

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

	I.T.A. No. 4086/Del/2013	
	A.Y. : 2004-05	
M/s Vijay Power Generators Ltd., 5, Park End, (Opp.) Preet Vihar, Metro Pillar No. 101, Vikas Marg, New Delhi - 11- 0902 (PAN: AAACV0191N)	Vs.	ACIT, Circle 17(1), New Delhi
(APPELLANT)		(RESPONDENT)

Assessee by : Sh. Sanat Kapoor, Adv., Ms. Ananya
Kapoor, Adv.
Department by : Sh. S.K. Jain, Sr. DR

Date of Hearing : 11-02-2016
Date of Order : 30-03-2016

ORDER

PER H.S. SIDHU, JM

Assessee has filed this Appeal against the Order dated 30.3.2013 passed by the Ld. Commissioner of Income Tax (Appeals), New Delhi pertaining to assessment years 2004-05 on the following grounds:-

"1. That the CIT(A) has in view of the facts and circumstances of the case , erred on facts and in law in upholding the notice u/s 147 I 148 of the IT Act and the order passed by the AO u/s. 148/143(3).

2. *That the CIT(A) has failed to appreciate the fact that the notice u/s 147/148 issued by the AO and the assessment order passed are illegal, bad in law, without jurisdiction and also barred by time limitation.*
3. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the notice u/s 147/148 since this is a case of change of opinion and also no income had escaped assessment.*
4. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the notice u/s 147/148 since the assessee is clearly covered by the first proviso to Section 147.*
5. *That the CIT(A) has failed to appreciate the fact that there is no failure on the part of the Assessee and there is no allegation by the AO in the reasons recorded that there was a failure on part of the assessee to disclose 'truly and fully all material facts necessary for the assessment of income, hence the notice issued U/s 148 is illegal, bad in law and without jurisdiction.*
6. *That the CIT(A) has failed to appreciate that the fact that the AO has not taken the required approval prior to issuance of notice u/s 148 as such the notice U/s 148 is illegal and bad in law.*
7. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the notice u/s 147/148 since there was no fresh material/tangible material against the assessee.*
8. *That the CIT (A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the addition of Rs 29,65,101/- since the assessee had filed all details of sales, stock transfer and reconciliation of Rs 29,65,101/- before the AO and the same have been accepted in original assessment proceedings as well as proceedings u/s 154 of the Act.*

9. That the CIT (A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the addition of Rs 29,65,101/- since it is clearly explainable and there is no provision under the law to tax the same.

10. That the explanations given, evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the same do not justify the additions/allowances made. In any case the additions upheld by the CIT(A) are highly excessive.

11. That the various observations made by the CIT(A) and the AO are illegal, bad in law and factually incorrect and based on surmises and conjectures.”

2. The brief facts of the case are that the original return was filed on 1.11.,2014 declaring income of Rs. 3,53,850/-. The assessment was completed u/s. 143(3) at an income of Rs. 4,55,170/- on 28.12.2006. Subsequently, the case of the assessee was reopened u/s. 147. After recording the reasons to believe, AO issued Notice dated 2.12.2011 passed u/s. 148 of the I.T. Act, 1961 to the assessee and Assessee's AR of the assessee attended the hearing and filed the reply dated 5.12.2011. Thereafter, the AO added back the income of Rs. 29,65,101/- and completed the re-assessment at a total income of Rs. 34,20,270/- u/s. 143(3)/148 of the I.T. Act, 1961 vide his order dated 13.12.2011.

3. Against the order of the Ld. AO, assessee appealed before the Ld. CIT(A), who vide impugned order dated 30.3.2013 has dismissed the appeal of the assessee.

4. Aggrieved with the order of the Ld. CIT(A), Assessee is in appeal before the Tribunal.

5. At the time of hearing, Ld. Counsel of the assessee draw our attention towards the original assessment order dated 28.12.2006 which is at Page no. 100-102 of the Paper Book and stated that the original return was filed on 01-11-2004 declaring income of Rs. 3,53,850/-. The assessment was completed u/s 143(3) at an income of Rs.4,55,170/-. During the assessment proceeding the assessee produce all books of a/c with detail require by A.O., which have been dully examine & check and discuss as per para-1 of the original assessment order. He further draw our attention towards the Page no. 45 of the Paper Book which is a notice u/s 154/155 of I.T. Act received on dated 04-04-2008 for clarification of sales assessment year 2004-05 including stock transfer shown in the Balance Sheet and Profit & Losses Account filed from Delhi to branch Pondicherry, which contain element of stock transfer from Delhi to branch Pondicherry and vice- versa. He further draw our attention towards page no. 46 of the Paper Book which is a written explanation filed personally before ITO ,Ward - 17(3) as well as one copy filed at counter on 30th April 2008 explaining the detail of sale which contain detail element of transfer of stock and credited in the books of accounts which has been accepted by the Department. He further pointed that that the notice issue u/s 148/147 is illegal and beyond

the time limit of notice as per section 149 of IT Act. He further stated that AO has wrongly issued a notice u/s 147 on account of income escaping assessment when there is no reason to believe and concealment of fact that i.e. Sales and stock transfer it mere change of opinion after the original assessment completed. All facts were dully discussed and verified there is no new facts or concealment of any facts as per u/s 147, there must be reason to believe the income has chargeable to tax has escaped assessment. He stated that the AO has wrongly added of Rs. 29,65,101/-. He further stated that the reassessment proceeding is time bar and assessment cannot be reopen due to mere change of opinion after the assessment, the addition of Rs.29,65,101/- has wrongly been made, which was dully explained and duly credit in books of alc and there is no concealment. He stated that the Notice u/s. 148 has been issued to the assessee after recording the reasons u/s. 147 of the I.T. Act without any tangible material. Therefore, he prayed that reassessment framed may be quashed. In support of his contention he relied upon the following case laws:-

- a) Order dated 3.11.20087 in the case of M/s Haryana Acrylic Manufacturing Company vs. CIT passed in WP(C) No. 4074/2007 (Delhi High Court) 308 ITR 38
- b) Order dated 14.8.2014 in the case of Madhukar Khosla vs. ACIT passed in CWP(C), CM No. 2744/2014 and 2745/2014 (Delhi High Court).

- c) ITAT, SMC-2, Delhi Bench decision dated 17.11.2015 passed in the case of Sh. Rakesh Bandhu vs. ITO in ITA No. 2586/Del/2014 (AY 2009-10).
- d) CIT vs. Kelvinator of India Limited 256 ITR 1 (Delhi) [FB]
- e) CIT vs. Kelvinator India 320 ITR 561 (SC)
- f) CIT vs. Orient Craft 354 ITR 536

6. On the other hand, Ld. DR relied upon the order of the Ld. CIT(A) and stated that the Ld. CIT(A) has passed a well reasoned order on the basis of the documentary evidence filed by the assessee as well as prevailing law. He further stated that Notice u/s. 148 has been issued after adopting the prescribed procedure under the law and with tangible material. Therefore, he stated that the question of quashing the reassessment does not arise. Accordingly, he requested that the Appeal filed by the Assessee may be dismissed.

7. We have heard both the parties and perused the records especially the orders of the Revenue authorities alongwith the Paper Book filed by the assessee containing pages 1 to 122 having various documentary evidences. We have also perused the case laws cited by the Ld. Counsel of the Assessee. We have also perused the reasons recorded by the AO which is at page no. 1 of the Assessment Order. For the sake of clarity, we are reproducing the reasons recorded by the AO as under:-

“Section 5 of the Income Tax Act, 1961 provides that the total income of a person for any previous year includes all income from whatever sources derived which is received or deemed to be received on which accrues or arises during such previous year unless specifically exempted from tax.

It is found the assessee had shown sales of Rs. 7,99,03,512/- in the consolidated profit and loss accounts. However, as per details of Delhi Unit had transferred goods amounting to Rs. 2,27,48,494/- to its Branch Unit Pondicherry but it was shown Rs. 1,97,83,393/- only by the Branch Unit in its purchase accounts. Therefore an amount shown Rs. 1,97,83,393/- only by the Branch Unit in its purchase accounts. Therefore an amount of Rs. 29,65,101/- should have been added to its income. This resulted in underassessment of income of Rs. 29,65,101/- involving short levy of tax of Rs. 10,63,730/-.”

8. As regards issue of reopening is concerned, we find that during the assessment proceeding the assessee produced all the books of a/c with detail require by A.O., which have been dully examined & checked and discussed in the original assessment order. The detail chart of sale with stock transfer along with consolidate Audit balance sheet of Company head office Delhi and branch office / factory Pondicherry, which was dully filed during the assessment proceeding. The sale and stock transfer declare in the detail chart were dully

verified from the Audit balance sheet of consolidated as well as individual of the company that is Head Office Delhi and branch office / factory Pondicherry. Even During the original assessment proceeding it was duly explained the difference in the stock transfer to branch and vice-versa and credited in the books of accounts There was difference of stock transfer to branch in the books of branch office which has shown credited their stock less by Rs. 29,65,101/-. We find force in the assessee's counsel version that because this unit is covered under Excise Act therefore to claim MODVAT as per excise law in the stock transfer. It segregated excise duty and CST in separate head in their books of account. We also find that a notice dated 4.4.2008 u/s 154/155 of I.T. Act was received for clarification of sales assessment year 2004-05 including stock transfer shown in the Balance Sheet and Profit & Losses Account filed from Delhi to branch Pondicherry, which contain element of stock transfer from Delhi to branch Pondicherry and vice-versa and in response thereto the assessee has filed the reply of the notice on 30.4.2008 explaining the detail of sale which contain detail element of transfer of stock and credited in the books of accounts which has been accepted by the Department and no further query was asked by the AO and sent the notice u/s. 147 on account of income escaping assessment when there is no reason to believe and concealment of fact i.e. Sales and Stock transfer it mere change of opinion after the original assessment completed. We find that all the facts were duly discussed and verified, hence, there is no new facts or concealment of any facts as per section 147. The AO has wrongly added of Rs. 29,65,101/- in the original assessed income, in the reassessment proceeding frame u/s 148/147 when it contain only excise duty and CST charge on stock transfer from Head Office to Branch Office . The excise duty and CST is Govt. revenue which has been accounting in respective accounts as per excise act to claim MODVAT. In our considered opinion, this is a change of opinion

case because the original assessment has been framed in the case of the assessee u/s. 143(3) of the I.T. Act on 28.12.2006, after making detailed enquiry and the AO has accepted the version of the assessee. Therefore, we are of the considered view that assessee had made full and true disclosure during the original assessment proceedings. We are 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. We 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. It is a settled law that merely change of opinion is not permissible under the law. This view is supported 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 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.

8.1 In view of the aforesaid facts and circumstances, as explained above and respectfully following the law laid down by the Hon'ble Supreme Court of India and Full Bench of the Hon'ble High Court of Delhi, as aforesaid, we are of the view that both the authorities below have gone wrong in deciding the reopening as valid. However, in view of the aforesaid discussions and the precedents relied upon, as aforesaid it is established that in the present case the issue reopening of assessment is incorrect and invalid. Therefore, we quash the orders of the authorities below on this legal issue and decide the same in favor of the assessee.

8.2 Since we have already quashed the reassessment proceedings as aforesaid, raised in the Assessee's Appeal, in our considered opinion, there is no need to adjudicate the issues on merits.

9. In the result, the Appeal filed by the Assessee stand allowed.

Order pronounced in the Open Court on 30/03/2016.

Sd/-

[L.P. SAHU]
ACCOUNTANT MEMBER

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 30/03/2016

"SRBHATNAGAR"

Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches