IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 430 OF 2012

ICICI Home Finance Co. Ltd.
Having its registered office at
ICICI Bank Towers,
Bandra Kurla Complex,
Bandra (E), Mumbai -51 ..Petitioner

versus

1. The Assistant Commissioner of Income Tax
10-(1), Mumbai, having its office
at Room No.455/461 Aaykar Bhavan,
4th Floor, M. Karve Road,
Mumbai – 400 020.

2. The Union of India
through Ministry of Law,
Aayakar Bhavan, M.K.Road,
Mumbai – 400 020. ..Respondents

Ms. Aarti Vissanji alongwith Mr. S.J.Mehta for the Petitioner.
Mr. Tejveer Singh for the Respondents.

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CORAM : S.J.VAZIFDAR &
M.S.SANKLECHA, JJ.

DATE : 20th July, 2012.

(JUDGMENT PER M.S.SANKLECHA,J.)

1 Rule. Returnable forthwith. Respondents waive service. At the instance of the Advocates for both the parties, the petition is taken up for final disposal.

2 This petition under Article 226 of the Constitution of India challenges:

a) Notice dated 24.03.2011 (hereinafter referred to as 'impugned notice') issued under Section 148 read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') seeking to reopen the assessment for the assessment year 2006-2007; and

b) Order dated 07.12.2011 of the Assistant Commissioner of Income Tax (hereinafter referred to as 'the Assessing Officer') rejecting

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the Petitioner's objection to initiations of reopening assessment for assessment year 2006-2007 under Section 148 of the Act (hereinafter referred to as 'the impugned order').

3 The facts leading to the present petition are as under:

a) The Petitioner is engaged in the business of home finance. For the assessment year 2006-2007 (previous year ending on 31.03.2006), the Petitioner filed its return of income declaring a loss of Rs.9.11 crores. Thereafter, on 31.12.2008, by an order passed under Section 143(3) of the Act, the Assessing Officer assessed the Petitioner, to a loss of Rs.18.24 crores under Section 115(JB) of the Act.

b) On 29.12.2009, an audit objection was raised by the Dy. Commissioner of Income Tax (Audit) with regard to the Petitioners assessment to tax for assessment year 2006-2007. The audit objections were as under:

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"I) Perusal of the records made available reveal that the assessee bank is engaged in the business of 'Housing Finance'. During the year under review, assessee claims a turnover of Rs. 3,13,47,33,037/-. After reducing the direct and indirect expenses the assessee companies' Profit and Loss Account shows a net profit of Rs.12,28,90,685/-. However, reading of the computation reveal that the assessee company has claimed the following deductions which are essentially 'provisions'/'contingencies' in nature and character:-

1.	Write Back of serving cost disallowed earlier	Rs.21,78,715/-
2.	Write Back of provisions for delinquencies, Prepayment and conversion risk disallowed earlier.	Rs.48,79,51,991/-
3.	Reversal of provisions on sale of Loan portfolio	Rs.8,86,55,725/-
	Total :	Rs.57,87,86,431/-

Prima facie, by and large, these are provisions on various accounts, though the nomenclature adopted by the assessee primarily appears to be varied.

It is an accepted fact that no provisions are eligible for deduction while arriving at the taxable profit of the year. In principle, only amounts expended wholly and exclusively for the purpose of earning the profit from the said business are eligible for deduction before arriving at the taxable income.

Rummaging of the records made available, reveal that the disallowance of these provisions amounting to Rs.57,87,86,431/- has ineligible as admissible deduction. Subject to further verification the tax effect on this lapse

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works out to Rs.17,36,35,929/-.

II) Perusal of the Profit and Loss Account and the submissions on record reveal that TDS has remained to be deducted on advertisement and sales promotion expenses to tune of Rs.22,48,91,672/- under the head Establishment and other expenses in accordance with Chapter XVII-B of the I.T. Act, 1961.

The aforementioned expenses are to be disallowed under section 40(a)(ia) r/w Section 200(1) of the I.T.Act, 1961 for non deduction of tax at source. Tax effect on this account is Rs.6,74,67,501/-.

Further, the quantum of TDS that has remained to be deducted could be quantified at Rs.22,48,916/-.

Penalty under Section 271-C for non compliance of TDS provision could be quantified at Rs. 22,48,916/-.

III) The assessee company has declared short term capital gain to the tune of Rs.36300587/-. However, the submissions on record does not reveal that details of the transactions relating to these short term capital gains in order to ascertain as to why the same could not be classified as business income. The correctness of these transactions therefore, has prima facie, remained to have been examined during the assessment proceedings. Prima facie, from the records it appears that the guidelines and directions laid down in instruction number 4 of 2007 dated 15th June, 2007 for distinguishing shares held as stock-in-trade and shares held as investment, has remained to have been followed during the assessment proceedings. Revenue effect can only be

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worked out after verifying the details of the transactions, hence not quantified."

c) On 24.03.2011, the Assessing Officer issued a notice under Section 148 of the Act pointing out that he has reason to believe that income chargeable to tax had escaped assessment for the assessment year 2006-07 and therefore he proposes to reassess the income for the assessment year 2006-2007.

d) Thereafter at the instance of the Petitioner, on 12.10.2011 the Assessing Officer provided the Petitioner the reasons for issuing of said notice under Section 148 of the Act. The reasons read as under :

" Perusal of the records made available reveal that the assessee comapny is engaged in the business of 'Housing Finance'. During the year assessee had a turnover of Rs. 3,13,47,33,037/-. After reducing the direct and indirect expenses the company showed a net profit of Rs.12,28,90,685/-. However, the computation of income reveal that the company has claimed the following deductions which are 'provisions'/'contingencies' in nature and character:

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1. Write Back of serving cost disallowed earlier Rs.21,78,715/-
2. Write Back of provisions for delinquencies, Prepayment and conversion risk disallowed earlier. Rs.48,79,51,991/
3. Reversal of provisions on sale of Loan portfolio Rs.8,86,55,725/-

Prima facie, by and large, these are provisions on various accounts, though the nomenclature adopted by the assessee primarily appears to be varied. It is an accepted fact that no provisions are eligible for deduction while arriving at the taxable profit of the year. In principle, only amounts expended wholly and exclusively for the purpose of earning the profit from the said business are eligible for deduction before arriving at the taxable income. The records reveal that the disallowance of these provisions amounting to Rs.57,87,86,431/- has remained to have been disallowed during the assessment proceedings. Perusal of the Profit and Loss Account and the submissions on record reveal that TDS has remained to be deducted on advertisement and sales promotion expenses to tune of Rs.22,48,91,672/- under the head Establishment and other expenses in accordance with Chapter XVII-B of the I.T. Act, 1961. The aforementioned expenses are to be disallowed under section 40(a)(ia) r/w Section 200(1) of the I.T.Act, 1961 for non deduction of tax at source.
The company has declared short term capital gain to the tune of Rs.3,63,00,587/-. Prima facie, from the records it appears that as per the guidelines and directions laid down in instruction no. 4 of 2007 dated 15th June, 2007 for distinguishing shares held as

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stock-in-trade and shares held as investment this STCG is to be treated as the business income has remained to have been followed

In view of the above, I have reason to believe that income of Rs.83,99,78,690/- chargeable to tax has escaped assessment. Hence, the assessment is proposed to be reopened and notice under Section 148 is to be issued. "

e) On 28.11.2011, the Petitioner filed its objection to the reasons communicated on 24.10.2011 for reopening the assessment for assessment year 2006-2007. In its objection, the Petitioner pointed out that there has been no escapement of income for the assessment year 2006-2007. In any event, all facts in respect of which the assessment is being sought to be reopened were available with the Assessing Officer at the time of assessment and the issues now raised were specifically raised during the assessment proceeding for the assessment year 2006-2007. Therefore, the notice under Section 148 of the Act was a mere change of opinion and unwarranted. Without prejudice the above, it was pointed out that the reopening of the assessment has been done

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only at the behest of the audit department and not on independent application of mind. In view of the above, the petitioner requested that the said notice under Section 148 of the Act be withdrawn.

f) On 07.12.2011, the Assessing Officer by the impugned order disposed of the Petitioner's objection to reopening of assessment for assessment year 2006-2007 by the impugned notice. The relevant portion of the reasons recorded in the impugned order read as under :

> Whereas notice u/s. 148 of the Income Tax Act, 1961(hereinafter referred to as 'the Act') was issued on 24.03.2011 and duly served on the assessee company on 28.03.2011;
>
> 2 Whereas objections have been raised by the assessee company, vide its letter dated 28.11.2011 submitted on 29.11.2011 against the issuance of the said notice, which are summarized as under:
>
> (I) There is no failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment.
>
> (II) No reopening can be done for the reason of mere change of opinion.
>
> 3.1 The objections raised by the

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assessee are not maintainable and rejected in numerous judgments discussed hereunder. The gist of all these judgments is that mere acceptance of the claim of the assessee and mere production of various details does not amount to full and true disclosure and the Assessing Officer has information in his possession leading to a prima facie belief that the income has escaped assessment, the notice u/s 148 is valid. It is pertinent to refer to the Explanation 1 to Section 147 which provides that "*Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso*". Therefore, all the ingredients of the apex court's judgment in the case of 259 ITR 0019(SC), GKN Driveshafts (India) Ltd have been complied with in this case which says that the objection of the assessee, if any, are to be disposed off by passing a speaking order.

Besides the impugned order relied upon extract of various case laws without mentioning how the same are relevant to the present purposes.

4 Ms. Aarti Vissanji, the learned Counsel for the Petitioner in support of the Petition submits as under:

a) The said notice is completely

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without jurisdiction as the Assessing Officer does not have any independent reason to believe that the petitioner's income for the assessment year 2006-2007 has escaped assessment. The only basis for the notice is the audit objection dated 29.12.2009. In particular, she invited our attention to the fact that the reasons for audit objection and the reasons recorded to reopen the assessment are identical.

b) All facts with regard to the reasons mentioned for reopening the assessment for the assessment year 2006-2007 was a subject matter of examination by the Assessing Officer while passing the assessment order dated 31.12.2008 for the assessment year 2006-2007.

c) The impugned order is without reasons and displays a non-application of mind to the objections made to reopening of assessment for the assessment year 2006-2007. Consequently, the entire exercise of seeking to reopen the assessment

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for assessment year 2006-2007 has been initiated not on any tangible material, but merely on a change of opinion and the same is not permissible.

5 As against the above, Mr. Tejveer Singh, Counsel for the Respondent submits:

a) That the present proceeding to reopen assessment for assessment year 2006-2007 has been commenced by the impugned notice, within 4 years from the end of the relevant assessment year. In such cases, it is his submission that the jurisdiction is very wide and not fettered by the conditions found in the proviso to Section 147 of the Act seeking to reopen an assessment after the expiry of 4 years from the end of the relevant assessment year;

b) In case where assessment sought to be reopened is less than 4 years then unless an assessment order deals with a particular issue, the Assessing Officer is free to re-agitate the issue even if the same may have been before the Assessing

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Officer during the assessment proceeding;

c) In view of explanation (1) of Section 147 of the Act mere production of evidence during the course of assessment proceeding would not necessarily lead to the conclusion that the Assessing Officer has applied his mind and formed an opinion with regard to the claim of the Petitioner.

d) In any event, the petitioner could contest the issues raised in reassessment proceeding on merits during the course of reassessment proceeding. At this stage the court should not stop the respondent from proceeding further with reassessing the petitioner's income for the assessment year 2006-2007. Therefore, he submits that the petition be dismissed.

6 The power to reopen a completed assessment under Section 147 of the Act has been bestowed on the Assessing Officer, if he has reason to believe

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that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. In fact, the Supreme Court in the matter of India Eastern Newspaper Society v. Commissioner of Income Tax, New Delhi, reported in 119 ITR page 996 has held that whether an assessment has escaped assessment or not must be determined by the Assessing Officer himself. The Assessing Officer cannot blindly follow the opinion of an audit authority for the purpose of arriving at a belief that income has escaped assessment. In the present facts, it would be noticed that the reasons for which the assessment for the assessment year 2006-2007 is sought to be reopened by communication dated 12.10.2011 are identical to the objection of the audit authority dated 29.12.2009. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on

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record. This itself indicates that there was no independent application of mind by the Assessing Officer before he issued the impugned notice. On this ground alone, the assumption of jurisdiction by the Assessing Officer can be faulted.

7 However, as submissions were made on other issues also we are examining them also. It is a settled position in law that where assessment sought to be reopened is before the expiry of four years from the end of the relevant assessment year, then in such cases the power to reopen an assessment is very wide. However, even though such a power is very wide yet such a power would not justify a review of the assessment order already passed. The Supreme Court in the matter of the Commissioner of Income Tax v. Kelvinator (India) Ltd, reported in 320 ITR page 561 has observed that the power to reassess is conceptually different from a power to review. The Assessing Officer under the said Act has only power to reassess on fulfillment of certain precondition namely, he must

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have reason to believe that income has escaped assessment and that there must be tangible material to come to the conclusion that there is an escapement of income from assessment. The Apex Court cautioned that in the garb of reopening an assessment review should not take place. This court following the Apex Court in the matter of Cartini India Ltd. v. Addl. C.I.T. reported in 314 ITR 275 has also held that even where reassessment is sought to be done within four years from the end of the relevant assessment year, there must be reason to believe that income has escaped assessment and such reason to believe should not be on account of mere change of opinion. Therefore, where facts have been viewed during the original proceeding and an assessment order has been passed then in such cases, reopening of an assessment on the same facts without anything more would be a review and not permitted under the garb of reassessment. This would be a mere change of opinion in the absence of any tangible material and is not sufficient to assume jurisdiction to issue

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the impugned notice. In fact, our court in the matter of Idea Cellular Ltd v. Deputy Commissioner of Income tax reported in 301 ITR 407 has held that once all the material with regard to particular issue is before the Assessing Officer and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him. Further, as observed by the Full Bench of Delhi High Court in the matter of C.I.T. v. Kelvinator of India Ltd. Reported in 256 ITR 1, when the entire material is placed before the Assessing Officer at the time of original assessment and he passes an assessment order under Section 143(3) of the Act a presumption can be raised that he applied his mind to all the facts involved in the assessment.

8 Therefore, in the present facts one would have to examine the contention of the Petitioner that the impugned notice is without jurisdiction as the self same facts were not only before the Assessing Officer but he had also viewed the very

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issues on which the assessment is sought to be reopened. So far as, the issue in respect of provisions claimed as deduction for arriving at taxable profit aggregating to Rs.52.87 crores is concerned, the same was not only dislcosed in the notes to account filed with the return of Income but also in response to specific queries raised during the assessment proceeding. It was reiterated at the hearing that on the aforesaid account of provision, the tax had already been paid in the earlier years and the amounts were merely written back in this year to the extent they were in excess of the provisions required. So far as, failure to deduct TDS on advertisement and sales promotion are concerned leading to disallowance of the entire amount of Rs.22.48 crores under Section 40(a)(ia) the same was also subject to scrutiny by the Assessing Officer during the assessment proceedings. In fact, the clause 17(f) of the tax audit report submitted alongwith return of income clearly brings out the fact that where tax has not been deducted, then the entire amount of payment

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has been offered for disallowance under Section 40(a)(ia). In fact, by letters dated 10.11.2008 and 26.12.2008 in response to specific queries of the Assessing Officer during assessment proceedings the petitioner had pointed out alongwith details the expenses in respect of which the tax had not been deducted and which were offered to tax. So far as, the reason to reopen the assessment on the ground that the petitioner had declared short term capital gains of Rs.3.63 crores in respect of income earned out of investments had to be taxed/classified as business Income is concerned, it is not disputed before us that the treatment given was consistent with the earlier year practice and accepted by the Respondent. Further, it is not disputed before us that the short term capital gains have been assessed to the maximum marginal rate and even if considered as business income, the tax effect would be the same. Consequently, there could be no reasonable basis to have a belief that there is any escapement of Income.

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9 Therefore, in view of the above, we are of the view that the impugned notice is without jurisdiction and the impugned order dealing with the objection of the Petitioner is non speaking order in as much as it does not deal with any of the objections raised by the Petitioner in its objections.

10 In the circumstances, the impugned notice dated 24.03.2011 issued under Section 148 of the Act as well as the impugned order dated 07.12.2011 rejecting the objection to initiation of reopening the assessment for the assessment year 2006-2007 are quashed and set aside.

11 The Petition is allowed. No order as to costs.

(M.S. SANKLECHA, J.) **(S.J.VAZIFDAR, J.)**

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