IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "SMC-II", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

	ITA No. 4762/Del/2016	
	A.Y. : 2007-08	
DCIT(E) CIRCLE-1(1), ROOM NO. 2418, 24TH FLOOR, E-2, BLOCK, PRATYAKASH KAR BHAWAN, DR. SHYAMA PRASAD MUKHERJEE CIVIC CENTRE, JAWAHAR LAL NEHRU MARG, NEW DELHI – 110 002	VS.	MAI KAMLIWALI JAN KALYAN CHARITABLE TRUST, J-12 RAJOURI GARDEN, COMMUNITY CENTRE, NEW DELHI (PAN: AAAAM0224H)
(APPELLANT)		**(RESPONDENT)**

Department by : Sh. S.K. JAIN, SR. DR

Assessee by : Sh. Gautam Jain, Adv. & Sh. Piyush Kumar Kamal, Adv. & MS. SAKSHI ARORA, CA

ORDER

The Revenue has filed the present appeal against the impugned order dated 13/6/2016 passed by the Ld. Commissioner of Income Tax (Appeals)-40, New Delhi on the following grounds:-

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by ignoring the fact that the case of the assessee covered under clause 9b) relevant to the issuance of notice u/s. 148 of the I.T. Act, 1961.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by ignoring the fact that the AO had all the reasons to believe that the income of the assessee had escaped assessment on the basis of which, after obtaining due approval from Ld. CIT(E), new Delhi vide approval dated 27.3.2014, the case was reopened u/s. 147 of the Act and notice u/s. 148 was issued to the assessee on 27.3.2014.
3. The appellant craves leave to add, to alter or amend any ground of appeal raised above at the time of hearing.

2. The facts in brief are that the assessee has filed its Return of income declaring income at Rs. NIL on 26.10.2007. The assessment at Rs. 5,02,650/-. Subsequently order u/s. 154 of the I.T. Act was passed in this case on 27.4.2011 enhancing the income from Rs.5,02,650/- to Rs.7,70,540/- by making an addition of Rs.

2,67,890/- on account of corpus fund received by the assessee. After obtaining the approval of Ld. CIT(E), New Delhi vide approval dated 27.3.2014 the case was reopened under section 148 of the I.T. Act and notice u/s. 148 of the I.T. Act was issued to the assessee on 27.3.2014. Formal notices u/s. 142(1) of the I.T. Act was issued to the assessee. Thereafter, AO observed that purchases made by MKW Chemists to the extent of Rs. 42,61,280/- and accounted for in the Income and expenditure account as material consumed (Purchase of Hospital and purchase of Chemits) to the extent of Rs. 67,25,719/- is restricted to Rs. 23,58,543/- as material consumed and the balance amount of Rs. 42,61,280/- was added back to the total income of the assessee as undisclosed sales and assessed the income of the assessee at Rs. 45,58,680/- vide his order 31.3.2015 passed u/s. 147/143(3) of the I.T. Act, 1961.

3. Aggrieved with the aforesaid assessment order, assessee preferred an appeal before the Ld. CIT(A), who vide his impugned order dated 13.6.2016 has deleted the addition and allowed the appeal of the assessee.

4. Now the Revenue is aggrieved against the impugned order and filed the present appeal before the Tribunal.

5. At the time of hearing Ld. DR relied upon the order of the AO and reiterated the contentions raised by the Revenue in the grounds and requested that Appeal of the Revenue may be allowed.

6. On the contrary, Ld. Counsel of the Assessee has relied upon the order of the Ld. CIT(A) and stated that the AO has not alleged in the reasons recorded as to that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and, therefore, action is invalid. He further stated that, mere statement that there is failure to disclose full and true all material fact does not satisfy the statutory preconditions provided in proviso to section 147 of the Act i.e. reasons must indicative why and how the assessee had failed to make full and true disclosure of the material facts. It was the further contention that the perusal of assessment record enforces admission that there is no fresh tangible material and, no failure to disclose full and true all material facts necessary for assessment. He further stated that reasons are based on change of opinion, as held in CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC) and CIT vs. Usha International Ltd. 348 ITR 485 (Del) and also stated that AO did not dispose of the objection by a speaking order in accordance with judgment of GKN Drive Shafts (India) Ltd. vs. ITO 259 ITR 19. He further stated that no valid approval had been obtained in terms of section 151 of the Act.

To support the aforesaid contention, he relied upon the various case laws including the following cases:-

- 357 ITR 646 CIT vs. Viniyas Finance and Investments (P) Ltd.
- 343 ITR 141 (Del) Atma Ram Properties Pvt. Ltd. vs. DCIT
- 384 ITR 113 (Del) Alcatel Lucent France vs. ACIT
- 217 Taxman 115 (Del) CIT vs. Convertech Equipments P ltd.

7. I have heard both the parties and perused the records, especially the impugned order passed by the Ld. CIT(A). I find that Ld. First Appellate Authority has elaborately discussed the issue in dispute by considering the submissions of the assessee and adjudicated the issue as under:-

> *"….6. Having gone through the submission of the appellant, order of assessment made by the Assessing officer and the facts on the record, it emerges that during the original assessment proceeding under section 147/148/143(3) of the Income Tax Act, 1961, the Assessing officer made*

the inquiry regarding material consumed amounting to Rs. 67,25,719/- (as depicted at point no. 25 of questionnaire dated 18.02.2009 of Assessing Officer) and the appellant vide letter of reply, submitted details of material consumed before the AO, and after considering the submission of appellant the "material consumed" was allowed to be claimed as revenue expenditure. The Assessing Officer was satisfied regarding the queries and no addition was made by him on the ground." ……

…….12. In light of the above discussion the revenue's appeal must fail. 1t is hereby dismissed as no substantial question of law arises consideration.

In the instant case, the original assessment was completed under Section 143(3) of the Act vide order dated 23.12.2009. The notice under Section 148 was issued on 27.03.2014 after the expiry of four years. In response to notice under Section 148 on 02/04/2014, and thereafter, the assessee filed replies from time to time. The Assessing Officer was required to demonstrate that the assessee had either failed to make a return

under section 139 or in response to a notice issued under sub- section (I) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. It is an admitted fact that the assessee filed its return of income; thus, for the initiation of reassessment proceedings to be valid, the last stated condition must be shown to have been met. In my considered opinion this condition was not met. The Assessing Officer has examined the issue in detail of "material consumed" and allowed them as the revenue expenditure and no addition was made on account of these issues. This was sought to be disturbed in the reassessment proceedings after expiry of four years. This is a clear case where the primary facts available before the Assessing Officer, and therefore, the assessee cannot be held to have failed to disclose fully and truly all material facts. The Assessing Officer examined the claim of revenue expenses for material consumed for Rs. 67,25,719/-. The Assessing Officer after being satisfied do not make any addition on these issues. In view of the observations made by the jurisdictional High Court (supra), it is held that the

reassessment by issuing the notice u/s 148 of the Act dated 25.03.2013 is were "change of opinion" and the consequent proceedings are null and void. The addition of the same figure by the AO is not justified by any means of law and void and do hereby delete the same."

7.1 After going through the findings of the Ld. CIT(A), as aforesaid, I find that in the instant case, the original assessment was completed under Section 143(3) of the Act vide order dated 23.12.2009. The notice under Section 148 of the Act was issued on 27.03.2014 after the expiry of four years. In response to notice under Section 148 of the Act on 02/04/2014, and thereafter, the assessee filed replies from time to time. The Assessing Officer was required to demonstrate that the assessee had either failed to make a return under section 139 or in response to a notice issued under sub- section (I) of Section 142 of the Act or Section 148 of the Act or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. It is an admitted fact that the assessee filed its return of income; thus, for the initiation of reassessment proceedings to be valid, the last stated condition must be shown to have been met. In my considered opinion this condition was not met. The Assessing Officer has examined the issue in detail of "material consumed" and allowed them as the revenue

expenditure and no addition was made on account of these issues. This was sought to be disturbed in the reassessment proceedings after expiry of four years. This is a clear case where the primary facts available before the Assessing Officer, and therefore, the assessee cannot be held to have failed to disclose fully and truly all material facts. The Assessing Officer examined the claim of revenue expenses for material consumed for Rs. 67,25,719/-. The Assessing Officer after being satisfied do not make any addition on these issues. Therefore, I am of the considered view that assessee had made full and true disclosure during the original assessment proceedings. I am also of the view that reopening had been done merely on change of opinion in as much as that in the original assessment made u/s. 143(3) of the I.T. Act and I also find that AO has no fresh material to form his opinion regarding escapement of assessment and he has also not found any tangible material to record the reasons for reopening of the assessment of the assessee. I further note that it is a settled law that merely change of opinion is not permissible under the law as held by the Hon'ble Delhi High Court decision in the case of Commissioner of Income Tax vs. Usha International Ltd. [2012] 348 ITR 485 (Delhi) [Full Bench] and also held in the decision of the Hon'ble Supreme Court of India in the case of CIT vs. Kelvinator of India Limited in Appeal Nos. 2009-2011

of 2003 reported in 320 ITR 561. Therefore, the Ld. CIT(A) has rightly held that the reassessment by issuing the notice u/s 148 of the Act were "change of opinion" and the consequent proceedings are null and void. Therefore, Ld. CIT(A) has rightly observed that the addition of the same figure by the AO was not justified by any means of law and void and hence deleted the same. In view of the above, I am of the considered view that Ld. CIT(A) has passed a well reasoned order which does not need any interference on our part, on the issue in dispute, hence, I uphold the same.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 03/1/2017.

SD/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 03/1/2017

"SRBHATNAGAR"
Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar