



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

BEFORE SHRI AMARJIT SINGH, JM AND SHRI G. MANJUNATHA, AM

आयकर अपील सं/ I.T.A. No.4727/Mum/2017

(निर्धारण वर्ष / Assessment Years: 2008-09)

Asst. CIT Circle 8(3)(1) 6 th Floor, Room No.615, Aayakar Bhavan, M.K.Road, Churchgate, Mumbai - 400020	बनाम / Vs.	Smt. Rashna N. Talati 96-D, Villa Modern, Worli Seafact, Worli, Mumbai - 400018
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPT0859N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri Manoj Kumar Singh (Sr.DR)
Assessee by:	Shri B. V. Jhaveri

सुनवाई की तारीख / Date of Hearing: 17.01.2019

घोषणा की तारीख /Date of Pronouncement: 30.01.2019

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 26.09.2016 passed by the Commissioner of Income Tax (Appeals)-14, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2008-09

2. The revenue has raised the following grounds of appeal:-

"1.

(i) *The ld. CIT(A) has erred on facts and in law in holding that reopening u/s.147 was made on the basis of material on record which was duly considered by the AO while complete the original Assessment order.*

(ii) *The ld. CIT(A) has erred on facts and in law in extending the scope of "Change of opinion" to a case where no opinion was actually formed by the Assessing Officer.*

(iii). *The ld. CIT(A) has erred on facts and in law in not properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer in reason recorded for reopening the assessment.*

2. *The Ld. CIT(A)'s order is contrary in law and on facts and deserved to be set aside.*

3. The facts of the case are that the appellant purchased series of agricultural lands during the year 2004-05 and converted part of such land into non-agricultural land in 2006 and thereafter plotted the land and sold 3 plots. The resultant profit was shown as Long Term Capital Gain. The original assessment u/s.143(3) of the Income Tax Act, 1961 (in short "the Act") was completed on 10.11.2010 in which addition of Rs.1,36,915/- was made on account of Long Term Capital Gain on sale of plots and non-agricultural land. The Ld. AO thereafter, reopened the assessment u/s.148 of the Act vide notice dated 20.03.2013 contending that sale of land after plotting was a business. During the assessment proceedings, the appellant submitted that the Ld. AO has already applied his mind and computed LTCG in the original assessment proceedings applying indexation for previous year 2006-07, therefore, reopening of the case after more than 3 years was a change of opinion. The appellant further contended that the activity in question was not a adventure in nature of trade as decided by the Supreme Court in the referred cases but it was a LTCG. The Ld. AO, however did not accept the submission and treated the income of the assessee as income from business. Thereafter, the assessee filed an appeal

before the CIT(A) who also dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NO.1:-

4. We have heard the arguments advanced by the learned representative of the parties and perused the record. The learned representative of the assessee has argued that the assessee and her husband Shri Noshir D Talathi were the joint owner of the agricultural land which was converted into non agricultural land in the year 2006 and thereafter plotting the said land into three plots, the same was alienated. The assessee assessed the profit as Long Term Capital Gain, thereafter, the Assessing Officer reopened the assessment u/s.148 of the Act by virtue of notice dated 25.03.2013 contending that the sale of land after plotting was a business and accordingly assessed. Since the land was joint, therefore her husband Shri Noshir D Talathi challenged the reopening assessment u/s.147 of the Act and the reopening was quashed by the Hon'ble ITAT, Mumbai 'G' Bench by virtue of order dated 23.04.2018 for A.Y.2008-09 in ITA No.2306/Mum/2016 in case titled as DCIT Vs. Noshir D. Talathi, therefore, in the said circumstances, the assessment raised in view of the section 147 of the Act has no force in the eyes of law, hence the proceeding u/s.147 of the Act is liable to be quashed. However, on the other hand the learned representative of the department did not dispute about this fact that Hon'ble ITAT, Mumbai 'G' Bench by virtue of order dated 23.04.2018 for

A.Y.2008-09 in ITA No.2306/Mum/2016 in case titled as DCIT Vs. Noshir D. Talathi has set aside the proceeding u/s.147 of the Act. The relevant finding has been given in para no.5 to 8 which is hereby reproduced below:-

“5. Before us, the Ld. Counsel for the assessee vehemently supported the order of the Ld. CIT(A) and Ld. DR supported the order of the Ld. CIT(A) and Ld. DR supported the orders of the Assessing Officer.

6. We have heard the rival submissions perused the orders of the authorities below. On a perusal of the assessment order passed u/s.143(3) of the Act and the order of the Ld.CIT(A), we find that the assessee returned long term capital gains for the assessment year 2008-09 on sale of non-agricultural land located in Pune district and the Bungalow at Pune. Assessing Officer computed the long term capital gains and completed the assessment accordingly. It is the finding of the Ld. CIT(A) that the addition was made after calling for copies of sale and purchase agreements of the impugned non-agricultural land by way of notice u/s.142 of the Act and the Assessing Officer had examined them, applied his mind and made addition to the returned long term capital gains and therefore there is change of opinion by the Ld. AO, in coming to the conclusion subsequently that the said capital gains should be assessed as business income as against capital gains. It is also the finding that

there are no tangible materials came on record to suggest that the income had escaped assessment in the case of the assessee except for the reason that Assessing Officer opined that the gain from sale of lands should be assessed as business income instead of capital gains. In the circumstances, Ld. CIT(A) held that there is a change of opinion, without there being no material on record to suggest that the income had escaped assessment and therefore in view of the decision of the Hon'ble Supreme Court in the case CIT Vs. Kelvinator of India Ltd. (supra) as it is only a mere change of opinion by the Assessing Officer the reopened assessment u/s.147 of the Act is invalid. While holding so it was observed as under:-

“5. Decision – I have carefully considered the AO's order and the appellant's submission. The brief undisputed facts of this case are as follows. The appellant had returned LTCG of ₹1.26 crore for AY 2008-09 by way of his half share on sale of non-agricultural land located in Pune district and a bungalow at Pune, the balance being the share of his wife. While the overall LTCG (of both husband and wife) for the non-agricultural land alone had been shown at ₹2.21 crores in his return of income, the AO in his scrutiny assessment order had re-computed the same at ₹2.24 crores, adding ₹2.73 lakhs in the process. The appellant's half share therein of ₹1.36 lakh had been added back in his hands in the original scrutiny assessment. The AO had made this particular addition after calling for copies of the sale and purchase agreements of the impugned non-agricultural land, by way of a notice issued under section 142(1) of the Act. It is hence clear that the AO had called for certain details, examined them, applied his mind and made an addition to the returned LTCG. In these circumstances, he would be permitted to take recourse to the provisions of section 147 of the Act only if he is able to demonstrate escapement of income directly as a result of some information coming to his knowledge subsequent to the assessment proceedings. Such information and its source would be contained in the reasons for reopening, which have already been reproduced earlier in his order. There is however no mention of any additional information, Rather, there is only a mention of his belief that income had escaped assessment, it having charged to LTCG as opposed to having been charged as business income. This is nothing but mere change of opinion

on part of the AO, which cannot be a basis for reopening. The Hon'ble Supreme Court in its decision in the case of CIT Vs. Kelvinator of India Ltd. (supra) had held that for the purpose of reopening under section 147 of the Act, the AO's reason to believe that income had escaped assessment has to be recorded in writing and that there must be tangible material for the formation of such belief. In the instant case, there is no material available in this regard. The reasons recorded by the AO and reproduced in his order give elaborate details of the real estate transaction, but merely record his satisfaction in the end that income had escaped assessment, on account of the application of the wrong head of income. In other words, there is absolutely no material tangible or otherwise that the AO has relied on for the formation of his belief that income has escaped assessment. His action thus directly runs counter to the ratio of the Hon'ble Apex Court as laid down in its decision in the case of CIT Vs. Kelvinator of India Ltd. (supra), namely the necessity of tangible material for reopening of an assessment. Accordingly, respectfully following the said ratio of the Hon'ble Apex Court, the AO's action in reopening this assessment is held to be invalid. He is accordingly directed to revert to the status quo ante as it existed on the passing of the origin assessment order under section 143(3) of the Act.

7. On a careful reading of the order passed by Ld. CIT(A) order, we do not find any valid reasons to interfere with the decision of the Ld. CIT(A) in holding that is only on account of mere change of opinion the Assessing Officer reopened the assessment without there being any tangible material on record to suggest that the income had escaped the assessment. Thus, we sustain the order of the Ld. CIT(A) and reject the grounds of the Revenue.

8. Since, we have sustained the order of the Ld. CIT(A) in holding that reopening of assessment is invalid, we are not inclined to go into the merits of the additions / disallowances made by the Assessing Officer as it was only academic at this stage.”

5. On appraisal of the above mentioned findings, it is quite clear that the Hon'ble ITAT in case of the assessee's husband i.e. Noshir Talathi has set aside the proceeding u/s.147 of the Act. Therefore, the assessment u/s.147/148 of the Act is not liable to be sustainable in the case of wife of the assessee also who is the appellant in this case. CIT(A) has decided the appeal of the assessee on the basis of the finding of the Hon'ble ITAT in case of Noshir D Talathi which is quite applicable to the facts of the present case. Moreover, the proceeding u/s.147/148 of the Act has been ordered to be set aside, therefore, the assessment order u/s.143(3) r.w.s 147 of the Act has become non-est in the eyes of law. Accordingly, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage.

6. In the result, the appeal filed by the revenue is hereby dismissed.

Order pronounced in the open court on this 30.01.2019.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Mumbai; Dated 30.01.2019
MP

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.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai