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

INCOME TAX APPEAL NO.1237 OF 2011

The Commissioner of Income Tax-3,
Mumbai, R.No.613, Aayakar Bhavan,
Mumbai-400 020. ...Appellant.

v.

ICICI Bank Ltd.,
ICICI Bank Towers,
Bandra Kurla Complex,
Mumbai -400051. ...Respondent.

Mr. Vimal Gupta for the Appellant.
Ms. Aarti Vissanji i/by S.J.Mehta for the Respondent.

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

DATE : 09th July, 2012

JUDGMENT:(**Per M.S. SANKLECHA, J.**)

This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the said Act) is directed against the order dated 27/8/2010 of the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") relating to assessment year 1996-97.

2) Being aggrieved by the Order dated 27/8/2010 the appellant has raised the following substantial question of law for consideration by this Court:

> Whether on the facts and in the circumstances of the case and in law the Tribunal was right in holding that the notice for reopening of assessment issued u/s.148 of the Income Tax Act was bad in law as the notice was based on mere change of opinion even though the assessment was reopened within a period of four years and the record shows that the Assessee Company had claimed excess deduction u/s. 36(1)(viii) of the Income Tax Act on income which included non fund base income and income from short term finance?

3) The appeal is admitted on the above question. At the instance and request of the Advocates for the appellant and the respondent the appeal is taken up for final disposal.

4) The facts leading to this appeal are as under:

a) The respondent is a public financial institution. The respondent carries on the business of providing finance in the form of long or medium term loans, equity participation, sponsoring and underwriting new issue of shares and securities, providing hire purchase, lending etc. Its income from business of providing long term finance i.e. loans in

excess of five years is referred to as fund based income while income arising from its business other than providing of long term loans is referred to as non-fund based income.

b) In its return of income for the Assessment year 1995-96 the respondent had given the complete working of the fund based income (long term finance) and also disclosed that 79.99% of its total income was attributable to it. Consequently the expenses incurred were also shown to be divided between fund based activity and non fund based activity at the rate of 79.99% and 20.01%. By an order dated 19/3/1999 under Section 143(3)of the said Act, the Assessing Officer assessed the respondent to a total income of Rs.193 crores and while so assessing allowed deduction under Section 36(1)(viii) of the said Act to the extent of Rs.85.00crores in respect of the special reserve created/credited, capped to the extent of 40% of the fund based income(long term finance).

c) Thereafter the assessment for the assessment year 1996-97 was reopened by notice dated 21/10/1999 under Section 148 of the said Act. This reopening was on the issue of claiming deduction under Section 80M of the said Act and with regard to interest attributable to investments under Section 36(1) (iii) of the said Act. Consequent to the above, by an order dated 22/2/2000 under Section 143(3) r/w 147 of the said Act the respondent was assessed to an income of Rs.223Crores.

d) Thereafter, one more notice under Section 148 of the said Act was issued on 20/3/2001 seeking to reopen the assessment for the Assessment Year 1996-97. The reasons recorded for reopening the assessment for the Assessment Year 1996-97 were as under:

> "In the course of assessment proceedings for AY 1998-99, the issue has been examined on the basis of details obtained from the assessee. After going though the details, it is seen that the assessee has been claiming deduction u/s.36(1)(viii) on its income which included non fund based income and income from short terms finance. As such information was not furnished for A.Y. 1996-97, the same could not be examined and proper deduction u/s. 36(1)(viii) was not computed. Consequently, the assessee was allowed excess deduction u/s.36 (1)(viii) to which I(sic) was not entitled to. In view of the above, I have reason to believe that the income chargeable to tax has escaped assessment within the meaning of Sec. 147. The assessment is required to be reopened by issuing notice u/s. 148".

e) Consequent to the above, the Assessing

Officer on 26/3/2002 reassessed the respondent and computed the assessee's total income at Rs.264 Crores. However, while so determining the assessee's total income, deduction available under Section 36(1)(viii) was reduced from Rs.85crores to Rs.40.22crores. This was on the basis of the estimate that the expenses incurred in respect of non fund activity was only 10% and not 20.1% as originally claimed by the respondent during the course of assessment proceeding for the Assessment year 1996-97.

f) Being aggrieved by the order dated 22/3/2002, the respondent filed an appeal to the Commissioner of Income Tax (Appeal) inter alia challenging the reopening of assessment for the assessment year 1996-97 by a notice dated 20/3/2001 under Section 148 of the said Act. On 18/3/2004 the Commissioner of Income Tax (Appeals) disposed of the respondent's appeal by holding that the reopening of assessment for 1996-97 by notice dated 20/3/2001 under Section 148 of the said Act was correct in law.

g) Being aggrieved by the order dated 18/3/2004 of the Commissioner of Income Tax (Appeals) the respondent preferred an appeal to the Tribunal. By its Order dated 27th August 2010, the Tribunal allowed the appeal of the respondent holding that the reopening proceedings initiated by notice dated 20/3/2001 was only on account of mere change of opinion and would

amount to review which is not permitted. Further, the Tribunal held that the issue on which the appellant-revenue had sought to reopen the assessment for the Assessment Year 1996-97 was that the income earned on non fund business had been included in income earned on fund based activity i.e. long term finance while claiming deduction u/s. 36(1)(viii) of the said Act while the reassessment order holds that expenditure claimed at 20.1% was higher then 10% which alone was allowable from non fund based income.

h) Being aggrieved by the order dated 27/8/2010 of the Tribunal the appellant has filed the present appeal. The respondent has also filed its affidavit in reply dated 15/6/2012 opposing the appeal.

5) In support of the appeal Mr. Vimal Gupta Advocate submits that :

i) As the reopening of assessment in the present case is for a period less than the period of 4 years from the end of the relevant assessment year, the power to reopen the assessment under the main part of Section 147 of the said Act is very wide and therefore the notice dated 20/3/2001 issued by the department cannot be faulted;

ii) During the course of the original assessment proceeding leading to the order dated 19/3/1999 as well as the first reopening proceeding leading to the order

dated 22/2/2000 the Assessing Officer had not considered the issue of the expenditure claimed in respect of non fund income at 20.01% and consequently the present proceeding cannot be considered to be on account of a mere change of opinion;

iii) The fact that excess expenditure was claimed for deduction from the income attributable to non fund activity came to the department's knowledge only during the course of assessment proceeding for the assessment year 1998-99. Therefore there was tangible material available only during the Assessment Year 1998-99 which led to the reasonable belief that income had escaped assessment for the Assessment year 1996-97.

iv) The Tribunal erred in holding that reasons for reopening the assessment under Section 148 of the said Act were different from the reasons for passing the reassessment order dated 26/3/2001; and

v) The Tribunal did not deal with the decisions of the Supreme Court in Kalyanji Mavji & Co. v. Commissioner of Income Tax, West Bengal 102 ITR 287 and A.L.A. Firm v CIT 186 ITR 285;

6) Per contra Ms. Aarati Vissanji, Advocate appearing for the respondent while supporting the order of the Tribunal dated 27/8/2010 submits that;

i) Even where the reopening is within a period of 4 years from the end of the relevant assessment year, the Assessing Officer does not have the power to review an assessment. This power can only be exercised when there is reason to believe that income had escaped assessment on the basis of some tangible material.

ii) Merely because the original order dated 19/3/1999 as well as the order dated 22/3/2000 passed consequent to the reopening proceeding, do not discuss the issues raised in the present reopening proceedings, it does not follow that the same were not considered. The orders contain no discussion on the same as the Assessing Officer was satisfied with the claim. Mrs. Vissanji relied upon the affidavit in reply to establish that the material on the basis of which deduction is being claimed for expenditure at 20.1% was given to the Assessing officer during the Assessment proceedings. Therefore on the same set of facts seeking to reopen the proceedings amounts to mere change of opinion and is not permissible;

iii) There was no tangible material available during the Assessment Year 1998-99 which could lead to the reasonable belief that income had escaped assessment for the Assessment year 1996-97 as the entire exercise of the quantum of deduction to be allowed as expenditure was on the basis of estimate; and

iv) The material received during the assessment year 1998-99 as per the grounds for reopening communicated was that income attributable to non fund based activity was included in Fund based income to claim higher deduction under Section 36(1)(viii) of the said Act. However no particulars to support the aforesaid conclusion was made known to the respondent. In any case the reassessment has been done on a completely new ground namely that the expenses attributable to income earned from non fund activities was only 10% and not 20.1% as claimed by the respondent. Consequently this is a completely new ground after giving up the earlier ground and therefore not sustainable in view of the decision of this Court in the matter of CIT **v**. Jet Airlines Private Limited in 331 ITR 236;

7) In this case the assessment is reopened within a period of 4 years from the end of the relevant assessment year. In such cases it is settled law that the power of the assessing officer to reopen the assessment is not subject to the limitation provided in the proviso to Section 147 of the said Act namely failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. Consequently, even where an assessee has disclosed all facts fully and truly for the purpose of assessment, the Assessing Officer would still have jurisdiction to reopen the assessment, if he has reason to believe that income chargeable to tax has escaped assessment. However, this reason to believe that

any income chargeable to tax has escaped assessment even within a period of four years from the end of the relevant assessment year, has to arise not on account of a mere change of opinion but on the basis of some tangible material. This is particularly so as the Income Tax Officer has not been conferred with a power to review his assessment. As observed by the Supreme Court in the matter of CIT v. Kelvinator of India Ltd. 320 ITR Page 561.

> "However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessment on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But, assessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place."

Therefore the sina qua non to issue a notice for reopening of assessments even within a period of less than 4 years from the end of the assessment year, is reason to believe that income has escaped assessment and this reason to believe should be on the basis of tangible material, otherwise the exercise of power to reopen would be a review of the assessment order. As held by this Court in the matter of Siemens Information System Ltd. v. Asst. C.I.T in 343 ITR 188 such tangible material could be even on the basis of fresh material obtained during subsequent assessment proceedings. However the test is that the reason to believe that

income has escaped assessment should emanate from tangible material.

8) As disclosed in the reasons recorded while issuing notice under Section 148 of the Act, in the present case, the impugned notice was based on the ground that the income earned from the non fund based activities of the respondent had been included in the fund based income so as to claim excess deduction under Section 36(1)(viii) of the said Act. The reasons only provide a conclusion and give no material particulars of information obtained during the course of assessment proceedings for the assessment year 1998-99 Therefore the reasons recorded do not indicate any tangible material which has led to a reasonable belief that income has escaped assessment. As held by this court in the matter of Hindustan Lever Ltd. v. R.B. Wadkar 268 ITR 332, the reasons for reopening as recorded must be clear and not suffer from any vagueness so to keep the assessee guessing for the reasons. It is the reasons which provide the link between the evidence and the conclusion. In this case the reasons as recorded do suffer from the vice of vagueness. The material on the basis of which the assessment is sought to be reopened is clear in the order dated 26/3/2002 of the Assessing Officer while reassessing the respondent for Assessment year 1996-97 consequent to reopening. In the above order dated 26/3/2002 it is revealed that the case of the Department is that expenses attributable to non fund based activity should be 10% and not 20.1% as claimed by the respondent. Consequently the expenses attributable to fund based activity would be 90% and not 79.99% resulting in less profit from fund based activity (long term finance). The respondent had

allocated its expenditure between fund based and non fund based activity on the basis of the ratio of the income earned between fund and non fund based activity. Therefore there was some basis for distributing the expenses. Neither the reasons nor the order of the Assessing officer dated 26/3/2002 indicate the basis on which 10% of expenditure is alone attributable to non fund activity. Therefore this again establishes absence of any tangible material obtained during proceeding for Assessment Year 1998-99 to form a reasonable belief that income has escaped assessment. In the circumstances the exercise of powers under Section 148 of the said Act is unwarranted.

9) To overcome the above hurdle, Mr. Gupta submitted that tangible material could also be obtained from the record of the assessment proceedings which are sought to be reopened. This is particularly so as the Assessing Officer in this case had not applied his mind to the record when originally assessing the respondent. Therefore, according to him this is not a case of a mere change of opinion but an opinion on the basis of material. In support of the above he states the fact that a material was available and made known to the Assessing officer during the assessment proceedings and he does not deal with/discuss the same in the adjudication order by itself would give rise to the conclusion that he has not formed any opinion on the issue. Consequently in the present case notice under Section 148 of the said Act has been properly issued.

10) The mere fact that an assessment order does not deal with a particular claim cannot lead to the conclusion that while allowing the claim the Assessing Officer had not applied his mind.

In Idea Cellular Ltd. **v.** Deputy Commissioner of Income tax in 301 ITR 407 this Court held as follows:

> "It was also sought to be contended that since the Assessing Officer had not expressed any opinion regarding this matter in his original assessment order, it could not be said that there was any change of opinion in this case. In our view, 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 cannot be said that he had not applied his mind when all the material was placed by the Petitioner before him."

The Delhi High Court in CIT v. Eicher Ltd. 294 ITR 310 took the same view as above. Similarly, the Full Bench of Delhi High Court in CIT v. Kelvinator of India Ltd. 256 ITR 1 held as under:

> "We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. 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 the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an

> authority exercising quasi judicial function to take benefit of its own wrong."

Besides the above, the reasons for reopening the assessment in this case is the material obtained during the subsequent assessment proceedings for the assessment year 1998-99 and not the material already on record. Therefore the revenue cannot now urge a new ground to support the reopening of an assessment for the assessment year 1996-97.

11) Mr. Gupta also placed reliance upon the decision of the Apex Court in the matter of Kalyanji Mouji (supra) and states that the Tribunal has not dealt with the above case law. In the above case while dealing with Section 34(1)(b) of the Income Tax Act, 1922 the court laid down the following parameters for the purposes for reopening of assessments.

> "On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of s. 34(1) (b) to the following categories of cases:
>
> (1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;
> (2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, in advertence or a mistake committed by the Income-tax officer. This is obviously based on the principle that the tax-payer would not be allowed to take advantage of an oversight or mistake committed by the Taxing Authority;
> (3) Where the information is derived from an external source of any kind. Such external

> source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;
> (4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.
> If these conditions are satisfied then the Income-tax officer would have complete jurisdiction to re-open the original assessment. It is obvious that where the Income-tax officer gets no subsequent information, but merely proceeds to re-open the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, s. 34(1) (b) would have no application."

12) The aforesaid decision has been considered by the Apex Court in the matter of ALA firm in 189 ITR 285 while dealing with reopening of an assessment under Section 147(b) of the said Act as in existence prior to 1989. The issue was whether the Assessing Officer was entitled to reopen an assessment on the ground that while making the original assessment the law laid down by the jurisdictional High Court was not noticed. In the facts of the above case, the Assessing Officer became aware of the binding decision subsequent to passing of original order of assessment and he initiated proceeding under Section 147(b) of the said Act. The material on which the Assessing Officer acted in the above case was the decision of the Madras High Court which was not pointed out during the original proceedings. It was this decision which constituted the opinion /material on the basis of which

reassessment was sought to be reopened. In the aforesaid facts the court questioned the conclusion of proposition No.2 of Kalyanji Mavji (supra). However so far as proposition No.4 is concerned the court observed that it would apply and proceeded to hold that:

> "Even making allowance for this limitation placed on the observations in Kalyanji Mavji (1976) 102 ITR 287 (SC) the position as summarised by the High Court in the following words represents, in our view,the correct position in law (at Page 629 of 102 ITR).
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> "The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income Tax Officer subsequent to the original assessment. If the Income tax Officer had considered and formed an opinion on the said material in the original assessment itself then he would be powerless to to start the proceedings for the reassessment. Where, however, the Income tax Officer had not considered the material and sequently came by the material from the record itself, then such as case would fall within the scope of section 147(b) of the Act."

13) However, in our view the decisions in Kalyanji Mavji as well as ALA Firm of the Apex Court are not of any assistance to the appellant in the facts of this case as this case is based on merely change in opinion on the material which was already on record and considered. The Apex Court in the matter of Kelvinator of India Ltd. (supra) held that the reopening of an assessment

cannot be on a mere change of opinion as the same would amount to review and there is no power of review given to an Income Tax officer.

Further, the Assessing Officer while reassessing the respondent by an order dated 26/3/2002 has in fact taken a ground different from the grounds in the reasons recorded for reopening the assessment under Section 148 of the said Act. The reasons furnished for reopening the assessment alleged that non fund income had been shown in fund based income so as to avail of a higher deduction. However, the basis of the order dated 26/3/2002 was that 20.1% out of the gross expenses attributed to non fund income was excessive and ought to be restricted to only 10%. Thus, the basis of the order is completely different from the reasons recorded for reopening the assessment. This is clearly not permissible as held by this Court in Jet Airways (supra). The Division Bench of this Court in Jet Airways held as under:

> "Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under Section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in sthe event of a challenge by the assessee".

14) In view of the above reasons, we are of the view that the Tribunal was correct in taking the view that the reopening of assessment by notice dated 20/3/2001 under section 148 of the said Act is not sustainable in law. We answer the question raised for our consideration in the affirmative i. e. in favour of the respondent and against the appellant-revenue. Appeal is disposed of. No order as to costs.

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