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

SHRI PRAMOD KUMAR, VICE PRESIDENT
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 7357/MUM/2019
(ASSESSMENT YEAR: 2007-08)

The Assistant Commissioner of Income
Tax- 4(3)(1), Mumbai,
Room No. 649, 6th Floor, Aayakar Bhavan,
M.K. Road, Mumbai - 400020 ..... Appellant

Vs

Kotak Securities Ltd.,
1st Floor, Bhaktawar, 229, Nariman Point,
Mumbai - 400021
[PAN: AAACK3436F] ..... Respondent

Appearances
For the Appellant/Department : Smt. Neelam Shukla
For the Respondent/ Assessee : Shri Farrokh Irani

Date of conclusion of hearing : 22.02.2022
Date of pronouncement of order : 20.05.2022

## O R D E R

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeal the Appellant/Department has challenged the order, dated 11.09.2019, passed by the Ld. Commissioner of Income Tax (Appeals)–9, Mumbai [hereinafter referred to as 'the CIT(A)'] under Section 250 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] in appeal [CIT(A)-9/Cir.-4/279/2012-13] for the Assessment Year 2007-08, whereby the CIT(A) had partly allowed the appeal filed by the Assessee against the Assessment Order, dated 22.03.2013, passed under section 143(3) read with section 147 of the Act.

2. Revenue has raised the following grounds of appeal:

*"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in holding that the*

*provision of explanation to Section 73 is not applicable to assessee's case thereby the speculation loss incurred by the assessee is trading in shares is allowable to be set off against non-speculative income earned."*

3. The Assessee has also filed application under Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963 (hereinafter referred to as 'the ITAT Rules') vide letter dated 06.01.2022 the relevant extract of which reads as under:

*"In connection with above appeal, we rely upon Rule 27 of the Income Tax (Appellate Tribunal) Rules 1963 to contend that the CIT(A) ought to have held that reassessment proceedings under Section. 147 of the Income Tax Act 1961 are without jurisdiction, bad in law and consequential order under Section 143(3) r.w.s. 147 dated 22.03.2013 to be quashed."*

4. Brief facts of the case are that the Assessee is a company engaged in the business of stock broking, providing demat services, portfolio management services, trading in share, securities and arbitrage. The Assessee filed return of income for the Assessment Year 2007-08 on 31.10.2007 declaring total income of INR 3,90,03,20,109/-. The case was selected for scrutiny and assessment under Section 143(3) of the Act was completed vide order dated 25.03.2009 determining total income at INR 4,01,55,38,340/-. Thereafter, case was reopened under Section 147 of the Act as notice dated 06.06.2011 was issued to the Assessee under Section 148 of the Act. The reasons recorded for reopening assessment were provided to the Assessee on 04.10.2011. The Assessee vide letter dated 25.02.2013 filed objections to reopening of the assessment which were rejected by the Assessing Officer (AO) vide order dated 27.02.2013. The AO thereafter, proceeded to frame assessment on the Assessee under Section 143(3) read with section 147 of the Act determining total income of the Assessee at INR 4,35,93,72,854/- after disallowing

set off of the loss of INR 39,36,79,000/- holding the same to be speculative loss.

5. Being aggrieved, the Assessee filed appeal before CIT(A) challenging the validity of the re-assessment proceedings as well as the disallowance of set off of losses amounting to INR 39,36,79,000/- on merits. The CIT(A) while rejecting the Assessee's challenge to the validity of re-assessment proceedings under Section 147 of the Act, granted relief to the Assessee on merits by permitting set off of the loss of INR 39,36,79,000/- against the profits of the Futures & Options Segment of the arbitrage business as claimed by the Assessee.

6. Challenging the order of CIT(A) of granting relief on merits by permitting set off of loss of INR 39,36,79,000/- as claimed by the Assessee, the Revenue has filed the present appeal. While the Assessee has invoked provisions of Rule 27 of the ITAT Rules to support the order of CIT(A) contending that the re-assessment proceedings initiated under Section 147 of the Act are without jurisdiction, and bad in law as this issue was decided against the Assessee by the CIT(A).

7. We have heard both the sides on the application filed by the Assessee under Rule 27 of the ITAT Rules. The Assessee has relied upon the decision of the Tribunal in the case of **ITO Vs. V.S. Chabbra (1986) 15 ITD 96 (Bom)** wherein while allowing the application filed by an assessee under Rule 27 of the ITAT Rules, the Tribunal has observed as under:

> *"14. In our view the assessee is entitled to advance his arguments with reference to the limitation as well as the legality or validity of the assessment as a defence to the departmental challenge in its appeal. The scope of rule 27 is very clear. An assessee may have filed an appeal on his own. Where he has not filed an appeal but the department files an*

*appeal it is open to him to file a cross-objection dealing with matters not covered by the departmental appeal or even those covered by the departmental appeal. In a particular case the assessee may not adopt any of these methods. He may just accept the first appellate authority's order either as a matter of compromise or otherwise, but when the department files an appeal on a point where the assessee has won he may not decide to give up his defence altogether against the point agitated in the departmental appeal. In such a case even if he does not want to agitate the other points on which he has a grievance against the first appellate authority's order, he cannot be precluded from putting up a defence against the departmental appeal. This is the proper scope of rule 27. In our view there seems to be a misunderstanding on the part of the department in seeking to exclude the operation of rule 27. In the first place neither the provision of an appeal as such nor the grant of right of cross-objection really renders rule 27 inoperative. This rule operates in a restricted field of pure defence. A literal reading of the rule also indicates that it comes into operation only where the respondent has not appealed but some point has been decided against him by the first appellate authority. In the present case amongst other things two sets of grievances were advanced by the assessee before the appellate authority: One, relating to the limitation and validity of the assessment and the second, challenging the addition of Rs. 8,31,381. The question of limitation the Commissioner (Appeals) decided against the assessee. On the question of validity the Commissioner (Appeals) did not pronounce any decision but insofar as the assessee did not withdraw this ground before the Commissioner (Appeals), the Commissioner (Appeals) must be regarded as having decided this point also against the assessee. On the question of addition itself of Rs. 6,31,381 the Commissioner (Appeals) decided in favour of the assessee. The assessee, therefore, could not have come on appeal against this point; Nor is it necessary for him to come on appeal on other grounds of limitation and validity decided against him when on the merits of the addition of Rs. 6,31,381 he has won. It is exactly against such a background and in such a situation that rule 27 comes in. As pointed out above, the grievance of the learned departmental counsel appears to be that by resorting to rule 27 the AAC could not have either on the ground of limitation or on the ground of invalidity set aside the entire assessment. The application of rule 27 does not and in our opinion cannot lead to this incongruity. All that it can help the assessee is with regard to the addition of Rs. 6,31,381 only and nothing more. The limited extent to which the assessee can urge the points relating to limitation and invalidity of the assessment is the question of addition of Rs. 6,31,381. The department having come on appeal cannot be worse off*

*than if it had not come on appeal. The fear expressed by the learned counsel for the department, therefore, that in a case where the assessee has not filed an appeal or cross-objection has been permitted to urge the grounds relating to limitation and validity would render the entire assessment non-existence is not correct. The decision would only relate to the addition of Rs. 6,31,381 and nothing more." (Emphasis Supplied)*

In the case of ACIT, Circle 18(3) Vs M/s Triace (ITA No. 2827/Mum/2004) decided on 26.11.2007, also relied upon by the Ld. Counsel for the Assessee, the Tribunal has, in identical facts and circumstances, allowed the application filed by the Assessee under Rule 27 of the ITAT Rules and permitted the Assessee to support the order of CIT(A) on the ground of invalidity of reassessment proceedings. The relevant extracts of the aforesaid decision read as under:

*"3. With the assistance of ……*

*The Id Counsel for the assessee pointed out that though assessee has not challenged the order of CIT(A) on the issue of re-opening but it can support the order of the CIT(A) which is in favour of the assessee on merit. The Tribunal is required to go into the issue of re-opening and if it is held that re-opening is bad in law then on this argument alone the appeal of the Revenue deserves to be dismissed without going into the merit of the additions. ……. On the other hand Ld. D.R controverted the contentions of the assessee. He pointed out that assessee has not filed the appeal, hence, such arguments could not be entertained under Rule 27 of ITAT Rules. On the merit of re-opening he relied upon the finding of Id. CIT(A).*

*4. We have duly considered the rival contentions. No doubt this issue has been decided against the assessee by the Id. CIT(A) and assessee has not challenged that order but it can take up this issue before the Tribunal with the aid of Rule 27 because Rule 27 provided that assessee can agitate any ground, which has been decided against it, but if those arguments are being accepted by the Tribunal then the order of the Id. CIT(A) can be upheld even on other issues, because the issue regarding reopening is going to hit the root and the moment it is held that*

*re-opening is bad in law then all other consequent proceedings would become redundant. Thus, we take up this issue first." (Emphasis Supplied)*

8. In view of the above, we allow the application filed by the Assessee under Rule 27 of the ITAT Rules and proceed to examine the issue of validity of re-assessment proceedings initiated under Section 148 of the Act which go to the root of the matter.

9. As regards the validity of the re-assessment proceedings, the case of the Assessee is that the issue on which re-assessment proceedings have been initiated was examined during the assessment framed under Section 143(3) of the Act. The Ld. Counsel for the Assessee took us through letter dated 25.02.2009 filed during the assessment proceedings wherein details of income from trading in securities were provided. He further submitted that the annual account for the relevant previous year - Schedule 20 – Note 9(a) carried quantitative information in respect of trading in shares and securities. According to the Ld. Counsel after examining the issue the AO formed opinion and being satisfied, did not find it appropriate to discuss about the same in the Assessment Order passed under Section 143(3) of the Act. He further submitted that the re-assessment proceedings have been initiated for merely re-examination on account of change of opinion without any fresh material. In the order rejecting objections, the AO has failed to controvert the objections of the Assessee in this regard. The Assessee placed reliance on the following judgments in support of his contentions - CIT v. Kelvinator of India: 320 ITR 561 (SC), NYK Lines (India) Limited Vs DCIT: 346 ITR 361 (Bom), Purity Textiles (P) Ltd. vs. ACIT: 325 ITR 459 (Bom) and Asian Paints Ltd. vs. DCIT308 ITR 195 (Bom).

10. Per Contra, Ld. Departmental Representative relied upon the order passed by CIT(A) rejecting the contention of the Assessee relating

to invalidity of re-assessment proceedings. She vehemently argued that though the details of trading in securities were provided, the Assessing Officer did not apply his mind to the issue of set-off. She further submitted that in case where express provisions of law leave no scope for discretion with the Assessing Officer, and the facts related to the same on record, if the Assessing Officer fails to examine the same provisions of Section 147 of the Act would be attracted. The Assessing Officer did not raise any specific query regarding the set-off of loss arising from trading in shares with the profits of Futures & Options business segment. Merely because generic details of trading in securities were called for does not tantamount to examination of the specific issue. Since the aspect of set-off of the losses was not examined by the AO during the assessment proceedings, the contention of the Assessee that the reassessment proceedings have been initiated on account of change of opinion is liable to be rejected. Ld. Department Representative submitted that mere production of documents/information is not sufficient to constitute full disclosure and in this regard, she relied upon Explanation 2 to Section 148 of the Act. She further submitted that in case the contention of the Assessee is accepted then the same would defeat the very purpose of Section 147 of the Act. She placed reliance on the following judgments – Export Credit Guarantee Corporation of India Ltd. Vs ACIT: 350 ITR 651 (Bom), Eleganza Jewellery Ltd. Vs Commissioner of Income Tax: 364 ITR 232 and CIT Vs Usha International Ltd: 348 ITR 485.

11. In rejoinder, the Ld. Counsel for the Assessee submitted that the reasons recorded for reopening assessment cannot be supplemented. The submissions made by the Ld. Departmental Representative go beyond the reasons recorded and/or the order rejecting objections to re-opening assessment filed by the Assessee. In this regard the Ld. Counsel for the Assessee relied

upon the decision of Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. vs. R.B. Badkar 268 ITR 332 (Bom). He further submitted that the judgment on which reliance has been placed by the Ld. Departmental Representative are distinguishable on facts as in the present case query was raised by the Assessing Officer.

12. We have considered the rival submissions and perused the material on record. We note that the reasons recorded state that the Assessing Officer has reasons to believe that income has escaped assessment as the Assessee has set off losses from share trading amounting to INR 39,36,79,000/- with the profits earned from Futures & Options business segment. The reasons recorded do not refer to any fresh/new tangible material or information.

In paragraph 4.2.2. of the order impugned, the CIT(A) has recorded that the assessment was reopened after verification of the return of income as well as the records available with the AO. The Ld. Departmental Representative has relied upon the judgment in the case of Export Credit Guarantee Corporation of India (supra) wherein it has been held by the Hon'ble Bombay High Court as under:

> *"8. To hold that the Assessing Officer must be deemed to have accepted what he has plainly overlooked or ignored in the assessment order would be to stretch the interpretation of Section 147 to a point where the provision would cease to have meaning and content. Such an exercise of excision by judicial interpretation is impermissible. When an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored relevant material in arriving at an assessment acts contrary to*

*law. If there is an escapement of income in consequence, the jurisdictional requirement of Section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within jurisdiction." (Emphasis Supplied)*

In the above case it was contended on behalf of the Revenue that no query was raised by the assessing officer in respect of any of the five points with reference to which the assessment was sought to be reopened. It was in this context, the Hon'ble Bombay High Court had observed as above. However, in the present case query was raised pertaining to income earned from trading in securities. The details provided by the Assessee, vide letter dated25.05.2009, ex-facie show that the Assessee has set off the losses from trading in shares with the profits from trading in futures & options. Further, it is clearly stated that net profits have been offered to tax as speculative income in the return of income. The relevant extract of letter, dated 25.02.2009, is reproduced below for reference:

"*4. Trading in Securities: During the course of assessment proceedings, you have asked us to give details of trading in securities. In this regards, we wish to submit that, during the year, the company has earned income from trading in securities. The details are as under:*

| *Particulars* | *Amount (Lacs)* |
|---|---|
| *Profit on trading in options/futures* | *: 10,594.69* |
| *Loss on trading in Equity Shares* | *: 3,936.79* |
| *Net Profit credited to profit and loss account* | *: 6,657.90* |

*The net profit of Rs.6657.90 Lacs is offered to tax as speculation income in the return of income."*

13. In view of the above, we find it difficult to accept the contention of the Ld. Departmental Representative that the 'aspect' of setting off of losses from share trading with profits of Future & Option business segment was not considered by the Assessing Officer

during the assessment proceedings. We agree with the Ld. Counsel of the Assessee that the judgments in the case of Export Credit Guarantee Corporation of India Ltd. (supra) and Eleganza Jewellery (supra), relied upon by the Ld. Departmental Representative, are distinguishable on facts, as the present case, in our considered view, it cannot be said that no enquiry was made during the assessment proceedings in relation to the issue on which re-assessment proceedings have been initiated. Further, the manner in which an assessing officer would draft/frame the assessment order is not within control of an assessee *[GKN Sinter Metals Ltd. vs. ACIT: 371 ITR 225 (Bom)].* We have perused the order of rejection of objection to reopening of assessment, dated 27.02.2013 and note that the arguments advanced by the Ld. Departmental Representative do not find place in the same. In the case of Hindustan Lever (supra) it has been held that the reasons recorded must be read as it is without any addition or inference.

14. Further, we note that in the case of CIT v. Kelvinator of India: 320 ITR 561, the Hon'ble Supreme Court had summarized the legal position as under:

> *"6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual*

*difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. ..... (Emphasis Supplied)*

15. The above principles were applied by the Hon'ble Bombay High Court in the case of NYK (Line) India Vs. DCIT : 346 ITR 361 (Bom), wherein re-assessment proceedings were initiated within a period of 4 years from the end of relevant assessment years. In that case the Hon'ble Bombay High Court held as under:

**"***12. The reopening of the assessment in the present case has taken place within a period of four years of the end of the relevant assessment year. The power of the Assessing Officer to reopen an assessment within a period of four years of the relevant assessment year is undoubtedly wider than where a period of four years has elapsed. Once a period of four years has elapsed, the proviso to Section 147 stipulates that there must be a failure on the part of the Assessee to disclose fully and truly all material facts necessary for assessment as a result of which income chargeable to tax has escaped assessment. But, that is not to say that within a period of four years, the power of the Assessing Officer to reopen an assessment is untrammelled. Even within a period of four years, it is now a*

*settled principle of law that an assessment cannot be reopened on the basis of a mere change of opinion. The Supreme Court has emphasized that the Assessing Officer has no power to review, but his power is a power to reassess. If a mere change of opinion cannot furnish a ground for reopening of an assessment, then, under the garb of reopening an assessment, a review would not equally be permissible. Consequently, the test is that there should be tangible material to come to a conclusion that there is an escapement of income from assessment." (Emphasis Supplied)*

16. In the present case also re-assessment proceedings have been initiated within a period of four years. We are not persuaded to accept the contention of the Ld. Departmental Representative that the aspect of set-off has not been examined by the Assessing Officer during the assessment proceedings. In our view re-assessment proceedings have been initiated on account of mere change in opinion in absence of any fresh tangible material having live link with income escaping assessment. Accordingly, we hold that the re-assessment proceedings are invalid having been initiated in violation of the provisions of Section 147 read with Section 148 of the Act.

In view of our finding on the issue of validity of re-assessment proceedings, the appeal filed by the Revenue challenging the relied granted by the CIT(A) on merits is dismissed.

In result the present appeal is dismissed

Order pronounced on 20.05.2022.

| | |
|---|---|
| *Sd/-* | *Sd/-* |
| (Pramod Kumar) | (Rahul Chaudhary) |
| Vice President | Judicial Member |

मुंबई Mumbai; दिनांक Dated : 20.05.2022
*Alindra, PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai