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

+ ITA Nos. 1379/2009 & 1410/2009

THE COMMISSIONER OF INCOME TAX Appellant
Through Mr. Sanjeev Sabharwal, Sr.
Standing Counsel.

versus

JAGSON INTERNATIONAL LTD. Respondent
Through Mr. C.S. Aggarwal, Sr.
Advocate with Mr. Rajiv Saxena,
Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

ORDER
29.02.2012

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Heard.

2. Admit.

3. The following substantial question of law is framed:-

“Whether the Income Tax Appellate Tribunal was right in holding that exercise of jurisdiction by the Assessing Officer under Section 147/148 of the Income Tax Act, 1961 was non est and invalid?”

4. As we have heard the learned counsel for the parties, we proceed to pronounce our decision.

5. The respondent assessee-Jagson International Limited is



a public limited company. For the assessment year 2001-02, the respondent assessee filed its return of income on 29th October, 2001 declaring taxable income of Rs.48,61,651/-. Assessment order dated 24th March, 2003 under Section 143(3) of the Act was passed computing the total income at Rs.2,81,20,170/- as against the returned income mentioned above. The Assessing Officer recomputed the deduction under Section 33AC of the Act. The Assessing Officer also examined the deduction under Section 80 IA of the Act and the deduction was recomputed.

6. Subsequently, the Assessing Officer recorded “reasons to believe” dated 6th January, 2005 to initiate the reassessment proceedings, which read as under:-

“(a) The assessee had claimed deduction u/s 33AC on the ground that the assessee is in the business of operation of ships. From the perusal of record, it is noticed that the assessee purchased a drilling ship called Deep Sea Matdrill and the same was used for exploration/drilling purposes as per agreement with ONGC. Such a business of deriving income from drilling rig cannot be termed as business of operation of ships. Deduction u/s 33AC was claimed at Rs. 9,23,56,432/- and allowed at Rs. 6,91,25,704/- u/s 143(3) of the Act. Therefore, the deduction u/s 33AC has wrongly been claimed and allowed.

(b) The assessee had claimed deduction u/s



80IA amounting to Rs. 74,89,845/- resulting to operation of ship Deep Sea Matdrill. This deduction is not admissible under the provisions of Section 80-I(3) if the ship was owned by a person resident in India and used it in Indian territorial waters prior to acquisition. From the perusal of record, it is seen that this ship was purchased by the assessee company from the earlier owner who was operating it in Indian territorial waters prior to assessment year 1993-94. Further this ship was used for drilling exploration purposes, therefore, the deduction u/s 80IA is not admissible on such drilling rig. Therefore the deduction u/s 80IA was wrongly claimed and allowed.

(c)The assessee had claimed deduction u/s 80IA in respect of income derived from new port infrastructure facilities. As per the provisions of section 80-IA(4), the deduction is admissible when an agreement is entered into with the port authorities and the new facilities starts operating on and after 1.4.1995. The perusal of record reveals that the assessee entered into an agreement with the trustees of New Mangalore Port on 9.2.1990. The deduction claimed on this account is not admissible in the case of the assessee.

(d)The assessee had claimed depreciation amounting to Rs. 93,26,271/- @ 25% on addition of Rs. 3,69,87,480/- made to Plant & Machineinry during the year. From the perusal of record. ot is noticed that the said addition was made after Sept., 2000 on which depreciation @ 12.5% (50% of 25%) is admissible. Therefore, the asessee has claimed depreciation of rs. 46,23,435/- in excess.

(e)The assessee has shown dividend



income of Rs. 1,21,07,517/- and has claimed as exempt u/s 10(33) of the Act. While making assessment, the expenses incurred on earning of dividend income has not been deducted as per the provisions of section 14A of the Act.

(f)The assessee has claimed depreciation @ 25% on Port infrastructure unit whereas the same is admissible @ 20%, therefore an amount of Rs. 8,37,717/- has been allowed in excess.

Total escapement of income comes to Rs. 8,20,76,701/- in respect of items at (a) to (f) I have reason to believe that an income of Rs. 8,20,76,701/- chargeable to tax has escaped assessment for the assessment year 2001-02.”

7. The tribunal by the impugned order, as is apparent from the question of law, has held that the aforesaid “reasons to believe” do not justify reopening and satisfy the requirements under Section 147/148 of the Act.

8. With regard to reasons (a), (b) and (c), the tribunal has observed that these issues were examined at the time of original assessment and, therefore, amount to change of opinion. With regard to reason (e), the tribunal has relied upon the proviso to Section 14A and held that reopening is not permissible under the said Section for ground (e). With regard to ground (f), the tribunal has observed that the schedule of depreciation clearly shows that the respondent assessee had claimed depreciation



@ 25% for port infrastructure.

9. This Court while issuing notice on the present appeal, vide order dated 22nd December, 2009 had held as under:-

“ Re-assessment proceedings were initiated by the Revenue, inter alia, stating that income had escaped assessment in respect of so many items. Additions were made on account of as many as six heads, which are taken note of by the Tribunal in the impugned order. Insofar as additions at (a) to (c) are concerned, on these very grounds the Revenue had earlier filed ITA Nos. 57 & 341/2009, which have since been dismissed. Qua additions at (e) are concerned, the Tribunal has stated that there is a subsequent amendment to Section 14A by the Finance Act, 2002 vide which proviso to the said section is added as per which the Assessing Officer is debarred from re-assessing the income under Section 147 of the Income Tax Act, 1961 qua this head. Insofar as addition at (f) is concerned, the ITAT has stated that a perusal of schedule of depreciation clearly shows that the rate of depreciation, as provided in the Schedule for Port Infrastructure Unit is 25% and, therefore, there was no case for reopening.

In these circumstances, we issue notice only qua addition as per clause (d), returnable on 11th May, 2010.”

10. Thus, the notice was issued in respect of ground (d) alone and not in respect of grounds (a) to (c), (e) and (f).

11. During the course of hearing before us, learned counsel for the appellant has drawn our attention to the order dated 7th



December, 2011, which reads as under:-

“ Vide order dated 22nd December, 2009 notice was issued in respect of ground d. It is noticed that ground e pertains to proviso to Section 14A, which was introduced and brought into the statute book by the Finance Act, 2002. The effect of the said proviso was examined by this Court in W.P. (C) No. 9036/2007, ***Honda Siel Power Products Ltd. vs. DCIT & Anr.*** Ld. counsel for the parties will examine the said decision and whether it will apply to the facts of the present case.

Relist this appeal for hearing and final disposal on 15th February, 2012.”

12. He has also referred to the decision of this Court in ***Honda Siel Power Products Ltd.*** (supra) and the observations made in that case with reference to the proviso to Section 14A. The contention of the Revenue may be correct, but in view of the order dated 22nd December, 2009, we cannot and should not go into the said aspect. We may note that the Revenue has not preferred any application for review or filed any appeal against the order dated 22nd December, 2009.

13. In these circumstances, we are only examining ground (d) and whether the reopening on the said ground was justified.

14. The Assessing Officer with reference the ground (d) has made addition of Rs.46,23,435/- in the reassessment order



dated 28th February, 2006. In the first appeal, the said addition was sustained with the CIT(Appeals) specifically recording as under:-

“Ground No. 4: is raised against is raised against disallowance of Rs.46,23,435/- on account of excess claim of depreciation on plant and machinery. The assessing officer has noticed that certain additions have been made after September, 2000 on which assessee is entitled to depreciation @ 12.5% for which the appellant has not filed any explanation before the assessing officer. Before me the AR has drawn my attention to the proceeding u/s 144 A of the Income Tax Act. It was contended that, assessment was completed on 28.2.2006 in hurried manner providing reasonable and sufficient opportunity to the assessee. The AR has drawn my attention to an application under section 144a filed before Additional Commissioner of income tax on 27.12.2005 for which reply has been furnished by the assessing officer on 07.02.2006. After seeking additional time the appellant filed reply to the report submitted by the DCIT on 23.2.2006(sic) in which various objection have been raised regarding reopening of the assessment as well as claim of deduction made under Section 33 AC and 80 IA. On 24.02.2006 the assessing officer replied to the preliminary objections regarding reassessment as well as claim of deduction made under Section 33 AC and 80 IA. On 24.02.2006 the assessing officer replied to the preliminary objections regarding reassessment proceedings by providing an opportunity on 27.2.2006 the appellant requested for on 27.2.2006 providing copy of observation and directions made by Additional Commissioner of Income Tax in



response to application made under Section 144A on 28.2.2006 the assessing officer has completed the assessment without providing any further opportunity. It would be seen that during the course of all these correspondence only legal issues regarding reopening to the assessment as well as claim of deduction have been discussed because reassessment itself was bad in law and reply to other reasons and filing explanation on merits would be frivolous and without any meaning. The assessing officer has not provided any opportunity to the assessee for furnishing any explanation towards this.

The submission made by the Id. A.R. of the appellant has carefully been considered but I do not find any substantial support in his contention. The Assessing Officer had specially asked to submit the details and evidences for claiming the full depreciation but same has not been complied with. The contention of the Id. A.R. of the appellant that he has not given sufficient opportunity to give the reply to the queries of the Assessing Officer in respect of the claim of the full depreciation has not been found convincing and satisfactory. In fact, the opportunity for submitting the various documents in support of its claim has not been availed even in the course of appellate proceeding although many dates of hearings were fixed. Therefore, the findings of the Assessing Officer that the additions to certain plant and machineries have been made after September, 2000 and assessee is entitled for depreciation @ 12.5% only prevails. I uphold the decision of the Assessing Officer to allow the depreciation of 121.5% bon the pant(sic) and machineries which were added after September, 2000. Appellant's appeal on this ground stands dismissed."



15. The tribunal in the impugned order in paragraph 12 has dealt with the said contention and observed as under:

“12. In regard to the reasons recorded in clause (d), it is noticed that the reasons also do not show the fresh information which has come to the possession of the AO to show that the plant and machinery has been added after September, 2000 but on which depreciation has been claimed.....”

16. This is the only discussion by the tribunal on the said aspect in the impugned order. The aforesaid discussion does not meet the requirements of law. The order passed by the tribunal is cryptic and does not deal with the contentions and the issues raised with reference to the reopening under Section 147 of the Act. We have referred to and quoted the order of the CIT(A), to highlight the factual matrix and not for any other purpose. The “reasons to believe” have to be tested on the facts/material when the reasons are recorded. As noticed above, the tribunal has not examined and dealt with the said aspect as mandated and required. We accordingly accept the appeal by the Revenue and pass an order of remand directing the tribunal to decide the issue afresh. This is necessary as the respondent assessee has filed before us several documents,



which it is stated, were also filed before the tribunal to show and justify that the date of acquisition of assets was prior to 30th September, 2000 and, therefore, full depreciation in the entire year and not 50% depreciation @ 12.5% was available.

17. Accordingly, we answer the aforesaid question of law in affirmative in favour of the Revenue, but limited to the extent indicated above. We also record that in case the reopening is upheld by the tribunal, necessary consequences will flow. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

**FEBRUARY 29, 2012
VKR**