

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.3409/M/2016  
Assessment Year: 2006-07**

M/s. Jilco Securities Ltd., Pushpawati Building, 2 <sup>nd</sup> Floor, Girgaon Road, Chandanwadi, Mumbai - 400 002 <b>PAN: AAACJ 1567A</b>	Vs.	ITO-4(2)(4), Mumbai
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Pramod Kumar, A.R.  
Revenue by : Shri M.C. Ominingsen, D.R.

Date of Hearing : 01.06.2018  
Date of Pronouncement : 28.06.2018

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The present appeal has been preferred by the assessee against the order dated 21.01.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2006-07.

2. At the outset, the Bench pointed out to the Ld. AR that the appeal of the assessee is late by 27 days which was accepted by the Ld. A.R. of the assessee. Explaining the delay he submitted that delay in filing the appeal was for the reasons which were beyond the control of the assessee. The Ld. A.R. submitted that the person who was looking after the taxation and accounts matters lost his father on 03.06.2016 who was suffering from heart ailment, diabetic and BP etc.

The said person was bedridden for the last one year and therefore, the C.A. could not attend to the appeal documents. Moreover it was not desirable to change the C.A. in such circumstances and finally the appeal handed over to the assessee on 12.05.2016 and ultimately the appeal was filed on 16.05.2016 resulting into delay of 27 days. The Ld. A.R. prayed before the Bench that since the delay was due to bonafide and reasonable cause which deserved to be condoned. In defense of his arguments he relied on the decisions in the case of National Thermal Power Company Ltd. vs. CIT 229 ITR 383 (SC), CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom.) and Jute Corporation India vs. (1991) 187 (ITR) 688.

3. The Ld. D.R., on the other hand, objected to the contentions of the Ld. A.R. by submitting that it is the first and foremost duty cast upon the assessee who is aggrieved by the order of Ld. CIT(A) to file appeal well within the time and period of limitation has been provided in the Act and therefore the same should not be admitted at all.

4. After hearing both the parties and perusing the material on record, we find that the delay in filing the appeal by 27 days has been explained by the Ld. A.R. which is primarily on account of illness of the father of the counsel of the assessee who was attending the tax and other matters. Ultimately the ailing person expired and the appeal could not be filed within the due time. In our opinion, there is a good and sufficient reason constituting reasonable cause for the delay and

therefore delay has to be condoned. We also rely on the decisions of National Thermal Power Company Ltd. vs. CIT (supra), CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (supra) and Jute Corporation of India Ltd. (supra) wherein the courts have clearly held that the party should not be denied justice for the technical reason of delayed filing of appeals and any delay in filing the appeal should be liberally and generously considered. Accordingly, we admit the appeal for adjudication by condoning the delay.

5. The issue raised in ground No.1 is against the confirmation of re-assessment under section 147 read with section 148 by Ld. CIT(A) as made by the AO whereas the issue challenged in ground No.2 is on merit.

6. The facts in brief are that the assessee filed its return of income on 30.11.2006 declaring nil income whereas income declared under section 115JB was Rs.74,05,922/-. The assessee was issued notice under section 153A of the Act which was complied by the assessee by filing return on 07.12.2009. Thereafter, assessment under section 143(3) read with section 153A of the Act was completed on 16.12.2009 accepting the nil income as filed by the assessee. The assessee is engaged in the business of trading in shares and securities right from the earlier years and income of the assessee from the share trading was accepted as income from business in the earlier years including the instant year. Thereafter, the assessee was issued notice under section 148 of the Act on 26.03.2013 which was complied with by the

assessee by stating that return filed on 30.11.2006 may be treated as compliance to the notice under section 148 of the Act. The assessee also filed return on 13.04.2013 and thereafter the assessee was supplied the copy of reasons recorded for issuing notice under section 148. The reasons recorded are extracted as under:

“The case was received on transfer from the ACIT Cent. Cir. 2(1), Ahmedabad on 20.10.2010. Return for A.Y. 2006-07 was filed on 7.12.2009 at NIL income and tax was paid as per 115JB. Order u/s 153A r.w.s.143(3) was passed on 16.12.2009 and NIL income was accepted. Assessee is dealing in shares and securities and during the year the assessee has earned income of Rs. 69,72,125/- from share transactions. The same was adjusted against the c/f share trading loss which is treated as deemed speculation loss. Thus, for an income to be defined as speculation income it should be covered by section 43(5) of the Act and not under section 73 of the Act.

The assessee has incurred deemed speculation losses in share trading as per explanation of sec.73(4) and same is adjusted against income from profits and gains of business. Assessee has concealed these facts and escaped income of Rs.69,72,125/- by adjusting against c/f speculation loss and offered NIL income for taxation.

Accordingly, in view of the provisions of section 147 & section 149(1) (b) read with section 151(1) of the Income Tax Act, 1961, notice u/s 148 is issued.”

7. A perusal of the reasons recorded shows that the case of the assessee was reopened on the ground that income from dealing shares and securities earned during the year of Rs.69,72,125/- was allowed to be adjusted against the carried forward share trading loss which is treated as deemed speculation loss as defined under section 43(5) of the Act and not under section 73 of the Act and thus the income of the assessee escaped assessment to the tune of Rs.69,72,125/- as the same is adjusted against the carried forward speculation loss. In other words the AO treated the current year income from share trading as normal business income

and not the deemed speculative income as in the earlier years and thus the whole controversy was born. Assessee submitted before the AO that if the brought forward losses from the share trading are treated as speculation losses then the income in the current year from the business of share trading should be treated as deemed speculation income and loss should be allowed to be set off against this income. Finally, the AO denied the set off of Rs.69,72,125/- against the carried forward losses and brought ward the same to the tax by framing assessment under section 143(3) read with section 147 of the Act vide order dated 30.01.14.

8. In the appellate proceedings, the assessee challenged the jurisdiction of the AO in reopening the assessment without being any material before him which was based upon the change of opinion before the first appellate authority which was dismissed by the Ld. CIT(A) by holding that the proceedings under section 143(3) read with section 147 were rightly initiated against the assessee. The Ld. A.R. vehemently submitted before us that it is undisputed that the assessee was carrying on business of share trading from years to years which was accepted by the Revenue over the years and therefore there was absolutely no material for the AO to reopen the case of the assessee under section 147 by issuing notice under section 148 primarily because of these facts were before the AO at the time of framing the assessment under section 143(3) read with section 153A of the Act. The Ld. A.R. submitted that there was no material before the AO to come to the belief that the income of the assessee has escaped

assessment as the brought forward losses from the earlier years are deemed speculation losses and current year income can not be allowed to be set off against the said losses in view of the provision of section 43(5) of the Income Tax Act. The Ld. A.R. contended that the present case of reopening is nothing but a change of opinion by the AO as on the reexamination of the same records/set of information as available before the AO in the assessment framed under section 143(3) read with section 153A. The AO has formed the belief that the assessee has concealed the particulars of his income. The Ld. A.R. submitted that the said change of opinion is not permissible under the Act and therefore prayed before the Bench that the assessment as framed by the AO should be knocked down on the basis of change of opinion. In defence of his argument the Ld. A.R. relied on a series of decisions namely;

- (a) CIT vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)
- (b) CIT vs. Foramer France [2003] 264 ITR 566 (SC)
- (c) CIT vs. Corporation Bank Ltd. [2002] 254 ITR 791 (SC)
- (d) CIT vs. Andhra Bank Ltd. [1997] 225 ITR 447 (SC).

The another alternative plea taken by the Ld. A.R. was that the proceedings under section 148 read with section 147 of the Act were initiated on the basis of objection filed by audit party and therefore it is not permissible under Act. On merit Ld. A.R. relied on the decision of Jurisdictional High Court in the case of CIT vs. Lokmat Newspapers (P.) Ltd. [2010] 189

Taxman 370 (BOM.) and prayed before the Bench that the appeal of the assessee be allowed both on the technical as well as on merit.

9. The Ld. D.R., on the other hand, relied on the authorities below and submitted on the mere fact that the loss from the shares and security trading was treated as speculative loss in the earlier years would not entail any burden on the AO to treat the same on identical basis. The Ld. D.R. submitted that the case of the assessee is clearly covered under the provision of section 43(5) and the setting off of the income from the shares/securities which was treated as normal business income against the carried forward speculative loss was correctly denied by the AO. Finally, the Ld. D.R. prayed before the Bench that the order of Ld. CIT(A) be affirmed on this issue.

10. We have heard the rival submissions of both the parties and perused the material on record including the impugned order and decisions cited by the assessee. In the present case before us, we find that the assessee is dealing in shares and securities and whatever profit/losses are made are shown as speculative income. The same practice was consistently followed in the earlier years also which was accepted by the Revenue. We note that the assessee has some brought forward speculative losses. During the year, the assessee earned income to the tune of Rs.69,72,125/- from the share trading services which is identical to one as carried on in the earlier years which was set off against the brought forward

speculative losses. The AO denied the setting off of the current year income against the brought forward speculative losses by treating the income in the current year as normal income from business and thus not allowed set off against the speculative brought forward loss. The case of the assessee was originally assessed under section 143(3) read with section 153A and all the facts and information on the basis of which the belief was formed were before the AO in the ordinary assessment proceedings culminated u/s 143(3) r.w.s 153A of the Act. Moreover, treatment as given by the assessee to the income from dealing in shares and securities was consistently followed from earlier years and accepted by the Revenue in the earlier year also even in the scrutiny proceedings concluded u/s 143(3) of the Act. The Ld. CIT(A) dismissed the appeal of the assessee on technical ground as well as on merit by holding that the proceedings under section 147 read with 148 were rightly initiated and the claim was rightly denied. On the technical issue, we find that all the facts were before the AO at the time of original assessment and the AO considered and allowed the set off of the current year income from trading in shares and securities against the brought forward losses and thus the issue stands examined by the AO in the original assessment proceedings. Now, to reopen the case of the assessee on the ground that current year income cannot be adjusted against the brought forward speculative loss or vice versa is not permitted under the Act as the same amounts to review of the decision or forming a different opinion on the

basis of same materials as was before the AO in the original assessment proceedings. The case of the assessee is squarely covered by the ratio laid down in the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. (supra) wherein the Hon'ble Supreme Court has held that no change of opinion is permissible under the Act and any reassessment proceedings based upon the change of opinion has to be quashed. Accordingly, we hold that the reassessment proceeding as affirmed by the Ld. CIT(A) is bad in law and accordingly quashed. We are not going into the merit of the case as we have adjudicated the legal issue raised by the assessee in its favour.

11. In the result, the appeal of the assessee is partly allowed as indicated above.

**Order pronounced in the open court on 28.06.2018.**

**Sd/-  
(Saktijit Dey)  
JUDICIAL MEMBER**

**Sd/-  
(Rajesh Kumar)  
ACCOUNTANT MEMBER**

Mumbai, Dated: 28.06.2018.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.