

ORDER SHEET

ITA NO.155 OF 2009
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME-TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOL-II
Versus
M/S. EUREKA STOCK & SHARE BROKING SERVICES LTD.

BEFORE:

The Hon'ble ACTING CHIEF JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 30th August, 2016.

MR.SIDDHARTHA BHATTACHARYYA, MS.MAMTA BHARGAVA, ADVOCATES FOR APPELLANT
MR.J.P.KHAITAN,SR.ADVOCATE, MR.P.JHUNJHUNWALA, MR.ASOK BHAUMIK, ADVOCATES FOR RESPONDENT

The Court : The subject matter of challenge is a judgment and order dated 18th December, 2008 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata in ITA No. 142(Kol)/2008 pertaining to the assessment year 2001-02, by which the learned Tribunal dismissed an appeal preferred by the revenue.

The revenue has come up in appeal, which was admitted on 8th September, 2010. The following substantial questions were formulated.

- “(i) *Whether the learned Tribunal is justified in following its own order passed in ITA 684(Kol.)/2008, dated June 23, 2008 in preference to the judgment of this Hon’ble Court, reported in 2008 ITR 1023 (Cal.) ?*
- (ii) *Whether the aforesaid judgment of the Hon’ble High Court in the facts and circumstances is applicable in this case or not ?*
- (iii) *Whether in the facts and circumstances of the case, if the answers to the aforesaid questions are in favour of the revenue, the learned Tribunal was justified in law in not interfering with the orders of the learned Commissioner, Income Tax (Appeals) as the assessee’s case is covered by explanation to section 73 of the Income Tax Act, 1961 ?”*

The facts and circumstances of the case are briefly stated as follows:-

The original assessment under section 143(3) of the Income Tax Act, 1961 was made on 12th March 2004. A notice thereafter under section 148 was issued and an assessment under section 147/143(3) was made on 28th December, 2006. In an appeal preferred by the assessee the C.I.T.(A) was of the opinion that *“it is apparent that*

the proceeding u/s.147 was initiated merely on change of opinion by the successor A.O. This is not at all permitted in law.”

In an appeal preferred by the revenue, the learned Tribunal, without anything more, concurred with the opinion expressed by the CIT(A).

Mr. Khaitan, learned senior Advocate appearing for the assessee-respondent, submitted that both the CIT(A) and the learned Tribunal set aside the order under section 147 on the sole ground that the power was exercised in view of change of opinion and therefore the order passed under section 147 read with section 143(3) was bad. He contended that although the revenue has come up in appeal, but there is no ground nor any challenge thrown to the view expressed both by the CIT(A) and the learned Tribunal that it was a case of change of opinion.

Mr. Bhattacharjee, learned Advocate appearing for the revenue, submitted that there may have been some deficiency on the part of the learned draftsman in squarely putting the matter before the Court; but it is not correct to say that the appeal is not directed against that part of the order which has been highlighted by Mr. Khaitan. He, in support of his submission, drew our attention to the question no.3 which we already have quoted above.

Mr. Khaitan, in support of his submission that an order passed on the basis of change of opinion is not sustainable, cited a judgment in the case of *Indian and Eastern Newspaper Society –vs- Commissioner of Income Tax, New Delhi*, reported in (1979) 119 ITR 996 (SC). He drew our attention to the following views expressed by the Apex Court:

“Now, in the case before us, the ITO had, when he made the original assessment, considered the provisions of ss.9 and 10. Any different view taken by him afterwards on the application of those provisions

would amount to a change of opinion on material already considered by him. The revenue contends that it is open to him to do so, and on that basis to reopen the assessment under s.147(b). Reliance is placed on *Kalyanji Mavji & CO. v. CIT* [1976] 102 ITR 287 (SC), where a Bench of two learned judges of this court observed that a case where income had escaped assessment due to the “oversight, inadvertence or mistake” of the ITO must fall within s.34(1)(b) of the Indian I.T. Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this court in *Maharaj Kumar Kamal Singh v. CIT* [1959] 35 ITR 1 (SC), *CIT v. A. Raman and Co.* [1968] 67 ITR 11 (SC) and *Bankipur Club Ltd. v. CIT* [1971] 82 ITR 831 (SC) and we do not believe that the law has since taken a different course. Any observations in *Kalyanji Mavji & Co. v. CIT* [1976] 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law.”

The next judgment cited by Mr. Khaitan is in the case of *CIT –vs- Kelvinator of India Ltd.*, reported in (2002) 256 ITR 1(SC). He drew our attention to the following views appearing at page 15 of the judgment:

“It is well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income-tax Officer does not possess

the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue."

Lastly, Mr. Khaitan drew our attention to the judgment in the case of *CIT –vs- Kelvinator of India Ltd.*, reported in (2010) 320 ITR 561(SC), wherein the following views were expressed:

"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz. That where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. 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 assessments 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 reassessment has to be based on fulfilment of certain pre-conditions 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. 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 1st April, 1989, the Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.”

The reasons recorded for exercise of power under section 147 are as follows:

“It appears from records that the entire business of the assessee co. was not that of purchase and sale of shares but a part of its business was of purchase and sale of shares in which it incurred a loss of Rs.80,01,831/-. The assessee co. also does not fall under any of the tests excepting as laid down in provisions of Explanation to section 73 of the I.T. Act, 1961. Hence the loss of Rs.80,01,831/- incurred in purchase and sale of shares should be treated as speculating loss as per provisions of Explanation to section 73.

Further, as per P&L Act, it is found that the a.’s total expenses during the year was of Rs.1,6617959/-. A portion of such expenses should be attributable to the a.’s activities of purchase and sale of shares. On apportionment of expenses among brokerage income, loss on purchase and sale of shares and other income, the expenses attributable to loss on purchase and sale of shares should be as under:

$$\begin{array}{r} 16617959 \times 8001831 \\ \hline 19602970 \end{array} = 67,83,364/-$$

Taking into a/c. the proportionate expenses the speculative loss should be of Rs.147,85,195/- (80,01,831 + 67,83,361) which is not to be allowed to set off against other income but to be carried forward for set off against any future speculation profit.

Accordingly total income of the 'a' should be as under:

Business Income:-

Business loss as computed u/s.143(3)= (-)13,15,218

Add: Speculation loss not to be

Set off = (+)1,47,85,195
1,34,69,977

Income from a/s. as computed

U/s. 143(3) = 24,45,834

Total Income = 1,59,15,811

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In view of the above I have the reason to believe that the income charged to tax to the extent of Rs.1,47,85,191/- (15915811+1130616) has escaped asst.

Hence proceedings u/s.147 have been initiated."

In order to bring home his point, Mr. Khaitan drew our attention to the notice dated January 7, 2003, issued under section 142(1) of the Act as also under section 143(2) of the Act, wherein the following, amongst other explanations, were called for from the assessee:

"(iv) An explanation as to why the loss of Rs.80,01,831/- as per Schedule 14 shall not be treated as a speculation loss within the meaning of explanation to section 73 of the I.T. Act."

The assessee replied thereto by a letter dated February 8, 2003, stating, inter alia, as follows:

"You must be fully aware that in order to earn brokerage income the share broker has to purchase or sale various shares securities for client and in process on their own account also. In order to ascertain the net income derived from brokerage by dealing in shares schedule 14 gives you the amount of brokerage earned by the assessee during the year but the brokerage cannot be earned without purchase and sale of shares. The brokerage income is always a product of purchase and sale of shares in the hands of a share broker. It is bifurcated only for the purpose of determining service tax payable, which is an excise item, and the levy is on the value of services rendered to client by Stock Exchange Members. According to books of account maintained by the assessee, I am enclosing herewith a combined share purchase and sales account during the previous year relevant to assessment year 2001-02 Marked Annexure NO.1 to 48. A perusal of the combined account indicates that the assessee has derived income from share broking operation as has been shown in schedule 14 of the balance sheet at Rs.15125115/-. The combined trading account also indicates the volume of purchases and sales made by the assessee company. The entire activities of purchase and sale in shares indicate a profit of Rs.15125115/-. In schedule 14 a sum of rs.8001831/- has been shown in bracket as the reduction in value of the share stock held by the assessee company on their own account. This does not mean that this is a loss to the assessee whereby explanation to section 73 applies. Please note that in case of share

Broker Company, the explanation to sec.73 is definitely applicable but as it appears from your letter you intend to apply this explanation only to the part activities of the assessee company which is not permissible in law.

Your attention is drawn to departmental circular no.264 dated 24th July, 1976 reported in 110 ITR (1977) statute page 21 & 32. This circular clearly indicates that the entire purchase and sale of shares has to be considered while considering explanation to section 73. On this submission reliance is placed on the decision of Calcutta High Court in case of CIT –Vs- Arvind Investment Ltd. reported in 192 ITR, Page 365.

Please note that in case of the assessee company the entire business operation comprises of share purchase and sale and income derived therefrom has to be considered in totality on the same principle.

In view of the facts stated above and in view of the details furnished to you for the entire share purchase and sale amount along with this letter marked annexure no.1 to 48, the question of treating reduction in value of stock held by the assessee company amounting to Rs.8001831/- as speculation loss cannot arise at all. The entire operation of the assessee company from share trading indicates income from business operation in schedule 14 at Rs.1,51,25,115/-. If you do not agree to my aforesaid submission you are requested to intimate the assessee in writing for any reason or basis before taking any adverse inference in the matter.”

The assessing officer thereafter allowed the loss of Rs.80,01,831/- to be set off against the income earned by the assessee on account of brokerage of shares. Mr.Khaitan submitted that the recorded reasons would go to show that it was only as

a matter of change of opinion that the succeeding assessing officer resorted to the exercise of power under section 147.

We have not been impressed by this submission advanced by Mr.Khaitan for the following reasons.

The assessee, by its letter dated February 8, 2003, misrepresented the facts. He also actively misled the assessing officer into believing that “in order to earn brokerage income, the share broker has to purchase or sale various shareson their own account also. This does not mean that this is a loss to the assessee.” The suggestion made by the assessee, it was not disputed by Mr. Khaitan, was factually incorrect. The assessing officer, who succeeded, realised that the assessee had misrepresented the facts to the earlier assessing officer. He in the circumstances issued the notice under section 148 and also recorded the reasons. It is not therefore a case of change of opinion. The facts have to be correctly understood by the concerned officer. When the concerned officer was under a misapprehension as regards the facts based on misrepresentation made by the assessee it cannot, in that case, be said that he subsequently changed his opinion when he issued notice seeking to disallow the loss earlier allowed expressly or impliedly to be set off against the income arising out of the brokerage of shares.

The judgments cited by Mr. Khaitan do not really help him.

In the case of *Indian and Eastern Newspaper Society(supra)*, the question arose whether the assessing officer had changed his opinion with respect to the meaning and purport of sections 9 and 10 of the Act.

In the case of *Kelvinator India Ltd., reported in 256 ITR(supra)*, Mr.Khaitan has relied upon two sentences out of the context. Those two sentences are preceded by the following sentence.

“Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising jurisdiction of rectification of mistake”.

It is not in dispute that originally the assessee had made a misrepresentation of fact which misled the assessing officer in believing that the loss was suffered in the course of share broking business. Whereas the truth is that loss was suffered in sale and purchase of shares which had no connection with the business of the assessee as a share broker.

The last judgment, in the case of *Kelvinator India Ltd.*, reported in (2010) 320 ITR(supra), the question for consideration was whether the concept of change of opinion stood obliterated with effect from April 1, 1989 after substitution of section 147 of the Income Tax Act, 1961 by the Direct Tax Laws (Amendment) Act, 1987. That question was answered in the negative by the Apex Court. Far from helping the assessee, the judgment, in our view, militates against him. Their Lordships held, “Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.”

There is in fact tangible material to come to the conclusion that income escaped assessment which we have already discussed. There is thus no question of any change of opinion.

For the aforesaid reasons, an additional question is formulated by us as follows:

Whether there is any change of opinion in the facts and circumstances of the case in reassessing the income of the assessee under section 147/143(3) of the Income Tax Act?

The aforesaid question is answered in the negative.

Considering the view we have taken and considering that the CIT(A) and the learned Tribunal did not go into the merits of the matter, we refrain from expressing our views with regard to the other questions. The order passed by the learned Tribunal and the CIT(A) are both set aside. The matter is remanded to the CIT(A) for hearing the appeal on merits.

The views expressed by us are for the purpose of disposal of the appeal and shall not preclude the CIT(A) from deciding the merits of the matter in accordance with law.

(GIRISH CHANDRA GUPTA, ACJ)

(ARINDAM SINHA, J.)

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