REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2732 OF 2007

Income Tax Officer Ward No. 16(2) .... Appellant(s)

Versus

M/s TechSpan India Private Ltd. & Anr. .... Respondent(s)

J U D G M E N T

R.K. Agrawal, J.

1) The present appeal has been preferred against the impugned final judgment and order dated 24.02.2006 passed by the High Court of Delhi in W.P.(C) No 14376 of 2005 whereby a Division Bench of the High Court, while allowing the petition filed by the Respondent herein, quashed the notice dated 10.02.2005 issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the IT Act') and the order dated 17.08.2005 passed by the Income Tax Officer.

2) **Brief facts**:-

(a) M/s TechSpan India Private Ltd.-the Respondent is a private limited company incorporated under the Companies Act, 1956 and is engaged in the business of development and export of computer softwares and human resource services. It is also relevant to mention here that the Respondent-Company is also eligible for deduction under Section 10A of the IT Act.

(b) On 25.10.2001, the Respondent filed its return of income for the Assessment Year (AY) 2001-02 declaring a loss of Rs 3,31,301/-. The Respondent, while filing the return for the aforementioned period, has declared its income from two sources, namely, software development and human resource development but claimed expenses commonly for both. It also claimed deduction under Section 10 A of the IT Act for the income from the software development. The said return was accepted and accordingly intimated to the Respondent.

(c) The return was selected for regular assessment under Section 143(3) of the IT Act and a show cause notice dated 09.03.2004 was issued to the Respondent to show cause as to why the expenses claimed with regard to the allocation of common expenses between the two heads, viz., software

development and human resource development do not reveal any basis for such allocation. The issue was duly contested and decided vide order dated 29.11.2004 and the proceedings ended with a rectification of the Assessment Order under Section 154 of the IT Act while arriving at an income of Rs. 31,63,570/- which was fully set-off against the loss brought forward and the income was assessed as 'Nil' for the AY 2001-2002.

(d) Further, on 10.02.2005, a Notice was served upon the Respondent by the Revenue for re-opening the assessment under Section 148 on the ground that the deduction under Section 10A of the IT Act has been allowed in excess and the income escaped assessment works out to Rs. 57,36,811/- in the original assessment. The Respondent filed a detailed reply objecting to the re-assessment. However, by order dated 17.08.2005, the objections were rejected and reassessment was approved by the Revenue.

(e) Being aggrieved, the Respondent challenged the above said show cause notice dated 10.02.2005 as well as the order dated 17.08.2005 before the High Court by filing a Writ

Petition (C) No. 14376 of 2005. Vide judgment and order dated 24.02.2006, the High Court set aside the show cause notice dated 10.02.2005 as well as the re-assessment order dated 17.08.2005.

(f) Being aggrieved, the Revenue has filed this appeal before this Court.

3) Heard Mr. Rajesh Ranjan, learned counsel for the Appellant and Mr. C.S. Agarwal, learned counsel for the Respondents and perused the records.

Point(s) for consideration:-

4) The only point for consideration before this Court is whether the re-opening of the completed assessment is justified in the present facts and circumstances of the case?

Rival contentions:-

5) Learned counsel for the Appellant contended that the Assessing Officer (AO) was well within his powers to issue the show cause notice under Section 148 as the deduction that was allowed under Section 10A was in excess and had escaped assessment for which re-assessment proceedings can be issued under Section 147. He further contended that the High

Court has erroneously held that the re-assessment proceedings initiated under Section 147 of the Act are illegal and not sustainable in the eyes of law. Learned counsel finally contended that the impugned judgment of the High Court is erroneous in the eyes of law and is liable to be set aside.

6) Learned counsel appearing on behalf of the Respondent submitted that the ground for re-assessment proceedings under Section 147 in the present case is nothing but merely a change of opinion on the same material facts of the case and no new fact has come to the knowledge of the Appellant enabling the said authority to initiate re-assessment proceedings under the IT Act, and therefore, the High Court was right in allowing the writ petition in light of the fact that mere change of opinion cannot be a ground for re-assessment.

7) He further submitted that the ground on which the re-assessment proceedings were initiated was well considered by the competent authority during the time of original assessment proceedings. He further contended that the order dated 17.08.2005 was not a speaking order and was rightly set aside by the High Court. Learned counsel finally submitted

that the High Court has rightly set aside the show cause notice dated 10.02.2005 and the order dated 17.08.2005 and no interference is called for by this Court in the matter.

Discussion:-

8) To appreciate the present controversy between the parties, it would be appropriate to refer to Sections 147 and 148 of the IT Act. For ready reference, relevant portion of Sections 147 and 148 of the Act are reproduced below:-

> **"147. Income escaping assessment:--** If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):
> Provided that where an assessment under sub- section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub- section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year:
> x x x
> x x x"

> **"148. Issue of notice where income has escaped assessment**.-(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139:
> x x x
> x x x
> (2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his

change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

9) Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.

10) To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The

word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

11) It is well settled and held by this court in a catena of judgments and it would be sufficient to refer ***Commissioner of Income Tax, Delhi*** vs. ***Kelvinator of India Ltd.*** (2010) 320 ITR 561(SC) wherein this Court has held as under:-

> "5....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".....
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> 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.
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> 6. 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 re-assessment 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.
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> 7. 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 1st April, 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."

12) Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings.

13) The fact in controversy in this case is with regard to the deduction under Section 10A of the IT Act which was allegedly allowed in excess. The show cause notice dated 10.02.2005 reflects the ground for re-assessment in the present case, that

is, the deduction allowed in excess under Section 10A and, therefore, the income has escaped assessment to the tune of Rs. 57,36,811. In the order in question dated 17.08.2005, the reason purportedly given for rejecting the objections was that the assessee was not maintaining any separate books of accounts for the two categories, i.e., software development and human resource development, on which it has declared income separately. However, a bare perusal of notice dated 09.03.2004 which was issued in the original assessment proceedings under Section 143 makes it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 09.03.2004 was that the assessee was not maintaining any separate books of account for the said two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under

Section 10A of the IT Act was well considered in the original assessment proceedings itself. Hence, initiation of the re-assessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under Section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings.

14) In light of the forgoing discussion, we are of the view that impugned judgment and order of the High Court dated 24.02.2006 does not call for any interference. The appeal is accordingly dismissed with no order as to costs.

.....J.
(R.K. AGRAWAL)

.....J.
(MOHAN M. SHANTANAGOUDAR)

NEW DELHI;
APRIL 24, 2018.