आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

(समक्ष)Before **श्री महावीर सिंह,** न्यायीक सदस्य **एवं/and श्री शामीम याहया**, लेखा सदस्य)

[Before Shri Mahavir Singh, JM & Shri Shamim Yahya, AM]

आयकर अपील संख्या / I.T.A No.1650/Kol/2014

निर्धारण वर्ष/Assessment Year: 2007-08

Munshi Mini Rice Mill (PAN: AAFFM1149K)	Vs.	Income-tax Officer, Wd-2(2), Hooghly.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Date of hearing: 10.09.2014
Date of pronouncement: 14.10.2014

For the Appellant: Shri Somnath Ghosh, Advocate
For the Respondent: Shri Varinder Mehta, CIT

आदेश/ORDER

Per Shri Mahavir Singh, JM :

This appeal by assessee is arising out of order of CIT(A)-XXXVI, Kolkata in Appeal No. 188/CIT(A)-XXXVI/Kol/ITO,Wd-2(2),HG/2012-13 dated 30.06.2014. Assessment was framed by ITO, Wd-2(2), Hooghly u/s. 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2007-08 vide his order dated 30.11.2009.

2. The first issue in this appeal of assessee is against the order of CIT(A) confirming assumption of jurisdiction by AO u/s. 147 of the Act after issuing notice u/s. 148 of the Act, which is prima facie invalid. For this, assessee has raised following three grounds:

> *"1. FOR THAT the Ld. Commìssìoner of Income Tax (Appeals) XXXVI, Kolkata was legally remìss ìn faìlìng to appreciate that none of the conditions precedent existed and/or have been complied with and/or fulfilled by the Ld. Income Tax Officer, Ward 2(2), Hooghly for hìs alleged assumptìon of jurìsdìction u/s. 147 of the Income Tax Act, 1961 and the specious order passed u/s. 147/143(3) of the Act in pursuance to the ìmpugned notice dated 07-07-2011 ìssued u/s. 148 of the Act ìs therefore ab inìtio void, ultra vires and ex-facie null in Law.*
>
> *2. FOR THAT on a true and proper interpretation of the scope and ambìt of the provìsìons of s. 147 of the lncome Tax Act, 1961, the Ld. Commissioner of ìncome Tax (Appeals) XXXVI, Kotkata was absolutety ìn error in upholdìng the actìon of the Ld. Income Tax Officer, Ward 2(2), Hooghly of issuing notice u/s. 148 of the Act by mìsconstruìng the crucìal expression 'tangibie material' in support of such futìle exercìse and the purported conclusìon reached on that behalf ìs opposed to law.*

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3. FOR THAT the Ld. Cornmìssioner of lncome Tax (Appeals) XXXVI, Kolkata acted unlawfully ìn upholding the action of the Ld. Income Tàx Officer, Ward 2(2), Hooghly of ìssuìng notìce u/s. 148 of the Income Tax Act, 1961 merely on a change of opìnìon basìng only on the evìdence already adduced on record ìn course of the orìginal assessment proceedìngs and the specìous actìon on that behatf ìs absolutely arbitrary, unwarranted and perverse."

3. Briefly stated facts are that the assessee is in the business of rice mill. During the relevant AY 2007-08, assessee filed its return of income on 24.03.2008 and the same was processed u/s. 143(1) of the Act on 05.12.2008. A notice u/s. 148 of the Act dated 28.05.2008 was issued for the reason that income chargeable to tax has escaped assessment. The assessee in response to notice u/s. 148 of the Act, filed return of income on 22.06.2009 and AO issued notice under sections 143(2) and 142(1) of the Act. During the course of assessment proceedings, assessee appeared from time to time and filed the details, which are recorded in the assessment order by observing that "*assessee appeared from time to time and filed purchase statement, statement of sale of rice, statement of stock, bank statement, salary and wages statement, purchase of diesel statement, copy of electric bills, statement of bani milling charges, professional tax, panchayat tax along with G.P. rate details"* and assessment was framed by making addition on account of fluctuation of gross profit rate at Rs.30,000/-. Further, the AO issued notice u/s. 148 of the Act dated 07.07.20121 and for this, the reasons recorded are as under:

"*The assessment u/s. 147/143 was completed on 30.11.2009 and assessed income Rs.30,000/-. On scrutiny of the assessment records it has been gathered that the assessee paid payment total amounting Rs.14,67,200/- to 49 (forty nines) parties in cash during the financial year 2006-07 for paddy purchase. So @ 20% of Rs.14,67,200/- i.e. Rs.2,93,440/- should not be deductible expenditure and same would be require to be added back to total income.*

As per provision of sec.40A(3) of the Income Tax Act, 1961 provides that – where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure."

So, I reason to believe that income chargeable to tax had escaped assessment."

The assessee objected to assumption of jurisdiction u/s. 147 of the Act by taking pleading that all the material details were placed before the AO during original assessment proceedings framed u/s. 147 r.w.s. 143(3) of the Act vide order dated 30.11.2009, wherein entire material was verified and no disallowance u/s. 40A(3) of the Act was made despite the fact that the AO was in the prime knowledge that purchases are made in cash. Accordingly, it was stated that

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this is mere change of opinion by virtue of which reopening is made by AO. But the AO rejected the objection of the assessee for the following reasons:

> *"1. That during course of original assessment for above said assessment year no documents were filed which transparently shows the mode of payment for purchase of paddy.*
>
> *2. That the cost of transportation of paddy after purchase and sales of rice is not disclosed in the accounts which is a very cogent fact and form bonafide information for reason to believe that there should be such expenses for carrying on a business of the nature which is followed by you.*
>
> *3. It is evident from the available record that mere 'Coolie expenses" was shown to have incurred for Rs.831/- and debited from Profit & loss account for the year ending 31.3.2007 against cost of production charges Rs.17,62,958/-, against purchase of paddy Rs.14,67,200/-, sales of Rice and bran of Rs.19,11,.000/- and Rs.25,200/- respectively."*

The AO made addition of cash payments made on account of purchases by invoking the provisions of section 40A(3) of the Act and thereby made disallowance out of total purchase of Rs.14,76,200/- made from 49 parties in cash @ 20% i.e. at Rs.2,93,440/-. Aggrieved, assessee preferred appeal before CIT(A), who confirmed the assumption of jurisdiction by AO u/s. 147 of the Act by issuing notice u/s. 148 of the Act by observing as under:

> *"On perusal of the assessment record it is seen that during the course of original assessment, it is seen that no query regarding purchases in cash exceeding Rs.20,000/- has been made. Consequently no examination regarding disallowance u/s. 40(A)(3) has been made. When in the original assessment proceeding the assessing officer has not examined the issue at all, no opinion was formed, the principle of change of opinion cannot apply. Further this is a case where the assessment has been reopened within 4 years of the end of the assessment year. Therefore the reassessment proceeding cannot be treated as invalid on the ground that full and true disclosure of material fact was made in the original proceeding."*

Aggrieved, now assessee has challenged the jurisdiction before us.

4. We have heard rival submissions and gone through facts and circumstances of the case. First of all, we have to examine the documents produced by the assessee during the course of original assessment framed u/s. 147 read with section 143(3) of the Act vide order dated 20.11.2009. We find from the assessment order that the assessee produced complete details of purchases i.e. purchase statement. Ld. counsel for the assessee drew our attention to pages 46 to 48 of assessee's paper book, wherein total purchases made for an amount of Rs.14,67,200/- by way of cash memo is disclosed. Ld. counsel for the assessee stated that these were produced before the AO during the course of original assessment proceedings. On query from the bench, Ld. CIT, DR stated that he has no objection in admitting that these documents were placed before the AO during original assessment proceedings. From the above statement of paddy

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purchase during the FY 2006-07 relevant to AY 2007-08 from 49 parties was in cash as is evident from the statement. The statement was available before the AO during the course of assessment proceedings and on purchases, a specific query was raised by the AO, which is evident from the questionnaire issued along with notice u/s. 142(1) wherein vide point no.1, which is enclosed at page 51 of assessee's paper book, the query raised was that *"details of paddy purchase with name & address of the parties"*. This was replied by the assessee vide letter dated 07.10.2009, which is enclosed at assessee's paper book page 45, wherein statement of paddy purchase was given. From the very reasons recorded, as reproduced above, clearly reveals that this reopening is on scrutiny of assessment records, which has been gathered that the assessee has paid total amount of Rs.14,67,200/- to 49 parties in cash during the FY 2006-07 relevant to AY 2007-08 for paddy purchase. From the above facts, we are of the view that the findings of AO now rejecting the objections of the assessee recording reasons for assumption of jurisdiction u/s. 147 of the Act and reasons recorded are contradictory. How this contradiction is, now we can explain that at the first instance the AO for recording of reasons states that from the assessment records it is revealed that the assessee has made cash payments for making purchases and on the other hand, while rejecting the objections of the assessee for assumption of jurisdiction u/s. 147 of the Act he merely states that there was no evidence available in the assessment record, which decipher the fact that the assessee has filed evidence that the purchases are in cash. Admittedly, the fact is available in the assessment record, and that was filed during the course of assessment proceedings by the assessee, that the purchases are made in cash and despite this fact, assessment was framed u/s. 147 r.w.s. 143(3) of the Act. From the above reason, it is clear that nothing new tangible material was available before the AO for reopening the assessment and consequently, the AO acted on the same material, which was available before him at the time of original assessment. We find that this issue is squarely covered in favour of the assessee and against revenue by the judgment of Hon'ble Supreme Court in the case of CIT Vs. Kelvinator India Ltd. (2010) 310 ITR 561 (SC), wherein newly substituted provision of section 147 of the Act with effect from 01.04.1989 is interpreted by observing, that section 147 of the Act, as substituted w.e.f. 01.04.1989 does not postulates conferment of power upon the AO to initiate reassessment proceeding upon his mere change of opinion. Further, if 'reason to believe' of the AO is founded on an information which might have been received by the AO after the completion of assessment, it may be a sound foundation for exercising the power under section 147 r.w.s. 148 of the Act. It cannot be accepted that only because in the assessment order, detailed reasons have not been recorded, an analysis of

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the materials on the record by itself may be justifying the AO to initiate a proceeding u/s. 147 of the Act. When a regular order of assessment is passed in terms of section 143(3) of the Act, 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 section 114(e) of the Indian Evidence Act, 1872, 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 AO to reopen the proceeding without any thing further, the same would amount to giving a premium to an authority exercising quasi judicial function to take benefit of its own wrong.

5. Similarly, Hon'ble Supreme Court in the case of CIT Vs. Foramer France (2003) 264 ITR 566 (SC) affirmed the judgment of Hon'ble Allahabad High Court in the case of Foramer Vs. CIT (2001) 247 ITR 436 (All), wherein Hon'ble Allahabad High Court held as under:

> "*Having heard learned counsel for the parties, we are of the view that these petitions deserve to be allowed.*
>
> *It may be mentioned that a new section substituted section 147 of the Income-tax Act by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989. The relevant part of the new section 147 is as follows:*
>
> > *"147. If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
> >
> > *Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year."*
>
> *This new section has made a radical departure from the original section 147 inasmuch as clauses (a) and (b) of the original section 147 have been deleted and a new proviso added to section 147.*
>
> *In Rakesh Aggarwal v. Asst. CIT [1997] 225 ITR 496, the Delhi High Court held that in view of the proviso to section 147 notice for reassess-*

ment under section 147/148 should only be issued in accordance with the new section 147, and where the original assessment had been made under section 143(3) then in view of the proviso to section 147, the notice under section 148 would be illegal if issued more than four years after the end of the relevant assessment year. The same view was taken by the Gujarat High Court in Shree Tharad Jain Yuvak Mandal v. ITO [2000] 242 ITR 612.

In our opinion, we have to see the law prevailing on the date of issue of the notice under section 148, i.e., November 20, 1998. Admittedly, by that date, the new section 147 has come into force and, hence, in our opinion, it is the new section 147 which will apply to the facts of the present case. In the present case, there was admittedly no failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment. Hence, the proviso to the new section 147 squarely applies, and the impugned notices were barred by limitation mentioned in the proviso.

Learned departmental counsel relied on section 153(3)(ii) of the Income-tax Act and submitted that there was no bar of limitation in view of the said provision. We do not agree. Section 153 relates to passing of an order of assessment and it does not relate to issuing of notice under section 147/ 148. Moreover, this is not a case where reassessment is sought to be made in consequence of or to give effect to any finding or direction contained in the order of the Tribunal in Boudier Christian's case. As already stated above, Boudier Christian's case related to the employees of the company, whereas the impugned notice has been issued to the company. Hence, it cannot be said that the proposed reassessment in consequence of the impugned notice would be in consequence of or to give effect to any findings of the Tribunal in Boudier Christian's case.

A direction or finding as contemplated by section 153(3)(ii) must be a finding necessary for the disposal of a particular case, that is to say, in respect of the particular assessee and in relevance to a particular assessment year. To be a necessary finding it must be directly involved in the disposal of the case. To be a direction as contemplated by section 153(3)(ii) it must be an express direction necessary for the disposal of the case before the authority or court vide Rajinder Nath v. CIT [1979] 120 ITR 14 (SC) ; Gupta Traders v. CIT [1982] 135 ITR 504 (All) ; CIT v. Tarajan Tea Co. (P.) Ltd. [1999] 236 ITR 477 (SC) and CIT v. Goel Bros. [1982] 135 ITR 511 (All), etc. The case of an expatriate employee was to be decided on the basis of the provisions of article XIV of the treaty, whereas corporate income was to be decided on the basis of either article III or article XVI of the treaty or section 44BB of the Act. Hence, the observations of the Tribunal in Boudier Christian's case was not a direction necessary for the disposal of the appeal relating to the petitioner. The exigibility of income of the petitioner from manning and management contracts was never an issue directly or indirectly involved in the case of Boudier Christian.

Moreover, the Tribunal in the appeal relating to the assessment of the petitioner's own case, vide Deputy CIT v. ONGC [1999] 70 ITD 468 (Delhi) has considered the decision of the Tribunal in Boudier Christian's case. It is settled law that an appeal is a continuation of the original proceedings and hence when the Tribunal in the appeal relating to the petitioner has considered the decision of the Tribunal in Boudier Christian's case, the

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impugned notice under section 147/148 would obviously be on the basis of a mere change of opinion by the income-tax authorities, which would not be valid as held by the Supreme Court in Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 ; Gemini Leather Stores v. ITO [1975] 100 ITR 1 (SC) and Jindal Photo Films Ltd. v. Deputy CIT [1998] 234 ITR 170 (Delhi), etc.

In the decision of the Tribunal in the assessee's own case, Deputy CIT v. ONGC [1999] 70 ITD 468 (Delhi) it has been held that the income from the contract between the parties was business income and not fee for technical services.

Although we are of the opinion that the law existing on the date of the impugned notice under section 147/148 has to be seen, yet even in the alternative even if we assume that the law prior to the insertion of the new section 147 will apply even then it will make no difference since even under the original section 147 notice for reassessment could not be given on the mere change of opinion as held in numerous cases of the Supreme Court, some of which have been mentioned above. Since the Tribunal in the appeal relating to the assessee-company had considered the Tribunal's earlier decision in Boudier Christian's case, it will obviously amount to mere change of opinion, and hence the notice under section 147/148 would be illegal."

6. From the above facts of the case and legal position as enunciated by Hon'ble Supreme Court in the above two case laws, we are of the considered view that the reopening u/s. 147 r.w.s. 148 of the Act is bad in law. Hence, reopening is quashed.

7. Since the reopening is quashed, we need not to go into merits of the case.

8. In the result, appeal of assessee is allowed.

9. Order is pronounced in the open court on 14.10.2014

Sd/-	**Sd/-**
शामीम याहया, लेखा सदस्य	**महावीर सिंह**, न्यायीक सदस्य
(Shamim Yahya)	(Mahavir Singh)
Accountant Member	Judicial Member

Dated : 14th October, 2014

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

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आदेश की प्रतिलिपि अग्रेषितः- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – Munshi Mini Rice Mill, C/o S. N. Ghosh & Associates, Advocates, "Seven Brothers" Lodge, PO Buroshibtala, P.S. Chinsurah, Dist, Hooghly, Pin 712 105.
2 प्रत्यर्थी/ Respondent – ITO, Ward-2(2), Hooghly.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ CIT Kolkata
5. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy, आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.

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