

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

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

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND

SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं /I.TA No. 1176/Mum/2011

(निर्धारण वर्ष / Assessment Year: 2002-03

M/s. General Machinery & Technical Services Ltd., 1-B, Parekh Mahal, 1 st Floor, Veer Nariman Road, Mumbai-400 020	बनाम/ Vs.	The ACIT, Circle-1(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACG 2083Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri Sharad Shah
प्रत्यर्थी की ओर से/ Respondent by:		Shri S. Senthil Kumaran

सुनवाई की तारीख / Date of Hearing :16.03.2016

घोषणा की तारीख /Date of Pronouncement :27.05.2016

आदेश / O R D E R

PER C.N. PRASAD, JM:

This appeal is filed by the assessee against the order of the Ld. CIT(A)-1, Mumbai dated 27.10.2010 pertaining to assessment year 2002-03.

2. The first ground of appeal of the assessee against the order of the Ld. CIT(A) challenging the reopening of assessment by the Assessing Officer. The assessee also raised the ground challenging

the order of the Ld. CIT(A) sustaining the disallowance towards repairs and maintains expenses incurred by the assessee.

3. With regard to reopening of the assessment, the Ld. Counsel for the assessee submits that the assessee filed return on 31.10.2002 declaring income of Rs. 15,05,790/- and the assessment was completed u/s. 143(3) on 10.1.2005 determining income at Rs. 16,41,480/-. He submits that later the assessment was reopened by issue of notice u/s. 148 and completed the reassessment on 27.9.2007 u/s. 143(3) r.w. Sec. 147 determining the income of the assessee at Rs. 26,11,680/-. The Ld. Counsel for the assessee submits that in the reassessment, the Assessing Officer disallowed Rs. 9,70,000/- being the expenditure incurred on repairs and maintenance. At the outset, he submits that no tangible materials have come on record after completion of assessment u/s. 143(3) so as to form an opinion by the Assessing Officer that the income has escaped assessment. Referring to page 2 & 3 of the Paper Book which are the reasons for reopening submits that the reasons were culled out from the records and as such there is no tangible materials for issue of notice u/s. 148 of the Act. He submits that it is a mere change of opinion for reopening the assessment and to disallow the expenses incurred towards repairs and maintenance and reopening of assessment on mere change of opinion is not permissible in law. He places reliance on the following decisions:

1. Rallis India Ltd Vs ACIT (323 ITR 54) (Bombay H. C)
2. Godrej Agrovet Ltd. Vs DCIT 323 ITR 97 (Bombay H. C)
3. CIT Vs Kelvinator of India (320 ITR 561) (SC)

4. The Ld. Departmental Representative submits that this ground has not raised before the Ld. CIT(A) and for the first time this ground is raised before the Tribunal. He submits that the matter has not been examined by the Ld. CIT(A). He further submits that there is no change of opinion.

5. Heard both sides, perused the orders of the authorities below and the decisions relied on by the Ld. Counsel. With regard to the submissions of the Ld. Departmental Representative that the issue of reopening of assessment is not raised before the Ld. CIT(A), we are of the view that this issue is purely a legal issue and assessee is permitted to raise such ground even before the Tribunal, when there is no need to go into examining fresh facts in view of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Corpn. Ltd Vs CIT (229 ITR 383).

6. The reasons for reopening of the assessment are as under:

“Dated : 28.3.2007

In this case, the return of income was filed on 31.10.2002 declaring total income at Rs. 15,05,790/-. The case was selected for scrutiny. The assessment was completed u/s. 143(3) of the Act on 10.1.2005 on total income of Rs. 16,41,680/- and book profit of Rs. 13,88,488/-.

On going through the records, it is noticed that the assessee has claimed a deduction of Rs. 14,75,016/- towards repair charges which includes a sum of Rs. 7,00,000/- paid to Shree Dutta Indus (I) Ltd for repair and maintenance charges and Rs. 2,70,000/- paid to K.S. Cambatta & others towards monthly payment for July 2001 to March, 2002. It is seen from the records that the payment of Rs, 7,00,000/- represents payment made to

Shree Dutta Indus (I) Ltd, another company. Similarly, the amount of Rs. 2,70,000/- represents the monthly contribution paid to the Cambatta Bldg., Tenants Association building Repair fund set up for taking care of present and future contingent repairs and renovation of Cambatta Bldg.,(Eros Bldg.), lift maintenance and other amenities. As such, both these expenditures are not allowable deductions.

I have, therefore, reason to believe that income to the extent of Rs. 9,70,000/- has escaped assessment within the meaning of Sec. 147 of the I.T. Act, 1961.”

7. As could be seen from the above reasons recorded for the reopening of assessment, the Assessing Officer on going through the records noticed that assessee claimed certain expenditure towards repairs and maintenance and according to him this is not an admissible expenditure. Therefore he was of the opinion that there is escapement of income within the meaning of Sec. 147 of the Act by the assessee. On going through the reasons recorded, we find that no tangible materials have come on record after completion of assessment so as to believe that the income of the assessee has escaped assessment. It is only from the records the Assessing Officer came to the conclusion that the expenses are not allowable and therefore there is escapement of income. In our considered view, this is only a mere change of opinion of the Assessing Officer to reopen the assessment based on the materials already available on record which it is not permissible under law. The Hon'ble Bombay High Court in the case of Rallis India Ltd (supra) considering the decision of Hon'ble Supreme Court in the case of CIT Vs Kelvinator of India (supra) held as under:

“We are conscious of the circumstance that in the present case the reopening of assessment is sought to be effected within a period of four years of the expiry of the relevant assessment year. However, it is now a well settled position of law that a mere change of opinion would not justify the Assessing Officer in seeking a recourse to the powers under sections 147 and 148 and there must be tangible material before the Assessing Officer to prove that income chargeable to tax has escaped assessment. The principle that there must be tangible material on the basis of which an assessment is sought to be reopened even within a period of four years is now established in view of the judgment of the Hon’ble Supreme Court in CIT vs. Kelvinator of India Ltd.(2010) 320 ITR 561. The Supreme Court has held thus(page 564):

“Therefore, post April 1, 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 precondition and if the concept of ‘change of opinion’ is removed, as contended on behalf of the Department, then, in the garb of reopening of the assessment, review would take place. One must treat the concept of ‘change of opinion’ as an inbuilt test to check abuse of power by the Assessing Officer. Hence, after April 1, 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.”

In the present case, there was an absence of tangible material on the basis of which the assessment could have been reopened. The reason which weighed with the Assessing Officer is extraneous to the basis on which the deduction can legitimately be claimed under section 36(1)(vii). This is a case of a mere change of opinion without any tangible material. The reopening of the assessment on this ground is hence unsustainable.”

Following the said decision we hold that the reassessment is bad in law for the reason that no tangible material has come on record suggesting escapement of income and it is only a mere change of opinion of the Assessing Officer to reopen the assessment based on the materials already available on record, it is not permissible under law. This ground of appeal is allowed.

7. Since we have held that the reopening of assessment is bad in law, we are not inclined to go into the merits of the disallowance which becomes only an academic.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 27th May, 2016.

Sd/-

(RAMIT KOCHAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 27th May, 2016

व.नि.स./ Rj , Sr. PS

Sd/-

(C.N. PRASAD)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai