

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

ITA.No. 2222/MUM/2016 (A.Y: 2006-07)

Asst. Commissioner of Income
Tax – 29(1) Room No. 108,
1st Floor, C-10, Pratyankshakar
Bhavan, B.K.C., Bandra (East)
Mumbai – 400 051.

v. Shri Bharat B Bhanusali
604, Abhinandan Takshila,
Nirmal Nagar,
Mulund-Goragaon Link Road,
Mulund (W) – 400 080

PAN No: AABPB 1246 Q

(Appellant)

(Respondent)

C.O. NO. 320/MUM/2017

[ARISING OUT OF ITA.NO. 2222/MUM/2016 (A.Y: 2006-07)]

Shri Bharat B Bhanusali
604, Abhinandan Takshila,
Nirmal Nagar,
Mulund-Goragaon Link Road,
Mulund (W) – 400 080

v. Asst. Commissioner of Income
Tax – 29(1) Room No. 108,
1st Floor, C-10, Pratyankshakar
Bhavan, B.K.C., Bandra (East)
Mumbai – 400 051

PAN No: AABPB 1246 Q

(Appellant)

(Respondent)

**Assessee by : Shri Dr. K. Shivaram &
Shri Rahul K. Hakani**

Revenue by : Ms. Pooja Swarup

Date of Hearing : 08.03.2018

Date of Pronouncement : 31.05.2018

ORDER**PER C.N. PRASAD (JM)**

1. This appeal is filed by the Revenue and Cross Objection by the assessee against the order of the Ld. Commissioner of Income-tax (Appeals) – 40, Mumbai dated 19.01.2016 for the Assessment Year 2006-07.

2. The Revenue has raised the following grounds in its appeal: -

“1. On the facts and in the circumstances of the case and in the law, the Ld. CIT(A) erred in deciding that the AO has not made out any case that income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for making the assessment.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has failed to consider the fact that the sale and purchase relating to the scrips of Agrotech Foods and International Travel appear in the Demat A/c but do not appear in the STCG/Business income shown by the assessee.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has failed to consider the fact that the transactions in respect of scrips as mentioned in Annexure B to the assessment order do not reflect in the Demat A/c.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) has failed to consider the fact that in respect of transactions of scrips as mentioned in Annexure C of the assessment order there is mismatch between the quantity transacted vis-a-vis the Demat statement.

5. The appellant craves leave to add, to amend, alter, substitute or modify any of the above ground or add a fresh ground as and when found necessary either before or at the time of hearing.”

3. Briefly stated the facts are that, assessee originally filed return of income on 31.08.2006 declaring income of ₹.1,48,06,754/- and the assessment was completed u/s. 143(3) on 28.03.2008 determining the income at ₹.1,49,06,753/-. Subsequently assessment was reopened by

issue of notice u/s. 148 of the Act on 20.03.2013 on the ground that assessee claimed short term capital gain on certain share transactions and tax was paid @10% and since shares were sold before, there could be entered into Demat account. The same has to be treated as speculation income and not under the head short term capital gain and therefore speculation income on the transactions escaped the assessment. One more reason given by the Assessing Officer for reopening the assessment is that the transactions as submitted by the assessee in respect of certain shares scrips were not reflected into Demat account and there is a mis-match between the quantity transacted as appeared in the statement of computation of capital gain vis-à-vis Demat statement. With these reasons the assessment was reopened and the short term capital gain reported by the assessee was assessed as business income.

4. On appeal the Ld.CIT(A) held that the reopening of assessment is bad in law as the reasons recorded for reopening of assessment, the Assessing Officer could not make out any case that the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose full and truly all material facts necessary

for making the assessment. Against this order the Revenue is in appeal before us.

5. Ld. DR vehemently supported the orders of the Assessing Officer.

6. We have heard the rival submissions, perused the orders of the authorities below. Undisputedly the assessments were reopened beyond four years from the end of the Assessment Year and the original assessments were completed u/s. 143(3) of the Act. In the circumstances the first proviso of section 147 applies according to which when the assessment is completed u/s. 143(3) no action shall be taken u/s. 148 of the Act after expiry of four years from the end of the Assessment Year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts, necessary for his assessment. On a perusal of the reasons recorded by the Ld.CIT(A), we find that there is no such allegation by the Assessing Officer that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment. We also find from the reasons that the Assessing Officer tried to say that there is an escapement of income based on the information already furnished by the assessee in respect of the share transactions. Nothing new material have come on record to suggest that

there is escapement of income except the information which was already placed on record at the time of assessment. Moreover, we find that, what the Assessing Officer was trying to do is to assess the short term capital gains as business income that means a mere change of opinion on head income. When there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment, in view of the first proviso to section 147 of the Act the Assessing Officer loses jurisdiction to reopen the assessment. This aspect of the matter has been elaborately considered by the Ld.CIT(A) with reference to the decisions of the Hon'ble Supreme Court in the case of CIT v. M/s. Kelvinator of India Limited [320 ITR 561] and the Hon'ble Jurisdictional High Court in the case of Aroni Commercials Ltd. v. DCIT [362 ITR 403] and held that reopening of assessment by issue of notice u/s. 148 is not valid and hence bad in law. What we see is a mere change of opinion of the Assessing Officer to assessee the short term capital gain shown by the assessee as business income of the assessee, beyond the period of four years from the end of the Assessment Year, where the assessment was completed u/s. 143 of the Act. This action of the Assessing Officer is not permissible in view of the decision of the Hon'ble Supreme Court in the case of CIT v. M/s. Kelvinator of India Limited (supra) as it amount to mere change of opinion. In the circumstances, we uphold the order of the

Ld.CIT(A) in holding that the reopening of the assessment is bad in law. Since we have held that the reopening of the assessment is bad in law, we are not inclined to adjudicate the cross objection filed by the assessee and hence the same is dismissed.

7. In the result, appeal of the Revenue and cross objection of the assessee are dismissed.

Order pronounced in the open court on the 31st May, 2018.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Mumbai / Dated 31/05/2017
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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,

(Asstt. Registrar)
ITAT, Mum