

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

% Judgment delivered on: 25<sup>th</sup> January, 2010

+ **W.P.(C) 13603/2004**

D.T.& T.D.C.LTD.

..... Petitioner

-versus-

THE ASSISTANT COMMISSIONER OF INCOME TAX

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Rajiv Tyagi with Ms Chanchal Biswal  
For the Respondent : Mr Sanjeev Sabharwal

**CORAM:**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE SIDDHARTH MRIDUL**

1. Whether reporters of local papers 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?

**BADAR DURREZ AHMED, J (ORAL)**

1. This writ petition concerns three assessment years-1997-98, 1998-99 and 1999-2000.

2. Approval of the Committee on Disputes had been taken for pursuing this writ petition. Permission was granted on 26<sup>th</sup> September, 2008.

3. The Government of National Capital Territory of Delhi (Delhi Administration at the relevant time) had authorized the petitioner (Delhi Tourism & Transportation Development Corporation Limited) (DTTDC) to run liquor vends throughout Delhi. The petitioner was required to keep aside a sum of Rs 5/- per bottle for the Transport Infrastructure Utilization Fund (TIUF) which was to be spent towards the activities of construction of flyovers and pedestrian facilities. The said fund was under the direct control of the Government of National Capital Territory of Delhi and utilized for the aforesaid purpose.

4. The fact that the petitioner kept aside a sum of Rs 5/- per bottle for the TIUF was disclosed by the petitioner in its income tax return. In fact, the department had, in respect of earlier assessment years, taken the stand that the said sum of Rs 5/- per bottle was taxable in the hands of the petitioner. However, in respect of the assessment year 1990-91 and 1991-92 the matter was carried in appeal to the Income Tax Appellate Tribunal, which by its decision dated 31<sup>st</sup> August, 1995 held the same not to be taxable, after recording a finding that it was nothing but diversion of income by overriding title. The reference is pending before this Court in respect of the said

Tribunal's decision dated 31<sup>st</sup> August, 1995. In respect of the assessment year 1996-97, the Income Tax Appellate Tribunal took a similar view in favour of the assessee by virtue of its order dated 27<sup>th</sup> October, 2000. The Revenue preferred an appeal against the same which is pending before this Court.

5. The original assessment order was passed in respect of three assessment years in question namely 1997-98, 1998-99 and 1999-2000 on 28<sup>th</sup> March, 2002. In each of the assessment orders pertaining to each of the three assessment years the TIUF has been specifically noticed by the Assessing Officer. He had brought the interest on such amount to tax but had not taxed the amount transferred to the TIUF. We may also point out that in the course of the assessment proceedings in respect of the three years in question, the Assessing Officer had raised specific queries with regard to TIUF. The petitioner had submitted a detailed reply dated 18<sup>th</sup> January, 2002 explaining the exact nature and purpose of TIUF. It is only thereafter that the assessment order was passed by the Assessing Officer on 28<sup>th</sup> March, 2002.

6. By three separate notices, all dated 26<sup>th</sup> March, 2004, issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to the 'said Act'), the Assessing Officer proposed to reopen the assessments in respect of the three assessment years in question. The reasons for reopening the

assessments were supplied by virtue of the letter dated 28<sup>th</sup> April, 2004 to the petitioner. The reasons in respect of the three years are virtually identical and we shall refer only to the reasons provided in respect of the assessment year 1997-98. The reasons disclosed are as under:-

“Sub-Reasons for reopening of case u/s 147 of the IT Act for AY 1997-98

Please refer to your letter dated 19.4.04. The reasons for reopening assessment for AY 1997-98 are as under:-

It was noticed that the assessee company has debited a sum of Rs.13,70,08,125 in the P&L account towards “Transportation Infrastructure Utilization Fund”. Further, during the year the assessee company earned interest income of Rs.1,31,19,000 on the outstanding balances of Transportation Infrastructure Utilization Fund (TIUF) and this interest income was also transferred to TIUF treating this as part of TIUF. In the Notes annexed to and forming part of the Accounts, it has been mentioned that

“Funds provided by the government or funds diverted to “Transportation Infrastructure Utilization Fund” from sale proceeds of Country Liquor, as per the obligatory requirements of the government of NCT of Delhi, are utilized for constructing flyovers and pedestrian facilities in Delhi and meeting establishment and other administrative expenses of Engineering Wing specially created for the purpose. In this regard the amount of retail margins to be diverted is being decided by the state government from time to time.”

In the assessment orders for AY 1990-91 1991-92, 92-93, 94-95 & 96-97, the amount transferred to TIUF was disallowed by the than AO. While disallowing the same, the AO held that the expenses debited under the above head were an application of income and not the diversion of income as contended by the assessee company. And the amounts spent by the assessee company on the construction of flyover & pedestrian facilities etc amounted to an expenditure of capital nature and was not

allowable deduction. The findings of the AO was confirmed by the CIT(A) in all those years. However, the ITAT decided the issue in favour of the assessee company holding that the expenditure actually incurred on the construction of flyovers and pedestrian facilities is revenue expenditure. In all the said years, the department has filed reference/appeal against the decision of the ITAT.”

7. The petitioner, thereafter, filed objections in respect of each of the years on 30<sup>th</sup> April, 2004 and submitted that what the Assessing Officer was proposing to do amounted to a mere change of opinion which was impermissible under Section 147 of the said Act. We may point out at this juncture that that prior to the furnishing of the reasons, the petitioner had approached this Court by way of a writ petition challenging the issuance of the Section 148 notices. During the pendency of the writ petition, the reasons were supplied and the objections were also taken by the petitioner. This Court disposed of the said writ petition by directing that the procedure prescribed in **GKN Driveshafts (India) Ltd. vs. Income Tax Officer and Others: 259 ITR 19 (SC)** be followed and a speaking order be passed. Thereafter, the speaking orders dated 26<sup>th</sup> July, 2004 have been passed in respect of each assessment years in question.

8. We have examined the purported reasons, as well as the objections and the speaking order and have also heard counsel for the parties. We are of the view that the reopening of the completed assessments amounted to a mere change of opinion, which is not permissible as per the settled legal

principles. The Assessing Officer had clearly applied his mind to the setting apart of Rs 5/- per bottle for the purpose of the TIUF. This is evident from a plain reading of the original assessment order itself as well as from the query and the detailed answer given by the petitioner with regard to the said fund.

9. We may also point out that insofar as the assessment year 1997-98 and 1998-99 are concerned, the same would require application of the proviso to Section 147 of the said Act, inasmuch as the notices under Section 148 of the said Act in respect of these two years have been issued beyond the period of four years prescribed in the said provision. That being the case, before the Assessing Officer could acquire jurisdiction for reopening the assessments in respect of these two years, it would have to be shown that the assessee did not file a return or that he did not make a full and true disclosure. It is an admitted position that the assessee had filed a return, therefore, the only question which remains to be open is whether the assessee made a full and true disclosure or not. In the present case there is no allegation in the reasons recorded by the Assessing Officer that the assessee had failed to make a full and true disclosure of the relevant facts. In fact, there could be no such allegation because the assessee had clearly indicated the nature and contents of the TIUF and the treatment given by the assessee in its books of accounts. The same had also been examined by the Assessing Officer as aforesaid. Thus, in respect of the assessment years

1997-98 and 1998-99 this additional ground is also available in favour of the assessee/petitioner.

10. The position that a mere change of opinion would not entitle an Assessing Officer to reopen a completed assessment is well settled. The latest decision being of the Supreme Court in Civil Appeal No.2009-2011 of 2003 and Civil Appeal No. 2520 of 2008 decided on 18<sup>th</sup> January, 2010 which approves this Court's Full Bench decision in the case of **Commissioner of Income Tax vs. Kelvinator of India Limited:256 ITR 1 (Del.) (HC)**. The power of re-assessment is different from the power of review. The Assessing Officer has been given the power to re-asses under Section 147 upon certain conditions being satisfied. The Assessing Officer does not have the power of review. If a change of opinion were to be permitted as a ground for re-assessment then it would amount to granting a licence to the Assessing Officer to 'review' his decisions, which power he does not have.

11. Consequently, holding that initiation of the proceedings in question was based entirely on change of opinion, we find that the re-assessment proceedings are without jurisdiction. The notices under Section 147/148 of the said Act and the proceedings pursuant thereto stand quashed. We make it clear that in this writ petition we have considered the case only from the stand point of jurisdiction and not on the merits of the issues with regard to

taxability of the amount transferred to TIUF.

12. The writ petition stands allowed accordingly. No order as to costs.

**BADAR DURREZ AHMED, J**

**SIDDHARTH MRIDUL, J**

**JANUARY 25, 2010**

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