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

\+ **Date of Decision:14.11.2019**

% ITA 510/2019

PR. COMMISSIONER OF INCOME TAX- 2 ..... Appellant
Through: Mr. Zoheb Hossain, Advocate.

versus

M/S CENTURY METAL RECYCLING PVT. LTD..... Respondent
Through: Mr. Piyush Kumar Kamal with Mr. Gautam Jain, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

VIPIN SANGHI, J. (ORAL)

1. We have heard learned counsels and proceed to dispose of the appeal at this stage. The following question of law arises and is framed for our consideration in this appeal:

> *"Whether on the facts and in the circumstances of the case and in law, ITAT is correct in law and fact by quashing the reassessment proceedings made by the AO"*

2. The original assessment order was passed under Section 143(3) of the Act assessing a total loss of Rs. 3,63,58,446/- against the declared loss of Rs. 3,80,64,292/-. A notice under Section 148 was issued to the assessee for reopening the assessment on the basis of an information received from the Office of the ADIT (Inv) –II Faridabad, premised on Survey operation

conducted on the assessee on 26.03.2015. It was alleged that during the survey proceedings, evidence of discrepancies/ tax evasion was found and it emerged that the assessee during the Financial Year 2008-2009 was engaged in the sale of Aluminum Dross, which emerged during the manufacture of Aluminum alloy ingots in the guise of "Ash and Residue", with the intention to suppress the actual value of aluminum dross and to evade payment of appropriate duty on the actual value thereof. Pursuant to the said notice under Section 148 of the Act, a reassessment order was passed making an addition of Rs. 13,99,00,275/- which rejecting the respondent's arguments and holding that the respondent had sold Aluminum Dross valued at Rs. 13.19,00,275/- during the financial year fraudulently by issuing sale invoices of Ash and Residue to suppress the actual value thereof clandestinely.

3. The CIT (A) upheld the action of the reopening under Section 148 of the Act, but deleted the addition of Rs. 13,19,00,275/- primarily on the basis that there was no evidence that the assessee has sold Aluminum Dross during the year, or that it had under-reported its sales. The CIT (A) also noticed that the CESTAT had set aside the findings in the adjudication order–holding that the revenue had failed to bring out any corroborative evidences in the form of any cash transaction, or other evidences to support its findings.

4. The revenue preferred the appeal before the learned Tribunal being ITA No. 6657/Del/2017 for the assessment year 2009-10, wherein the respondent preferred CO No. 36/Del/2018. The Tribunal rejected the appeal preferred by the Revenue primarily relying upon on the order passed by the CESTAT taken note of hereinabove.

5. The submission of Mr. Hossain, learned senior standing counsel for the revenue is that the approach of the Tribunal in rejecting the appeal on the basis of the order passed by the CESTAT was not correct inasmuch, as, the revenue has preferred an appeal before the Punjab and Haryana High Court against the order of the CESTAT. A copy of the order passed by the CESTAT has been tendered in Court by learned counsel for the respondent. The same bears different dates different places.

6. Be that as it may, there is no dispute that the Commissioner of Central Excise has preferred appeals before the Punjab and Haryana High Court being C.A. No. 57, 58, 66 to 68 of 2017, against the order of the CESTAT. This position is not disputed by learned counsel for the respondent assessee.

7. Mr. Hossain submits that in view of the said appeal being preferred, the Tribunal should have adopted the same course as prescribed by this Court in ***A.T. Kearney India Ltd. v. Income Tax Officer***, (2015) 371 ITR 179. In that case, though the appeal had not been preferred against the order, setting aside the order which formed the basis for issuance of notice under Section 148, the period of limitation was still available. In that light, the Division Bench observed as follows:

> *"6. We find that there is one factor which is different from that case and, that is, that while in the previous case no appeal had been filed against the Tribunal's order, in the present case the Tribunal's order had been passed only on 26.08.2014 and there is still time for filing of the appeal on the part of the Revenue.* ***In these circumstances, while the very basis for the issuance of the notice under Section 148 no longer survives, we are of the view that as there is still time for the filing of an appeal by the Revenue before this court, a different order would be required to be passed.***

7. It is clear that as the position stands today, the reasons do not survive. However, subsequently the position may be altered in case the Revenue files and appeal and succeeds therein. Therefore, the Revenue also has to be protected. Consequently, we are inclined to adopt the approach indicated in National Agricultural Co-operative Marketing Federation of India Ltd. v. Assistant Commissioner of Income Tax - Circle 32(1), W.P.(C) 5895/2010 decided on 07.08.2014 wherein we passed the following order:-

"In these circumstances, we find that as of now, the very basis of initiating the re-assessment proceedings by virtue of the notice dated 02.02.2010 issued under Section 148 of the Income Tax Act, 1961 does not survive. Therefore, we are disposing of this writ petition with liberty to both sides to seek revival in case the need arises. We make it clear that in case it is ultimately held in favour of the revenue, then the revenue shall be entitled to revive its proceedings pursuant to the notice under Section 148 of the said Act and the assessee shall not take up the plea of limitation.

The writ petition stands disposed of accordingly."

8. Consequently, we direct that the re-assessment proceedings stand closed and the present writ petition is disposed of with liberty to both sides to seek revival in case the need arises. We make it clear that if the case is ultimately decided in favour of the Revenue in respect of the assessment year 2009-10, then the Revenue shall be entitled to revive its proceedings pursuant to the impugned notice under Section 148 of the said Act and the assessee shall not take up the plea of limitation. *As of now, the re-assessment proceedings initiated by virtue of the impugned notice under Section 148 does not survive. We are making it clear that we have not expressed any opinion with regard to the validity of the issuance of the notice under Section 148 on the date on which it was issued."* *(emphasis supplied)*

8. Mr. Hossain submits that, accordingly, the Tribunal should have disposed of the appeal while reserving the liberty of the appellant/ revenue to

revive the re-assessment proceedings, in case the order – which forms the basis of issuance of the notice under Section 148 of the Income Tax Act being eventually upheld, while making it clear that the assessee could not be entitled to raise a plea of limitation.

9. Learned counsel for the respondent has no objection to the said course of action being adopted.

10. Accordingly, we answer the question framed in favour of the Revenue, and we direct that the appeal preferred by the revenue before the Tribunal is deemed as disposed of with liberty to both sides to seek revival in case need arises. We make it clear that, in case, the order, which forms the basis of issuance of the notice under Section 148 of the Act, is upheld and sustained, eventually, then the Revenue shall be entitled to revive its proceedings pursuant to notice under Section 148 of the Act and the assessee shall not take up the plea of limitation. As of now, the re-assessment proceedings initiated by virtue of the notice under Section 148 do not survive due to the subsisting order of the CESTAT.

11. We make it clear that we have not expressed any opinion with regard to any aspect on merits of the case.

12. The appeal stands disposed of.

VIPIN SANGHI, J

SANJEEV NARULA, J

NOVEMBER 14, 2019
N.Khanna