IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH 'B, CHANDIGARH

BEFORE: SHRI N.K. SAINI, VICE PRESIDENT
AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 305/Chd/2021
(Assessment Year: 2012-13

M/s Valco Industries Ltd., SCO: 37, Sector 26, Chandigrh.	VS	The Asstt. Commissioner of Income Tax, Central Circle, Chandigrh.
PAN NO: AAACV5195J		

Assessee by: Shri Tej Mohan Singh, Adv.
Revenue by Dr.Ranjeet Kaur, Sr. DR

Date of Hearing: 07.04.2022
Date of Pronouncement: 11.05.2022

ORDER Per

Sudhanshu Srivastava, Judicial Member:

This appeal is preferred by the assessee against the order dated 31.08.2021 of Learned Commissioner of Income Tax (Appeals)- 3 , Gurgaon [in short the ' Ld.CIT(A)'], passed u/s 250(6) of the Income Tax Act, 1961 (in short 'the Act') for the assessment year 2012-13.

20 0 The brief facts of the case are that the assessee is the manufacturer of Aluminum Extrusion having its unit-II at Baddi, Himachal Pradesh. The return declaring total income of Rs.4 , 83, 83 ,620 /- was originally filed on 28 . 09. 2012 after

claiming deduction of Rs. 5,75,64,789/- u/s 80 IC of the Act. The assessment was completed u/s 143(3) of the Act on 27.03.2015 at an income of Rs. 8,07,03,620/- after making an addition of Rs. 3,23,20,000/- on account of share of assessee company in industrial property by making the calculation of the share of the assessee company at 20%.

21 1 Subsequently, notice u/s 148 of the Act dated 10.03.2017 was issued after recording the following reasons:

Reasons recorded for re-opening of case u/s 147 of the I.T. Act, 1961

Name of assessee	*M/s Valco Industries Limited*
Address	*27, Madhya Marg, Sector 26, Chandigarh*
PAN	*AAACV5195J*
Status	*Company*
Assessment Year	*2012-13*
Previous Year	*2011-12*

The original assessment in this case was made u/s '43(3) of the Income Tax Act, 1961 at income of Rs, 8,07,03,620/- by making an addition of Rs. 3,23,20,000/- in returned income of the assessee. The assessee company has two manufacturing units, Unit No-I is located at 184, Industrial Area, Phase-I, Chandigarh, which was set up in the year 1998 and the Unit No-ll is located at Village Katha, Baddi setup in year 2004, The assessee is in the business of manufacturing of various types of aluminum products and availed deduction u/s 80IC in respect of Unit No-II Baddi.

2. The case of the assessee was completed on the basis of findings of a survey conducted u/s 133A at the business premises of the assessee on 17.06.2013 at #SR-37, Sector-26, Madhya Marg, Chandigarh, The assessment order in this case was passed on 27.03.2015 by making only addition of Rs. 3,23,20,000/-. However, on going through the assessment records, it is seen from the Para No. 4 of the assessment order

that the share of the assessee in the property "Industrial Site No. 70,1A-1, Chandigarh" was 23%, however the calculation of these share of the assessee in Para No 6 of the same order has been done @ 20% only. By doing so the share of the assessee has been determined by a lesser amount of Rs. 3,23,20,000/- instead of Rs. 3,11,68,0001; hence amount of Rs.48.43,000/- (Rs. 3,71,68,000 — Rs. 3,23,20,000) has escaped assessment in terms of section 147 of the Income Tax Act, 1961.

3. Further, as per provisions of section 80IC(i) r.w.s. sub section 3 a company assessee Deriving any profits & gains from the eligible businesses in liable for deduction for ten years. A deduction of 100% is allowed for the first 5 years and 30% of deduction is allowed for the subsequent five years from the assessment year (Initial Assessment Year) in which such enterprise/undertaking begins its operations.

4. On going through the assessment records of the assessee company it is seen from the Report u/s 10CCB that the assessee started its manufacturing activities in F.Y. 2004-05 relevant to 2005-06 and claimed 100% deduction for A.Y. 2005-06, 2006-07 & 2007-08. As per provisions of the Act the assesses was eligible for 100% deduction for A.Y. 2008-09 & 2009-10 also and the assessee was eligible for 30% deduction from A.Y. 2010-11 to 2014-15eligible for 30% deduction from A. Y. 2010-11 to 2014-15. Further is seen that the assessee has undertaking substantial expansion during the F.Y.2 008-09 relevant to A.Y. 2009-10 and again started claiming 100% deduction from the A.Y. 2010-11 on wards re-shifting the initial assessment year from 2005-06 to 2009-10. By doing So the assessee enhanced the time period for 100% deduction upto A.Y. 2013-14, for which it was not eligible as, only the existing units which were in existence before coming in force the provisions for 80IC were eligible deduction on the grounds of substantial expansion. It is pertinent to mention here that the Unit No-II, located at Baddi was started after commencement of the provisions of section 801C.

5. It is seen from the ITR, Computation and 10CCB Report that the assessee has claimed 100% deduction of the profit & gains derived by the undertaking/enterprises (Unit No-II, Baddi) from the eligible business at Rs. 5,84,94,739/-, whereas as per the above detailed discussion the assessee was eligible for only 30 % deduction at Rs. 1,75,48,422/-. Therefore, I have *reason to believe that assessee has claimed excessive deduction u/s 80IC and income of Rs.4,09,46,317/- has been escaped assessment as per provisions of section 147 of the Income Tax Act, 1961.*

6. Further, it is again clarified that I have gone through the complete case records and the perused the details available and I am satisfied that this is a fit case to issue notice u/s 148 as the amount of Rs.4,57,79,317 (Rs.48,43,000 + Rs.4,09,46,317/-) has not been offered for tax. Therefore, in view of the above, I have reason to believe that the amount of Rs.4,57,79,317/- has escaped assessment within the meaning of Section 147 of the Income Tax 1961."

22. In response to the notice issued u/s 148 of the Act, the assessee intimated the Assessing Officer (AO) that the return already filed u/s 139(1) of the Act may be treated as return in response to notice u/s 148 of the Act and also requested the AO to supply the copy of reasons recorded for reopening of the case. Thereafter, the assessee filed objections against the issuance of notice u/s 148 of the Act which were disposed off by the AO rejecting the assessee's objection against the issuance of notice u/s 148 of the Act. Thereafter, the assessment was finalized in terms of section 147 r.w.s. 143(3) of the Act after making a disallowance of Rs. 4, 09 ,45 ,317 /- being alleged excess claim of deduction u/s 80IC of the Act. Another addition of Rs. 48, 43,000 /- was made on account of difference in share of the assessee company in industrial property. The assessment was completed at Rs.12,64,93,000/-.

23. Aggrieved, the assessee carried the matter before the Learned First Appellate Authority challenging the invocation of jurisdiction u/s 147 of the Act on legal grounds. The

assessee also challenged the disallowances/additions on merits. The Ld.CIT(A) dismissed the assessee' s legal challenge to the invocation of jurisdiction u/s 148 of the Act. On merits, the Ld. CIT(A) upheld the addition on account of difference in the share percentage in industrial property. The Ld. CIT(A) also upheld the disallowance made u/s 80IC of the Act.

24. . Aggrieved, the assessee has now approached this Tribunal and has challenged the action of the Learned First Appellate Authority by raising following grounds of appeal:

"1. That the Ld. Commissioner of Income Tax (Appeals) has erred in law in upholding the reopening of the already completed assessment by issuance of notice u/s 148 of the Act without complying with the mandatory statutory requirements and as such the order passed is illegal, arbitrary and unjustified.

2. That there was no reason to believe that the income already assessed under section 143(3) had escaped assessment and as such the assessment framed and upheld by the Commissioner of Income Tax(Appeals) based on a mere change of opinion is illegal, arbitrary and unjustified.

3. That the Ld. .Commissioner of Income Tax (Appeals) has erred in holding that the notice issued on the basis of an audit objection is a valid one which is contrary to the settled legal position and as such the order passed is illegal, arbitrary and unjustified.

4. That the mechanical approval given by the Ld. Principal Commissioner of Income Tax does not tantamount to application of mind and as such the reopening based on such a mechanical approval is illegal, arbitrary and unjustified.

5. *Without prejudice to the above, the Ld. Commissioner of Income tax (Appeals) has erred in upholding the addition of Rs.48,43,000/- taking share in the property at 23% as against 20% which is arbitrary and unjustified.*

6. *That the Ld. Commissioner of Income Tax (Appeals) has further erred in law as well as on facts in upholding the addition of Rs.4,09,46,317/- made by restricting the deduction claimed under section 80IC to 30% as against 1 00% claimed by the assessee which is arbitrary and unjustified.*

7. *That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.*

8. *That the order of the Ld.CIT(A) is erroneous, arbitrary, opposed to the facts of the case and thus untenable."*

3.0. . At the outset the Ld. Authorized Representative submitted that ground Nos.3 , 4 and 5 were not being pressed. Accordingly, these three grounds are dismissed as not pressed.

3.1. . The Ld. Authorized Representative submitted that ground Nos. 1 and 2 challenge the reopening of the already completed assessment by issuance of notice u/s 148 of the Act, whereas ground No. 6 challenges the upholding of addition on merits. The Learned Authorized Representative submitted that the assessee company had commenced its operations in Baddi plant during f inancial year 2004 - 05 relevant to assessment year 2005 - 06 and had availed 100 % deduction u/s 80 IC of the Act for assessment years 2005 - 06 , 2006- 07 and 2007 - 08 . Thereafter, due to substantial

expansion in the financial year 2008 - 09 , the assessee had also claimed 100 % deduction in assessment year 2009 - 10 onwards. It was submitted that the addition to plant & machinery had started in financial year 2006 - 07 and further additions and deployment of additional working capital required to use the enhanced capacity was done during financial year 2008 - 09 which resulted in enhancement of the production/output from assessment year 2008 - 09 onwards. It was submitted that even the Department of Industries, Himachal Pradesh vide certificate dated 17 . 12 . 2008 had certified the addition /expansion during financial year 2008 - 09 which supports the assessee' s contention of substantial expansion during that year. It was submitted that, therefore, in view of the substantial expansion carried out in assessment year 2009 - 10 , the assessee was eligible for claim of deduction u/s 80 IC of the Act @ 100 % in the captioned assessment year also (i.e. the year under appeal). The Learned Authorized Representative also drew our attention to the order of the ITAT Chandigarh Bench in assessee' s own case for assessment years 2010 - 11 and 2013- 14 wherein the ITAT had held that the assessee was entitled to claim deduction @ 100 % of its eligible profits in view of the substantial expansion undertaken by following the law laid down in Civil Appeal No.1784 of 2019

dated 20 .02 .2019 in the case of Pr. CIT, Shimla Vs. M/s Aarham Softronics by the Hon' ble Apex Court. It was submitted that since the ITAT had upheld the assessee' s claim for deduction in subsequent assessment year i.e. assessment year 2013 - 14 , the assessee' s claim could not be negated in assessment year 2012-13.

3. 2 The Learned Authorized Representative argued that as far was the assessee' s claim for deduction u/s 80 IC of the Act is concerned, all the documentary evidences in respect of substantial expansion alongwith certificate from the Department of Industries had duly been submitted during the course of original assessment proceedings which were completed u/s 143 (3) of the Act and were already on record. It was argued that at no point of time there was a doubt in the mind of the AO, at the time of the original assessment proceedings, with regard to the date of substantial expansion. The Learned Authorized Representative also submitted that it is settled law that the assessees are entitled to deduction u/s 80IC of the Act @ 100 % for the first f ive years even in case of substantial expansion and he placed reliance on plethora of judicial precedents in this regard. It was submitted that, therefore, once the AO had duly examined the claim of the assessee during the course of original assessment proceedings, revisiting the same

issue again was a mere change of opinion as all the necessary evidences and explanations had already been examined and veted by the AO during the course of original assessment proceedings and that he, only after being duly satisfied, had accepted the assessee' s claim at that point of time. It was submitted that there was not fresh or cogent material available with the AO at the time of recording of reasons which would empower him to issue notice u/s 148 of the Act. It was submitted that, therefore, reopening of the assessment being only a change of opinion was legally not sustainable. The Learned Authorized Representative further submitted that the assessee company had truly and fully disclosed all the material facts while f iling its return of income and also during the course of original assessment proceedings which had duly been considered by the AO while framing the assessment and there was no suppression of material facts and further there was no failure on the part of the assessee company to fully disclose the material facts necessary for the purpose of the assessment and further the AO did not have any tangible material or independent reasoning to justify the reopening of a concluded assessment and, therefore, the reopening was bad in law and deserve to be set aside.

4. 0 . Per contra,, The Ld.CIT DR submitted that by way of issuance of notice u/s 148 of the Act, the AO himself was disputing the initial year of substantial expansion because it was not clear from the record when the plant & machinery after substantial expansion was either ready to use or put use. The Ld.CIT DR submitted that since the initial manufacturing activities had commenced from assessment year 2005 - 06 , the assessee was eligible for deduction @ 100% for assessment years 2005-06, 2006-07, 2007-08, 2008 - 09 & 2009 - 10 and hereafter @ 30 % from assessment year 2010 - 11 onwards for five years. It was further submitted that the assessee had claimed substantial expansion during assessment year 2009 - 10 and had started claiming deduction @ 100 % again for the next five years although the assessee was eligible for deduction only @ 30 % in the captioned assessment year (i.e. assessment year 2012 - 13). The Ld. CIT DR argued that this was a f it case for the purpose of issuing notice u/s 148 of the Act as the assessee' s claim u/s 80 IC of the Act was not properly verifiable. The Ld.CIT DR also drew our attention to the fact that the Ld. Pr. CIT (Central) Gurgaon had passed the order u/s 263 of the Act in the case of the assessee for assessment year 2013- 14 in which the assessment order had been set aside on the issue of taking assessment year 2009-

10 as the initial assessment year on account of substantial expansion for the purpose of deduction u/s 80 IC of the Act and had directed the AO to modify the assessment order by taking assessment year 2007 - 08 as the initial assessment year for the purpose of substantial expansion. Referring to the order passed by the ITAT against the order passed u/s 263 of the Act in assessment year 2013- 14 , the Ld.CIT DR submitted that no factual f inding had been recorded by the ITAT and, therefore, the issue of initial assessment year for substantial expansion was still debatable. It was submitted that by taking the initial assessment year as 2007 -08 for substantial expansion, the assessee' s claim for deduction u/s 80IC of the Act in the present assessment year i.e. assessment year 2012 - 13 had rightly been curtailed to 30 % instead of 100% as claimed by the assessee. While supporting the order of the Ld. CIT(A) the Ld.CIT DR argued that the Ld.CIT(A) had rightly dismissed the assessee' s appeal on the legal grounds as well as on merits.

5. 0 . We have heard the rival submissions and have also perused the material available on record. We have also gone through the copy of reasons recorded for reopening of the case and have also gone through the objections raised by the assessee in this regard as well as the order of the AO rejecting the objections. The basic question for us to

consider is whether the assessee' s allowance of claim of deduction u/s 80 IC of the Act can be revisited by issuing notice u/s 148 of the Act especially when there has been no change in facts and circumstances of the case. The primary facts are not in dispute. The assessee company started its production in assessment year 2005 - 06 , and thus, assessment year 2005- 06 was the initial assessment year for the purpose of claim of deduction u/s 80 IC of the Act and the assessee was eligible for such deduction @ 100 % up to assessment year 2009 - 10. Thereafter, the assessee undertook substantial expansion and it is the assessee' s claim that the substantial expansion took place in assessment year 2009 - 10 and, therefore, the assessee was eligible for claim of deduction u/ s 80 IC of the Act again @ 100 % from assessment year 2009 - 10 to assessment year 2013 - 14. The assessee' s claim, both in assessment years 2010 - 11 and 2012- 13 (i. e. the year under consideration), was initially allowed by the AO by accepting the assessee' s claim u/s 143 (3) of the Act. However, later on, the AO reached a conclusion that the initial assessment year with respect to substantial expansion was assessment year 2007 - 08 . The assessments for assessment years 2010 - 11 and 2012 - 13 were subsequently reopened and the appeal of the assessee for assessment year 2010-11 was allowed on merits

by following the judgment of the Hon' ble Apex Court in the case of Pr.CIT, Shimla Vs. M/s Aarham Softronics in Civil Appeal No.1784 of 2019 dated 20 . 02. 2019 . Similarly,, the assessee' s appeal for assessment year 2013 - 14 was also allowed by Coordinate Bench of the ITAT Chandigarh. Both these appeals were decided in favour of the assessee vide order dated 14 . 06. 2019 in ITA Nos. 122 & 123 / Chd/2019 . The Department has not gone into further appeal against the orders of the Tribunal in assessee' s own case in assessment years 2010 - 11 and 2013 - 14 as aforesaid. Thus for all practical purposes, the Department has accepted the assessee' s claim that it was eligible for deduction u/s 80 IC of the Act @ 100 % both in assessment year 2010- 11 as well as in assessment year 2013-14.

5.1 1 In the year under appeal i.e. assessment year 2012 - 13 , although the reasons for reopening were recorded in March, 2017 and the assessment order u/s 147 r.w.s. 143 (3) of the Act was passed on 27. 11 .2017, a perusal of the reasons would show that the AO had no fresh material before him to establish that there was any tangible material in his possession or that there was any suppression of any material information on the part of the assessee which would justify the invocation of jurisdiction u/s 147 of the Act especially when the AO had already examined the claim

of the assessee regarding deduction u/s 80 IC of the Act in the original assessment order passed u/s 143 (3) of the Act However, inspite of assessee' s challenge to the assumption of jurisdiction u/s 148 of the Act, the Ld. CIT(A) chose to ignore its submissions and went ahead with upholding the same totally ignoring the fact that when he had passed the impugned order on 31. 08 .2021, the order of the Tribunal dated 14 .06 . 2019 for assessment years 2010 - 11 and 2013 - 14 had already been pronounced wherein the assessee' s claim for deduction u/s 80 IC of the Act @ 100 % had been accepted by the Tribunal and also by the Department in as much as there was no further appeal by the Department against this order of the Tribunal. If the assessee' s claim for deduction is held to be allowable in assessment year 2013 - 14 , there is no reason why the assessee' s claim is not allowable in assessment year 2012 - 13 (i. e. the year under appeal) when the Statute specifically provides allowance of claim of deduction @ 100 % for the initial f ive assessment years. As far as the issue of having multiple initial assessment years for the purpose of claim of deduction is concerned, the same stands having attained f inality by the order of the Hon' ble Apex Court in the case of Pr.CIT, Shimla Vs. M/s Aarham Softronics (supra) and there is no dispute about that. It is also to be mentioned again, even at

the cost of repetition, that the AO himself had accepted the assessee' s claim for deduction @ 100 % on substantial expansion in the original assessment proceedings and, therefore, without recording any cogent reason, which would justify the reopening, without pointing out any difference in the facts and circumstances of the case and without establishing that there has been some fraud or misrepresentation on part of the assessee, the claim once allowed cannot be revisited.

52 2 Section 147 of the Act authorizes the re- opening of any assessment of a previous year. Section 148 , which contains the conditions for re- opening assessments, including the limitation period within which notices can be issued, by its proviso, enacts that:

> *" Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice."*

53 3 Long ago, in its decision reported as Calcutta Discount Company Ltd vs. Income Tax Officer reported in 1961 (2) SCR 241 , the Hon' ble Apex Court had underscored the obligation of every assessee to make a true and full disclosure and said that:

> *"There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority l ies on the assesses."*

The Hon' ble Court further held that once the duty is discharged, it is upto the assessing officer to inquire further and draw the necessary inferences while completing the assessment.

54 4 As to what can be the valid grounds for re-opening an assessment has been the subject matter of several decisions. In Income Tax Officer, Calcutta & Ors. vs. Lakhmani Mewal Das reported in 1976 (3) SCR 956 , the Hon' ble Apex Court held that the " reasons to believe" must be based on objective materials, and on a reasonable view.

55 5 A three judge Bench of the Hon' ble Apex Court in Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd. reported in 1993 Supp(1) SCR 28 after considering the previous decisions, re- stated the correct position as follows:

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

> *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.*
>
> *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 1 st 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 l ive l ink with the formation of the belief."*

5.6 6 It is therefore, clear that the basis for a valid re- opening of assessment should be availability of tangible material, which can lead the AO to scrutinize the returns for the previous assessment year in question, to determine, whether a notice under Section 147 is called for.

5.7 7 Accordingly, in view of the settled judicial precedents as noted above, we cannot endorse the reopening of the assessment in the present case. Moreover, it is our considered view that reopening for the captioned year at this juncture which also now runs against the order passed by the Tribunal cannot be upheld. We uphold the entire re- assessment proceedings to be bad in law. Accordingly, We allow ground Nos.1 and 2 raised by the assessee and hold that the reopening vis- à- vis the assessee's claim for

deduction u/s 80IC of the Act was bad in law and deserves to be set aside.

10. . In the final result, the appeal of the assessee stands partly allowed.

Order pronounced on 11.05.2021.

Sd/-	Sd/-
(N.K. SAINI)	(SUDHANSHU SRIVASTAVA)
Vice President	Judicial Member

Dated: 11.05.2022

By order,

Assistant Registrar