB loan to the extent used for import of fixed assets'.

The sum of Rs.8,27,12,030/- mentioned above is a notional figure used to re-state the extent of ECB loan as on the close of the accounting year. The word unrealized used by the assessee itself shows that such loss has not accrued and it is only for the purpose of disclosure such figure is incorporated in the financial statements. This is a notional loss as held by ITAT Chennai Bench in Mahindra Holidays & Resorts India Ltd Vs. DCIT (ITA 1616/Mds/2011-17-10-2012)

Also, any excess payment made by assessee on account of fluctuation on foreign exchange for re-payment of loan taken for revenue purpose is allowable only in the year of such payment as held by ITAT Hyderabad Bench in MW Zender (S) P Ltd Vs. ADIT (Int. Tax) [ITA 2095/Hyd/2011-order dated 09.08.2012]

Further, there is no evidence on record to show that the ECB loans were taken for day to day running of business. Even if this fact is not proved, as per the view of Hon'ble SC in the case of CIT vs. Woodward Governor India (P) Ltd. 312 1TR 254, the foreign exchange fluctuation loss cannot be allowed as deduction even at the time of making payment, as it is capital in nature. Hence the same requires to be allowed.

> ii) In the details of "addition to the plant and machinery mode during the year of sum of Rs. 1,32,213/- is under the head more than 180 days and Rs. 3,10,991/ is under the head less than 180 days and both these pertains to foreign exchange fluctuation loss included in the cost of assets u/s.43A. Since the loan was token and plant and machinery was purchased in the preceding year, Le. F.Y. 2007-08, it is not eligible for additional depreciation as only plant and machinery purchased and put to use in the previous year i.e. FY. 2008-09 is eligible for additional depreciation. Therefore, additional depreciation grunted@ 20% on Rs. 1,32,213/- and 10% on Rs. 3,10,991/- amounting to Rs.57,543/- requires to be disallowed.
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> iii) As per TDS certificates filed by assessee and the credit claimed in the assessment, the interest income received during the year is Rs. 34,15,723/- Whereas the assessee has offered only a sum of Rs.34,02,285/- for assessment. Hence this amount, requires to be added back to the total income of the assessee and taxed accordingly,

In view of the above, I have reason to believe, that income assessed to tax has escaped assessment and also the assessee has failed to disclose fully and truly all the material facts necessary for assessment for the AY 2009-10 hence the case is re-opened u/s 147 of the Income Tax Act.

In view of the above, I have reasons to believe that income assessed to tax has escaped assessment and also assessee has failed to disclose fully and truly

all the material facts necessary for assessment year 2009-10 and hence the case is re-opened u/s.147 of the Income Tax Act.

7. From perusal of the aforesaid reasons, it is noted that AO has re-opened the original assessment dated 13.02.2013, on following three issues :-

i. Excess loss on account of foreign exchange fluctuation.
ii. Excess grant of additional depreciation.
iii. Interest income escaping assessment

8. Regarding the first issue i.e. excess loss on account of foreign exchange loss, we find from the perusal of the records that during the original assessment proceedings this issue had been enquired into by the AO by raising query u/s.142(1) of the Act, and pursuant to that, the assessee had filed letter explaining about the forex loss [refer letter dated 08.02.2013 Page Nos.84-85 of the Paper Book] and had filed, *inter alia*, ledger copy of the forex loss and chart showing details on forex gain/loss and thus AO during the assessment proceedings, had enquired about this issue and being satisfied has not made any observation about it in the original assessment order dated 13.02.2013. Similarly, in respect of second issue i.e., additional depreciation, pursuant to questionnaire from the AO, we note that the assessee had filed details of addition to fixed assets and filed relevant bills/invoices (Annexure-9) which facts was duly shown in TAR. Thus, it is noted that assessee had filed details called for by AO regarding claim of additional depreciation with description and

dates of additions which were furnished vide letter dated 04.01.2023 in reply to questionnaire issued by the AO which is found kept at Page Nos.73-83 of the Paper Book. Likewise, we also find the details of the third issue viz interest income was furnished by the assessee to the AO vide letter dated 26.07.2011 along with TDS certificates pursuant to his notice. Thus, we find that the AO in the first round (original assessment) had called for details of these three (3) issues and after going through the assessee's reply and supporting material, after enquiry has accepted the claims of assessee on these issues. Hence, the AO's impugned action of re-opening the assessment to re-examine these issues was nothing but change of opinion/review of his own order, which is not permissible under law. Moreover, the impugned re-opening notice u/s.148 of the Act has been issued on 30.03.2015, which is undisputedly after expiry of four years from the end of relevant assessment year, therefore, the first proviso to sec.147 of the Act will come into play and the AO had to clear one more hurdle i.e. he has to show that assessee failed to disclose fully and truly all material facts necessary for the assessment. And we find that there was no failure on the part of the assessee to disclose all material facts necessary for the assessment on the three issues that has been raised/flagged by the AO to re-open the assessment. Therefore, the AO's action of re-opening the assessment for AY 2009-10 without satisfying the first proviso to sec.147 of the Act i.e. without specifying the

failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment is found to be wholly without jurisdiction. For completeness, we would like to deal with the Ld.DR's reliance on the following observation of AO repelling assessee's objection that impugned action of AO to reopen the assessment was nothing but change of opinion as reproduced:-

> 3.1 One of the objections raised is that the reassessment has been on the basis of a change of opinion. The present case is not one of change of opinion as urged by the assessee company. The question of change of opinion arises when an Assessing Officer forms an opinion and decides not to make an addition and holds that the assessee is correct. In the present case though the Assessing Officer had called for certain details with regard to the unrealized foreign exchange fluctuation loss, additional depreciation and interest income, there is no discussion in the assessment order as regards the claim of deduction in respect of the above items, to hold that an opinion with respect to assessee's eligibility for the aforesaid deduction or the quantum thereon was formed. Only when the issue was touched there could be an appreciation of fact. When left untouched, there is no formation of any opinion then so as be categorized as change in opinion later.

9. However, we don't agree with such wrong observations of the AO and disagree to such a contention of the Revenue for the reasons that the AO during the course of assessment proceedings has called for the details of the three issues stated in the reasons recorded for re-opening as noted supra and the assessee has given his reply/details along with relevant documents; and if the AO is convinced with the answer/explanation given by the assessee, then, even if the AO has not discussed the same in the assessment order, that can't be a ground to say that the AO has not expressed his opinion in his assessment order and therefore, question of change of opinion doesn't arise. In this regard, we must appreciate that

the AO is duty bound to correctly assess the income of the assessee and during the assessment proceedings, if the AO has asked certain questions and the assessee has replied with supporting documents to the satisfaction of the AO, and if he doesn't expressly state so in the assessment order, that omission on the part of the AO can't be a ground to say that the AO has not expressed any opinion on that issue because assessee can't dictate to the AO how to draft the assessment order. It is implied that when the AO accepts the claim of the assessee on an issue which he enquired, then even if the assessment order is silent about that issue, it can't be said that there was no opinion of the AO on that issue. Moreover, we note that the Hon'ble Supreme Court had an occasion to test such a contention of Revenue in the case of ACIT v. Marico Ltd. {SLP in Civil Appeal No.7367 of 2020) wherein, the Hon'ble Supreme Court held as under:

> According to the record, certain queries were raised by the Assessing Officer on 25.09.2017 during the assessment proceedings which were responded to by the Assessee vide letters dated 10.10.2017 and 21.12.2017.
>
> After considering said responses, the assessment order was passed on 30.01.2018.
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> Subsequently, by notice dated 27.03.2019 issued under Section 148 of the Income-Tax Act, the matter was sought to be re-opened. While accepting the challenge to the issuance of notice, the High Court in para 12 of its judgment observed as under:
>
> > "12. Thus we find that the reasons in support of the impugned notice is the very issue in respect of which the Assessing Officer has raised the query dated 25 September 2017 during the assessment proceedings and the Petitioner had responded to the same by its letters dated 10 December 2017 and 21 December 2017 justifying its stand. The non-rejection of the explanation in the Assessment Order would amount to the Assessing Officer accepting the view of the assessee, thus taking a

> view/forming an opinion. Therefore, in these circumstances, the reasons in support of the impugned notice proceed on a mere change of opinion and therefore would be completely without jurisdiction in the present facts. Accordingly, the impugned notice dated 27 March 2019 is quashed and set-aside."

In the circumstances, we see no reason to interfere in the matter. This special leave petition is, accordingly, dismissed.

Pending application(s), if any, also stand disposed of.

10. Further, we note that the Hon'ble Bombay High Court in the case of GKN Sinter Metals Ltd. v. ACIT reported in 371 ITR 225 had an occasion to deal with similar plea of the Revenue viz. that an assessment order passed u/s.143(3) doesn't contain any discussion on an issue, it must follow that no opinion was formed by the AO in the regular assessment proceedings, was repelled by the Hon'ble High Court by observing as under:-

> 14. According to the Revenue, it could only be when the assessment order contains discussion with regard to particular claim can it be said that the Assessing Officer had formed an opinion with regard to the claim made by the assessee. This Court in Idea Cellular Ltd. v/s. Deputy Commissioner of Income Tax 301 ITR 407 has expressly negatived on identical contention on behalf of the Revenue. The Court held that once all the material was placed before the Assessing Officer and he chose not to refer to the deduction/ claim which was being allowed in the assessment order, it could not be contended that the Assessing Officer had not applied his mind while passing the assessment order. Moreover in this case, it is evident from the letter dated 6th August, 2007 addressed by the Assessing Officer to the Petitioner containing the reasons recorded for issuing the impugned notice also record the fact that during the regular assessment proceedings, the Petitioner has been asked to furnish details in support of the claim for exemption under Section 80IA/IB of the Act. The letter further records that the details sought for were furnished and it is now observed that there has been a disproportionate distribution of expenses between various units belonging to the Petitioner for claiming deduction under Section 80IA/IB of the Act. This is a further indication of the fact that the Assessing Officer had during the regular assessment proceedings for Assessment Year 200203 sought information in respect of the allocation of expenses and the explanation offered by the Petitioner was found to be satisfactory. This is evident from query dated 27th December, 2004 and the Petitioner's response to the same on 25 th January, 2005 explaining the manner of distribution of common expenses for delaying the process of claiming deduction under Section 80IA/IB of the Act. All this would indicate that Assessing Officer had formed an opinion while passing the order dated 9th March, 2005. This Court in Aroni Commercials Ltd. v/s. Assistant Commissioner of Income Tax 367 ITR 405 had occasion to consider somewhat

> similar submission made by the Revenue and negatived the same by holding that when a query has been raised with regard to a particular issue during the regular assessment proceedings, it must follow that the Assessing Officer had applied his mind and taken a view in the matter as is reflected in the Assessment Order. Besides, the manner in which an Assessing Officer would draft/frame his order is not within the control of an assessee. Moreover, if every contention raised by the assessee which even if accepted is to be reflected in the assessment order, then as observed by the Gujarat High Court in CIT v/s. Nirma Chemicals Ltd. 305 ITR 607, the order would result into an epic tome. Besides, it would be impossible for the Assessing Officer to complete all the assessments which have to under gone scrutiny at its hand. In the above view, it is clear that once a query has been raised during the assessment proceedings and the Petitioner has responded to the query to the satisfaction of the Assessing Officer as is evident from the fact that the Assessment Order dated 9th March, 2005 accepts the Petitioner's claim for deduction under Section 80IA/IB of the Act. It must follow that there is due application of mind by the Assessing Officer to the issue raised.

11. Similar view has been taken by the Hon'ble Madras High Court in the case of Asianet Star Communications Pvt. Ltd. v. ACIT reported in [2020] 422 ITR 47 (Mad.), wherein, the Hon'ble Madras High Court held (relevant paras) as under:-

> 32. Mr. Narayanaswamy counters that there is nothing in the orders of assessment, no discussion of any nature whatsoever, to indicate that there has been application of mind by the Assessing Officer to the issues in question and as such, the orders of assessment passed originally, though under section 143(3), cannot be said to have considered the issues at all. The question of review of such an order does not arise in these circumstances.
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> 33. I disagree. The records contain all relevant details in regard to the issues in question, being the expenditures amortised as well as foreign remittances and deduction of tax thereof. The counsel for the Revenue has, very fairly, not disputed this factual aspect even slightly. In the present case, the two questions proposed for reassessment, being amortisation of programme/movie cost and deduction of tax on foreign remittance, arise from a perusal of the financials itself. The audited financials, including the profit and loss accounts and audit report, present clearly all details in regard to the aforesaid two issues.

12. In the light of the aforesaid discussion, we find that there is no infirmity in the order passed by the Ld.CIT(A) that assessee had replied with relevant documents to the specific queries on the three issues raised by the AO to re-open the regular assessment which was completed u/s.143(3) of the Act; and therefore, after a lapse of four years from the

end of the assessment year, it can't be said that assessee failed to disclose fully and truly all material facts necessary for the assessment. Therefore, the Ld.CIT(A) has rightly allowed the legal issue raised by the assessee against re-opening of assessment by rightly relying on the decision of the Hon'ble Supreme Court in the case of Marico Ltd. (supra) and the Hon'ble Madras High Court in the case of Asianet Star Communications Pvt. Ltd. (supra). Therefore, there is no infirmity in the order passed by the Ld.CIT(A) allowing the legal issue raised by the assessee against re-opening of assessment.

13. Before parting, we would like to note from the grounds of appeal raised by the Revenue especially Ground No.3, wherein, the Revenue has assailed the action of the Ld.CIT(A) for not following the decision of the Hon'ble Supreme Court in the case of CIT v. P.V.S. Beedies Pvt. Ltd. reported in [1999] 237 ITR 13 (SC), which was a case of re-opening on the basis of audit objection. We find that such a ground is not emerging from the re-assessment order or reasons recorded by the AO before he ventured to re-open the assessment. And it is no longer *res-integra* that while the legal issue regarding reopening is tested, the reason recorded by the AO has to be tested on a stand-alone basis and nothing can be added or subtracted in it. Nothing emerges from perusal of reasons recorded by the AO that re-opening is resorted due to audit objection on

facts/issues which has not been noticed by the AO during regular assessment. In such a scenario, there is no merit in the grounds of Revenue, so dismissed.

14. Ground Nos.4-5 regarding the application of deeming provisions stated therein, we note that the assessment which is being re-opened is after four years from the end of the assessment year, therefore, the AO has to not only record *reason to believe escapement of income*, but also clear the hurdle placed by first proviso to sec.147 of the Act, which in this case, the AO failed as noted supra. Therefore, these grounds doesn't come to the aid of the Revenue and hence, dismissed.

15. In the result, appeal filed by the Revenue stands dismissed.

Order pronounced on the 09th day of October, 2024, in Chennai.

Sd/-	**Sd/-**
(एस. आर. रघुनाथा)	**(एबी टी. वर्की)**
(S.R.RAGHUNATHA)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 09th October, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF