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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&
SHRI G.MANJUNATHA, ACCOUNTANT MEMBER
ITA No.262/Mum/2016
(**Assessment Year :2005-06**)

DCIT-2(2)(1) Room No.545, 5th Floor Aaykar Bhawan M.K.Road Mumbai-400 020	Vs.	M/s Larsen & Toubro Limited L& T House, N.M.Marg Ballard Estate Mumbai-400 001
		PAN/GIR No.AAACL0140P
Appellant)	..	**Respondent**)

Assessee by	J.D.Mistry & Madhur Agarwal
Revenue by	Anadi Varma
Date of Hearing	**18/06/2019**
Date of Pronouncement	**06/09/2019**

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the revenue is directed against the order of the Commissioner of Income Tax (Appeals)–5, Mumbai, dated 27/10/2015 and it pertains to the Assessment Year 2005-06.

2. The revenue has raised the following grounds of appeal:-

1. The Order of the CIT (A) is opposed to law and facts of the case.

2. The Order of the CIT (A) is opposed to law and facts of the case.

3. On the facts and in the circumstances of the case, the CIT(A) has erred in holding that the assessment reopened u/s 147 Is invalid and deleting the addition made by the AO on account of product warranty.

4. On the facts and in the circumstances of the case, the CIT (A) has not appreciated Explanation 1 to Section 147 which states that production before

the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily to disclosure within the meaning of foregoing proviso,

5. On the facts and in the circumstances of the case, the CIT (A) has erred in holding that this was a mere change of opinion, when in fact the issue had not been considered at all and there was no application of mind on the part of the AO at any stage in the original assessment, so as to justify the inference of any change of opinion, so as to discredit re-opening and reassessment.

3. The brief facts of the case are that the assessee company is engaged in providing Engineering and related services, filed its return of income for AY 2005-06 on 28/10/2005, declaring total income at Rs. 729,06,67,610/-. The assessment has been completed u/s 143(3) of the I.T.Act, 1961,vide order dated 29/12/2008 and determined total income at Rs. 946,83,63,380/-. Subsequently, the assessment has been reopened u/s 147 of the I.T.Act, 1961, for the reasons recorded, as per which income chargeable to tax had been escaped assessment on account of various issues, including allowance of ineligible expenditure of a sum of Rs. 10.47 crores, on account of provision for product warranty. Accordingly, notice u/s 148 of the I.T.Act, 1961, dated 19/03/2012 was issued and duly served upon the assessee. Thereafter, the case has been selected for scrutiny and the assessment has been completed u/s 143(3) r.w.s. 147 of the I.T.Act, 1961 and determined total income of Rs. 963,93,21,530/- by making additions towards disallowance on warranty expenses of Rs. 10.47 crores, on the

ground that warranty provisions has been created on estimation basis, rather than on any scientific basic.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before, the Ld.CIT(A), the assessee has challenged reopening of assessment u/s 147 on two grounds. The first arguments of the assessee before the Ld.CIT(A) was that the assessment has been reopened on change of opinion without there being any tangible material, which is evident from reasons recorded for reopening of assessment, where the Ld.AO has referred to assessment records without any fresh material in his possession to establish escapement of income. The assesee has also challenged reopening of assessment, in light of proviso to section 147 of the I.T.Act, 1961 and argued that unless, the AO shows that there is failure on the part of assessee to disclose fully and truly, all material facts necessary for assessment, the assessment cannot be reopened after a period of four years from the end of relevant assessment years, if such assessment has been completed u/s 143(3) of the I.T.Act, 1961.

5. The Ld.CIT(A), after considering relevant submissions of the assessee and also by relied upon the decision of Hon'ble Supreme

Court in the case of CIT vs Kelvinator of India Ltd. 320 ITR 561 held that the assessment has been reopened on mere change of opinion without there being any tangible material before the Ld.AO for reopening the assessment. The Ld.CIT(A), further observed that in the reasons for reopening, the Ld. AO has mentioned that on review of the assessment, it is observed that there is under assessment of income. This statement shows that after reviewing the case records, he found that certain income had escaped assessment. But, fact of the matter is that the assesee has submitted a letter dated 13/12/2018, during the course of assessment proceedings u/s 143(3), where the issue on which the AO has reopened was already discussed and all the details were submitted before the AO. Therefore, he opined that it is a case of change of opinion, which is not permissible u/s 147 of the Act. Insofar as, second arguments of the assessee, in light of proviso to section 147 of the Act, the Ld.CIT(A) observed that on examination of reasons recorded, it is seen that nowhere, the Ld. AO had stated that there was failure on the part of assessee to disclose fully and truly, all the material facts necessary for reopening assessment. Accordingly, held that reopening of assessment u/s 147 is invalid. Consequently, the additions made by the AO towards product warranty is deleted.

Aggrieved by the Ld. CIT(A) order, the revenue is in appeal before us.

6. The Ld. DR submitted that the Ld. CIT(A) has erred in holding that the reassessment is bad in law without appreciating the fact that Explanation (1) to section 147 states that production before the AO of account books or other evidences from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure within the meaning of proviso to section 147 of the Act. The Ld. DR, further submitted that the Ld. CIT(A) has erred in holding that the assessment has been reopened on mere change of opinion, when in fact the issue had not been considered at all and there was no application of mind on the part of AO at any stage in the original assessment, so as to justify the inference any change of opinion. In this regard, he relied upon the decision of Hon'ble Supreme Court in the case of Dolgobinda Paricha Vs. Nimai Charan Misra & Others (1959) AIR 914 1959 SCR and also the decision of Hon'ble Supreme Court in the case of CIT vs Rai Bahadur Hardutory Motilal Chamaria (1967) 66 ITR 443 (SC)

7. The Ld. AR for the assesee, strongly supporting order of the Ld. CIT(A) submitted that the Ld. CIT(A) has appreciated the facts,

in light of reasons recorded by the Ld. AO and assessment order passed u/s 143(3) of the I.T.Act, 1961, to come to the conclusion that the assessment has been reopened on change of opinion without there being any tangible material, which suggest escapement of income. The Ld. AR, further submitted that the Ld. CIT(A) had also recorded categorical findings, in light of proviso to section 147 of the I.T.Act, 1961 and held that unless, there is a allegation from the AO that there is a failure, on the part of assesee to disclose fully and truly all material facts necessary for assessment, the assessment cannot be reopened after four years from the end of relevant assessment year, if such assessment has been completed u/s 143(3) of the I.T.Act, 1961. In this case, there is no doubt with regard to fact that the assessment has been completed u/s 143(3) of the I.T.Act, 1961, where the assesee has filed a detailed note on product warranty provision and the AO has discussed the issue in the assessment and after being satisfied with explanation filed by the assesee completed assessment. Therefore, this is a classic case of change of opinion, and hence, the ld.CIT(A) was right in quashing reassessment proceedings. In this regard, he relied upon the decision of Hon'ble Supreme Court in the case of ITO vs TechSpan India (P.) Ltd.(2018) 302 CTR 74 (SC) and also the decision of Hon'ble Bombay High Court in the case of

SBI vs ACIT (2019) 103 taxmann.com 164 (Bom.). The Ld. AR had also relied upon the decision of Hon'ble Bombay High Court, in the case of Pr.CIT vs M/s. L&T in ITA No. 135 of 2016.

8. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We have also carefully considered case laws relied upon by both the parties. The assesee has challenged reopening of assessment on two grounds. The Ld.CIT(A) had accepted the arguments of the assessee, in light of provisions of section 147 of the I.T.Act, 1961 and the assessment order passed by the AO u/s 143(3) of the I.T.Act, 1961,dated 29/12/2018 and came to the conclusion that the assessment has been reopened on change of opinion without there being any tangible material, in the possession of the AO, which suggest escapement of income. The Ld.CIT(A) had also recorded categorical findings, in light of proviso to section 147 of the I.T.Act, 1961 and held that unless, there is an allegation from the AO in the reasons recorded for reopening of assessment that any income chargeable to tax had escaped assessment by reasons of the failure, on the part of assesee to disclose fully and truly all material facts necessary for reassessment, for that assessment year, the assessment cannot be reopened after four years from the end of

relevant assessment year, if such assessment has been completed u/s 143(3) of the I.T.Act, 1961. In this case, on perusal of facts, we find that the original assessment has been completed u/s 143(3) of the I.T.Act, 1961 on 29/12/2018 and the assessment has been reopened after four years from the end of relevant assessment years without making any allegation as to failure on the part of assessee to disclose fully and truly all material facts necessary for assessment. Therefore, we are of the considered view that reopening of assessment, in this case was made on change of opinion without there being any tangible material in the position of the AO, which suggest escapement of income and also without making any allegation as to failure on the part of assesee to disclose fully and truly all the material facts necessary for assessment.

9. Insofar as, various case laws relied upon by the assessee, we find that the Hon'ble Supreme Court, in the case of ITO vs TechSpan India (P.) Ltd (supra) had held that where, question, as to how and to what extent deduction to be allowed u/s 10A was well considered in original assessment proceedings itself, initiation reassessment proceedings u/s 147 by issuing a notice u/s 148, merely because of fact that now AO was of view that deduction u/s 10A was allowed in excess, was based on nothing, but a change of

opinion. The Hon'ble Bombay High Court, in the case of SBI vs ACIT (supra) had considered reopening, in light of proviso to section 147 and held that where, in original return outstanding credit interest lying in inter branch account for more than 10years as on 30/09/2010 was credited to profit and loss account by assesee bank, as per RBI instructions, but same was not offered to tax, in accordance with the Tribunal decision, reassessment after four years was unjustified. The Hon'ble Bombay High Court in Pr.CIT vs M/s L&T Ltd. had considered identical issue and held that in the absence of the statutory requirement of income chargeable to tax had been escaped assessment due to the failure, on the part of assesee to disclose fully and truly, all material facts being satisfied, the Tribunal correctly held that the notice of reassessment was invalid. As regards, case laws relied upon by the Ld. DR, we find that in case of CIT vs Rai Bahadur Hardutory Motilal Chamaria (supra), the Hon'ble Supreme Court has explained, the term what consideration by the ITO means and held that consideration does not mean incidental or collateral examination of any matter by the AO in the process of assessment and there must be something in the assessment order to show that the ITO applied his mind to the particular subject of the matter or particular source of income with a view to its taxability or to its non-taxability and not to any incidental

connections. We find that the facts of the case laws relied upon by the Ld. DR is not applicable to the facts and circumstances of this case because, in this case, the Ld. AO has examined the issue in original assessment proceedings and after being satisfied with explanation furnished by the assessee accepted the claim. Insofar as, the decision of Hon'ble Supreme Court in the case of Dolgobinda Paricha Vs. Nimai Charan Misra & Othrs, we find that the word opinion has been explained by the Hon'ble Supreme Court, in the light of Indian Evidence Act, 1872 and it is a settled position of law that the Indian Evidence Act, 1872 is not strictly applicable to Income tax proceedings, the finding recorded by the Hon'ble Supreme Court, in the given facts and circumstances of that case may not be strictly applicable to facts of this case.

10. In this view of the matter and respectfully following the case laws discussed hereinabove, we are of the considered view that the Ld.CIT(A) has rightly quashed reassessment proceedings, therefore, initiated u/s 147 of the I.T.Act, 1961 and hence, we are inclined to uphold, the findings of the Ld.CIT(A) and dismissed appeal filed by the revenue.

11. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on this 06 /09/2019

Sd/-	**Sd/-**
(SAKTIJIT DEY)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 06 /09/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai