

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"E" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.2551&2129/MUM/2012

निर्धारण वर्ष/Asstt. Year:2006-07

The Shipping Corporation of India Ltd. Shipping House, 10 th Floor, 245, Madam Cama Road, Nariman Point, Mumbai-400021 PAN: AAA CT1 524 F	Vs.	Additional Commissioner of Income Tax LTU 29 th Floor, World Trade Centre, Colaba, Mumbai-400006
Assistant Commissioner of Income Tax LTU Centre-I, 28 th Floor, World Trade Centre, Cuffe Parade, Mumbai-400005		The Shipping Corporation of India Ltd. Shipping House, 10 th Floor, 245, Madam Cama Road, Nariman Point, Mumbai-400021 PAN: AAA CT1 524 F

(Applicant)		(Respondent)
Assessee by :		Shri Nitesh Joshi
Revenue by :		Shri R. Manjunatha Swamy, CIT

सुनवाई की तारीख/**Date of Hearing** : 11/11/2019

घोषणा की तारीख /**Date of Pronouncement**: 29/11/2019

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned cross appeals have been filed one by the assessee and one by the Revenue against the orders of the Learned Commissioner of Income Tax (Appeals)-24, Mumbai dated 06/01/2012 (in short "Ld.CIT(A)") arising in the matter of assessment order passed under s. 143(3) r.w.s. 147 of

the Income Tax Act, 1961 (here-in-after referred to as "the Act")
dt.28/12/2010 relevant to the Assessment Year 2006-07.

First we take up ITA No. 2551/MUM/2012, an appeal by the assessee.

2. The assessee has raised the following grounds of appeal:

"Ground no 1: Re assessment U/s.147

The Commissioner of Income Tax (Appeals)(Hereafter referred to as CIT(A) failed to appreciate that the jurisdictional pre-conditions necessary for invoking the jurisdiction under sections 147 to 151 of the Act, had not been fulfilled in the present case and therefore the re assessment order passed by the Assessing officer (hereafter referred to as A.O.) was illegal and bad in law.

Ground no 2: Income under the head Prior Period Adjustments:

The CIT (A) erred in upholding the action of the A.O. in assessing the prior period income of Rs. 30,75,08,600 & Rs. 41,188 He failed to appreciate that the prior period. income constituted profits from core activities and that could not be brought to tax under The Act.

Ground No 3: Additions under Sundry Receipts;

3.1 *The CIT (A) has erred in holding that 'sundry receipts Rs.10.51 crore were lot arising out of the core activity of operation of qualifying ships and the provisions of Tonnage Tax scheme was not applicable to these receipts.*

3.2 *In the alternative and without prejudice to the above since the sundry receipts are assessed to tax as business income, The CIT (A) ought to have granted deduction in respect of expenditure laid out or expended wholly and exclusively for the purpose of its business and earning such income.*

3.3 *The CIT A failed to appreciate that*

(i) *expenses Rs. 10.88 crores incurred on account of rent to take premises on lease which were subsequently let out to employees from whom income by way of house rent was earned.*

(ii) *expenses relating to insurance claim of Rs 8.41 crore incurred in relation to receipts of Rs 8.41crore on account of insurance claims due to Expenses/losses on P & I claims which is recovered and shown as income.*

(iii) *expenses Rs. 1.29 crore were claims on Employee Post Retirement Medical Scheme.*

4. *On the Facts and circumstances and as per provisions of law CIT (A) erred in confirming the interest levied under section 234D.*

Your appellant crave leave to add, amend, alter, modify, cancel, withdraw any of the ground/s of appeal before final hearing of appeal."

3. The assessee in the first ground of appeal has challenged the validity of the re-assessment framed under section 147 of the Act on the ground that it

was initiated on the same set of documents which were available during the original assessment proceedings under section 143(3) of the Act.

4. Before we embark an enquiry whether the proceedings under section 147 of the Act were initiated based on the same set of documents which were available during the original assessment proceedings under section 143(3) of the Act, it is pertinent to refer the reasons recorded for initiating the proceedings under section 147 of the Act. The reasons recorded reads as under:

“ The return of income was filed on 28/11/2006 declaring total income of Rs. 194,71,41,186/-. This was the second year of assessee under the tonnage tax scheme u/s 11 5V of the I. T. Act, 1961.

The return was processed U/s 143(1) and notice u/s 143(2) was served within the stipulated time period Order u/s 143(3) dated 05/12/2008 was passed at total- income of Rs. 202,32,28,750/-.

2. In assessment order u/s 143(3) dated 05/12/2008, even though on page 11 of assessment order, it was held that provisions written back of Rs. 23.94 crores do not form part of core activities, the amount of Rs 5.18 crores (handling expenses of stuffed container & transshipment handling expenses container) included in such provisions has not been included in ‘income from incidental activities’. This has led to escapement of Income.

3. Without prejudice to the above, it is also seen that before A.Y.2005-08, assessee was assessed under normal provisions of the I.T. Act. During A.Y. 2006-07, prior period income of R. 572 lakhs, sundry credit balances written back of Rs.47 lakhs, excess provisions written back of Rs. 2394 lakhs and sundry income of Rs. 1111 lakhs was received and/or written back as income in its books of accounts.

Since, all these incomes may have been derived in the assessment years before tonnage tax scheme; assessee should have included the same under normal provisions of the I.T. Act, 1961.

However, assessee failed to disclose these facts in its return of income and also during the assessment proceedings u/s 143(2).

4. Due to the above mentioned reasons, there has been a failure on part of assessee to disclose the facts fully and truly necessary for its assessment.

The above mentioned facts have given rise to estimated escapement of income of about 71,46,13,492/- and estimated tax thereon of Rs. 24,05,38,901/- as per the annexure to these reasons.”

5. On perusal of the reasons, it is revealed that the proceedings under section 147 of the Act were initiated for escapement of income mainly on account of two reasons as discussed below:

- i. The amount of provision written back amounting to Rs. 23.94 crores has not been included in the income under the head “income from incidental activities” while determining the income under chapter XII-G special provisions relating to income of shipping companies.
- ii. The assessee prior to the assessment year 2005-06 was subject to tax under the normal provisions of the Act. As such the assessee prior to the assessment year 2005-06 has claimed the deduction of certain items which were received/ written back in the books of accounts in the year under consideration. The details of the items stand as under:
 - a. Prior Period income of Rs. 572 lacs
 - b. Sundry credit balances written back of Rs. 47 lacs
 - c. Sundry income received/ written back of Rs. 1111 lacs.

6. The above income has been derived by the assessee prior to the tonnage tax scheme, therefore the same should have been offered to tax under the normal provisions of the Act. But the assessee has not done so which resulted in the escapement of income.

7. At the outset, the ld. AR for the assessee before us claimed that the proceedings for re-assessment under section 147 of the Act were based on the change of opinion on the same set of documents which were available during the original assessment proceedings under section 143(3) of the Act.

8. The learned AR before us filed a paper book running from pages 1 to 288 and submitted, regarding the provision written back of Rs. 23.94 crores (including the amount of Rs. 5.18 crores representing the handling expenses of stuffed containers & transshipment handling expenses container), before us that the impugned issue was duly verified during the original assessment proceedings under section 143(3) of the Act vide order dated 5-12-2018. The learned AR in support of his contention drew our attention on page 164-180 of the paper book where the copy of the original assessment order was placed.

9. The learned AR also submitted that the income by way of the provision written back for Rs. 23.94 crores was duly disclosed in the audited financial statements as evident from the details of the income placed on page 63 and 74 of the paper book.

10. The learned AR also submitted that the details for the provisions written back amounting to Rs. 23.94 crores were also furnished during the assessment proceedings. In this regard the learned AR drew our attention on page 143 to 147 and 151, 158 & 162 , 174 of the paper book where the reply of the assessee filed before the AO during the original assessment proceedings was placed.

10.1 Similarly, the learned AR submitted that the details of the items as mentioned in reason No. 2 were duly furnished by the assessee which was verified by the AO during the assessment proceedings. In this regard, the learned AR also drew our attention on page 137 of the paper book where the details sought by the AO during the original assessment under section 143(3) of the Act about different components of core shipping activities and the turnover declared in the financial statements, was placed. The reply of the

assessee was placed on page 140 and 151, 158 & 159 and 174, 176, 177 and 178 of the paper book.

10.2 The learned AR also claimed that all the details of the items as discussed above were duly disclosed in the financial statements as evident from the page 74 of the PB.

10.3 The learned AR in view of the above claimed that the initiation of proceedings under section 147 of the Act is based on the same set of documents which were available during the original assessment proceedings which was completed by the AO after due application of his mind. Accordingly, the learned AR for the assessee submitted that the reopening has been done merely on the basis of change of opinion which is not valid in the eyes of law. The learned AR in support of his contention referred to various case laws as detailed under:

- i- Idea Cellular Ltd. v/s DCIT (BOM HC) (301 ITR 407)
- ii- Asian Paints Ltd. v/s DCIT (BOM HC) (308 ITR 195)
- iii- CIT v/s Jet Speed Audio Pvt. Ltd. (BOM HC) (372 ITR 762)
- iv- State Bank of India (Mumbai) v/s ACIT writ petition no. 271 of 2018

10.4 The learned AR also claimed that the tribunal in the own case of the assessee involving identical facts and circumstances has decided the issue in favour of the assessee in ITA No. 145/MUM/2011 for the assessment year 2007-08 vide order dated 29th of July 2011.

11. On the other hand, the learned DR before us submitted the 1st year involving the identical issue in the own case of the assessee is AY 2005-06

but the learned AR for the assessee is intentionally taking up the matter for the assessment year 2006-07 in order to get the undue benefit.

11.1 The learned DR also claimed that the reopening was made in accordance to the 1st proviso to section 147 of the Act.

11.2 The learned DR before us submitted that the AO has not applied his mind during the original proceedings framed under section 143(3) of the Act for the items of income discussed in the reasons recorded which has resulted the escapement of income. The learned DR in support of his contention relied on the Judgments as narrated below:

“Hon’ble Supreme Court in the case of Raymond Wollen Mills Ltd. v. ITO And Others reported in 236 ITR 34 has observed as under:

In determining whether commencement of reassessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.

Bombay High Court in the case of Yuvraj v. Union of India reported in 315 ITR 84 has observed as under:

Points not decided while passing assessment order under section 143(3) not a case of change of opinion. Assessment reopened validly.

Hon’ble Supreme Court in the case of Honda Siel Power Products Ltd. v. Dy. CIT reported in [2012] 20 taxmann.com 5 (SC)/[2012] 206 Taxman 33 (SC)(MAG)/[2012] 340ITR 64 (SC)/[2012] 247 CTR 316 (SC) has observed as under:

Assessee having not pointed out during assessment proceedings about expenses incurred relatable to tax free income u/s 14A there was omission and failure on its part to disclose fully and truly material facts and hence reopening of assessment was justified.

Delhi High Court in the case of Honda Siel Power Products Ltd. v. Dy. CIT reported in [2011] 10 taxmann.com2 (Delhi)/[2011] 197 Taxman 415 (Delhi)/[2012] 340 ITR 53 (Delhi)/[2012]247 CTR 322 (Delhi) has observed as under:

Assessee having not pointed out during assessment proceedings about expenses incurred relatable to tax free income u/s 14A there was omission and failure on its

part to disclose fully and truly material facts and hence reopening of assessment was justified.

Bombay High Court in the case of Devi Electronics Pvt. Ltd. vs. ITO reported in 2017-TOIL-92-HC-MUM-IT has observed as under:

the likelihood of a different view when materials exist of forming a reasonable belief of escaped income, will not debar the AO from exercising his jurisdiction to assess the assessee on reopening notice

Delhi High Court in the case of Amsa India Pvt. Ltd. vs. CIT reported in 2017-TOIL-603-HC-DEL-IT has observed as under:

the department can reassess the return furnished by the assessee if the AO has a reason to believe that the facts have a proximate link with the assessee's concealed income"

11.3 The ld. DR also submitted that the assessee is enjoying double benefit by writing back the items discussed in the reasons recorded. As such, the assessee on the earlier occasion has claimed the deduction under normal computation of income and for the same items of income written back in the year under consideration, it is paying the tax on presumption basis.

12. The learned AR in his rejoinder submitted that the 1st proviso to section 147 of the Act is not applicable in the case on hand. The learned AR also claimed that all the necessary facts about the items of income recorded in the reasons to believe were available before the AO during the original assessment proceedings which is implied that the AO has applied his mind.

12.1 The learned AR also claimed that there were many more issues in the assessment year 2005-06 whereas the case on hand involves less complexity. Therefore, he prayed to take up the matter 1st for the year under consideration.

12.2 The learned AR also submitted that the issue of double benefit has already been considered by this tribunal in the own case of the assessee in ITA No. 145/Mum/2011 and decided in its favour.

13. We have heard both the parties and perused the records, especially the impugned orders and the case laws cited therein and also by the learned counsel for the assessee. In the present case the proceedings under section 147 of the Act were initiated for escapement of income for the reasons as discussed below:

- i. Prior Period income of Rs. 572 lacs.
- ii. Provisions written back of Rs. 23.94 crores
- iii. Sundry credit balances written back of Rs. 47 Lacs
- iv. Sundry income received/written back of Rs. 1111 lacs.

14. However, on perusal of the financial statement of the assessee, we note that the disclosures of the above items were duly made by the assessee therein. This fact can be verified from the schedule 18 and 19 attached with the financial statement of the assessee and reproduced for the sake of clarity as under:

SCHEDULE '18'

EXCESS PROVISIONS WRITTEN BACK

	<i>2005-06</i>	<i>2004-05</i>
	<i>Rupees</i>	<i>Rupees</i>
	<i>in lakhs</i>	<i>in lakhs</i>
<i>Direct Operating Expenses</i>	806	435
<i>Freight & Charter hire</i>	103	700
<i>Wages, Bonus and other expenses on floating staff</i>	86	Nil
<i>Insurance, P&I, Cargo claims & P&I Club fees</i>	13	Nil
<i>Provision for Doubtful Debts & Advances</i>	736	64
<i>Foreign Taxation</i>	72	150
<i>Provision for Offhire</i>	1	102
<i>Establishment Charges</i>	43	Nil
<i>Ship Repairs, Stores and Maintenance</i>	319	Nil
<i>Shore staff expenses</i>	174	Nil
<i>Staff canteen expenses</i>	40	Nil
<i>Others</i>	<u>1</u>	<u>54</u>
<i>TOTAL</i>	<u>2,394</u>	<u>1,505</u>

SCHEDULE '19'

OTHER INCOME

2005-06 ***2004-05***

	Rupees in lakhs	Rupees in lakhs
<i>Sundry Receipt</i>		
- Crore shipping activities	1,111	1,175
- Incidental activities	354	578
	1,465	1,753
<i>Profit on sale of Fixed Assets (other than Ships)</i>	29	2
<i>Dividend on trade Investments</i>	201	372
<i>Sundry Credit Balances written back – Core shipping activities</i>	47	1,237
TOTAL	1,742	3,364

15. The detail of the prior period adjustments was also disclosed in the notes on accounts being part of schedule 25 of the financial statements which is reproduced as under:

“7. Prior year’s adjustments (Net) amounting to Rs. 572 lakhs (cr.) [Previous year Rs. 2715 lakhs (Cr.)] includes income of Rs. 2203 lakhs (Previous Year Rs. 2393 lakhs) and expenses Rs. 1631 lakhs (Previous year Rs. (-)322 lakhs).

The summary of income is as follows:

	2005-06 Rupees in lakhs	2004-05 Rupees in lakhs
<i>Freight</i>	(-) 1284	1826
<i>Charter Hire</i>	90	(-)50
<i>Demurrage</i>	Nil	(-)22
<i>Recovery of Container Related Costs</i>	2883	118
<i>Remuneration from managed vessels</i>	(-)18	Nil
<i>Currency Exchange Difference</i>	494	Nil
<i>Others</i>	38	521
TOTAL	2203	2393

The summary of expenses is as follows

	2005-06 Rupees in lakhs	2004-05 Rupees in lakhs
<i>Stevedoring</i>	70	182
<i>Marine, Light & Canal Dues</i>	909	(-)336
<i>Brokerage & Commission</i>	151	145
<i>Fuel Oil</i>	62	41
<i>Wages, Bonus & Other Exp. – Floating Staff</i>	13	(-)2
<i>Stores, Repairs & Maintenance</i>	84	(-)586

<i>Insurance & P&I</i>	5	24
<i>Hire of Chartered Steamer</i>	465	44
<i>Establishment Expenses</i>	(-)191	69
<i>Sundry Steamer Charges</i>	44	Nil
<i>Expenses on Post Retirement Medical Scheme</i>	Nil	19
<i>Shore Staff Salary and other expenses</i>	6	Nil
<i>Others</i>	13	78
<u><i>TOTAL</i></u>	<u>1631</u>	<u>(-)322</u> ”

16. In the present case the assessment was framed under section 143(3) of the Act vide order dated 5th December 2008. The income of the assessee was chargeable to tax under Chapter XII-G of the tonnage tax scheme wherein the income is worked out on presumption/deemed basis. The AO, in the original assessment under section 143(3) of the Act after considering the items as discussed in the reasons to believe for reopening the assessment under section 148 of the Act, framed the assessment. This fact can be verified from the order of the AO under section 143(3) of the Act vide dated 5th December, 2008 which is placed on pages 164 to 180 of the paper book. The relevant extract is reproduced as under:

“It is evident that while working out the turnover from core shipping activities, the following incomes have been included:-

	(in Rs.)
(i) <i>Profit on Sale of Ship</i>	12,10,00,000
(ii) <i>Excess Provision written back</i>	23,94,00,000
(iii) <i>Sundry Receipts – core shipping</i>	11,11,00,000
(iv) <i>Profit on Sale of Fixed Assets</i> <i>(other than Ships)</i>	29,00,000
(v) <i>Sundry Credit balance written back</i>	47,00,000
(vi) <i>Reimbursement from Managed Vessels</i>	25,61,00,000

	73,52,00,000
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“(ii) Excess Provision written back & Sundry Balance Written back:-

These represent various expenses/ provisions which were disallowed in earlier years or expenses claimed in earlier years which were received back subsequently. From details furnished by the assessee, it is seen that excess provision written back constitutes write back of such expenses as Direct Operating Expenses, Freight & Charter hire, Provision for Doubtful Debts & Advances, Foreign Taxation, Ship Repairs, Staff Canteen expenses etc. It is the assessee's claim that these expenses, forming inherent part of core shipping activities, should be considered to be turnover from core shipping activities in the year in which they are Written back”.

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“The aforesaid contention of the assessee is, however, not acceptable. The function of selling ships & other fixed assets cannot be equated with the business of operating ships. The former fall into a different domain which cannot be linked with core activities within the definition of Section 115VI(2) of the Income-tax Act. As regards Excess Provisions & Sundry Credit balances written back, these consist of such items as provision for bad and doubtful debts, provision for foreign tax, provision for repairs etc. which, by their very definition, cannot form part of core shipping activities. The same is the case with Sundry Receipts comprising income from commission on disbursements, rent on furniture, rental income on ownership flats etc. So far as reimbursement of overhead from managed vessels is concerned, this basically constitutes recovery of cost incurred by the assessee which has been shown separately instead of netting off with expenses. As such, this is not income per se & cannot form part of income from "core activities".

It may be mentioned that during the course of assessment proceedings, the assessee was asked to give year-wise break-up of the different components forming part of excess provision written back. The idea was to ascertain whether any of the corresponding expenses pertained to the tonnage tax regime by virtue of which they could not be claimed as deduction by the assessee. However, it was submitted on assessee's behalf that it is not possible to cull out such year-wise break-up as desired. In the absence of such details, it is not possible to make any allowance to the assessee. Against the backdrop of the above, it is held that turnover of Rs.73,52,00,000/- crore cannot be treated as turnover from "core activities". Turnover from "core activities" thus stands reduced to Rs.3411,84,52,546/- in place of Rs.3485,36,52,5461- worked out by the assessee. Accordingly, taxable income from incidental activities is recomputed as under:

Total Turnover from Incidental Activities	18,06,64,178/-
Less : 0.25% of Turnover of	
Rs.341 1,84,52,546/	52,96,131/-
from core activities	
Excess of Incidental Activities	9.95.30,047/- * * ”

17. The AO during the original assessment proceeding has questioned about the different components of core shipping activities and the turnover vide notice dated 1st September, 2008 under section 142(1) of the Act. The relevant query/question raised by the AO, placed on page 137 of the paper book, reads as under:

5. *To identify the different components of core shipping activities and substantiate the turnover shown.*

18. The assessee in response to such notice has made a reply vide letter dated 30th September, 2008 as detailed under:

“5. Req identifying the different component of core shipping activities and substantiate the turnover shown:

The SCI is engaged fully in the shipping business. It has no other major activity. However the incomes viz: interest on deposits, dividend from the companies is considered as income from other sources. Accordingly while calculating the tonnage activity the income of these nature are suo moto considered as not forming core shipping activity.

In addition as per Rule 11R following activities are notified as incidental activities for the purposes of relevant shipping income. In view of this rule income from these activities are separately shown under income from incidental activities namely:-

- i) maritime consultancy charges;*
- ii) income from loading or unloading of cargo;*
- iii) ship management fees or remuneration received for managed vessels;*
and
- iv) maritime education or recruitment fees.”*

19. Similarly, the assessee also furnished the details of the excess provisions written back vide letter dated 10th October 2008 along with the submission that it is engaged fully in the business of shipping and no other business activity is carried on by it. The income has been offered to tax under tonnage scheme except the income from dividend and interest on deposits which was suo-moto treated as income from other sources. The copy of the letter is enclosed on pages 143 to 148 of the paper book.

20. The assessee further vide letter dated 27th October, 2008 has also furnished the details of turnover for core shipping including the excess provision written back of Rs. 23.94 crores, sundry receipts of core shipping of Rs. 1111 lacs and sundry balance written back of Rs. 47 lacs. The copy of the letter is enclosed on pages 150 to 161 of the paper book.

21. In view of the above, it is transpired that the AO in the original assessment proceedings under section 143(3) of the Act has conducted enquiries about the items as mentioned in the reasons recorded issued under section 148 of the Act. Therefore, the reopening under section 147 of the Act based on the same set of documents examined during the original proceedings is not sustainable. In this connection we find support and guidance from the judgment as discussed below:

Hon'ble Apex Court in the case of CIT versus Kelvinator India Ltd reported in 320 ITR 561 wherein it was held as under:

"the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment. Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However, on receipt of representations from the companies against omission of the words 'reason to believe', the Parliament re-introduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer."

Hon'ble Bombay High Court in the case of Idea Cellular Ltd. v/s DCIT reported in 301 ITR 407 wherein it was held as under;

"Where the assessee's assessment was reopened on the ground that since the assessee had failed to disclose the income accruing on amalgamation, provisions of section 147 were applicable.

Held that this was not a case where it could be said that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment in the relevant assessment year. The accounting entry for the amount of Rs. 9,984.15 lakhs was mentioned in the returns for the relevant year. The queries raised were replied to by the assessee. There was a full and

true disclosure of all material facts placed before the Assessing Officer and thus there was no suppression of any material from the assessment officer. Therefore, all materials were placed before the Assessing Officer when he passed the order. Therefore, the pre-requisite condition contained in the proviso to section 147 to enable the reassessment to be opened after period of 4 years had elapsed had not been met. This was a case in which the Assessing Officer raised specific queries on several occasions and all the queries were answered. Once all the material was before the Assessing Officer and he chose not to deal with the several contentions raised by the petitioner in his final assessment order, it could not be said that he had not applied his mind."

Hon'ble Bombay High Court in the case of Asian Paints Ltd. v/s DCIT reported in 308 ITR 195 wherein it was held as under;

"8. In the order rejecting the objection filed by the petitioner to the notice under section 148, respondent No. 1 has observed "verification of assessment record reveals that the said details were called for but inadvertently the same were not taken into account while framing the assessment and, therefore, it cannot be said that there is a change of opinion." According to respondent No. 1, thus, the relevant material was available on record, but he failed to apply his mind to that material in making the assessment order. The question is, can respondent No. 1 take recourse to the provision of section 147 for his own failure to apply his mind to the material which, according to him, is relevant and which was available on record. We find that this situation has been considered by the Full Bench of the Delhi High Court in its judgment in the case of CIT v. Kelvinator of India Ltd. [2002] and the Full Bench has observed thus (page 19) :

"The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. 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."

Hon'ble Bombay High Court in the case of CIT-II v/s Jet Speed Audio Pvt. Ltd reported in 372 ITR 762 wherein it was held as under:

"10. Mr. Chhotaray, learned Counsel for the Revenue urged on merits of the Revenue's case to charge Rs. 1.34 crores allowed as bad debts, has to be appropriately brought to tax as capital loss. We pointed out to Mr. Chhotaray, learned Counsel for the Revenue that the scope of the present proceedings is only with regard to reopening notice under Section 148 of the Act and we are not

dealing with the merits of the assessability of the income alleged to have escaped assessment. On this Mr. Chhotaray submitted that the issue which he seeks to urge is that merely because the Assessing Officer has been careless in bringing to tax a particular amount which is chargeable to tax, the Revenue should not be precluded from issuing notice under Section 148 of the Act. This submission of Mr. Chhotaray overlooks the facts that power to reopen is not a power to review an assessment order. At the time of passing assessment order, it expected of the Assessing Officer that he will apply mind and pass an order. An assessment order is not a mere scrap of paper. To accept the submission of Mr. Chhotaray, would mean to negate the well settled position in law as stated by the Supreme Court in the case "CIT v. Kelvinator of India Ltd. [2002] 123 Taxman 433 (Delhi) (FB)" that the concept of 'change of opinion' brought in so as to have in built test to check abuse of power. In view of the above, we find no substance in the submissions raised by Mr. Chhotaray."

22. We also draw support and guidance from the judgment of Hon'ble Bombay High Court in the case of State Bank of India (Mumbai) v/s ACIT writ petition no. 271 of 2018 wherein it was held as under wherein it was held as under;

"5. As against the above, it is the case of the Revenue that the re-opening notices should not be interdicted at this stage and the petitioners should be directed to contest the same before the Authorities under the Act. It is submitted that in this case, the Assessing Officer while passing the regular assessment orders had overlooked and/or ignored this particular claim. It is submitted that it is not a case of change of opinion neither the assessment order referred to allowing of this claim nor the assessment order was preceded by any queries with regard to the subject claim of the petitioners. Thus, there was no formation of opinion on the issue in the regular assessment proceedings. Consequently, there can be no change of opinion of the issue which forms the basis of the reasons recorded for issuing the impugned notices."

23. We also draw support and guidance from the judgment of Hon'ble Gujarat High Court in the case of Gujarat Power Corporation Ltd versus ACIT reported in 26 Taxmann.com 51 wherein it was held as under:

"37. Coming to the second question, as recorded, contention of the petitioner is that as in the present case, once the Assessing Officer examines a certain claim of the assessee in the original assessment proceedings, raises queries, receives replies, but thereafter makes no additions or disallowances, without giving reasons, it would not be permissible to reopen the assessment even within four years on very same grounds. The contention of the revenue is that in absence of any direct discussion in the assessment order, the Assessing Officer cannot be stated to have

formed any opinion and that therefore, reopening within a period of four years of such an assessment would be permissible.

38. In this context, we may recall that as held by the Apex Court in the case of (1) Kelvinator of India Ltd. (supra), even after 1.4.1989, reopening of an assessment previously framed after scrutiny would not be permissible on a mere change of opinion and that the Assessing Officer must have some tangible material to form a belief that income chargeable to tax has escaped assessment. The concept of change of opinion is not done away with in the newly amended section 147 of the Act."

24. We also note that the similar issue was decided by this tribunal in the own case of the assessee involving identical facts and circumstances in ITA No. 145/Mum/2011 vide order dated 29th July, 2011 wherein it was held as under:

"29. Provisions of section 115VA provides that the income from business of operating qualifying ships may be computed in accordance with the provisions of chapter XII-G, and that the income so computed shall be deemed to be the profits and Income from qualifying ships are defined in section 115VC, and there is no dispute on this aspect. Section 115VE mandates that profits from business of a company engaged in the business of operating qualifying ships shall be computed under the tonnage tax scheme. It also specifies that such business of operating qualifying ships shall be considered as a separate business distinct from all other activities or business carried on by the company. The mode of computation of tonnage income is given under section 115VG. The term "relevant shipping income" has been defined in section 115VI. It is basically classified into two categories i.e., profits from core activities referred to in sub-section 2 and profits from incidental activity referred to in sub-section 5. The issue is, whether the income by way of right back of provisions of sundry credit balances and prior period expenses can be considered as income from core activities of a tonnage tax company. In our opinion, write back of these items is to be considered as income from core activity. In a going concern, such write backs and making of supplementary provisions takes place. The Assessing Officer as well as the Commissioner (Appeals) have treated the very same income which is taxable under section 41(1) differently. The first being expenditure claimed in pre-tonnage tax scheme assessment years and the second being expenditure claimed in post tonnage tax scheme assessment years. Such a segregation is not permissible under the Act. Both the incomes are incomes from core activity and just because tax rates different, they cannot be treated as non-business income. The Assessing Officer as well as the Commissioner (Appeals) seem to have been influenced by the fact that the assessee has an income of Rs. 800 crores in its Profit & Loss account and whereas he has offered only Rs.18 crores to tax under the tonnage tax scheme. The decision whether a particular income has to be brought to tax or not, cannot be based on such a view of the matter. The legislature in its wisdom provided the manner of computation of income under the tonnage tax scheme. In section 115VA, it is clearly provided that sections 28 to 43C would not over ride the computation

of profits and gains under section 115VA. As section 41(1) falls within sections 28 to 43C, no separate addition under that section can be made. As section 41(1) seeks to bring to tax certain specified items of receipts under the head "profits and gains of business" the scheme should not be invoked while computing profits and gains of business under Chapter-XII-G. Hence, we are of the opinion that the argument of the assessee should succeed.

30. *With the introduction of chapter-XII-G, the entire methodology of taxing income from the business of operating qualifying ships has changed and recourse to the normal provisions of the Act in a peace-meal manner is not authorised by law. Though the assessee has computed other income while filing its return of income, in our opinion, the income arising from section 41(1), cannot be classified as, either income from other sources or income from incidental activities. When all the ships of the assessee are qualifying ships and when there is no other activity other than core activities and incidental activities, in our opinion, a third category of other business income cannot be created. As pointed out by the learned Sr. Counsel, if such introduction is allowed then, a claim of the assessee of deduction under section 43B i.e., deduction only on actual payment would be required through the expenditure actually belongs to pre-tonnage period, to be allowed. The Assessing Officer cannot take recourse to sections 28 to 43C, when there is no other activity or business carried on by the company, other than business of operating qualifying ships. In view of the above discussion, we allow ground no.1 of the assessee."*

25. The argument of the Id. DR for the Revenue that the assessee is getting double benefit has been duly considered by the Tribunal as discussed above.

26. We also note that the Id. DR has referred to certain Judgments as discussed above but we do not find any reason to recapitulate all of them but suffice to say that these are based on different proposition and do not apply in the present facts of the cases.

27. Thus, in view of the above we hold that the reopening of the impugned case under section 147 of the Act in itself is invalid and against the laws settled by the Hon'ble Supreme Court/ High Courts in the cases cited above.

28. The learned DR at the time of hearing has not brought anything on record contrary to the arguments advanced by the Id. AR for the assessee. Therefore, we do not find any reason to uphold in the finding of the learned

CIT (A). Accordingly, we quashed the assessment framed under section 147 of the Act. As the assessment framed under section 147 of the Act has been quashed, we are not inclined to decide the issue on merits. In view of the above, the ground of appeal filed by the assessee, on technical ground as elaborated above, is allowed.

29. In the result, the appeal of the assessee is partly allowed.

Coming to ITA No. 2129/MUM/2012, an appeal by the Revenue.

30. The Revenue has filed the following grounds of appeal:

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not deleting the addition made by the A.O. u/s 41(1) of the I.T. Act and allowing the tonnage tax provisions to the assessee on sundry credits written back to the extent of Rs. 47,36,865/- pertaining to pre tonnage tax period, without appreciating the fact that the income arising from sundry credits written back does not fall into core activity of qualifying ship.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 11.06 crores made u/s 41(1) of the I.T. Act on account of excess provisions written back, without appreciating the fact that the income arising out of excess provisions written back does not fall into the core activity of qualifying ship.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.4,11,50,152/- made by the A.O by denying tonnage tax provisions to the prior period income under normal provisions.

4. The appellant prays that the order of the ld. CIT(A) on the above ground be set aside and that of the Assessing Officer restored.

5. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

31. At the outset we note that we have already held that the reassessment framed under section 147 of the Act is invalid for the reasons discussed in ITA No. 2551/Mum/2012 vide paragraph No. 7 of this order. Once, the order framed under section 147/143(3) has been held as invalid, the appeal of the

Revenue is not maintainable. Accordingly, we dismiss the same as infructuous. Thus the grounds of appeal of the Revenue are dismissed.

In the result the appeal filed by the Revenue is dismissed.

32. In the combined result, the appeal filed by the assessee is partly allowed and the Revenue is dismissed.

Order pronounced in the Court on 29/11/2019 at Mumbai.

**-Sd-
(MAHAVIR SINGH)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated: 29/11/2019

Tanmay, Sr. PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai