21/03/2018

IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'B', LUCKNOW

BEFORE SHRI T. S. KAPOOR, ACCOUNTANT MEMBER AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

I.T.A. No.745/Lkw/2016
Assessment Year:2009-10

Dy.C.I.T., Range-IV, Lucknow.	Vs.	Shri Jasminder Singh, 28, Amir Nagar, Lucknow. PAN:ADWPS 3346 Q
(Appellant)		(Respondent)

Appellant by	Shri V. K. Bora, D.R.
Respondent by	Shri Rakesh Garg, Advocate
Date of hearing	12/03/2018
Date of pronouncement	15/03/2018

ORDER

PER T. S. KAPOOR, A.M.

This is an appeal filed by the Revenue against the order of CIT(A) dated 10/10/2016. The grounds of appeal taken by the Revenue are reproduced below:

"1. The Commissioner of Income Tax (Appeal) Lucknow has erred in law & on facts of the case in annulling the assessment order passed u/147/143(3) of the I.T. Act, 1961 by ignoring the fact that the reassessment proceedings u/s147 r.w.s 148 initiated by Assessing Officer were not based on change of opinion.

2. The Commissioner of Income Tax (Appeal) has erred in law & on facts of the case in deleting the addition/disallowance of Rs.78,55,605/- ignoring the fact that the assessee failed to deposit the TDS within the specified time as provided u/s section 40a (ia) of the I.T.Act,1961."

2. At the outset, Learned D. R. submitted that learned CIT(A) has quashed the assessment order holding it to be bad in law on the basis that the reopening was done merely on the basis of change of opinion whereas the fact remains that the assessee had not deposited TDS within the prescribed period of time and therefore, disallowance u/s 40(a)(ia) was warranted whereas in the original assessment the Assessing Officer had made disallowance only on account of the provisions of section 43B of the Act. In view of the above it was prayed that the order of the Assessing Officer be restored.

3. Learned A. R., on the other hand, submitted that the reasons on which the Assessing Officer had reopened the assessment were already examined by the Assessing Officer during the original assessment proceedings and therefore, the initiation of reassessment proceedings amounted to change of opinion which is not permitted under the law and therefore, learned CIT(A) has rightly allowed relief to the assessee by relying on the judgment of Hon'ble Delhi High Court in the case of CIT vs. Kelvinator of India Ltd. [2002] 256 ITR 1 (Del). Learned A. R. further submitted that Hon'ble Bombay High Court in the case of Asian Paints Ltd. vs. Dy.C.I.T. [2009] 308 ITR 195 (Bom) has further held that power u/s 147 cannot be used to review the order. It was submitted that the full bench judgment of Hon'ble Delhi High Court in the case of Kelvinator of India Ltd. (supra) was also relied while deciding this issue. Inviting our attention to the facts of the case, Learned A. R. took us to original assessment order placed at pages 13 to 17 of the paper book. Our specific attention was invited to para 3 of such order wherein the Assessing Officer had made disallowance of Rs.1,46,579/- being amount of TDS not deposited within the prescribed period of time as per the provisions of section 43B of the Act. Our attention was also invited to letter dated 25/11/2013 intimating the

reasons recorded for initiating the assessment proceedings u/s 147 placed at pages 35 & 36 of the paper book and the reasons recorded were read and in view of the reasons recorded and addition made during assessment proceedings, it was submitted that in the reasons recorded the Assessing Officer has taken the same issue which has already been decided by him in the original proceedings and therefore, learned CIT(A) has rightly allowed relief to the assessee.

4. We have heard the rival parties and have gone through the material placed on record. We find that original assessment order was passed on 16/12/2011 wherein vide para 3 the Assessing Officer had made an addition of Rs.1,46,579/- on account of depositing of TDS after the due date of filing the return. The Assessing Officer has made disallowance u/s 43B of the Act. The reasons recorded, placed at pages 35 & 36 of the paper book, reveal that this tax deducted at source related to the amount of Rs.78,55,605/- which the assessee had paid and on which tax was deducted but was paid after the prescribed period of time. The reasons recorded, as intimated to the assessee vide letter dated 25/11/2013, are reproduced below:

> *"3. In this case assessment was completed u/s 143(3) at the income of Rs.31,17,520/-. After completion of the assessment it is observed that the Assessing Officer has disallowed the amount of IDS amount to Rs.1,46,579/- on the account of the payment made by the Assessee after due date of filling of return of income while as per provision u/s 40a(ia) it is held that any amount shall not be deducted in computing the income chargeable under the head profit & services or fees for technical services payable to a resident, or amount payable to a contractor or sub-contractor, being resident, for carrying out any work. On which tax deductible at source under chapter XVII-B and such tax has not been deducted or, after, deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.*

On perusal of the file it is revealed, that Assessee has made the amounts of Rs. 3,00,000/- in the head of Artists and Model Remuneration u/s 194J, Rs. 39,75,000/- in the head of Artists and Model Remuneration u/s 194J, Rs. 1,14,975/- in the head of security Expenses u/s 194C, Rs. 28,65,630/- in the head of sound and Light Hire Charges u/s 194C and Rs.3,00,000/- in the head of Ground/Hall Rent u/s 1941 total amounting to Rs. 78,55,605/- and you did not deposit the TDS thereon of RS. 1,46,579/- on or before the due date of filling of return.

4. Therefore, I have reason to believe that the amount of Rs.78,55,605/- is not allowable expenses and should be adeed back to your income and there is an escaped income to the tune of Rs.78,55,605/- within the meaning of section 147 of the I.T. Act. Issue notice u/s 148."

4.1 From the above reasons recorded, it is apparent that the TDS of Rs.1,46,579/- for which the Assessing Officer had made the disallowance related to the amount of Rs.78,55,605/- which the Assessing Officer proposed to make addition on account of the provisions of section 40(a)(ia) of the Act. The assessment order and reasons recorded, if read together, clearly indicate that the Assessing Officer had in the original assessment proceedings made disallowance of TDS under the provisions of section 43B whereas for reopening of the case the Assessing Officer wanted to make disallowance u/s 40(a)(ia) of the Act. It is a clear case of change of opinion which as per judicial precedents is not permissible in the law. Hon'ble Bombay High Court in the case of Asian Paints Ltd. (supra) has allowed relief to the assessee by holding that the power u/s 147 cannot be used to review the order. While deciding so, Hon'ble court has followed the Full Bench judgment of Hon'ble Deolhi High Court in the case of Kelvinator India Ltd. For the sake of completeness, the relevant findings of Hon'ble Bombay High Court in the case of Asian Paints Ltd. are reproduced below:

"7. We have heard the learned counsel appearing for both sides. We have also gone through the judgments on which reliance was placed by the learned counsel appearing for both sides.

8. In the order rejecting the objection filed by the petitioner to the notice under section 148, respondent No. 1 has observed " verification of assessment record reveals that the said details were called for but inadvertently the same were not taken into account while framing the assessment and, therefore, it cannot be said that there is a change of opinion." According to respondent No. 1, thus, the relevant material was available on record, but he failed to apply his mind to that material in making the assessment order. The question is, can respondent No. 1 take recourse to the provision of section 147 for his own failure to apply his mind to the material which, according to him, is relevant and which was available on record. We find that this situation has been considered by the Full Bench of the Delhi High Court in its judgment in the case of CIT v. Kelvinator of India Ltd. [2002] 256 ITR 1 and the Full Bench has observed thus (page 19) :

"The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

9. It is clear from the observations made above that the Full Bench of the Delhi High Court has taken a view that in a situation where according to the Assessing Officer he failed to apply his mind to the relevant material in making the assessment order, he cannot take advantage of his own wrong and reopen the assessment by taking recourse to the provisions

of section 147. We find, ourself, in respectful agreement with the view taken by the Full Bench of the Delhi High Court.

10. It is further to be seen that the Legislature has not conferred power on the Assessing Officer to review its own order. Therefore, the power under section 147 cannot be used to review the order. In the present case, though the Assessing Officer has used the phrase " reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the Assessing Officer, nothing new has happened, therefore, no new material has come on record, no new information has been received, it is merely a fresh application of mind by the same Assessing Officer to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator [2002] 256 ITR 1 referred to above, has taken a clear view that reopening of assessment under section 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under section 148.

4.2 Keeping in view the above facts and circumstances and judicial precedents, we do not find any infirmity in the order of learned CIT(A) and therefore, the appeal of the Revenue is dismissed.

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

(Order pronounced in the open court on 15/03/2018)

Sd/.
(PARTHA SARATHI CHAUDHURY)
Judicial Member

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:15/03/2018
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent ~~Asse~~ by RPAD
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

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