Reportable

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

ITA No. 958 of 2008

% *Date of Decision: 22nd July, 2010*

COMMISSIONER OF INCOME TAX ..... Appellant

Through: Ms. Prem Lata Bansal, Advocate

versus

EICHER LIMITED ..... Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha,
Ms. Akansha Aggarwal and
Mr. Somnath Shukla, Advocates

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. *(Oral)*

1. The respondent-assessee has filed the return of its income in respect of the Assessment Year 1999-2000 declaring income at 9.49 Crores under Section 115JA of the Income Tax Act (hereinafter referred to as 'the Act'). This return was processed under Section 143(1) of the Act and the assessment was completed under Section 143(3) at an income of Rs.44,13,247/- under normal provisions of the Act and at Rs.10.17 Crores under Section 115JA of the Act. This assessment order was passed on 28.03.2002.

2. Within two years, however, the Assessing Officer (AO) sought to reopen the assessment by issuing a notice under Section 148 of the Act on 18.03.2004. Based thereupon, afresh assessment

order was passed on 22.02.2005. The AO added an income of Rs.15,662,632/- on the ground that when the first assessment order was passed while computing the business income, a deduction of Rs.5,67,48,804/- was claimed and the same was allowed under Section 37(1) of the Income Tax Act as part of the company's plan to expand its product range into higher horse power tractor segment, higher horse power tractors and its components and motorcycles, in the course of its existing business of manufacture and sale of tractors and its components and motor cycles. The addition of Rs.15,662,632/- to the aforesaid expenditure on its expansion of business was treated as 'capital expenditure' on the premise that it was made with a view to bringing into existence an asset or an advantage for the enduring benefit of the business.

3. The assessee challenged this order by an filing an appeal before the CIT (Appeals). Main contention of the assessee was that all the relevant facts in this behalf were placed before the AO when the assessment was carried out in the first instance and the AO had taken a categorical view that the entire expenditure was in the nature of revenue expenditure and therefore, liable for deduction. Relevant discussion contained in the order of the CIT(A) runs as follows:

> "3.3 On verification of the assessment record it was found to be correct that the original assessment proceedings u/s 143(3) was completed by the AO vide its order dated 28-03-2002 and during that proceedings the claim of the appellant in respect of the expenditure incurred in reference to development of higher horse power tractors and motorcycles was examined and the claim as per Note VI to the Computation of Income was allowed to the appellant."

4. On this premise, the CIT (A) quashed the notice issued under Section 148 as well as the second assessment order. We may

also state that even on merits, CIT(A) found the addition to be unsustainable, as he was of the opinion that the expenditure was revenue in nature.

5. It was now the turn of the Department to feel aggrieved and the Department accordingly approached the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') by way of filing the appeal and challenging the orders of the CIT (A). The appeal of the Department has, however, been dismissed vide orders dated 31.10.2007. The order of the Tribunal would show that it has extracted the aforesaid portion of the order of the CIT(A) and on that basis, remarked as under:

> "11. It may be pointed out here that we have asked the ld. DR that whether he is disputing these findings of ld. CIT(A). He said that he is not disputing these findings of CIT(A). If it is so, then it is an established fact that the claim of the assessee was looked into by the AO during the course of original assessment proceedings and after due application of mind the claim was allowed in the original assessment proceedings. The present reassessment proceedings are carried out only on the basis of mere change of opinion. It is also not the case of revenue that any material evidence was not fully and truly disclosed by the assessee. Law on reassessment is well settled that mere change of pinion does not confer jurisdiction to reopen a completed assessment on the interpretation of a particular provision earlier adopted by the AO. The scope of Section 148 does not extend to reviewing its earlier order sou moto irrespective of there being any material to come to a different conclusion apart from just having second thought about the inference drawn earlier. It has already been pointed out that it is not disputed that the claim of the assessee was looked into by the AO during the course of original assessment proceedings and the AO had formed an opinion of the issue and had allowed the claim of the assessee. Reliance by the ld. DR on the decision in the case of **Consolidated Photo And Finvest Ltd.** v. **ACIT** (supra) cannot advance the case of the department as the said decision was subsequently considered by the Hon'ble jurisdictional High Court in the case of **CIT** v. **M/s. Eicher Ltd.,** 163 Taxman 259 (Del) (supra) (a copy of which has been submitted in the paper book at pages 62 to 65) wherein referring to that decision it was observed by Hon'ble jurisdictional High Court that in view of earlier Full Bench decision of Delhi High Court in the case of **KLM Royal Dutch Airlines** vs. **ADI** (159 Taxman 191) the view expressed in the case of Consolidated Photo And Finvest Ltd. v. ACIT (supra) cannot be said to have laid down correct law....."

6. As it is clear that even the verification of the assessment record has revealed that all the facts were placed before the AO at the

time of first assessment and the findings of the CIT(A) in this behalf could not be disputed by the departmental representative even before the Tribunal. Thus, no fault can be found in the approach of the Tribunal.

7. Faced with the aforesaid situation, the learned counsel for the Revenue has made altogether different submission before us. She argued that in the 'reasons to believe' recorded by the AO while reopening the assessment, three aspects were noted. Apart from the aforesaid question relating to the expenditure in the assessee's plan to expand its product range into higher horse power tractor segment, higher horse power tractors, etc. and the part of the expenditure thereupon, revenue or capital in nature, she pointed out that there were two more reasons given by the AO in his 'reasons to believe', which are as under:

> "1. The assessee has created the provision of Rs.190 lakh towards gratuity but only Rs.75 lakh were actually paid. Excise provision of Rs. 115 lakh towards gratuity being an unascertained liability should have been disallowed.
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> 2. While calculating effect of newly inserted section 145A an amount of Rs.3,53,56,437/- on account of excise duty payable on opening stock of raw material, work in progress, finished goods etc as on 01.04.1999, and there was no addition on account of excise duty in valuation of inventory as on 31.03.98, the deduction of Rs.3,53,56,437/- on account of excise duty on opening stock should have been disallowed."

8. Her submission was that the Tribunal did not even look into these aspects, and they could form valid grounds for reopening of the assessments. In continuation, she argued that even if the additions on account of the aforesaid grounds, were not made by the AO in the second assessment orders passed by it, these grounds would still be relevant for consideration for reopening the assessment under Section 148 of the Act. She also submitted that

even if one of the grounds for reopening of the assessment is found valid, the notice under Section 148 of the Act cannot be set aside.

9. This contention is to be rejected on two grounds. In the first instance, we find that no such plea was taken before the Tribunal. The entire case was argued on the basis that the third reason, *viz.*, treating the entire expenditure as revenue in nature was incorrect and part of the expenditure could be treated as capital expenditure.

10. We may state here that even before CIT(A), the matter proceeded on this basis. It was presumably because of the reason that in respect of the first two 'reasons/grounds', the AO found that no additions were warranted. Maybe in order to determine the validity of the notice under Section 148 of the Act, this could still be pressed as grounds showing the justification for reopening the assessment. Fact remains that no such plea was taken by the Department before the CIT(A) or before the Tribunal. Therefore, such a plea cannot be allowed for the first time in this appeal.

11. Second reason is that the appellant has itself annexed 'office note' of the DCIT, Circle-11(1), New Delhi to the assessment order, which discloses as to why no additions on the first two reasons could be made at all. Relevant portion of this order reads as under:

> "1. Excess provision of Rs.115 lakh towards gratuity should have been disallowed. It may, however be mentioned that in the normal computation of income, the assessee has already disallowed the same under the head disallowance u/s 40A(7) amounting to Rs.1,14,95,024/-. Further even for the purpose of computation of income u/s 115JA, the same is allowable as the same was made on the basis of actuarial valuation and is, therefore, an ascertained and accrued liability as held by the Hon'ble Supreme Court in the case of Metal Box Company of India Vs. Their Workmen 73 ITR 53.

> 2. While calculating effect of newly inserted section 145A, no addition on account of excise duty in valuation of inventory as on 31.03.1998 was done resulting in excess deduction of Rs.3,53,56,437/- claimed by the assessee. No disallowance on above account is being done as the aforementioned amount has not been debited to the audited P&L account in view of accounting policy of the assessee in respect of valuation of inventory and excise and custom duty as stated at Schedule L at page 20 of audited P&L account in view of accounting policy of the assessee in respect of valuation of inventory and excise and custom duty as stated at Schedule L at page 20 of audited P&L account in view of accounting policy of the assessee in respect of valuation of inventory and excise and custom duty as stated at Schedule L at page 20 of audited P&L account. It may further be mentioned when the adjustment are made in valuation of inventory this will affect both the opening as well as closing stock. Section 145A starts with non-obstante clause "Notwithstanding anything to the contrary contained in section 145", therefore, to give effect to section 145A the opening stock as on 01.04.1998 will also have to be increased by any tax, duty, cess actually paid or incurred with respect to such stock if the same has not been added for the purpose of valuation and amounts."

12. Thus, it was found that such reasons were not sustainable at all and therefore, there is no basis for issuance of a notice under Section 148 insofar as these two reasons are concerned. Therefore, it is not permissible for the learned counsel for the Revenue to now raise such a contention.

13. In the result, we are of the opinion that no substantial question of law arises for our determination. This Appeal is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

JULY 22, 2010.
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