IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAMIT KOCHAR, AM

ITA No.1084/Mum/2012
(A.Y.:2005-06)

Luminant Investments Ltd., Radha Bhavan, 1st Floor, 121, Nagindas Master Road, Mumbai 400 023	Vs.	The Asst. Commissioner of Income Tax, Central Circle-40, Aayakar Bhavan, M. K. Marg, Mumbai 400 020
PAN: AAACL 0834 A		
Appellant	..	**Respondent**

Appellant by		**Shri Neelkanth Khandelwal, AR**
Respondent by		**Shri A. Ramachandran, DR**

Date of hearing		**14-06-2016**
Date of pronouncement		**08-07-2016**

O R D E R

***PER MAHAVIR SINGH, JM*:**

This appeal by the assessee is arising out of the order of CIT& (A)-37, Mumbai in appeal No.CIT (A)-37/I. T.102/ACCC-40/11-12 dated 09-01-2012. Assessment was framed by the ACIT, Central Circle-40, Mumbai for assessment year 2005-06 vide his order dated 27-09-2010 u/s 144 Income Tax Act, 1961 (hereinafter referred to as "the Act") read with section 147 of the Act.

2. The first issue in this appeal of the assessee is against the order of CIT(A) upholding the action of the AO in framing re-assessment u/s 147 r.w.s. 148 of the Act is without jurisdiction being the notice issued u/s 148 of the Act is bad in law.

3. Brief facts leading to the above issue are that for the relevant assessment year 2005-06, the assessee filed return of income u/s 139 (1) of the Act on 31-10-2005. Assessment in this case was framed u/s 143(3) of the Act vide order dated 26-12-2007 i.e. the original assessment. The assessee is engaged in the business of trading in shares and securities. Subsequently, notice u/s 148 (1) of the Act dated 21-12-2009 was issued for the reasons recorded by the AO u/s 148 of the Act, which reads as under:-

"Reasons recorded u/s. 148(2) before issue of notice u/s. 148 (1) of I. T. Act.
M/s. Luminant Investment Pvt. Ltd. 2005-06

> *Return of income was filed on 31.10.2005 declaring total income of Rs.68,35,529/-. The return was processed u/s. 143(1) on 18.05.2006 accepting returned loss. The case was selected for scrutiny being compulsory scrutiny assessed in Central Charge. Assessment u/s 143(3) completed on 26.12.2007 accepting loss of Rs.68,35,529/-*
> *Subsequently the following issue was noticed which falls under the description of income escaping assessment u/s 147.*
> *During the year under reference the assessee has shown above loss of Rs.68,35,529/-from share and securities. The loss was on account of market-to-market valuation of shares, which were held as stock in trade. This loss was incurred due to decrease in market value of shares of 'Rasheel Agrotech' which had decreased from Rs.73,27,964/- in the previous year to Rs.5,13,021/- in the year under reference. During the year the assessee has not carried out any business activity. The loss was on account of market-to-market valuation of shares only. Hence in the absence of any business activity the loss incurred on valuation of shares needs to be disallowed. The tax on above works out to Rs.24,52,245/-.*
> *In the view of above, I believe that there is an under assessment of income to the tune of Rs.68,35,529/- within the meaning of section 147."*

The AO framed reassessment and disallowed the business loss claimed by the assessee on account of market-to-market valuation of shares which were held as stock-in-trade. Aggrieved, the assessee preferred appeal before CIT (A) and challenged the issue of reopening by the AO u/s 148 of the Act. The CIT (A) also confirmed the action of the AO in initiating proceedings of re-opening u/s 148 of the Act. Aggrieved, the assessee came in second appeal before the Tribunal.

4. We have heard the rival contentions and gone through the facts and circumstances of the case. At the outset, the learned Counsel for the assessee after drew our attention to the reasons recorded and stated that the re-opening is based on change of opinion. For these arguments, he drew our attention to the accounts of the assessee, which are audited accounts, wherein the assessee has made complete disclosure and are filed along with the return of income. The learned Counsel for the assessee drew our attention to page 20 of the assessee's paper book Para 6, 7, 8 and 9 which read as under:-

> *"6. The Company has received an order dated December 12, 2003 under section 11(4), 11B of SEBI Act, 1992 read with Regulation 11 of SEBI (Prohibition and Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, prohibiting the Company from buying, selling or dealing in securities for a period of 14 years. On the basis of legal advice, the*

Company has made necessary petition before the Securities Appellate Tribunal (SAT). The appeal is pending disposal.

7. Mr. Ketan V. Parekh, notified under the TORTS Act, 1992 is an ex-director of the Company. The Custodian has withdrawn a sum of Rs.1,51,346 from various bank accounts of the Company. The Company has no liability under the TORTS Act and hence, the sum has been separately shown as an asset under the head – Loans and Advances. Mr. Ketan V. Parekh has made an application under the aforesaid Act for de-notification. The said amount will be received back as soon as he is de-notified. In any view, the amount is receivable from the aforesaid ex-director.

8. The accounts include remuneration to Auditors in respect of:

		Previous year
	Rupees	*Rupees*
Audit fees	*11,020*	*11,220*

9. The details in respect of stock-in-trade as at 31st March,2005 are as follow –

				Previous Year	
Name of scrip	*Face value (Rs.)*	*Quantity*	*Amount (Rs.)*	*Quantity*	*Amount (Rs.)*
Nirma Ltd.	*10*	*22125*	*4944938*	*2212*	*4944938*
Rashel Agrotec	*10*	*128900*	*513021*	*128900*	*7327964*
		151025	*5457959*	*151025*	*12272902"*

The learned Counsel for the assessee further stated that while framing the original assessment u/s 143 (3) of the Act, the AO during the course of assessment proceedings required the assessee to explain the loss from shares and the assessee filed the following details vide its reply dated October 12, 2007 which is placed in assessee's book at page 24 and the relevant Para 6 reads as under:-

"6) Details of loss from shares & securities – Statement 6

Reasons why loss from shares & securities should not be disallowed

Loss from shares & securities of Rs.6,814,943 is on account of market-to-market valuation of stock held by us. The shares have been held by the Company as stock-in-trade. As such, the loss thus arising is allowable as business loss as the stocks held are stock-in-trade of the Company. There are no trading transactions in shares entered into by the Company".

The learned Counsel finally drew our attention to the original assessment framed by the AO u/s 143 (3) of the Act dated 26-12-2007 wherein on page 2 of the assessment order

Para 4, the AO has considered the issue of trading loss of shares and allowed the claim by observing as under:-

> *"4. <u>Share trading Loss Rs.6814943/-</u>*
>
> *4.1 In the course of assessment proceedings, the assessee was asked to furnish the details of business loss of Rs.6814943/-. Vide letter dt. 12/10/2007, the assessee has furnished the details of loss from shares on securities at Rs.6814943/- which is on a/c of valuation at market to market valuation of stock held by the company. The shares have been held by the company as stock. As such, it is claimed that the loss arising is allowable as speculation business loss. It is further stated that there is no trading transaction in shares entered into by the company".*

5. In view of the above facts, that, the AO during the course of original assessment proceeding considered the claim of the assessee and allowed the same after going through the evidences and in such circumstances, re-opening on the same reason is merely a change of opinion as the AO deemed to have applied his mind on facts which are on record and reopening on change of opinion is not permissible even within 4 years. This view of ours is supported by CIT vs. Kelvinator of India Ltd. (2002) 256 ITR 1 (Delhi) of Full Bench of Hon'ble Delhi High Court while considering a case of reopening u/s 147 of the Act within 4 years from the end of the assessment year. The Court held that when a regular order of assessment is passed in terms of section 143 (3) of the Act, a presumption can be raised that such an order has been passed on application of mind. It was held that if it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. It was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. Hon'ble Supreme Court dismissing the appeal of revenue held that though the power to reopen under the amended s. 147 of the Act is much wider, one needs to give a schematic interpretation to the words "reason to believe" failing within section 147 of

the Act would give arbitrary powers to the AO to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. One must also keep in mind the conceptual difference between power to review and power to re-assess. The AO 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. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1.4.1989, the AO 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 live link with the formation of the belief. This is supported by Circular issued by CBDT vide No.549 dated 31.10.1989 which clarified that the words "reason to believe" did not mean a change of opinion. Further this is again reiterated in the judgment of the Hon'ble Bombay High Court in Asteroid Trading and Investments Pvt. Ltd. Vs. DCIT (2009) 308 ITR 190 (Bom.) and Asian Paints Ltd. Vs. DCIT (2009) 308 ITR 195 (Bom.), which are impliedly approved, while that of the Allahabad High Court in EMA India 30 DTR (All) 82 (which had dissented from the Full Bench judgment in Kelvinator) is impliedly overruled. Hon'ble Delhi High Court in the case of CIT Vs. Eicher Ltd. (2007) 294 ITR 310 (Delhi) held that the fact that there is no discussion in the assessment order does not mean there is no application of mind.

6. Full Bench of Hon'ble Delhi High Court in Kelvinator of India Ltd. was affirmed by the Hon'ble Supreme Court in the case of CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC), wherein it is held as under:-

> *"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. 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 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. 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, 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 live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

7. In view of the above facts of the case as discussed above that the entire information was available before the AO during the course of assessment proceedings, which was called by him by issuing questionnaire and the assessee replied to the same, it can easily be said that the AO has formed an opinion regarding allowance of loss claimed by assessee on share transactions as trading loss. The reopening is merely change of opinion and the same is not permissible in view of the above precedence and position of law. Accordingly, we quash the reopening and allow this appeal of the assessee.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 08/07/2016.

Sd/-	Sd/-
(RAMIT KOCHAR)	**(MAHAVIR SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 8/7/2016

Lakshmikanta Deka/Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI