* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: January 07, 2015
Pronounced on: January 19, 2015

\+ **ITA 86/2014**

**DONALDSON INDIA FILTERS SYSTEMS PVT. LTD.**
..... Appellant
Through: Mr.Nageshwar Rao, Ms.Sayaree Basu Mallik and Mr.Shailesh Kumar, Advs.

Versus

**DCIT, CIRCLE 10(1)** ..... Respondent
Through: Mr.Rohit Madan, Mr.Ruchir Bhatia, Mr.Akash Vajpai and Mr.P.Roychaudhuri, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**
**HON'BLE MR. JUSTICE R.K.GAUBA**

**MR. JUSTICE R.K.GAUBA**

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1. This appeal by the assessee seeks to assail the order dated 27.05.2013 passed by Income Tax Appellate Tribunal (ITAT) in appeal registered as ITA No. 2141/Del/2012 and for quashing of the re-assessment order passed by the respondent (the assessing authority) under Section 147 of the Income Tax Act. By the impugned order, the ITAT set aside the order passed by the Commissioner Income Tax (Appeals) [CIT(A)] on 15.02.2012 whereby the assessment order made on 02.12.2010 by Assistant Commissioner, Income Tax Circle 10(1), New Delhi for the assessment year (AY) 2003-2004 assessing the income at ₹1,63,90,330/- having the effect of tax liability in the sum of ₹23,83,380/- under Section 147 read with Section 143(3) of

Income Tax was set aside.

2. The assessment order dated 21.12.2010 passed by the Assistant Commissioner, Income Tax Circle 10(1), New Delhi shows that the assessee had filed return of income for the assessment year 2003-2004 on 02.12.2003 declaring an income of ₹1,17,24,580/-. The return was processed under Section 143(1) of the Income Tax Act, 1961. The case was selected for scrutiny and notice under Section 143(2) of the Income Tax Act, 1961 was issued and later the assessment was completed at ₹1,32,03,670/- after making certain additions in the returned income of the assessee company. Subsequently, the income was revised at ₹1,17,24,580/- by order under Section 250/143(3) of the Income Tax Act dated 21.09.2007.

3. The case was re-opened under Section 147 of Income Tax Act leading to notice under Section 148 of Income Tax Act being issued on 22.03.2010 which action was resisted by the assessee through a response. In the course of re-assessment proceedings, the assessee was called upon to furnish details of Income Tax Return /bank account/profit and loss account/tax audit report etc. vide letter dated 14.10.2010. The assessing authority found in the re-assessment proceedings that the assessee, while calculating deduction under Section 80HHE, had adopted incorrect turnover which had resulted in excess claim under the said provision of law to the tune of ₹46,65,749/-. The Assessing Officer proceeded to re-calculate the deduction and restricted it to 50%, that is to say ₹6,41,070/-. On that basis, the revised taxable income was calculated at ₹1,63,90,329/- on which interest under Sections 234-B and 234-D was also applied, simultaneously withdrawing proportionately the interest allowed under Section 244-A. The Assessing Officer directed penalty proceedings to be initiated separately under Section 271(1)(e) of

Income Tax Act.

4. The CIT(A) in appeal by the assessee, however, found the re-assessment order to have been actuated by "change of opinion" of the Assessing Officer which is not permissible in law, also for the reason the case had been re-opened after expiry of four years prescribed in the proviso to Section 147 of the Income Tax Act. In reaching such conclusions, the first appellate authority, *inter alia*, referred to dictum in *CIT v. Kelvinator India Limited* 320 ITR 561 (SC).

5. The ITAT in the appeal by the Revenue, however, found that the first appellate authority had failed to give an opportunity to the AO for responding to the objections of the assessee in the first appeal and had also not given any specific finding after investigating the fact as to whether there had been failure on the part of the assessee to make the return under Section 139 or in response to notice under Section 142(1) or Section 148 or for that matter as to whether there had been a failure on the part of the assessee to disclose fully and truly material facts necessary for the assessment of this case.

6. The ITAT, thus, set aside the order of CIT(A) and restored the matter to the said forum for re-adjudication after giving appropriate and reasonable opportunity to both parties.

7. The pleadings and the submissions made in the course of hearing indicate that the appellant assessee on 08.11.2013 has moved an application before the ITAT invoking Section 254(2) of the Income Tax Act seeking rectification of the order dated 27.05.2013 reiterating its position about there being no material showing failure on its part to make full and true disclosure and questioning the grounds on which the assessing authority had re-opened

the case. The said application is pending consideration before the ITAT.

8. The CIT(A) exercises the jurisdiction of the first appellate authority following the procedure prescribed under Section 250 of the Income Tax Act. It is clear from Section 250(2) that at the hearing of such appeal both sides, i.e. the assessee and also the Assessing Officer, have a right to be heard, either in person or by a representative. A perusal of the order of CIT(A) in this case clearly shows that the Assessing Officer was never called upon by the said authority to assist at the hearing before the appeal of the assessee was allowed.

9. Technically speaking, the ground on which the matter has been remanded by the ITAT to CIT (A) cannot be questioned. Ordinarily, in such fact situation, this court would not interfere. But, having heard both sides, we find merit in the view taken by CIT (A) on the validity of the satisfaction on the basis of which the case of assessment for the assessment year in question was re-opened in the matter at hand. Since it is a jurisdictional error, we proceed to set out hereinafter the reasons why the remand order passed by the ITAT should be set aside and the matter of re-assessment for assessment year 2003-2004 in respect of the appellant assessee be closed.

10. In the facts and circumstances, the following question of law arises:-

> *"Whether the re-opening of the assessment under Section 147 of Income Tax Act, after completion of the assessment proceedings on 21.03.2006 under Section 143(3), leading to the notice under Section 148 of Income Tax Act issued on 22.03.2010 was for the reason of "change of opinion" and, therefore, impermissible in law?"*

11. The procedure for assessment is prescribed in Section 143 of the Income Tax Act. Every person liable to pay income tax is required by the

law (Section 139) to submit return of income. There is a provision for inquiry before assessment (Section 142), for which purposes the assessing authority is required to issue a notice for submission of return or production of specified account or document or furnishing of information, as may be deemed necessary.

12. The assessment is made under Section 143(1) on the return submitted under Section 139, or material furnished in response to notice under Section 142.

13. The assessing authority is vested with power to subject a case to be taken for scrutiny under Section 143(2) and (3) of Income Tax Act. Generally, if he considers it necessary or expedient to do so, to ensure that the assessee has not understated the income or has underpaid the tax in any manner and, particularly, in cases where he has reasons to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible. For cases taken up under the "scrutiny" clause, the Assessing Officer is required to issue a notice calling for such information and documents as are considered necessary.

14. In cases of failure to make the return under Section 139, or in compliance with the notice under Section 142, or the notice under Section 143(2) on the part of the assessee, the AO is vested with the jurisdiction to make best judgment assessment (Section 144) of the total income or loss accruing to, or incurred by, the assessee and for determining the sum payable as income tax thereupon, after taking into account the relevant material "gathered" by such authority subject, however, to the requirement of giving to the assessee an opportunity of being heard.

15. Ordinarily, the assessment procedure stands concluded upon the

assessment order being passed either under Section 143 or Section 144 of the Income Tax Act. But, the legislation provides for dealing with the cases of income escaping assessment and for such purposes the procedure is stipulated in Section 147 of Income Tax Act which, as amended by the Direct Tax Laws (Amendment) Act, 1989, brought in force with effect from 01.04.1989 (as is relevant for purposes), reads as under:

> *"**147. Income escaping assessment.-** 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:*
>
> ***Provided further** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.*

***Provided also*** *that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.*

*Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.*

*Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—*

*(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;*

*(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;*

*(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;*

*(c) where an assessment has been made, but—*

*(i) income chargeable to tax has been underassessed ; or*

*(ii) such income has been assessed at too low a rate ; or*

*(iii) such income has been made the subject of excessive relief under this Act ; or*

*(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.*

*(d) where a person is found to have any asset (including financial interest in any entity) located outside India.*

*Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.*

*Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."*

(emphasis supplied)

16. The Supreme Court in *Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers P. Ltd.* (2007) 291 ITR 500 explained the law in the following words:-

*"The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly the Assessing Officer must have been reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to*

> *disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to re-open the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.*
>
> (emphasis supplied)"

17. The expression "reasons to believe" appearing in Section 147 of the Income Tax Act has been a subject matter of interpretation in a number of cases decided by this court including in *Haryana Acrylic Manufacturing Company v. The Commissioner of Income-tax IV and Anr.* (2009) 308 ITR 38, *Jindal Photo Films Ltd. v. Commissioner Income Tax* (1998) 234 ITR 170 and *CIT v. Kelvinator* (2002) 256 ITR 1 (Del) (Full Bench).

18. In *Jindal Photo Films Ltd. v. Commissioner Income Tax* (supra), this court observed as under:-

> *"It is also equally well settled that if a notice under section 148 has been issued without the jurisdictional foundation under section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If 'reason to believe' be available, the writ court will not, exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under section 147/148 of the Act."*

19. The view taken by the Full Bench of this court in *CIT v. Kelvinator* was affirmed by Supreme Court of India in civil appeal vide judgment reported as (2010) 2 SCC 723. The observations of the Supreme Court in the said case (after noting the legislative changes) appearing in Para No. 6 of the report, to the following effect are germane to the issue raised here:-

> *"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1989, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment 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 re-opening 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, Assessing Officer has power to re-open, 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."*

(emphasis supplied)

20. The first proviso to Section 147 quoted earlier makes it abundantly clear that no action thereunder is ordinarily permissible in cases where assessment for the relevant assessment year has already been made under Section 143(3), after expiry of four years from the end of the relevant assessment year. But, it is clear that this limitation would apply only if there has been a scrutiny assessment and not otherwise. There is, however, an exception available even to the four year rule wherein such re-opening of the assessment proceedings is permitted if any income chargeable to tax has escaped assessment on account of failure on the part of the assessee "to disclose fully and truly all material facts necessary" for assessment for the assessment year in question. Noticeably, the re-opening of the assessment after expiry of four years is permitted only if there has been a default on the part of the assessee to disclose. To put it conversely, the law does not provide for re-opening of the assessment, through the route of Section 147 Income Tax Act, if any income has escaped assessment on account of failure on the part of the assessing authority to gather necessary information within the prescribed period or to make proper inquiry or subject the available material to proper scrutiny.

21. Thus, it emerges that generally the assessing authority is vested by the amended law in Section 147 to re-assess (re-compute etc.) if he has reasons to believe that income has escaped assessment but this he can do only within four year period. On elapse of such period, the matter must attain finality. Yet, if the Assessing Officer also finds material giving rise to reasons to believe that the escapement was due to default of assessee to truly disclose,

the bar of limitation would get lifted.

22. Undoubtedly, explanation – 1 to Section 147 indicates that mere production of account books or other evidence before the Assessing Officer would not necessarily amount to disclosure of the material information by the assessee. But then, the explanation clarifies the said general refrain by the words "not necessarily". Therefore, the burden is equally placed on the Assessing Officer to exercise due diligence in examining the record (account books or evidence) produced before him in the light of declarations made in the return or responses (to the notices, questionnaire etc.). As has been noted above, the *sine quo non* for action under Section 147 (to deal with escapement of income) is gathering or availability of some "tangible material" requiring the matter to be re-opened.

23. The impugned order passed by the ITAT quotes the reasons recorded by the assessing authority for re-opening the assessment under Sections 147/148 of Income Tax Act as under:-

> "*The assessment was completed and order u/s* 143(3) *of the Act was passed on 30. 11.2005. After going through the records, it is revealed that the calculation of deduction admissible u/s 80HHE of the IT Act, the assessee adopted the total turnover of the business as ₹1,63,58,001/- whereas the P & L account shows that the total turnover as* ₹14,54,12,662/- *(Sales gross + Services). Adoption of incorrect total turnover resulted in excess allowance of deduction u/s 80HHE* to *the tune of* ₹42,17,556/- *entailing short levy of tax of* ₹21,27,313/-.
>
> *Therefore, I have reason* to *believe that the income of the assessee has escaped the assessment as per the section* 147 *of the IT Act.*
>
> *Issued Notice u/s* 148.
>
> *The approval of Commissioner of Income Tax, Delhi-IV, has been obtained on 19.02.2010.*"

24. It is clear from bare reading of the aforementioned satisfaction note recorded by the assessing authority for re-opening the assessment five years after the assessment had been completed under Section 143(3) (on 30.11.2005) that the only indication set out as to the grounds which had triggered such action is through the words "after going through the records". The assessing authority would not elaborate as to which records had been adverted to and what was the event which had occurred that had impelled such perusal of the records for a fresh view to be taken. Noticeably, the Assessing Officer while recording his satisfaction by note dated 19.03.2010 that a case had been made out for the income to be re-assessed would not attribute any act of commission or omission on the part of the assessee so as to constitute a failure to discuss fully and truly of the material facts. Indeed, the assessing authority expressed that reasons to believe existed that a part of the income had escaped assessment. But, it would not clarify even remotely as to how the said failure had occurred.

25. A relevant part of the re-assessment order that came to be eventually passed by the assessing authority on 21.12.2010 needs to be extracted. It reads as under:-

> "*The reply filed by the assessee company has been considered, however, no found to tenable. In the absence of any substantiating submissions filed by the assessee company it is presumed that it has nothing to say in the matter. On going through the P&L A/c submitted by the Assessee it appears that Net Sales was of Rs.10,89,05,293/= and after adding back services and others total turnover comes to RS.13,16,12,262/= whereas on perusal of the Annexure-2 regarding deduction under chapter VI-A the assessee in computation of deduction under section 80HHE the total turnover claimed was RS.1,63,58,001/=. Thus details relating to the claim by the*

*exporter computer software for deduction under section 80HHE of the I.T.Act, shows that as per Form No. 10CCAF the total turnover of the assessee company for the year under consideration has been taken at Rs.1,63,58,001/- instead of Rs.13,54,12,662/- (Sales Gross + Services).*

*In view of the above, it is quite evident that the assessee company, while computing the deduction u/s 80HHE has adopted incorrect turnover which has resulted excess claim of deduction U/s 80HHE to the tune of Rs.46,65,749/-..."*

26. The Revenue has placed reliance on *Honda Siel Power Products Limited v. The Deputy Commissioner of Income Tax and Anr.* (2012) 340 ITR 53 (Delhi) to argue that mere production of books of account or other evidence was not sufficient in view of explanation – 1 to Section 147 noted earlier. In our considered view, the factual matrix of *Honda Siel Power Products Limited* (supra) is distinguishable. The court had found on that occasion omission or failure on the part of the assessee which attracted initiation of action under Section 147(1) on account of the first proviso thereto coming into play.

27. The order passed by the assessing authority extracted above unmistakably shows that even at that stage it had no fresh material available to it so as to exercise the jurisdiction available under Sections 147/148 of Income Tax Act. It was, thus, taking a fresh call on the subject of assessment of income (i.e. re-assessment), drawing conclusions and inferences from the same very material that had been scrutinized in the original assessment proceedings. The case at hand is concededly not covered by other exceptions as indicated by second and third proviso or explanation to Section 147 quoted earlier.

28. The re-opening of the assessment in the case at hand through notice under Section 148 of Income Tax Act issued on 22.03.2010 fails to pass the muster on both the tests. The satisfaction note does not disclose the foundation of "reasons to believe" as it vaguely refers to the perusal of "the records" without specifying the fresh "tangible material" that had come to light giving rise to a need for such action. Since the assessment had earlier been concluded under Section 143(3) by order dated 21.09.2007, the restrictions on the exercise of the power of re-assessment as contained in the first proviso to Section 147 would inhibit further action in absence of material showing default by the assessee to fully or truly disclose.

29. In the above facts and circumstances, we concur with the view taken by the CIT(A) that it is a case of impermissible change of opinion. The order whereby the proceedings have been re-opened for assessment under Section 147/148 of Income Tax Act, thus, is found to suffer from jurisdictional error. Consequently, the proceedings taken out in its wake cannot sustain.

30. We, thus, answer the question of law formulated as above in affirmative against the Revenue.

31. Consequently, the order of ITAT is set aside and the order passed by CIT(A) on 15.12.2012 is restored.

**R.K.GAUBA**
**(JUDGE)**

**S. RAVINDRA BHAT**
**(JUDGE)**

**JANUARY 19, 2015**
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