

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

ITA No. 309/2006

Decided on: May 22, 2007

**COMMISSIONER OF INCOME TAX** ..... Appellant  
Through Mrs. P.L. Bansal

versus

**M/S EICHER LTD.** ..... Respondent  
Through Mr. Ajay Vohra with  
Ms. Kavita Jha

CORAM:

HON'BLE MR. JUSTICE MADAN B. LOKUR  
HON'BLE MR. JUSTICE V. B. GUPTA

MADAN B. LOKUR, J. (Oral)

The Revenue is aggrieved by an order dated 14th July, 2005 passed by the Income Tax Appellate Tribunal, Delhi Bench 'C' in ITA No.3966-67/Del/2002 relevant for the assessment years 1993-94 and 1994-95.

2. In this appeal, we are concerned only with the assessment year 1993-94.

3. The Assessee had filed its return of income on 27th December, 1993 and declared a loss. The Assessing Officer completed the assessment under the provisions of Section 143(3) of the Income Tax Act, 1961 on 7th December, 1995.

Subsequently, he sought to reopen the assessment by issuing a notice dated 30th March, 2000 under Section 148 of the Act. The reason for reopening the completed assessment was to tax the waiver of interest allegedly not offered to tax by the Assessee.

4. It appears that the Assessee was facing some financial problems and, therefore, it had taken term loans from some banks and financial institutions. The Assessee was unable to pay interest on these loans either to the banks or to the financial institutions. Since the Assessee did not pay any interest to the banks and financial institutions, it did not claim any expenditure or any deduction on this account.

5. Subsequently, it appears that some negotiations took place between the Assessee and the banks and financial institutions with the result that the outstanding interest amount against the loans taken by the Assessee was converted into a "Funded Interest Term Loan." This was, of course, in addition

to the earlier amounts that were taken by the Assessee as loans from the banks and financial institutions.

6. In respect of assessment years 1988-89 to 1991-92, the interest outstanding was treated as discharged and replaced by an equivalent amount of loan. The amount was treated as a deduction under Section 43B of the Act and necessary book entries were made in this regard.

7. For the assessment year 1993-94, as already mentioned, the Assessee filed its returns which were accepted by the Assessing Officer but the assessment was sought to be reopened. It may be mentioned that in the original return filed by the Assessee it had claimed that the waiver of the funded interest was not liable to tax under Section 41(1) of the Act and the Assessee had appended the following remark to the return: -

“Waiver of Funded Interest Loan credited to P and L account in the books not taxable as the same is a Capital Receipt”

8. When the Assessee received a notice under Section 148 of the Act, it raised an objection and contended that the reopening was based on a change of opinion by the Assessing Officer and not because the Assessee had not fully and truly disclosed all material facts. In support of this submission, the Assessee pointed out that in the original assessment proceedings, the Assessing Officer had sent a questionnaire to which the Assessee had responded by a letter dated 8th November, 1995. In that letter, the Assessee had clearly pointed out that it had approached the banks and financial institutions for fresh loans to repay the arrears of interest and principal. The banks and financial institutions had agreed to the same and the principal and interest thereon were re-scheduled and the interest arrears were funded and treated as a fresh interest bearing loan.

It was submitted that as such the entire arrears of interest upto the relevant previous year were treated as having been paid to the banks and financial institutions out of the fresh interest bearing loans. According to the Assessee all these facts were before the Assessing Officer who chose not to give a finding on them, but accepted the contention of the Assessee and did not treat the interest amount that had been waived as the income of the Assessee.

9. The Assessing Officer rejected the contention of the Assessee that this case was merely one of change of opinion on the same facts. Feeling aggrieved, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) who allowed the appeal and thereafter the Revenue preferred an appeal before the Tribunal, which was dismissed by the impugned order and that is how the Revenue is before us under Section 260-A of the Act.

10. The Tribunal noted the fact that for the earlier assessment years 1988-89 to 1991-92, the Revenue had accepted the decision arrived at by the Assessing Officer. Adverting to the letter sent by the Assessee on 8th November, 1995, the Tribunal came to the conclusion that the Assessee had disclosed all relevant material facts at the time when the original order of

assessment was made and in the letter dated 8th November, 1995 the Assessee had explained its stand regarding non-taxability of the amount. Since there was a full and true disclosure by the Assessee, there was no reason for the Assessing Officer to come to the conclusion that income chargeable to tax had escaped assessment. In other words, the Tribunal was of the view that the case was really one of change of opinion.

11. Learned counsel for the Revenue relied upon Consolidated Photo and Finvest Ltd. vs. Assistant Commissioner of Income Tax, (2006) 281 ITR 394, wherein a Division Bench of this Court considered the case law and came to the conclusion that in principle a mere change of opinion would be applicable only to a situation where the Assessing Officer had taken a conscious decision on the matter in issue. It was held that it would have no application where the assessment order does not record a finding on the aspect which formed the basis for reopening the assessment.

12. In response, learned counsel for the Assessee drew our attention to Commissioner of Income Tax v. Kelvinator of India Ltd., (2002) 256 ITR 1, wherein the Full Bench of this Court had taken a completely contrary view and it was submitted that the Division Bench did not follow the Full Bench. It was pointed out that the Full Bench held that when a regular order of assessment is passed in terms of Section 143(3) of the Act, a presumption can be drawn that such an order has been passed on due application of mind. Reference was also made to Section 114(e) of the Indian Evidence Act for drawing a presumption to the effect that judicial acts and official acts are performed in a regular manner. The Full Bench was of the view that if it be held “.....that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi judicial function to take benefit of its own wrong.”

13. Before the Full Bench, a decision of the Gujarat High Court, namely, Praful Chunilal Patel v. Makwana (M.J.), CIT (Asst.), (1999) 236 ITR 832, was relied upon by learned counsel for the Revenue and the Full Bench clearly stated that it was, with respect, unable to accept the view propounded in that judgment. Notwithstanding this, in Consolidated Photo and Finvest Ltd., the Division Bench found itself in respectful agreement with the view of the Gujarat High Court.

14. Subsequently, a similar issue came up before another Division Bench of this Court in KLM Royal Dutch Airlines v. Assistant Director of Income Tax, (2007) 208 CTR (Delhi) 33. The Division Bench noted the conflict between the decision of the Full Bench and the Division Bench of this Court and quite naturally concluded that since the view expressed by the Division Bench cannot be reconciled with the view of the Full Bench, it must be held that the Division Bench did not lay down the correct law. Following the view expressed in KLM Royal Dutch Airlines, we are of the view that it would not be correct on our part to overlook the decision of the Full Bench in Kelvinator of India Ltd and

rely upon the decision of the Division Bench in Consolidated Photo and Finvest Ltd. That would be subversive of judicial discipline.

15. In Hari Iron Trading Co. v. Commissioner of Income Tax, (2003) 263 ITR 437, a Division Bench of Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions / disallowances are made. We agree.

16. Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the Assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the Assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the Assessee should be made to suffer the consequences of that lapse.

17. In so far as the present appeal is concerned, we find that the Assessee had placed all the material before the Assessing Officer and where there was a doubt, even that was clarified by the Assessee in its letter dated 8th November, 1995. If the Assessing Officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the Assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the Assessing Officer at the time of framing the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the Assessee.

18. In sum and substance, this was the decision rendered by the Tribunal and we do not find any fault in the view taken. Consequently, we are of the view that since the case is one of a mere change of opinion, that does not justify the Assessing Officer's reopening the assessment of the Assessee.

19 No substantial question of law arises. The appeal is, therefore, dismissed.

Madan B. Lokur, J  
V.B. Gupta, J

May 22, 2007