आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील स / ITA No.921/PUN/2014
निर्धारण वर्ष / Assessment year : 2006-07

Sushil Kashmirilal Agarwal,
Basera 46/25, PCNTDA,
Nigidi, Pune – 411044.

..... अपीलार्थी /
Appellant.

PAN : AARPA0355K.

बनाम v/s

The Asst. Commissioner of Income Tax,
Circle 9, Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri P.S. Shingte.

Revenue by : Shri M.K. Verma.

सुनवाई की तारीख / Date of Hearing : 09.07.2019		घोषणा की तारीख / Date of Pronouncement: 16.10.2019

आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (A) – 2, Nashik dated 07.03.2014 for the assessment year 2006-07.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual stated to be carrying on business of weighbridge in the name and style of "Goyal Weighbridge". Assessee filed his return of income for A.Y. 2006-07 on 31.03.2007 declaring total income of Rs.54,18,350/-. The case was initially taken up for scrutiny and thereafter assessment was framed vide order dated 24.12.2008 u/s

143(3) of the Act. Thereafter, notice u/s 148 of the Act dt.30.03.2011 was issued and served on the assessee. In response to notice u/s 148 of the Act, assessee vide reply dated 12.04.2011 submitted that the return of income filed by him on 31.03.2007 for A.Y. 2006-07 be considered as return of income in response to notice u/s 148 of the Act. Thereafter, the case was taken up for scrutiny and assessment was framed u/s 143(3) r.w.s. 147 of the Act vide order dt.30.12.2011 and the total income was determined at Rs.1,05,42,450/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dated 07.03.2014 (in appeal Nsk/CIT(A)-2/754/13-14) dismissed the appeal of assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us and has raised the following grounds :

> *"1. On the facts and in the circumstances of the case and in the law the lower authorities erred in initiating reassessment proceedings u/s 147 of the Income Tax, 1961 in spite of the fact that all the material facts were available before Assessing Officer at the time of passing of original assessment order therefore, entire proceedings are bad in law.*
>
> *2. On the facts and in the circumstances of the case and in the law the lower authorities erred in not passing speaking order in reference to objection raised by the appellant therefore, the entire proceedings are bad in law*
>
> *3. On the facts and in the circumstances of the case and in the law the lower authorities erred in making the addition of a sum of Rs. 51, 24,097/- on account of cash payments made to parties for claiming alleged fake capital gain. The addition is entirely based on presumption of Assessing Officer and is by disregarding appellant submission in this regard and therefore needs to be struck down."*

3. All the grounds being inter-connected are considered together.

3.1. Before us, Ld.A.R. submitted that a survey action at the business premises of the assessee's wife took place on 29.02.2008 wherein documents pertaining to the assessee were found in a Diary in which certain entries relatable to share purchase and share sale transaction of the assessee were recorded. On the basis of the aforesaid documents,

the reasons were recorded for re-opening and it was concluded that there was an escapement of income in the case of assessee. He submitted that during the course of original assessment proceedings for A.Y. 2006-07 the AO had made a detailed enquiry relating to various transactions of the assessee including share purchase and sale transactions to which the assessee also made detailed submissions from time to time and after taking into consideration of all the submissions, assessment order was passed u/s 143(3) of the Act on 24.12.2008. In support of his contentions about the inquiries with respect to share purchase / sale transactions made during the course of assessment proceedings and assessee's reply to it, he pointed to the copy of the questionnaire placed at Pages 160 and 161 of the Paper Book and the submission made by the assessee at Page 134 to 159 of the Paper Book. He submitted that the case of assessee and his wife are assessed by the same Assessing Officer. He further submitted that survey action on the business premises of the assessee's wife was conducted on 29.02.2008 and the assessment proceedings for A.Y. 2006-07 in assessee's case were completed on 24.12.2008. He submitted that in between assessment proceedings for A.Y. 2007-08 were also initiated on 18.09.2008 and in the assessment order passed u/s 143(3) of the Act dated 23.12.2009 for A.Y. 2007-08, there is a reference about the documents found during the search. He further submitted that the addition made in the order u/s 143(3) of the Act for A.Y. 2007-08 on account of capital gains was subsequently deleted by the AO by suo moto by passing a rectification order as assessee has offered the same for taxation. He therefore submitted that the necessary enquiries were made regarding entire purchase of sale of share transactions and after application of mind, the AO had passed the assessment order and the

re-opening is on the basis of change of opinion, which is not permissible. He therefore submitted that the proceedings u/s 147 of the Act be treated as void and ab initio and for which he placed reliance on the decision of Hon'ble Supreme Court in the case of M/s. CIT Vs. Kelvinator of India Limited reported in (2010) 320 ITR 561 SC. Ld. D.R. on the other hand, supported the order of AO and Ld.CIT(A).

4. We have heard the rival submissions and perused the material on record. Assessee in the present appeal is challenging the re-opening of the assessment u/s 147 / 148 of the Act. It is an undisputed fact that assessee had filed original return of income for A.Y. 2006-07 on 31.03.2007 and the original assessment was framed u/s 143(3) of the Act vide order dt.24.12.2008. Thereafter, notice u/s 148 of the Act was issued on 30.03.2011 i.e., within four years from the end of the assessment year A.Y. 2006-07. The law on re-opening of an assessment under the Act, is fairly settled. The Assessing Officer can re-open an assessment only in accordance with the express provisions provided in Section 147/148 of the Act. It is only on the Assessing Officer strictly satisfying the provisions of Section 147 of the Act that he acquires jurisdiction to re-open an assessment. Section 147 of the Act, clothes the Assessing Officer with jurisdiction to reopen an assessment on satisfaction of the following: (a) The Assessing Officer must have reason to believe that (b) Income chargeable to tax has escaped the assessment and (c) In cases where the assessment sought to be reopened is beyond the period of four years from the end of the relevant assessment year, then an additional condition is to be satisfied viz: there must be failure on the part of the Assessee to fully and truly disclose all material facts necessary for assessment.

5. In the present case, notice under section 148 of the Act has been issued on 30.03.2011 in relation to assessment year 2006-07. Hence, the reopening of assessment is within a period of four years from the end of the relevant assessment year. In such cases, the Assessing Officer would be clothed with jurisdiction to issue a notice for reopening of an assessment if he has reason to believe that income chargeable to tax has escaped the assessment. The requirement of failure to make true and full disclosure as provided in the proviso to Section 147 of the Act is not to be satisfied for issuing of re-opening notice within the period of four years from the end of the relevant assessment year. Thus, in the absence of cumulative satisfaction of reason to believe and in the absence of any income chargeable to tax escaping assessment, the Assessing Officer is not empowered with jurisdiction to reopen an assessment.

6. In the present case it is also a fact that original assessment for the year under consideration was framed under section 143(3) of the Act. In such a situation, another aspect that has to be kept in mind is as to whether the reopening is based upon any tangible material which has come to the knowledge of the Assessing Officer subsequent to the framing of the earlier assessment or whether the same is merely a change of opinion on the part of the Assessing Officer.

7. When the facts of the present case is seen in the light of the aforesaid legal position, it is an undisputed fact that during the course of original assessment proceedings, AO had issued questionnaire and had sought information of the transactions of sale/purchase of shares and the assessee had also made available the information and details to the AO from time to time. Thereafter the assessment was framed u/s

143(3) and the submissions of the assessee in respect of purchase and sale of shares was accepted by the AO and no addition was made. It is also a fact that the assessee and his wife are assessed by the same Assessing Officer. Further, the document found at the place of business of assessee's wife was found during the course of survey conducted on 29.2.2008 and the assessment of the assessee u/s 143(3) for A.Y 2006-07 was finalized on 24.12.2008 meaning thereby that the document found during the course of the survey and which is the basis of the present reopening was already before the AO while conducting the assessment proceedings. In such a situation, the conclusion would be that the document found during survey was considered while framing the original proceedings and therefore we find force in the contention of the Ld AR that the impugned notice have been occasioned by a change of opinion. It is trite law that a mere change of opinion cannot constitute a reason for re-opening the assessment. On the issue that change of opinion cannot constitute a reason for reopening we find that Hon'ble Apex Court in the case of CIT Vs. Kelvinator India (2010) 320 ITR 561 (SC) has held so. The relevant observation of the Hon'ble Apex Court is as under:

> *"6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the 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 reopen the assessment. Therefore, post-1st April, 1989, power to reopen 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 reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. 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 reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would*

take place. One must treat the concept of "change of opinion" as an inbuilt test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, 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 reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

8. The aforesaid view has been reiterated in several decisions thereafter. Considering the totality of the aforesaid facts and in view of the decisions cited hereinabove, we are of the view that in the present case, the notice of reopening the assessment u/s 148 of the Act is on account of change of opinion by the AO, which is not permissible as per law. We are therefore of the view that the impugned notices cannot be sustained and the same deserves to be quashed and set aside. We therefore quash the impugned reassessment proceedings for A.Y. 2006-2007 are thus set aside the same. Since we have hereinabove set aside the assessment framed u/s 143(3) r.w.s 147 of the Act and held it to be void therefore the issue on merits have been rendered academic and requires no adjudication. **Thus, the grounds of Assessee are allowed.**

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

Order pronounced on 16th day of October, 2019.

Sd/-	**Sd/-**
(**SUSHMA CHOWLA**)	(**ANIL CHATURVEDI**)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 16th day of October, 2019.
Yamini

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-2, Nashik.
4. Pr. CIT-2, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.