आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 1175/CHNY/2019**
निर्धारण वर्ष / Assessment Year: 2009-10

M/s. MRF Limited, New No.114, Greams Road, Chennai – 600 006.	v.	The ACIT, Large Tax Payer unit-2(i/c), Chennai.

PAN: AAACM4154G

(अपीलार्थी/Appellant) (प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Vikram Vijayaraghavan, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri Suresh Periasamy,JCIT

सुनवाई की तारीख/Date of Hearing : 30.12.2020
घोषणा की तारीख/Date of Pronouncement : 28.01.2021

आदेश /O R D E R

Per G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-9, Chennai, dated 28.02.2019 and pertains to the assessment year 2009-10.

2. The assessee has raised the following grounds in its appeal:-

1. The order of the Commissioner of Income tax (Appeals) is contrary to law, facts and in the circumstances of the case.
2. The Commissioner of Income tax (Appeals), erred in confirming the reopening of the assessment u/s 147 beyond the period of four years from the end of the assessment year.
2.1. The Commissioner of Income tax (Appeals), ought to have appreciated that the appellant has furnished all the materials and particulars fully and truly. Hence as per proviso to section 147, re-assessment is beyond the time and without jurisdiction inasmuch as the assessment under section 143(3) was completed on 19.12.2011 and notice under Section 148 was issued on 30.03.2016, beyond the period of four years from the end of the assessment year.
2.2. The Commissioner of Income tax (Appeals) ought to have appreciated that addition made in the reassessment has arisen only due to change of opinion and not on account of concealment of any particulars by the Appellant; hence the order is to be quashed as being without jurisdiction. CIT Vs.Kelvinator of India Ltd- 320 ITR 561 (SC).
2.3. The appellant relies on the decision of ITAT in Assessee's own case for the assessment year 2008-09 in ITA no-641/2018, wherein the ITAT has held that the reopening was invalid as there was no failure on part of the assessee to disclose fully and truly all material facts necessary for its assessment,
3. The Commissioner of Income tax (Appeals) erred in confirming the disallowance of deduction of additional wages paid to new workmen claimed u/s 8OJJAA amounting to Rs.43,14,651/-,
3.1. The Commissioner of Income tax (Appeals) ought to have appreciated that a workman who was employed subsequent to the date of 4th June in the preceding year and continues to be in service during the current year would qualify as a new regular workman in the year in which he completes 300 days.
4. Appellant craves leave to adduce additional evidence at the time of hearing.

3. The brief facts of the case are that the assessee company is engaged in the business of manufacture and sale of automobile tyres, tubes and automobile rubber products, filed its return of income for the assessment year 2009-10 on 30.09.2009 admitting

total income of Rs.59,55,81,270/-. The assessment for the impugned assessment year was completed u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 19.12.2011 and assessed total income at Rs.64,42,73,804/-. The case has been, subsequently reopened u/s.147 of the Act, for the reasons recorded as per which income chargeable to tax had been escaped assessment on account of excess claim of deduction u/s.80JJAA of the Act for Rs.79,73,230/-. Accordingly, notice u/s.148 of the Act dated 30.03.2016 issued. In response to notice, the assessee filed return on 12.04.2016 and simultaneously requested reasons for reopening of assessment and such reasons were furnished to the assessee. The assessee filed objections for reopening assessment and the same has been disposed off vide speaking order dated 28.11.2016. The assessment have been completed u/s.143(3) r.w.s. 147 of the Act on 28.12.2017 and determined total income at Rs.66,45,78,250/- after making addition towards disallowance of excess claim of deduction u/s.80JJAA of the Act, for Rs.72,36,875/-.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the ld.CIT(A), the assessee has challenged reopening of assessment on the ground that reopening of assessment is invalid because the original

assessment was completed u/s.143(3) of the Act and assessment has been reopened after a period of 4 years without making an allegation on the part of the assessee that there is a failure to disclose fully and truly all material facts necessary for assessment. The assessee has also relied plethora of judicial decisions including the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC) on change of opinion and has also cited the decision of ITAT, Chennai Bench in assessee's own case for the assessment year 2008-09. The ld.CIT(A) after considering the relevant submissions of the assessee had rejected legal ground taken by the assessee challenging reopening of assessment on the ground that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment because mere production of books of account or other evidences cannot be held to have disclosed all material facts necessary for assessment. In this case, assessment had been reopened for excess claim of deduction u/s.80JJAA of the Act and the disclosure made by the assessee on this claim is not sufficient as observed by the AO. Therefore, he opined that the assessee's contention that the AO has failed to record the failure of the assessee to disclose fully and truly all material facts necessary for assessment is thus held to be incorrect and thus rejected. The

CIT(A) has also rejected the alternative plea taken by the assessee on change of opinion in light of decision of the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., *supra* on the ground that the assessee has failed to furnish any evidences to prove that the AO has examined the issue in the original assessment order. In absence of any evidence to prove that the issue has been examined in the original assessment, the question of change of opinion does not arise. The ld.CIT(A) has also dismissed the issue on merit by following the decision of ITAT, Chennai in assessee's own case for assessment years 2010-11 to 2011-12, where the Tribunal has upheld disallowance of excess claim of deduction u/s.80JJAA of the Act. The relevant findings of the CIT(A) are as under:-

"5.3.2 At the outset it is to state that the AR of the appellant had objected to the reopening of the assessment, It was contended that all the facts relating to the reason for reopening, viz, claim of deduction u/s 80JJAA of the Act were adequately disclosed both in the return filed u/s 139(1) as well as in the course of assessment proceedings u/s 143(3) of the Act. It was further contended that when the primary facts necessary for assessment were fully and truly disclosed, AO is not entitled to change of opinion to commence reassessment proceedings. It was also argued that when a regular order of assessment was passed in terms of S. 143(3) of the Act, a presumption can be raised that such an order has been passed on application of mind and therefore to initiate reassessment would amount to change of opinion.

5.3.3 In this case, an assessment u/s. 143(3) of the Act was completed on 19.03.2011. Subsequently, a notice u/s. 148 of the Act was issued on

30.03.2016 and the assessment was reopened to withdraw the excess claim of deduction made u/s 80J4JAA by the appellant. Admittedly, this is a case of reopening after a period of four years from the end of the relevant assessment year where an assessment u/s. 143(3) of the Act was already completed.

5.3.4 In accordance with the provisions of section 147 of the Act, in a case where an assessment has been completed u/s. 143(3), no notice u/s. 148 can be issued after a period of four years from the end of the relevant assessment year unless the income has escaped assessment due to the failure on the part of the appellant to disclose fully and truly all material facts necessary for the assessment. Therefore, the crucial issue to be examined in this case is whether the escapement of income is on account of any failure on the part of the appellant to disclose fully and truly all material facts necessary for the assessment.

5.3.5 The escapement of income in the instant case is on account of incorrect claim of deduction made by the appellant u/s 80JJAA of the Act pertaining to wages paid to new workmen employed during AY's 2007-08, 2008-09 and 2009-l0.Since the deduction is allowable for employing only new workmen and also when such new workmen are employed for a period exceeding 300 days during the relevant assessment years, the crucial question that determines the eligibility of the appellant for the deduction is therefore, the correct disclosure of new workmen and the number of man days the new workmen completed during the relevant years under consideration.

5.3.6 The appellant, in the instant case, had claimed deduction for wages paid to 557 workmen pertaining to A Y 2009-10, whereas only 185 workmen were employed for more than 300 days. Thus, it can be seen that the deduction has been claimed in contravention to the relevant provisions of Section 8OJJAA of the Act. Claiming of excess deduction which the appellant is not entitled to, in my opinion, tantamounts to failure to disclose truly and fully all material facts pertaining to the deduction. AO never noticed the claim of excess deduction in the original assessment which led to the escapement of income.

5.3.7 During the course of appeal proceedings, the AR of the appellant has mentioned in the submissions filed that the AO had communicated to the appellant on the issue of reopening of the assessment as under:

> "merely producing the books of account or other evidences cannot be held to have disclosed fully and truly all material facts necessary for assessment."

5.3.8 A perusal of the above observation made by the AO, prima facie, reveals that the AO has given a finding that the appellant had failed to disclose truly and fully the relevant facts and evidences, Under these circumstances, the appellant's contention that the Assessing Officer has failed to record the failure of the appellant to disclose fully and truly all material facts necessary for assessment, is thus held to be incorrect and thus rejected.

5.3.9 It is to further state that it has been judicially held that the assessment can be reopened when there is no true and full disclosure by the appellant; Reliance is placed on the following judgements:

> The Hon'ble Bombay High court in the case of Indian Hume Pipe Co. Ltd 348 ITR 439had held that where reopening was beyond a period of four years from the end of the relevant Assessment Year, the assessee cannot merely rely upon the fact that if the AO had followed an enquiry with due diligence on the basis of the account books or other evidence produced by the assessee, he could have discovered the same. Mere production of account books or other evidence from which material evidence could with due diligence have been discovered by the assessing officer does not necessarily amount to a disclosure within the meaning of the first proviso to section 147.
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> The ITAT, Mumbai in the case of Manubhai Sons & Co., 18 SOT 297 also held that even if it is assumed that, from the documents produced, the assessing Officer, if he had been circumspect, could have found out the truth, he is not on that account precluded from exercising the power to assess income, which has escaped assessment. Therefore, mere disclosure in books of account or in other evidence does not necessarily mean that the assessee has disclosed fully and truly all material facts necessary for the assessment.

The Delhi High Court in the case of Honda Siel Power Products Ltd., 340 ITR 53 also held that the explanation to seetionl47 stipulates that mere production of books of account or other evidence is not sufficient. Merely because material lies embedded in material or evidence, which the Assessing Officer could have uncovered but did not uncover, is not a good ground to deny or strike down a notice for assessment, Whether the Assessing Officer could have found the truth but he did not, does not preclude the Assessing Officer from exercising the power of reassessment to bring to tax the escaped income.

The Kolkata High court in the case of ITO v. Electra Steel Castings Ltd, (2003) 264 ITR 410, 426, held that it cannot be accepted that there has been full and true disclosure of all material facts relating to the payment of the selling agency commission by mere disclosure of the selling agency agreement.

The Kerala High court in the case of Alappat JeweIs, 30 taxrnann. corn 212, had also held that mere production of books of account etc. is not enough for escaping reassessment. The assessee has .a duty to brIng to the notice of the officer that particular item in the books of account or portions of documents which are relevant.

The Punjab & Haryana High Court in the case of Sewak Ram 17 DTR 361 held that reassessment is permissible even on the basis of particulars disclosed in the return without any new material if the same was not considered while processing the return u/s 143(1) or making assessment u/s 143(3).

5.3.10 In view of the above cited judicial precedents and on the facts of the case, it Is hereby held that the reopening of assessment beyond the limit of four years is valid.

5.3.11 The appellant also contended that the reassessment proceedings are a result of change of opinion. The appellant placed reliance on the Hon'ble Supreme Court's judgement in the case of Kelvinator of India Ltd., 187 Taxman 312. It is to state in this regard that in the case of Kelvinator of India, the Hon'ble Court had held that after 01.04.1989

also the concept of 'change of opinion' must be treated as in built and the AO has power to reopen provided there is tangible material to come to the conclusion that there is escapement of income. The Hon'ble Court had also held that the AS does not have power of review, but has the power to reassess, The question of power of review comes only if the AS applied his mind to the facts of the case and took a course of action which he cannot subsequently change without any tangible material as that would amount to power of review.

5.3.12 In the case of the appellant, there is no information that the AO examined the issue in the original assessment order. The AR of the appellant was also unable to furnish that any questionnaire was issued by the AO on the said issue or that any submissions were furnished by the appellant during the course of original assessment proceedings inviting the attention of the AO on the said issue. No case is thus made out to show that there was an opinion already expressed by the AO on the matter which is now sought to be reviewed under the reassessment proceedings.

5.3.13 On similar facts, it has been held judicially that the reopening of assessment is valid under such circumstances in the following cases:

> "The Bombay High Court in the case of Export Credit Guarantee corporation of India Ltd., 350 ITR 651 held that failure of AO to apply his mind during the original assessment proceedings to what is on which assessment is sought to be reopened would form tangible materials and reasons to believe that income escaped assessment.
> The ITAT, Koikata in the case of Som Dutt Builders P. Ltd., 98 lTD 78 held that the change of opinion only comes to the rescue of the assessee where the Assessing Officer has taken one of the permissible views at the time of original proceedings and a wrong appreciation of law cannot be held as permissible view and that can always be changed for appreciating the law."

5.3.14 Relying on the above cited judicial precedents which are applicable to the facts of the appellant's case, the reopening of assessment u/s 147 is thus held to be valid as in the instant case also,

no view whatsoever was expressed by the AO in the original assessment proceedings with regard to the issue sought to be reopened.

5.3.15 At this juncture, the AR of the appellant relied upon the decision of the jurisdictional Chennai Tribunal rendered in its own case for the AY 2008-09 in ITA No. 641/Chny/2018 wherein the Hon'ble Tribunal had held that reopening of the assessment was invalid on the ground that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for its assessment.

5.3. 16 The order of the Hon'ble ITAT along with the submissions made by the appellant are duly considered. On perusal of the ITAT's order rendered in appellant's case for the AY 2008-09 it is noticed that the said ruling is not applicable to the facts of the appellant for the assessment year under consideration, as the facts are distinguishable. In the instant case, as stated earlier, there is a finding by the AO that the appellant had not disclosed fully and truly all material facts, This is evident from the observations of the AO which were communicated to the appellant as under

> 'merely producing the books of account or other evidences it cannot be held that the appellant had fully and truly disclosed all material facts necessary for assessment"

5.3.17 Since there is a finding brought on record by the AO with regard to the appellant's failure to disclose fully and truly all material facts necessary for assessment in the year under consideration, the requirement for reopening of the assessment beyond the period of four years is thus held to have been met in the instant case which was not the case in the ruling relied upon by the appellant. This distinguishing feature renders the decision relied upon by the appellant as not applicable to the facts of AY under consideration.

5.3.18 In the light of the detailed facts and circumstances of the case as discussed above, it is therefore held that the reopening beyond four years from the end of the relevant assessment year is valid.

(Grounds: Dismissed)

5.3.19 On merits of the case it is seen that AO had disallowed the appellant's claim of wages paid to new workmen in excess of 185

workmen who were found to be employed for less than 300 days during the year. In this regard it is to state that on similar facts, the Hon'ble Delhi Tribunal in the case of LG Electronics India P.Ltd 33 taxmann.com 465had held while confirming the disallowance, that the argument taken by assessee that employees employed in the preceding year who had not completed 300 days in that year should be taken in the current year when he completes 300 days, was of no force.

5.3.20 Further, it is also to state that the jurisdictional Tribunal in the appellant's own case in ITA Nos. 641 to 645/Chny/2018 for the AY's20 10-11 and 2011-1 2had upheld the disallowance made by the AO on the said issue vide its order dated 09.05.2018 by relying on the decision of ITAT Delhi as cited above, Respectfully, following the binding judicial precedent of the ITAT in the appel1ants own case cited supra, the disallowance of excess claim of deduction u/s 80JJAA of the Act is thus upheld.

5. The ld.AR for the assessee at the time of hearing submitted that the ld.CIT(A) erred in upholding reopening of assessment u/s.147 of the Act, ignoring the fact that the assessment has been reopened beyond the period of 4 years from the end of the assessment year and the original assessment has been completed u/s.143(3) of the Act and in such case, the assessment cannot be reopened unless the AO alleged that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment. In this regard, he relied upon decision of ITAT, Chennai Benches in assessee's own case for assessment year 2008-09 in ITA No.641/Chny/2018.

6. The ld.DR on the other hand strongly supporting order of ld.CIT(A) submitted that there is a failure on part of the assessee to disclose fully and truly all material facts necessary for assessment which is evident from the fact that the assessee has made excess claim of deduction even though the number of employees employed during the year is lesser than what was considered by the assessee to claim deduction u/s.80JJAA of the Act. The AO on the basis of materials available has formed reasonable basis for escapement of income and hence there is no error in the findings recorded by the ld.CIT(A) to reject ground taken by the assessee challenging reopening of the assessment.

7. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The provisions of Section 147 of the Act, deals with reopening of assessment, where it states that if the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of Section 148 to 153 of the Act assess or re-assess such income. Further, as per the proviso provided to Section 147 of the Act, if the assessment is reopened after 4 years from the end of the assessment year and such assessment was completed u/s.143(3) of

the Act, no action shall be taken after the expiry of 4 years from the end of relevant assessment year unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. In a case where assessment was reopened after 4 years, for invoking proper jurisdiction, the AO has to record the reason to believe that any income chargeable to tax had escaped by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In this case, on perusal of reasons recorded for reopening of assessment, we find that there is no allegation by the AO on failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, we are of the considered view that reopening of assessment is not based on sound footing and hence the impugned assessment order framed u/s.143(3) r.w.s. 147 of the Act, is illegal and liable to be quashed. Further, the issue is fully covered in favour of the assessee by the decision of ITAT, Chennai Benches in assessee's own case for assessment year 2008-09 in ITA No.641/Chny/2018, where the Tribunal after considering relevant facts had held that reopening of assessment without satisfying

second condition is invalid and liable to be quashed. The relevant findings of the Tribunal are as under:-

15. The original assessment for this assessment year was completed u/s. 143(3) on 24.12.2010. Subsequently, this assessment was re-opened u/s. 148 on 21.04.2015, after four years from the end of the assessment year. The assessee objected to the assessment, however, overruling the same the AO completed the assessment u/s. 143(3) r.w. 147. While doing so, he disallowed the deduction claimed by the assessee u/s. 80JJAA. Aggrieved, the assessee filed an appeal before the CIT(A), challenging the re-opening of the assessment and also on merits. The CIT(A) dismissed the appeal. Aggrieved, the assessee filed this appeal. The assessee primarily challenged the re-opening of the assessment.

15.1 The AR submitted that the assessee sought the reason for re-opening the assessment. He invited our attention to the copy of letter dated 21.04.2015 issued by the AO. The relevant portion is extracted as under:

"During the year, the assessee has claimed deduction u/s. 80JJAA for Rs.13,S56,082. As per the form 100A, the claim relates to employees employed during F.Y. 2005-06 for Rs 3,91,030 and during F Y. 2006-07 for Rs.7,65,052. As per the Annexure to Form 10DA, giving the list of employees, it is ascertained that, oil the employees employed during F, Y. 2005-06 has been employed for a period less than 300 days In the year in which they are employed.

As per the explanation 2 to sub section (2) of section 8OJJAA, "a regular workmen does not include, any other workmen employed for a period of less than 300 days during the previous year."

Since, in the present case, alt the new workmen employed in F V 2005-06, was employed for less than 300 days, the assessee is not eligible for deduction u/s. 80JJAA in respect of additional wages paid in F. Y. 2005-06.

Similarly, in FY. 2006-07 out of the existing employees of 434 Nos., only 20 new workmen were employed for more than 300 days in the year in which they are employed.

As per Explanation to section 80JJAA..

(1) "additional wages" means the wages paid to the new regular workmen in excess of one hundred workmen employed during the previous year:

Provided that in the case of an existing [factory], the additional wages shall be nil if the increase in the number of regular workmen employed during the year Is less than 10% of existing number of workmen employed in such (factory] as on the last day of the preceding year; Since, if F. Y. 2006-07 less than 10% of the new workmen employed Is employed for more than 300 days, the assessee is not eligible for deduction u/s. 80JJAA for additional wages paid in F.Y. 2006-07.

Accordingly, the assessee is not eligible for the entire claim of Rs.13,55,082 u/s. 80JJAA."

15.2 Inviting our attention to the above, the AR pointed out that no where the AO recorded that there is a failure on the part of assessee to disclose fully and truly all material facts necessary for its assessment in that assessment year. Hence, he pleaded that the re-opening of the assessment needs to be quashed. Per contra, the DR supported the order of the AO and the CIT(A)

15.3 We heard the rival submissions. It is clear from the reasons disclosed by the AO, supra, that the AO has not recorded the failure, if any, on the part of the assessee. The assessment is re-opened after four years from the end of the assessment year. In such case, for invoking proper jurisdiction, (i) the AO has to record the reason to believe that any income chargeable to tax escaped for any assessment year and (ii) any income chargeable to tax escaped assessment for such assessment year by reason of the failure on the part of the assessee. In this case, the second condition has not been fulfilled. Hence, the notice issued u/s. 148 has no legal sanction and hence the impugned assessment is quashed.

8. In this view of the matter and by following the decision of Co-ordinate Bench of the Tribunal in assessee's own case for assessment year 2008-09, we are of the considered view that

reopening of assessment is bad in law and liable to be quashed. Hence, we quash notice issued u/s.148 of the Act and consequent assessment framed u/s.143(3) r.w.s.147 of the Act.

9. The assessee has also challenged the additions made by the AO towards disallowance of excess claim of deduction u/s.80JJAA of the Act on merits. Since, we have quashed the re-assessment proceedings initiated u/s.147 of the Act, the issue raised on merit becomes academic in nature and does not require specific adjudication and hence the ground taken by the assessee on merits has been dismissed as infructuous.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 28th January, 2021 at Chennai.

Sd/-	**Sd/-**
(महावीर सिंह)	(जी. मंजुनाथ)
(MAHAVIR SINGH)	(G. MANJUNATHA)
उपाध्यक्ष /VICE PRESIDENT	लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated, the 28th January, 2021

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF.