

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'A(SMC)' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member**

**I.T.A. No. 1536/KOL/ 2015  
Assessment Year: 2006-2007**

**S.K. Dudhoria Holdings (P) Limited,.....Appellant**  
**Room No. 5A, 5<sup>th</sup> Floor, Crescent Towers,**  
**229, A.J.C. Bose Road,**  
**Kolkata-700 020**  
**[PAN : AADCS 7341 A**  
**-Vs.-**

**Income Tax Officer,.....Respondent**  
**Ward-1(3), Kolkata,**  
**Aayakar Bhawan,**  
**P-7, Chowringhee Square,**  
**Kolkata-700 069**

**Appearances by:**

*Shri D.K. Kothari, A.R., for the assessee*

*Shri Sudipta Gupta, JCIT, Sr. D.R., for the Department*

Date of concluding the hearing : May 02, 2016

Date of pronouncing the order : June 03, 2016

**O R D E R**

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals)-5, Kolkata dated 07.10.2015 for the assessment year 2006-07 and the solitary issue raised therein relates to the validity of assessment made by the Assessing Officer under section 143(3) read with 147 of the Act.

2. The assessee in the present case is a Company, which is engaged in the business of trading in shares. The return of income for the year under consideration was filed by it on 16.11.2006 disclosing total income of Rs.61,161/-. In the assessment originally completed under section 143(3) vide an order dated 05.08.2008, the total income of the assessee as declared in the return of income was accepted by the Assessing Officer after scrutiny. Subsequently the Assessing Officer found from the audited accounts filed by the assessee along with the return of income that the

speculation loss of Rs.9,09,389/- was adjusted by the assessee against the business income. According to him, such adjustment was prohibited as per the provision of section 73 and there was thus escapement of income of the assessee from the assessment. He, therefore, reopened the assessment after recording the reasons and issued a notice under section 148 and in response to which a letter dated 16.03.2011 was filed by the assessee requesting that the return originally filed on 16.11.2006 be treated as the return filed in compliance to the notice under section 148. During the course of re-assessment proceedings, the validity of the action of the Assessing Officer in reopening the assessment was challenged by the assessee on the ground that in the absence of any new tangible material or information coming to the possession of the Assessing Officer, the reopening of assessment by the Assessing Officer was based on a mere change of opinion. The Assessing Officer did not find merit in this contention of the assessee and by relying on Clause (C) below Explanation 2 to section 147, he proceeded to complete the assessment under section 143(3)/147 vide order dated 05.12.2011, wherein the claim of the assessee for adjustment of speculation loss against business income was disallowed by him.

3. Against the order passed by the Assessing Officer under section 143(3) read with section 147, an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging, inter alia, the validity of assessment made by the Assessing Officer on the ground that the reopening of assessment itself was bad in law as the same was based on a mere change of opinion. This stand of the assessee was not found acceptable by the Id. CIT(Appeals). According to him, the Assessing Officer having not expressed any opinion on the issue relating to the assessee's claim for adjustment of speculation loss against business income in the assessment originally completed under section 143(3), it was not a case of reopening based on mere change of opinion. He, therefore, upheld the validity of the assessment completed by the Assessing Officer under section 143(3) read with section 147 and also

confirmed the addition made by the Assessing Officer therein by disallowing the assessee's claim for adjustment of speculation loss against business income. Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. The Id. counsel for the assessee, at the outset, invited our attention to the copy of reasons recorded by the Assessing Officer placed at page no. 19 of the paper book and pointed out that the assessment originally completed by the Assessing Officer under section 143(3) was reopened by him on the basis of the same records as was available before him while completing the original assessment under section 143(3). He contended that no new fact or new material had come to the possession of the Assessing Officer after completing the assessment originally under section 143(3) which forms the basis of reopening and thus the reopening of assessment by the Assessing Officer was clearly based on mere change of opinion, which is not permissible in law as rightly held, *inter alia*, by the Hon'ble Supreme Court in the case of CIT -vs.- Kelvinator of India Limited reported in 320 ITR 561.

5. The Id. D.R., on the other hand, strongly supported the impugned order of Id. CIT(Appeals) on this issue. He contended that the issue relating to the assessee's claim for adjustment of speculative loss against business income, which has not been examined by the Assessing Officer during the course of assessment proceedings under section 143(3) and there being no expression of opinion by the Assessing Officer on this issue, it was not a case of reopening based on mere change of opinion as rightly held by the Id. CIT(Appeals) in his impugned order.

6. I have considered the rival submissions and perused the relevant material available on record. In order to appreciate the stand taken by both the sides on the issue under consideration relating to the validity of reopening of assessment by the Assessing Officer, it was relevant to refer

to the reasons recorded by the Assessing Officer, which are extracted below:-

*"In the instant case, return of income was filed on 16.11.2006 disclosing total income of Rs.61,161/-. The return was assessed under section 143(3) at a total income of Rs.61,161/- on 05.08.2008. In the order under section 143(3), the entire amount was considered as short term capital gain.*

*Subsequently examination of audited accounts, it shows that the 'other income' is a negative figure of Rs.3,96,564/-. The details are given in Sch. 10 of the audited accounts. According to that Schedule, Speculation Loss is Rs.9,09,389/- which have been adjusted with dividend income and interest income.*

*As per provisions of sec. 73, speculation loss can only be set off with speculation profit. Therefore, in audited accounts, adjustment of speculation loss with interest and dividend income leads to under assessment of income of Rs.9,09,389/-. Accordingly, I have reason to believe that assessee's income escaped assessment of Rs.9,09,389/- and proceedings u/s 147 have been initiated against the assessee. As the assessment was completed u/s 143(3) prior approval from CIT, Kol-1, Kolkata had been obtained vide letter no. CIT/Kol-1/Approval/2010-11/3477 dt. 29.10.2010.*

*Hence, issue notice u/s 148 of the I.T. Act, 1961 to the assessee company for the A.Y. 2006-07".*

7. It is manifest from the reasons recorded by the Assessing Officer for reopening the assessment that the assessment originally completed under section 143(3) was reopened by the Assessing Officer on the basis of the same records as was available before him while completing the original assessment under section 143(3) and there was no new material that had come to his possession on the basis of which assessment was reopened. At the time of hearing before me, the ld. D.R. has not disputed this position. He, however, has contended that the reopening of assessment by the Assessing Officer was based on altogether new issues, which had not been examined by the Assessing Officer during the course of original proceedings under section 143(3). However, as demonstrated by the ld counsel for the assessee at the time of hearing before me on the basis of relevant material placed on record at page nos. 46 and 50-52 of

the paper book, the issue relating to the assessee's claim for speculation loss of Rs.9,09,389/- as appearing in Schedule 10 of the Profit & Loss Account was duly examined by the Assessing Officer during the course of assessment proceedings under section 143(3) and the same was accepted in the assessment completed under section 143(3) on due examination. The reopening of assessment on the said issue without there being any tangible new material coming to the possession of the Assessing Officer thus was clearly based on change of opinion, which is not permissible in law as held, *inter alia*, by the Hon'ble Supreme Court in the case of Kelvinator India Limited (supra). I am, therefore, of the view that the reopening of assessment by the Assessing Officer itself was bad in law and the assessment completed under section 143(3) read with section 147 in pursuance thereof is liable to be cancelled being invalid. I order accordingly.

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

Order pronounced in the open Court on June 03, 2016.

Sd/-

**(P.M. Jagtap)**  
**Accountant Member**

**Kolkata, the 3<sup>rd</sup> day of June, 2016**

- Copies to :
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Room No. 5A, 5<sup>th</sup> Floor, Crescent Towers,  
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Kolkata-700 020**
  - (2) **Income Tax Officer,  
Ward-1(3), Kolkata,  
Aayakar Bhawan,  
P-7, Chowringhee Square,  
Kolkata-700 069**
  - (3) **Commissioner of Income-tax (Appeals)-5, Kolkata**
  - (4) **Commissioner of Income Tax, Kolkata**
  - (5) **The Departmental Representative**
  - (6) **Guard File**

By order

**Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata**