IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2031 OF 2022

Clear Media (India) Private Limited,]
a company incorporated in India, having]
registered office at B 15-18, Commerce Centre,]
Tardeo Road, 2nd Floor, Above ICICI,]
Mumbai 400 034.]
]
PAN : AACCC 6691E]... Petitioner

Versus

1. Deputy Commissioner of Income-tax,]
6(1)(2), Mumbai,]
Room No. 511, Aaykar Bhavan,]
M.K. Road, Mumbai 400 020.]
]
2. Joint Commissioner of Income-tax,]
Range 6(1), Aaykar Bhavan, M.K. Road,]
Mumbai – 400 020.]
]
]
3. The Union of India]
through the Secretary, Ministry of Finance,]
Government of India,]
North Block, New Delhi -110 001.]
]
]
4. National Faceless Assessment Centre,]
2nd Floor, E-Ramp, Jawaharlal Nehru Stadium,]
Delhi – 110 003.]..Respondents

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Mr.Dharan V. Gandhi, Advocate for petitioner.

Mr.Charanjeet Chanderpal with Ms.Ruchi Rajput, Advocates for respondents.

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CORAM : DHIRAJ SINGH THAKUR &
VALMIKI SA MENEZES, JJ.

PRONOUNCED ON : 9th JANUARY, 2023

J U D G M E N T

PER DHIRAJ SINGH THAKUR, J.

1. In this petition, the petitioner challenges the notice, dated 30th March 2021 issued by respondent No.1 under section 148 of the Income Tax Act, 1961 ('the Act') proposing to reopen the assessment for the assessment year 2016-17 on the ground that the income exigible to tax for the said assessment year has escaped assessment. The petitioner also challenges the order dated 25th February 2022, passed by respondent No.4, whereby, the objections raised by the petitioner for the reopening the assessment have been disposed of.

2. Briefly stated the material facts are as under :

(a) The petitioner is a company engaged *inter-alia* in the business of FM Radio Broadcasting. Return of income for the assessment year 2016-17 was filed

under section 139(1) of the Act on 16th October 2016 declaring a total loss of Rs.7,88,83,872/-. By virtue of notice, dated 26th July 2017 issued under section 143(2) of the Act, as a part of the limited scrutiny among others identified the issue related to intangible assets for examination.

(b) In response thereto, the petitioner claims that it filed the relevant details, supported by documents explaining as to how the amounts payable under the agreement executed with the Ministry of Information and Broadcasting on migration from Phase-II to Phase-III were capitalized as “intangible assets” and the basis for claiming depreciation thereunder. A copy of this response dated 10th August 2017 is also placed on record.

(c) Thereafter, notices are stated to have been issued under section 142(1) seeking certain details of the assessee, pursuant to which the same were furnished including the audit report, profit and loss

balance-sheet etc. Finally, an order of assessment dated 22nd October 2018 came to be passed accepting the return of income of the petitioner which included the claim of depreciation under section 32 of the Act on intangible assets, without making any adjustment.

(d) A notice dated 30th March 2021 was issued by respondent No.1 invoking the provisions of section 148 of the Act seeking to reopen the assessment for the assessment year 2016-17 require the petitioner to file a return in the prescribed form for the said assessment year, which was filed by the petitioner and also sought the reasons for reopening of the assessment.

3. The following were the reasons for reopening of the assessment for the assessment year 2016-17 :

REASONS FOR REOPENING OF THE ASSESSMENT U/S.147 OF THE ACT

1. The assessee filed its return on income on 16.10.2016 declaring income at total loss of Rs.7,88,83,872/- and the assessment was completed

u/s 143(3) vide order dated 22.10.2018 accepting the returned income. The assessee is engaged in business of radio broadcasting.

2.1 Section 35ABB of the Income Tax Act provides that any capital expenditure actually paid for obtaining license to operate telecommunication services shall be allowed as deduction in equal installments during the number of years for which license is in force. Further as discussed in para 12 of the ITAT, Delhi in case of M/s. Digital Radio (Delhi) Broadcasting Ltd. Vide ITA No.4364/Del/2011 dated 24.11.2015, the scope of telecommunication services was increased to include the broadcasting services and cable services also, hence, provisions of Section 35ABB will apply to assessee engaged in these services. The Board has issued instructions from time to time that in scrutiny assessment, assessing officer shall make correct assessment of income or loss and determine correct sum payable by him or refundable to him on the basis of such assessment.

2.2 The assessee company was permission holder for radio broadcasting in the region of Delhi under Phase II of policy (valid upto August, 2016). In 2015, the Government has pronounced fresh policy (Phase III effective from 01.04.2015) and the assessee was given option to migrate to Phase III by paying one time non-refundable entry fee of Rs.33,33,78,328/- for 15 years. The assessee opted for same and capitalized amount of fee as intangible asset. Accordingly, one time fee paid upto August, 2015 relating to Phase II was adjusted and license fee payable was determined at Rs.31,44,39,730 and this amount was paid on 29.04.2016. Since, by claiming depreciation @ 25% on license fee for phase II, maximum amount had been claimed as depreciation in earlier years. Thus, assessee should have been allowed capitalization on Rs.31,44,39,730. As per provisions contain in Section 35ABB, the assessee was eligible for deduction of Rs.2,09,62,648/- (1/15th of Rs.31,44,39,730/-). However, it had capitalized the said fee as intangible asset and claimed 25%

> depreciation of Rs.8,11,12,130/- which was not in order in view of provisions quoted above. Failure to do so has resulted in allowance of excess depreciation claim of Rs.6,10,49,482/-.
>
> 3 Considering the above, I have reason to believe that the income chargeable to tax amounting allowance of excess depreciation claim of Rs.6,01,49,481/- has escaped assessment for the year under consideration and therefore, the condition specified in the proviso to Sec.147 are fulfilled.
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> 4. In view of the above facts, the provisions of clause (c) of explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment. Regular assessment u/s 143(3) was made on since, 4 years from the end of the relevant year has not expired in this case, the only requirement to initiate proceeding u/s 147 is reason to believe which has recorded above.
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> 5. This case is within four years from the end of the assessment year under consideration. Hence, necessary sanction to issue notice u/s 148 has been obtained separately from Addl. Commissioner of Income Tax Range 6(1) as per the provisions of section 151 of the Act.

4. Objections were filed to the notice under section 148 in which it was highlighted that claim of depreciation of licence fees as an intangible asset had been allowed since the assessment years 2007-08 in several scrutiny assessment proceedings and that it has also been done for the relevant assessment year 2016-17 in which a specific

query in that regard had been raised. It is also stated that even for the assessment year 2017-18, the return had been accepted, after scrutiny by the same officer who had issued the impugned notice. It is also stated that reopening of the assessment was nothing but a ‘change of opinion’ as there was no tangible material which would warrant the reopening of the assessment.

Objections filed by the respondents were disposed of by the order dated 25th February 2022 by respondent No.4.

5. Both, the notice as also the order (supra) have been called in question primarily on the ground that the issue with regard to claim of depreciation on the intangible assets had been a matter of detailed scrutiny during the assessment proceedings under section 143(3) for the assessment year in question. It is stated that queries were raised and response was filed, pursuant to which the claim on depreciation on intangible assets was allowed not only for the assessment year 2016-17, by virtue of assessment order 22nd October 2018, but even for the subsequent assessment year 2017-18, by virtue of the order dated 26th

December 2019. It is, therefore, urged that the present proceeding was nothing but a clear change of opinion without there being any new tangible material based on which assessment could be reopened.

6. Under section 147 of the Act, the AO can exercise its jurisdiction to reopen an assessment when; (a) he has 'reason to believe' that the income chargeable to tax had escaped assessment; and (b) in the cases where the assessment sought to be reopened is beyond the period of four years from the end of relevant assessment years, the AO has to additionally be satisfied that there was failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment.

7. In response, the stand taken by the respondents in the reply *inter-alia* is that the query raised by the AO during scrutiny assessment was only pertaining to the tax aspect of the intangible assets and that no specific query was raised regarding depreciation claim of the licence fee paid by the assessee. The stand taken indicates that there

was no application of mind by the AO with regard to the claim of depreciation on payment of onetime licence fee during the original assessment proceedings. It is stated that in a case, where the AO had not applied its mind in the original assessment proceedings to a particular issue, the reassessment proceedings must be held to be valid. It is also stated that a change of opinion presupposes an earlier formation of an opinion which is not discernible from the order of assessment. It was further urged that unless there was sufficient material on record which would prove that the issue had been duly considered, mere silence or absence of discussion would not prevent initiation of reassessment proceedings. Reliance in this regard was placed upon a Delhi High Court judgment in the case of ***M/s. Consolidated Photo and Finvest Ltd. Vs. Assistant Commissioner of Income Tax***[1]***.***

8. The Supreme Court in ***Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd.*** [2] held that there was a difference between 'power to review' and 'power to reassess'

1 (2006) 281 ITR 394 (Delhi)
2 [2010] 320 ITR 561

under section 147 and that the AO had no power to review and that, if the concept of 'change of opinion' was removed, then, in the garb of reopening of the assessment, a review would take place. It was held :

> 4 ……..Therefore, post-1-4-1989, 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 reassessment 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 1-4-1989, 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…..."

9. In fact, the Supreme Court in ***Kelvinator of India Ltd.*** (Supra) had upheld the Full Bench decision of Delhi High Court in ***Commissioner of Income-tax Vs. Kelvinator of India Ltd.***[3]. In the said judgment, the Full Bench of Delhi High Court held :

3 [2002] 256 ITR-1

> " We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. 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 the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi- judicial function to take benefit of its own wrong."

10. In ***Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax*** [4]***,*** the Court, in the light of the facts before it and in the background of section 147 of the Act, observed :

> "………………all that the Income-tax Officer has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the

4 [1998] 234 ITR 170 (Delhi)

opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Office has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under Section 147 of the Act.

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."

11. In the backdrop of the aforementioned judgments, it can be seen that during the course of scrutiny assessment, the petitioner had received a notice under section 143(2) of the Act, dated 26th July 2017 which identified the issue related to intangible assets as one of the issues for examination. This notice was replied by virtue of communication, dated 10th August 2017, in which it was stated that the amount payable under the agreement was capitalized in the books as intangible assets and depreciation had been claimed accordingly.

12. The AO appears to have finally passed the order of assessment dated 25th February 2022 accepting the claim of the petitioner for depreciation under section 32 of the Act. The basis for reopening with reference to the reasons furnished and referred to in the preceding paragraphs appears to be that the petitioner was eligible for deduction

in terms of section 35ABB of the Act and that instead it had capitalized the non-refundable entry fee as intangible assets and claimed 25% depreciation of Rs.8,11,12,130/- which was not in order in accordance with section 35ABB and that failure to do so had resulted in allowance of excess depreciation claim of Rs.6,01,49,482/.

13. From a reading of the reasons for reopening, it can be stated that the petitioner was entitled to claim deduction under section 35ABB of the Act but it has not been specifically stated in the reasons that the petitioner was not entitled to claim depreciation @ 25% in terms of section 32 on the amount capitalized as "intangible assets". Even otherwise, it does appear to us that the issue with regard to claim of depreciation had been gone into by the AO and notwithstanding the fact that in the order of assessment, there was no specific discussion as regards this particular claim, yet, considering the ratio of the judgments referred hereinabove, it must be presumed that the claim was considered and only then allowed.

14. In this regard, reliance is placed by learned counsel for the respondents in ***M/s. Consolidated Photo and Finvest Ltd.*** (Supra). In this case, the argument was that even when the order of assessment did not record any explicit opinion on the aspects which were sought to be examined during reassessment proceedings, it must be presumed that the same had been considered by the AO and held in favour of the assessee. The Court, while rejecting such a contention, held :

> "19 ……………...It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening computed assessments would be applicable only to situations where the assessing officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the assessing officer either generally or in the

> form of a reply to the questionnaire served upon the assessed. What is important is whether the assessing officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

15. However, subsequently Delhi High Court in ***KLM Royal Dutch Airlines Vs. Assistant Director of Income-tax***[5] held that the view expressed earlier in ***M/s. Consolidated Photo and Finvest Ltd.*** (Supra) was contrary to the view expressed by the Full Bench on the subject in ***Commissioner of Income-tax Vs. Kelvinator of India Ltd*** (Supra).

16. In the backdrop of the facts and the law stated in ***Jindal Photo Films Ltd.*** (Supra), even in the present case, between the date of the order of assessment sought to be reopened and the date of forming of opinion by the Assessing Officer, nothing new has happened. Neither is there any new information received nor is a reference made to any new material on record. The Assessing Officer simply has accorded a fresh consideration and come to a

5 [2007[159 Taxman 191 (Delhi)

conclusion that the assessee ought to have claimed benefit of deduction under section 35ABB which would have resulted in reducing the allowance under section 32 by Rs.6,01,49,482/-. In the absence of any tangible material, the present case is nothing but a case of change of opinion and thus does not satisfy the jurisdictional foundation under section 147 of the Act.

17. In that view of the matter, we have no hesitation in holding that the impugned notice dated 30th March 2021 under section 148 of the Act and the consequent order dated 25th February 2022 disposing off the objections raised for reopening of the assessment, are unsustainable and accordingly set aside the same.

18. This petition is allowed accordingly. No costs.

[VALMIKI SA MENEZES, J.] **[DHIRAJ SINGH THAKUR, J.]**