

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

**BEFORE SHRI PAWAN SINGH, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 3418/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2009-10)

SVC Co-Operative Bank Ltd. SVC Tower, J. N. Road, Vakola, Santacruz(E) Mumbai-400 055	बनाम/ Vs.	DCIT 1(3)(2) Room No. 540, 5 th floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AAAAT0177C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Rajeev Wagle, AR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri V.Vinod Kumar Sr DR
सुनवाईकीतारीख/ Date of Hearing	:	14.07.2020
घोषणाकीतारीख / Date of Pronouncement	:	16.07.2020

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals) – 3 in short referred as ‘Ld. CIT(A)’, Mumbai, dated 15.01.18 for Assessment Year (in short AY) 2009-10.

2. The brief facts of the case are, assessee filed its return of income on 30th September 2009 declaring total income of ₹ 56,77,82,893/-. The case was selected for scrutiny under section 143(3) of the Act and the assessment was completed by determining the taxable income at ₹ 63,62,09,130/- under section 143(3) dated 21.11.2011. Subsequently proceedings under section 147 of the Act was initiated, assessing officer observed that income of the assessee is escaped for taxation. Accordingly notice under section 148 dated 23.03.2016 was issued and served on the assessee. Subsequently statutory notices under section 143(2) and 142(1) were issued and served on the assessee. In response AR of the assessee attended and filed the relevant information as called for.

3. The assessing officer in his order under section 143(3) r.w.s 147 has highlighted the reasons for reopening at page 2 of the order, as per which assessee has claimed excess allowance of deduction under section 36(1) (viiia) and under section 36(1) (viii). Further, he observed that income which was chargeable to income tax has escaped assessment for the assessment year 2009-10 by reason of the failure on the part of the assessee to disclose fully

and truly all material facts necessary for assessment. Accordingly he completed the assessment by making addition under section 36(1) (viii) and 36(1) (viia) of the Act.

4. Aggrieved with the above order, assessee preferred an appeal before Ld. CIT(A) and before him, assessee has filed detailed submissions. After considering the submissions of the assessee, Ld CIT(A) sustained the addition made by the assessing officer with regard to deduction under section 36(1) (viii). However with regard to deduction under section 36(1)(viia), it was remitted to assessing officer in order to rework the deduction after considering the deductions under section 36(1) (viii) of the Act.

5. Aggrieved with the above order, assessee is in appeal before us raising the main grounds as well as additional grounds, which are reproduced below:-

On the facts & the circumstances of the case, the Ld. CIT (A) - 3 erred in :-

1). not appreciating that the original assessment order for the A. Y. 2009-10 was passed on 21.11.2011 u/s. 143 (3) of I. T. Act, 1961 and there was no failure on the part of the appellant to disclose fully & truly

all material facts necessary for its assessment for that assessment year & hence, the notice dated 23.3.2016 issued by the DCIT 1(3)(2) Mumbai u/s. 148 of I. T. Act, 1961 for the A. Y. 2009-10 was invalid since the proviso to S. 147 clearly states that no reassessment can be done after the expiry of 4 years from the end of the relevant assessment year where the original assessment is made u/s. 143(3) and there is no failure on the part of the assessee to disclose fully & truly the material, though not contended before him and the lower authority.

2. not appreciating that in terms of the proviso to S. 147 of I. T. Act, 1961 as stated in para 1 above, notice u/s. 147 could have been issued on or before 31.3.2014 i.e. 4 yrs. from the end of assessment year 2009-10 & hence, the notice dated 23.3.2016 was invalid having been issued beyond 4 years and there was no failure on the part of the appellant to disclose fully & truly the material, though not contended 4 before him and the lower authority.

3. not appreciating that the issue raised for the purpose of reassessment was highly debatable in the sense that it was a matter of interpretation and calculation & as such there was no question of non-disclosure of any material on the part of the

appellant, though not contended before him and the lower authority.

4. not appreciating that just because the assessing officer had calculated the deduction u/s. 36(1)(viii) by adopting a particular method which was different than that adopted by the appellant, it could not be said that there was a failure on the part of the appellant to disclose truly and fully all material relevant for the assessment since the section itself did not lay down any specific guidelines for arriving at the profits derived from the eligible business, though not contended before him and the lower authority.

5. rejecting the method of calculation adopted by the appellant for deduction u/s. 36(1)(viii) of I. T. Act, 1961.

And hence, the order passed by the CIT(A) - 3 deserves to be set aside in toto.

Your Appellant craves leave to add, alter, modify or delete all or any of the grounds of appeal.

Additional Grounds:-

1. The above appeal was filed on 21.5.2.018 with five grounds of appeal as mentioned in the Grounds of Appeal forming part of Form No. 36.

2. *The Applicant would like to state that Grounds of Appeal No. 1, 2 & 3 were neither taken nor contended before the CIT(A) - 3.*

3. *Since Grounds of Appeal No. 1, 2 & 3 were not taken before the CIT (A) - 3, the Appellant would like to take the same as additional grounds of appeal as under as Grounds of Appeal No. 3, 4 & 5 (original Grounds of Appeal No. 4 & 5 being numbered as 1 & 2)*

Grounds of Appeal No. 3 :-not appreciating that the original assessment order for the A. Y. 2009-10 was passed on 21.11.2011 u/s. 143 (3) of I. T. Act, 1961 and there was no failure on the part of the appellant to disclose fully & truly all material facts necessary for its assessment for that assessment year & hence, the notice dated 23.3.2016 issued by the DCIT 1(3)(2) Mumbai u/s. 148 of I. T. Act, 1961 for the A. Y. 2009-10 was invalid since the proviso to S. 147 clearly states that no reassessment can be done after the expiry of 4 years from the end of the relevant assessment year where the original assessment is made u/s. 143(3) and there is no failure on the part of the assessee to disclose fully & truly the material, though not contended before him and the lower authority.

Grounds of Appeal No. 4 :-not appreciating that in terms of the proviso to S. 147 of I. T. Act, 1961 as stated in pars 1 above, notice u/s. 147 could have been issued on or before 31.3.2014 i.e. 4 yrs. from the end of assessment year 2009-10 & hence, the notice dated 23.3.2016 was invalid having been issued beyond 4 years and there was no failure on the part of the appellant to disclose fully & truly the material, though not contended before him and the lower authority.

Grounds of Appeal No. 5 :-not appreciating that the issue raised for the purpose of reassessment was highly debatable in the sense that it was a matter of interpretation and calculation & as such there „was no question of non- disclosure of any material on the past of the appellant, though not contended before him and the lower authority.

4. The above grounds of appeal do not require any additional evidence and can be decided on the facts of the case.

5. In the aforesaid circumstances, the Applicant would humbly request the Hon'ble Bench to allow them to take the additional grounds of appeal as mentioned in para 3 above as Grounds of Appeal No.

*3, 4 & 5 at the time of hearing of the appeal on
21.1.2020.*

And the Applicant, as in duty bound, shall every pray.

6. Assessee has filed additional grounds of appeal objecting to the reopening of the assessment for which assessee has not filed any grounds of appeal before the First Appellate Authority. Since the additional grounds raised by the assessee are legal grounds, therefore we are inclined to accept the additional grounds of appeal on the basis of being legal grounds by considering the Hon'ble Supreme Court decision in the case of NTPC.

7. Before us Ld AR brought to our notice the fact of the case that the reassessment notice was issued after the expiry of 4 years. He submitted that assessee is in appeal before us on claim of deduction under section 36(1)(viii) of the Act which was sustained by Ld CIT(A). He brought to our notice findings of assessing officer in his order at paragraph 7 and further he brought to our notice relevant calculation to claim deduction u/s 36(1) in its return of income, which is placed at page 27, 28 and 29 of paper book. He submitted that all these informations were submitted during the

original assessment proceedings. He brought to our notice original assessment order which is also placed on record. Further he brought to our notice page 41 and 42 of paper book and submitted that the reassessment proceedings were initiated based on the audit objection and brought to our notice the reasons for reopening given in the assessment order that assessee has failed to disclose fully and truly all material facts necessary for assessment. He submitted that assessee has disclosed all the information for claiming deduction under section 36(1) and the then assessing officer while completing the original assessment accepted the information/calculation submitted by the assessee and accordingly completed the reassessment relying on the same set of information which was submitted by the assessee in the original assessment. He further submitted that assessee has rightly adopted interest on long-term advances but assessing officer wrongly considered total revenue, the issue is only the method of calculation adopted by the assessee which varies with the method adopted by the present assessing officer. Based on the reasons for reopening and change of opinion, assessing officer has reopened the assessment after 4 years and has not proved that assessee has failed to disclose fully

and truly all the relevant information for completion of the assessment when the original assessment was completed based on the same information which was completely and truly submitted during the original assessment proceedings. In this aspect he relied the following case law:

- i) Venkatesan Raghuram Prasad versus ITO (2018) 94 Taxmann.com 249 (madras)**
- ii) DCIT Vs. ICICI Bank (2019) (202 TTJ 560)**
- iii) ITA No. 5822/mum/2013 ACIT versus Latin Manharlal Securities Pvt. Ltd.**

8. On the other hand, learned DR submitted that assessee has not challenged the additional grounds of appeal on reopening of assessment before first appellate authority and he submitted that the reopening of assessment was properly made as per law. He supported the assessment order and submitted that the calculation given in the assessment order is proper and correct.

9. Considered the rival submissions and material placed on record. We notice that the reopening proceedings are initiated by the assessing officer after 4 years from the end of assessment year.

There is no dispute that original assessment under section 143(3) of the Act was completed based on the information which is already available in assessment records. We also notice from the record submitted by the Ld AR that the internal auditors has raised objections on the method of calculation adopted by the assessee to claim deduction under section 36(1) of the Act. Based on the above objection, assessing officer has initiated the reopening of assessment, but he has initiated the reopening proceedings without bringing on record anything in support of his finding that assessee has not disclosed fully and truly all the relevant information in order to complete the assessment. We noticed that the assessee has submitted all the relevant information during the original assessment proceedings and the same was verified by the assessing officer in the original assessments and completed the assessment. We notice in the similar facts and situation, the coordinate bench in ITA No. 5822/mum/2013 has adjudicated as below:

5. After considering the relevant finding given in the impugned order and after hearing Ld. DR, we find that the sole reason for which the assessment completed under section 143(3) has been sought to be reopened is that, tax liability under section 115JB is more than the

normal provision of the Act and further, assessee is not liable for deduction of rebate under section 88E while determining the tax liability under section 115JB. During the course of the original assessment proceedings, all these details of return of income under the normal provisions and under the book profit under section 115JB was there before the AO and AO after completing the assessment under section 143(3) has computed the tax liability. Now after the expiry of 4 years from the end of the relevant assessment year, the said assessment has been sought to be reopened in utter violation of statutory limitation as given in the proviso to section 147. Conditions precedent for lifting the ban of 4 years time limit under proviso to section 147 is that, if the assessment has been completed under section 143(3) then reopening of the assessment can be done only when there is failure on the part of the assessee filed a return under section 139 or there is failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Such a failure of the assessee has to be ascribed and demonstrated by the AO in the "reasons recorded" itself. Here in this case, it is an admitted position that, there is neither any failure on the part of the assessee either to furnish the return of income under section 139(1) nor any failure to disclose fully and truly all material facts necessary for the assessment which is evident from the

bare perusal of the "reasons recorded" and even from the assessment order. The assessee has duly shown the tax liability under the normal provisions and also as per under section 115JB. The AO while computing the income in the original assessment under section 143(3) has taken note of this fact. So now, the AO cannot hold that such a tax liability computed by the AO is erroneous or there is any failure on the part of the assessee to disclose fully and truly all material facts. Thus, the conclusion of the CIT(A) for holding that, reopening of the assessment is bad in law is thus affirmed. Accordingly, we also direct that such an action initiated under section 148 should be quashed.

6. However, without prejudice on merits also, we find that Ld. CIT(A) has decided this issue in favour of the assessee after following the decision of Hon'ble Karnataka High Court in the case of CIT vs Horizon Capital Ltd (supra), wherein it has been held that, the assessee is entitled to rebate under section 88E of the Act in respect of STT paid where the income is assessed under section 115JB. Without there being any contrary decision brought to our notice, we do not find any reason to deviate from such a findings of the Ld. CIT(A). Accordingly, the grounds raised by the revenue stands dismissed.

10. Respectfully following the above decision, we noticed that the coordinate bench has come to conclusion considering the fact that the reopening of the assessment was initiated based on the internal audit query and it may be a reasonable ground to reopen the assessment but all the relevant information required to reopen the assessment were already available on record and the original assessment was completed only after due verification by the then assessing officer and there is no new material brought on record by the present assessing officer. Since there is no new material available on record it will amounts to change of opinion/mind on the part of the assessing officer. Further we notice that the assessment proceedings were reopened after 4 years from the date of end of relevant assessment year and assessing officer has not brought on record any material which suggests that assessee has failed to submit all the relevant information fully and truly at the time of filing the return of income or failed to substantiate any information at the time of original assessment. Therefore we are inclined to accept the submissions of the Ld AR. Accordingly the ground raised by the assessee is accordingly **allowed**.

11. In the net result, the appeal filed by the assessee stands **allowed.**

12 Order pronounced in the open court on 16th July 2020.

<i>Sd/-</i>	<i>Sd/-</i>
(Pawan Singh)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member
मुंबई Mumbai; दिनांक Dated :	16.07.2020
<i>Sr.PS. Dhananjay</i>	

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
 2. प्रत्यर्थी/ The Respondent
 3. आयकरआयुक्त(अपील) / The CIT(A)
 4. आयकरआयुक्त/ CIT- concerned
 5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR,
ITAT, Mumbai
 6. गार्डफाईल / Guard File
- आदेशानुसार/ BY ORDER,**

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai