

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE
SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 1190/Del/2017
Asstt. Year : 2008-09

Asstt. Commissioner of Income Tax, Circle-31(1) New Delhi.	Vs.	Smt. Veena Mirdha Through Legal Heir Smt. Jyoti Mirdha 296, Forest Lane, Sainik Farms, New Delhi - 110 068 PAN AJAPM0214D
(Appellant)		(Respondent)

Assessee by:	Shri Anil Bhalla, CA
Department by :	Shri Umesh Takyar, Sr. DR
Date of Hearing	06.04.2022
Date of pronouncement	30.06.2022

ORDER

PER ASTHA CHANDRA, JM

The appeal by the Revenue is directed against the order dated 19.12.2016 of the Ld. Commissioner of Income Tax (Appeals) -11, New Delhi ("**CIT(A)**") pertaining to the assessment year ("**AY**") 2008-09.

2. The Revenue has taken the following grounds :-

"1. *Whether the Ld. CIT(A) has erred both on facts and in law in holding that assuming jurisdiction u/s 147 of the Act is ab-initio void.?*

2. *Whether the Ld. CIT(A) has erred both on facts and in law in holding that the assessing officer did not have any rationale to deviate from the consistent position taken by the department in view of the fact that there is no res-judicata in Income Tax proceedings.?*
3. *Whether the Ld.CIT(A) has erred in not noticing explanation 1 that says production before assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by assessing officer will not necessarily amount to disclosure within meaning of the provision to section 147.?"*

3. The assessee is an individual. Her return for AY 2008-09 was filed electronically on 30.09.2008 declaring income of Rs. 16,91,56,944/-. After initial processing under section 143(1) of the Income Tax Act, 1961 (**the "Act"**), the assessment under section 143(3) of the Act was completed on 31.08.2010 accepting the returned income. Subsequently, the assessment was reopened and notice under section 148 of the Act was issued on 10.02.2014. In response, the assessee filed letter dated 08.10.2014 stating that the original return filed be treated as the return filed in response to notice under section 148 of the Act.

3.1 After obtaining the reasons recorded for reopening the assessment, the assessee filed objections to the initiation of proceedings under section 147 of the Act. The Ld. Assessing Officer (**"AO"**) disposed off the same vide order dated 26.03.2015 and completed the assessment on 30.03.2015 under section 148 read with section 143(3) of the Act treating the income declared by the assessee under the head 'capital gains' as income from business of share trading.

4. Aggrieved, the assessee filed appeal before the Ld. CIT(A) who held that the reopening of the assessment under section 147 of the Act is ab initio void and on merits also the addition is not sustainable by recording his findings and observations in para 4.2 of his appellate order as under :-

“4.2 I have gone through the facts of the case, the reasons recorded by the AO and the written submission made by the AR and the following points emerge:

i. The appellant had filed the return for the assessment year 2008-09 showing income under the head capital gains on sale of shares;

ii. The said return of income was assessed u/s 143(3) of the Act and the returned income was accepted. During the course of these proceedings (original assessment proceedings), the AO has gone through the various documents called for and has examined the issue of short term capital gains shown by the appellant as is evident from the questionnaire issued by the then AO;

iii. There is no new material available with the AO at the time of re-opening of the assessment u/s 147 of the Act;

iv. The AO has relied upon the documents filed at the time of original assessment only while recording the reasons to re-open the case;

v. From the perusal of the reasons recorded to reopen the case, it is simply noticed that there is a change of opinion on the part of the AO without any new material brought on record;

vi. In the assessment year 2007-08 and 2009-10, the AO has made the assessment u/s 143(3) of the Act and has treated the income on sale of shares under the head capital gains. No substantial reason has been accorded by the AO to treat the said income in the A.Y. 2008-09 differently;

vii. The AO has taken the view of treating the income on sale of shares as business income merely because the appellant is maintaining a profit & loss account and balance sheet in which the share holding/investment in shares as on 31.03.2008 is shown as closing stock, but has not made the decision keeping in view the established principles on the issue vis-a-viz the intention of the tax payer, frequency of transactions, consistency etc;

viii. *The AO has not discussed the applicability of various circulars issued by the CBDT in this regard as per which the tax payers have been given an option to treat the income from sale of shares under a particular head on a consistence basis;*

ix. *The appellant has relied upon a number of judgments on all the above issues which are found relevant to the case and are in the favour of the appellant;*

On the basis of above arguments, I am of the opinion that the AO did not have any new material/information in his possession at the time of reopening the assessment and the same was done merely due to change in opinion in respect of the treatment of income arising out of sale of shares which has been consistently being shown by the appellant and is being accepted by the department as income under the head capital gains. In view of this, the reopening of the assessment u/s 147 of the Act is treated as ab initio void and on merits too, it is held that the AO did not have any rationale to deviate from the consistent position taken by the department. Therefore, on merits also, the addition made is deleted.”

5. The Revenue is in appeal before the Tribunal challenging the findings of the Ld. CIT(A) and all the three grounds of appeal relate thereto.

6. The Ld. DR supported the order of the Ld. AO. He submitted that the AO examined only the details of transactions in earlier AYs and the nature of transaction was never examined. Hence, it cannot be said that reopening of assessment is vitiated as it was only based on change of opinion. The Ld. DR laid stress on Explanation 1 to section 147 which explains what will not necessarily amount to disclosure within the meaning of the provisions of section 147. He argued that the Ld. CIT(A) has not taken notice of the said Explanation.

7. The Ld. AR drew our attention to para 3 to 6 of the reassessment order wherein the Ld. AO has indicated that there is failure on the part of the assessee to disclose full and true particulars necessary for assessment. He submitted that in response to item 11 and 12 of the questionnaire dated 05.02.2010 relating to script-wise details of capital gain (page 58 of Paper Book), the assessee had furnished full and complete details in the format prescribed by the Ld. AO which appears at page 60 & 61 of the Paper Book. Therefore, it is not correct to allege that there was failure by the assessee to disclose full and true particulars necessary for assessment framed under section 143(3) of the Act on 31.08.2010. It was a case selected for scrutiny under CASS. During assessment proceedings apart from written replies filed from time to time, books of account and other relevant documentary evidence were produced by the assessee which the Ld. AO had test checked. It was only thereafter that the Ld. AO accepted the income earned by the assessee from sale of shares as short-term capital gain ("**STCG**") and treated the long-term capital gain ("**LTCG**") earned by the assessee as exempt under section 10(38) of the Act. The Ld. AR further submitted that in the preceding AY 2007-08 as also in the succeeding AY 2009-10, though the assessments were made after scrutiny there was no adverse finding and the income shown by the assessee under the head 'capital gain' was accepted. Only in AY 2008-09 under consideration different view has been taken by the Ld. AO. This clearly shows that it is a case of change of opinion. The Ld. AO only re-apprised and reviewed the same set of facts and material as were available with him when he made assessment on 31.08.2010 under section 143(3) of the Act. The Ld. AR argued that neither any new material was brought on record nor any information was received subsequent to the passing of the assessment order dated 31.08.2010 under section 143(3) so as to confer jurisdiction in terms of section 147 of the Act. The Ld. AR relied on several case laws in support of his arguments.

8. We have considered the rival submissions carefully and perused the material available on records. The issue for our consideration is whether assumption of jurisdiction for re-assessment by invoking the provisions of

first proviso to section 147 of the Act by the Ld. AO is valid in the eye of law. The provision of first proviso to section 147 of the Act reads as under:-

“Where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:”

8.1 A bare reading of the above provision would reveal that in order to invoke this provision any income chargeable to tax should have escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

8.2 In *Sabharwal Properties Industries (P) Ltd. vs ITO (2016) 382 ITR 547 (Del)*, the Hon’ble Delhi High Court held that it is well settled that the reasons recorded for reopening the assessment have to speak for themselves. They have to spell out that- (i) there was a failure of the assessee to disclose fully and truly all material facts necessary for the assessment and (ii) the reasons must provide a live link to the formation of the belief that income has escaped assessment.

8.3 Hon’ble Bombay High Court in the case of *Pr.CIT vs. L&T Ltd. (2020) 113 taxmann.com 47 (Bom)* held that in absence of any failure on the part of assessee to disclose fully and truly all material facts at the time of assessment, reassessment proceedings could not be initiated after expiry of four years from the end of the assessment year.

8.4 In recent decision reported in (2021) 432 ITR 212 (Kar), the Hon'ble Karnataka High Court observed in the case of Dell India (P) Ltd. vs. JCIT that after 01.04.1989 the Assessing Officer has power to reopen assessment under section 147, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. The reasons must have a live link with formation of belief. Further, when a power under section 147 is to be exercised, concept of change of opinion must be treated as an inbuilt test to check abuse of power of the Assessing Officer. Hence 'reason to believe' in the context of section 147 cannot be based on mere change of opinion of the Assessing Officer.

9. We have perused the reasons recorded by the Ld. AO (pages 45-47 of the Paper Book). In para 3 thereof, he says that from the facts on records, it is observed that the assessee is engaged in the business of trading of shares and the income arising out of shares was to be assessed as income from business and not under the head 'capital gain' of the assessee and goes on narrating the facts from the records to corroborate the same. He analysed books of account maintained by the assessee including P&L account, balance sheet and audit report and came to the conclusion that frequent and voluminous transaction of shares were undertaken by the assessee.

9.1 The assessee filed objection (page 43-44 of the Paper Book) stating that the assessee was an investor in shares and proper records were maintained for the transactions incurred during the year. During assessment proceedings, calculation and copy of accounts were submitted for verification of LTCG/STCG. There was no Tax Audit Report as there was no business turnover. The assessee had purchased shares of one company only by 11 transactions and sales in 23 transactions only of the same company during the year so it cannot be said that assessee has frequent and voluminous transactions.

9.2 It was further stated that the case of the assessee was under scrutiny for continuously three assessment years i.e. AY 2007-08, AY 2008-09 and

AY 2009-10 and in all these years, the income of the assessee was assessed under the head 'capital gain' only. There is no change in the status of the case and all the information was already submitted. There is no material information with the Ld. AO to establish escapement of income by the assessee. If the income is reassessed as business income it is merely a case of change of opinion and cited the decision of Hon'ble Supreme Court in CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC).

9.3 Over-ruling the objections of the assessee, the Ld. AO completed the impugned re-assessment which has been vacated by the Ld. CIT(A) and in our opinion, rightly so.

9.4 Failure to disclose fully and truly all material facts necessary for assessment is sine-qua-non for assuming jurisdiction under first proviso to section 147 of the Act. The assessment order dated 31.08.2010 for AY 2008-09 itself reveals that it was a scrutiny case. Questionnaire accompanied the notice under section 142(1) of the Act. In the first query itself, the assessee was asked to state the nature of business and other financial activities performed during the year to which the reply of the assessee was that she was doing the investment in shares and securities during the year. In her return, the assessee had declared LTCG of Rs. 12,84,43,499/- which she claimed exempt and STCG of Rs. 16,91,56,994/- on which tax of Rs. 1,91,65,487/- was paid. Questionnaire 11 & 12 asked the assessee to furnish script-wise details thereof. The assessee furnished complete details in the proforma prescribed by the Ld. AO which included name of the script, date of purchase, cost of acquisition, date of sale, sale consideration and period of holding (pages 60&61 of the Paper Book). The Ld. AO applied his mind to the details and information submitted before him. Again, the Ld. AO asked for copy of contract notes and ledger account of India Bulls Securities Ltd. which were furnished by the assessee vide letter dated 26.08.2010. It was thereafter that the Ld. AO framed the assessment under section 143(3) on 31.08.2010.

9.5 On the face of the above facts, we have no hesitation in holding that the assessee had disclosed all primary facts to which the Ld. AO applied his mind and accepted the claim of the assessee that she had earned STCG which was brought to tax.

9.6 The reasons recorded for reopening the assessment contain ample proof in itself to show that there was no new material in the possession of the Ld. AO. He scrutinized the same documents which were already available on records for seeking to reopen the assessment which, in our view, amounts to re-appraisal of the same facts and change of opinion. In ITO vs. Mir Barkat Ali Khan Bahadur 97 ITR 239 (SC), the Hon'ble Supreme Court held that having second thoughts on the same material cannot be a ground for valid and proper initiation of reassessment proceedings.

10. Much stress has been laid by the Revenue on the principle of res-judicata which does not apply to income-tax proceedings. Suffice is to say that when the facts are not different it is necessary to maintain consistency as held by the Hon'ble Supreme Court in Union of India vs. Kumudini Narayan Dalal 249 ITR 219 (SC) and CIT vs. Narendra Doshi 254 ITR 606 (SC).

11. The contention of the Revenue that Explanation I to section 147 has been overlooked is devoid of any merit. The provisions contained in the present Explanation I were contained earlier in the then Explanation 2 prior to substitution of section 147 w.e.f. 01.04.1989. While interpreting the Explanation 2 the Hon'ble Calcutta High Court in Imperial Chemical Industries Ltd. vs. ITO 111 ITR 614 (Cal) observed that what the Explanation II refers to are voluminous account books and similar other documents which requires very careful scrutiny and from which material evidence cannot be discovered inspite of due diligence being exercised. Such is not the case of the assessee before us. On the contrary, facts reveal that books of account and other necessary documents were submitted before the Ld. AO during assessment proceedings and after scrutinizing them with reference to his queries, he called for further documents for the purpose of

finalizing assessment. In such a fact scenario, in our view, Explanation I relied upon by the Revenue, is not applicable. The case of the assessee is outside the scope of Explanation I to section 147.

12. For the reasons recorded above, we concur with the findings of the Ld. CIT(A) and reject all the three grounds of the Revenue.

13. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 30th June, 2022.

sd/-

sd/-

**(G. S. PANNU)
PRESIDENT**

**(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 30/06/2022

Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
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