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

BEFORE SHRI JASON P. BOAZ, ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA NO. 1827/MUM/2013 : **(A.Y : 2005-06)**

DCIT-1(3), Mumbai.	Vs.	M/s. Universal Ferro & Allied Chemicals Ltd., Liberty Bldg., Sir Vithaldas Thackersey Marg, Mumbai 400 020. **PAN : AAACU1697C**
(Appellant)		(Respondent)

Assessee by	:	Shri V. Mohan
Department by	:	Shri A. Kumbhar
Date of Hearing	:	12.05.2016
Date of Pronouncement	:	25.05.2016

O R D E R

PER SANDEEP GOSAIN, JUDICIAL MEMBER :

The present appeal has been filed by the Revenue against the order 25.10.2012 for A.Y 2005-06 in Appeal No. CIT(A)-7/IT-320/12-13 on the following ground.

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in quashing the escapement of income chargeable to tax to the extent of Rs.67,55,710/- within the meaning of section 147 of the IT Act on the premises that there is change of opinion. However, the facts are otherwise. The amount of

Rs.67,55,710/- was taxable which has been escaped from the original assessment made u/s 143(3) in view of provisions of section 147?"

2. The brief facts of the case are that the assessee company had set up an industrial undertaking to manufacture Ferro-Manganese at Manek Nagar, Tumsar in late 50s and early 60s. In early 80s the assessee set up a plant for manufacture of 45000 Tonnes of Ferro Manganese and the said plant had the status of being an Export Oriented Unit (EOU) and both the Government of India and the State Government granted various concessions which were available to the unit set being an EOU. Because of certain circumstances and pending court cases, though appellant company was in existence, but the assessee had to temporarily close the operations.

The assessee company filed its return of income for A.Y 2005-06 on 8.11.2005 declaring total loss of Rs.6,30,63,950/-. The assessment was completed u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act') on 21.11.2007 at total loss of Rs.5,73,56,870/-. Thereafter, the order was rectified u/s 154 on 5.1.2010 reducing the total income to Nil after set off of brought forward business loss. Subsequently, the case was reopened by issuing notice dt. 26.3.2010 u/s 148 of the Act which was served upon the assessee. After considering the submissions filed by the assessee available on record, DCIT vide order dt. 26.11.2010 passed an order of assessment u/s 143(3) r.w.s. 147 of the Act. Aggrieved by the order of the Assessing Officer, assessee preferred an appeal before the CIT(A) challenging the action of reopening of assessment done by the Assessing Officer. The CIT(A) after considering the case of both the parties held that reopening of the assessment was done by Assessing Officer merely based on

'change of opinion' and consequently, the additions so made by the Assessing Officer, even on merits, were found to be unsustainable and the appeal filed by the assessee was allowed by the CIT(A). Aggrieved by the order of the CIT(A), Revenue has preferred the present appeal on the ground mentioned hereinabove.

Ground No.1

3. The Ld. DR appearing on behalf of the Revenue submitted that Ld. CIT(A) erred in quashing the escapement of income chargeable to tax to the extent of Rs.67,55,710/- within the meaning of Sec. 147 of the Act on the premise that there is 'change of opinion'. It was argued by the Ld. DR that in the present case action of the Assessing Officer regarding reopening was not based on mere change of opinion, rather, it was based on the facts of the case as assessee reduced the amount of Rs.67,55,710/- from "income from business" in the computation of income. It was noted by the Assessing Officer that the assessee has derived benefit by way of one-time settlement wherein assessee becomes owner of the monies amounting to Rs.67,57,710/- which is no more payable. After considering these facts, the Assessing Officer has rightly come to the conclusion that this amount has to be taxed and not offering the same to tax has resulted in escapement of income chargeable to tax to the extent of Rs.67,55,710/- within the meaning of Sec. 147 of the Act. The Ld. DR also relied upon the judgment of ITAT, Delhi Bench in ITA No. 3134/Del/2010 in the case of Rollatainers Ltd. v. ACIT. Lastly, the Ld. DR submitted that the order of the Ld. CIT(A) may be reversed and the order of the Assessing Officer may be upheld.

4. On the other hand, the Ld. AR representing the assessee relied upon the order passed by the Ld. CIT(A). It was also argued by the

Ld. AR that the assessee has filed return of income on 8.11.2005 declaring income of Rs.6,30,63,950/- against which it claimed set off of brought forward loss. Further, processing u/s 143(1) was done on 10.3.2006 wherein income was wrongly taken at loss of Rs.6,30,63,950/-. In the assessment u/s 143(3) passed on 21.11.2007 the assessed income was determined at loss of Rs.5,73,56,870/-. Thereafter, the order was rectified u/s 154 of the Act on 5.1.2010 reducing the total income to Nil after set off of brought forward business loss. It was also argued by the Ld. AR that during the A.Y 2005-06 the assessee has credited amount of Rs.67,55,710/- in its Profit & Loss account towards remission of bank liability under the head "exceptional item". However, the assessee reduced this amount from "income from business" in the computation of income. It was further argued that the assessee has derived benefit by way of one-time settlement wherein assessee becomes owner of the monies amounting to Rs.67,55,710/-. The Ld. AR drew our attention to item no. 19 on page 15 of the paper book wherein details of remission of liability are mentioned and the said set of documents were also submitted by the assessee before the Assessing Officer as well as the Ld. CIT(A). It was further submitted that there has been total disclosure made in the Profit & Loss account in respect of remission of liability and since assessment has been termed being scrutiny assessment u/s 143(3), merely for change of opinion, where no additional information or addition is available, it would not be open for the Assessing Officer to invoke Sec. 148 and reopen the assessment. The Ld. AR also relied upon the judgment of the Hon'ble Bombay High Court in the case of *Asteroids Trading & Investments (P) Ltd. v. DCIT, 308 ITR 190; Asian Paints Ltd. v. DCIT, 308 ITR 195; Aventis Pharma Ltd. v. ACIT, 323 ITR 570 and GKN Sinter Metals Ltd. v. Ramapriya*

Raghavan, ACIT, 371 ITR 225. In addition, the Ld. AR submitted that the Assessing Officer has failed to appreciate that under the OTS scheme framed by the RBI assessee was entitled to certain benefits and PNB agreed to waive principal amount of loan aggregating to Rs.67,55,710/-. The loan amount has neither been debited to the Profit & Loss account in any of the preceding years nor claimed as a deduction and, therefore, crediting the same to Profit & Loss account would not change the character of the credit and, therefore, same cannot be taxed either u/s 41(1) and/or 28(iv). In this respect, the Ld. AR relied upon the judgment of Mahindra & Mahindra Ltd., 261 ITR 501 wherein it has been held by the Hon'ble Bombay High Court that for waiver of loan which has not been allowed as a deduction in the preceding year that is the principal amount of loan, the question of taxing same u/s 41(1) and/or 28(iv) does not arise. The Ld. AR also relied upon the judgment in CIT v. Chetan Chemicals Pvt. Ltd., 267 ITR 770 wherein a similar view has been taken by the Hon'ble Gujarat High Court. The Ld. AR further submitted that since the complete scrutiny assessment has already been done in the present case and the complete details were also disclosed by the assessee before the Assessing Officer, therefore, the Assessing Officer had no action to reopen the assessment by invoking provisions of reopening.

5. We have heard the counsels for both parties and also perused the material on record as well as the orders passed by the revenue authorities. Before we come to the merits of the case, it is necessary to analyse paragraphs 4.3 to 5.1, being the operative portion of CIT(A)'s order wherein the ground has been dealt. The same is reproduced below.

"4.3 I have considered the A.O.'s order as well as appellant AR's submissions. Having considered both, I find that the appellant has duly disclosed the aforesaid sum of Rs.67,55,710/- in its profit & loss account and as per schedule attached, even I find that the appellant company made the claim of the aforesaid sum for deduction through computation of income which was filed along with the return of income which was duly disclosed at the time filing of original return of income, consequent to which that the assessment was completed u/s. 143(3) of the Act on 21/11/2007. The perusal of the computation of income of the appellant company clearly suggests that the aforesaid sum was duly disclosed in the return of income as well as the same was clearly forming part of the computation of income which was filed with original return of income. The perusal of the appellant's submission also suggest that the said reopening has taken place based on audit objection which I find that the jurisdictional High Court, Mumbai in the case of Purity Techtextile Pvt Ltd. vs. ACIT reported in 325 ITR 459 has categorically held that reopening of assessment based on audit objecting can not be held to be a justified action. In addition to this, I am also of the considered view that once the assessment was completed u/s. 143(3) wherein the fact was duly disclosed by the assessee and then after subsequent action of reopening of the assessment on similar issue is merely a change of opinion of the AO as held by the Apex Court in the case of CIT v. Kelvinator of India Ltd. reported in (2002) 256 ITR 1 (Delhi)

4.4 Having taken note of the appellant AR's submission as well as the decisions cited by the appellant's AR in his submission, I am of the considered view that it was not correct on the part of the AO to reopen the assessment once the assessment was completed u/s. 143(3) of the Act. Even after taking note of the available record before me, I am of the considered view that the reopening of the assessment was merely a change of opinion and hence the reopening of the assessment is held to be unjustified. Hence the re-assessment order on this score itself deserves to be annulled. Hence, the assessment order is annulled.

5. Even I find that the appellant has challenged the addition as per Ground No.2 to 4. The perusal of the grounds of appeal and also the appellant's submission dated 09/05/2012 which is extracted as above in para 4.2 clearly suggest that the addition so made by the

AO was completely wrong and unjustified in view of the jurisdictional High Court's decision in the case of:

(a) Mahindra & Mahindra Ltd. Vs. CIT, 261 ITR pgs 501-513
(b) Compaq Electric Ltd. Vs. CIT – Karnatak High Court dated 18.10.2011 Reported in (2012) 249 CTR pgs 214-217.

5.1 In view of the above, the addition so made by the AO even on merit is also not sustainable. In the result, appellant's appeal is allowed."

After a co-joint reading of the ground taken by the Revenue as well as the orders passed by the Ld. CIT(A) and after hearing the counsels for both parties, we noted that the computation of income of the assessee company clearly suggests that the aforesaid sum was duly disclosed in the return of income as well as the same was clearly forming part of the computation of income which was filed with the original return of income. We have also perused page 15 wherein details of remission of liability have already been disclosed by the assessee and page 11 to 15 which are correspondence wherein the assessee has submitted/answered all the information/queries so raised by the Revenue. On a co-joint reading of the papers contained in the paper book it is manifestly clear that the assessee has made all the disclosures in the return of income as well as the same was clearly forming part of the computation of income. The assessee had already replied the queries so raised by the Assessing Officer and on the perusal of the records we also found that the original assessment was completed on 21.11.2007 u/s 143(3) of the Act and the correspondence which are being referred to by the assessee at pages 11 to 15 of the paper book are dt. 31.10.2007, i.e., prior to the completion of the assessment u/s 143(3) of the Act. The Ld. DR relied upon the judgment of the *Export Credit Guarantee Corporation of India*

Ltd., 350 ITR 651 (Bom) but on perusal of the judgment relied by the Ld. AR in the case of GKN Sinter Metals Ltd. *(supra)* it is observed that has been categorically mentioned in paragraph 16 as under :-

> *"16. It is further submitted on behalf of the Revenue that so far as letter dated 27th December, 2004 issued by the Assessing Officer is concerned, same was of general nature and particulars furnished by the Petitioner in response to the same are voluminous and, therefore, not indicative of any application of mind on this issue by the Assessing Officer. Reliance was placed on the decision of this Court in Export Credit Guarantee Corporation v/s. Additional CIT 350 ITR 651 by the Revenue in support of its stand that as the issue of allocation of expenses was ignored/overlooked while passing an assessment order, then in such case, it is open to an Assessing Officer to exercise its jurisdiction under Section 147/148 of the Act and re-open the assessment. In the above decision, during regular assessment proceedings, no query was made with regard to the issue on which the assessment was sought to be re-opened, and therefore, ex-facie indicative of non application of mind. In the present case, the Assessing Officer had raised queries with regard to the allocation for expenditure between the three manufacturing units of the Petitioner which could only be raised on consideration of the claim and consequently accepted on consideration of the reply. Thus, it is not a case where the Assessing Officer overlooked/ignored the material and/or the issue which now forms the basis of issuing the impugned notice for reopening of the assessment order for Assessment Year 2002-03."*

After perusal of the judgment of GKN Sinter Metals Ltd. *(supra)*, the Hon'ble Bombay High Court has distinguished the judgment of Export Credit Guarantee Corporation of India Ltd. *(supra)* and clarified that in that case during the regular assessment proceedings no queries were made with regard to the issue on which the assessment was sought to be reopened and, therefore, *ex facie* indicative of non-application of mind, but as per the facts of the present case, queries in respect of issues on which the reopening has been sought were asked and were

replied by the assessee. Moreover, the assessee has made full disclosure of all the aforementioned sum in the return of income as well as the same was clearly forming part of computation of income which was filed with the original return of income. Therefore, the *para materia* contained in the judgment of Export Credit Guarantee Corporation of India Ltd. *(supra)* is altogether different and not applicable to the facts of the present case. Moreover, after perusal of the judgment of the ITAT in ITA No. 3134/Del/2010 in the case of Rollatainers Ltd. v. ACIT we find that the facts of that case are altogether different from the facts of the present case and are distinguishable, and thus not applicable to the facts of the present case.

6. We have perused the judgment relied upon by Ld. AR in the case of Asteroids Trading & Investments (P) Ltd. *(supra)*, the relevant paragraph of which is reproduced below :

> ***Head Note*** - *Reassessment – Change of opinion – Different view on same facts – AO allowed deduction under s. 80M after applying his mind to the relevant records – No new material has come on record and no new information has been received between the date of the order of assessment and the date of forming of opinion by the AO for issue of notice under s. 148 – It is a case of mere fresh application of mind by the same officer to the same set of facts – Thus, it is a case of mere change of opinion which does not provide jurisdiction to initiate proceedings under s. 148.*
>
> *"9. It is, thus, clear from the observations quoted above that power under section 147 cannot be used like the power of review to reopen the assessment and this is precisely what has been done in the present case. The Division Bench of this court in its judgment in the case of German Remedies Ltd. [2006] 285 ITR 26, referred to above, has taken the same view. In our opinion, the following*

observations from the judgment of the Division Bench of this court are relevant:

> *"It is a settled position of law that though the power conferred under section 147 of the Income-tax Act for reopening the concluded assessment is very wide, the said power cannot be exercised mechanically or arbitrarily. The expression 'reason to believe that any income chargeable to tax has escaped assessment' means entertaining a reasonable belief that a particular income went unnoticed by the Assessing Officer and hence escaped assessment. Even after the introduction of the concept of deemed escapement of income by Explanation 2 to section 147 of the Act with effect from April 1, 1989, the belief that the income has escaped assessment entertained by the Assessing Officer must be a prudent belief and not mere change of opinion. Thus, an assessment order passed after detailed discussion cannot be reopened within a period of four years from the end of the relevant assessment year, unless the Assessing Officer has reason to believe that due to some inherent defect in the assessment, the income chargeable to tax has been underassessed or assessed at too low a rate or excessive relief is granted to excessive loss or depreciation allowance or any other allowance under the Act has been computed.*
>
> *In the present case, after the service of the notice under section 148 of the Act, the assessee had filed its objections for reopening the assessment to the effect that in the light of the binding decision of this court and the decision of the Income-tax Appellate Tribunal there is no scope for entertaining the belief that the income has escaped assessment. However, the said objection had been rejected without even considering the said binding decision. Therefore, it is necessary to find out as to whether the conditions precedent for invoking the jurisdiction to reopen the assessment have been met or not."*

7. We have also perused the judgment relied upon by Ld. AR in the case of Asian Paints Ltd. *(supra)*, the relevant paragraph of which is reproduced below :

> ***Head Note*** *- Reassessment – Change of opinion – Different view on same facts – Power under s. 147 cannot be used to review the order – Admittedly, in the instant case, no new material has come on record and no new information has been received between the date of order of assessment and the date of formation of opinion by the AO – AO is seeking to reopen the assessment on the ground that some material which was available on record while the assessment was made was inadvertently excluded from consideration – This amounts to reopening of assessment merely on the basis of change of opinion which is not permissible.*
>
> *".....(which para not clear)*
>
> *6. From the record, therefore, now it is clear that respondent No. 1 is invoking the power under s. 147 in reopening the assessment because, according to him, he inadvertently did not take into account the material information which was available on record, when he made the assessment order. The question is, can power under s. 147 be exercised in this situation."*

8. We have also perused the judgment relied upon by Ld. AR in the case of Aventis Pharma Ltd. *(supra)*, the relevant paragraph of which is reproduced below :

> ***Head Note*** *- Reason to believe – Change of opinion – In the original assessment, deduction of consultancy fee and the amount paid by the assessee to the purchaser for meeting the demand of the State Government towards unearned increase in the value of land was allowed in the computation of long-term capital gains – AO reopened the assessment for the reason that the amount paid to the Government is not allowable as deduction in computing the long-term capital gains – Not justified – There was no tangible material on the basis of which the assessment could be reopened – Reassessment is sought to be made on the basis of mere change of opinion – This is not permissible.*

14. The view which we have taken of the provisions of section 147 is consistent with the law laid down by the Supreme Court in CIT Vs. Kelvinator of India Ltd. [2010] 320 ITR 561. The Supreme Court has held that:

> *"....Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which we are afraid section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. 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 pre-condition 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 an 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 live link with the formation of the belief."*

15. Before concluding, it would be necessary to record two further submissions which have been urged on behalf of the assessee. The first submission is based on the proviso to section 147 which provides that the Assessing Officer may assess or reassess such income which is chargeable to tax and has escaped assessment, other than income involving matters which are the subject-matter of any appeal, reference or revision. Counsel for the assessee submitted that against the order of assessment, the assessee had filed an appeal before the CIT (Appeals). The grounds in the appeal specifically include a challenge to the order of assessment on the ground that the Assessing Officer erred in disallowing depreciation of Rs. 64.62 lakhs by holding that the same represented

depreciation on obsolete assets which are not used in business and included in the written down value of the block of assets. Similarly, another point in the appeal is that the Assessing Officer erred in determining long-term capital gains arising on the sale of Phase III land at Mulund to the extent of Rs. 10.66 crores. The contention is that in view of the proviso to section 147, the Assessing Officer is precluded from reopening the assessment on an issue which is the subject-matter of a pending appeal. The second submission was based on section 120 of the Act and it was urged that since the original order of assessment was passed by the Addl.CIT, Range 8(1), Mumbai, it was not within the jurisdiction of the Asstt. CIT, who is a subordinate authority, to reopen the assessment."

9. After perusal of the aforementioned judgments relied by the Ld. AR, we are of the considered view that the facts in those judgments are similar to the facts of the present case and are thus applicable. The Ld. CIT(A) while dealing with the said issue has taken into consideration that the assessee has made full disclosure of the aforesaid sum in the return of income as well as the same was clearly forming part of computation of income. Also, the Ld. CIT(A) on merits of the case has relied upon the judgment of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd., 261 ITR 501 (*supra*) and Hon'ble Karnataka High Court in the case of Compaq Electric Ltd. dt. 18.10.2011 reported in (2012) 249 CTR pages 214 to 217. The Ld. CIT(A) after considering the facts of the case and relying upon the judicial pronouncements has rightly come to the conclusion that once the assessment was completed u/s 143(3) wherein the facts were fully disclosed by the assessee, then, subsequent action of reopening of assessment on similar issue is nothing but merely 'change of opinion' of Assessing Officer and said conclusion by Ld. CIT(A) is fortified by the decision of the Apex court in the case of *Kelvinator of India Ltd., 256 ITR 1*. The Ld. CIT(A) after appreciating the judgment in the case

of Mahindra & Mahindra Ltd. (*supra*) and Compaq Electric Ltd. (*supra*) has rightly come to the conclusion that the addition so made by the Assessing Officer were clearly wrong and unjustified in view of the jurisdictional high court's decision as mentioned above. No new material or circumstances have been brought before us to controvert or rebut the judicious and well-reasoned findings recorded by the Ld. CIT(A), therefore, we see no reason to interfere or deviate from the findings recorded by the Ld. CIT(A).

10. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 25th May, 2016.

Sd/- Sd/-

(JASON P. BOAZ) **(SANDEEP GOSAIN)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Mumbai, Date : 25th May, 2016

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "F" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai