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

BEFORE SHRIABY T VARKEY, JUDICIAL MEMBER AND
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

आयकरअपीलसं/ I.T.A. No.1053/Mum/2022
(**निर्धारणवर्ष /** Assessment Year: 2008-09)

State Bank of India (Successor to Erstwhile State Bank of Indore), State Bank Bhavan, 3rd Floor, FRT, Department, Nariman Point, Mumbai-400021.	**बनाम**/ Vs.	DCIT, Circle-(2)(2)(1) Mumbai-400020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AAACS8577K		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Ketan Ved, Adv.
Revenue by**:**	Smt. Nilu Jaggi (DR)

सुनवाईकीतारीख / Date of Hearing: 16/02/2023
घोषणाकीतारीख /Date of Pronouncement: 30/03/2023

ORDER

PER ABY T VARKEY, J.M:

This is an appeal preferred by the assessee against the order of Ld. Commissioner of Income Tax, Appeals/National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] dated 25.03.2022 for the Assessment Year (AY) 2008-09.

2. At the outset, the Ld. Authorized Representative (AR) of the assessee draws our attention to the Ground No.1 which is a legal issue against the validity of the re-opening of the assessment which has been done after four years from the end of the AY 2008-09.

3. Since the assessee has challenged the validity of the re-opening of assessment carried out by the AO, we are inclined to decide the same first. For examining the validity of the re-opening, the relevant facts are that the assessee (State Bank of Indore which has been merged with State Bank of India) had filed return of income on 29.09.2008 declaring total income of Rs. 356,52,97,040/- which was processed under section 143(1) of the Income Tax Act, 1961 (for short 'the Act') on 08.07.2009 (accepting the income returned). Subsequently, the assessee filed a revised return of income on 11.11.2009 wherein total income was revised to Rs. 354,90,95,670/-. Thereafter, the case of the assessee was selected for scrutiny and assessment was completed under section 143(3) of the Act on 28.12.2010 determining the total income at Rs. 512,39,20,130/-. By impugned action, the AO had issued notice under section 148 of the Act on 30.03.2015 proposing re-opening of the assessment for AY 2008-09. Pursuant to the same, the assessee requested for a copy of the reasons recorded for re-opening the assessment which was after a period of four years from the end of the AY 2008-09. According to Ld. AR, the AO has resorted to re-opening the assessment after four years without satisfying the additional condition precedents as specified in 1st proviso to section 147 of the Act and according to him, therefore the reasons recorded by AO does not satisfy the requirement of law as specified u/s 147 of the Act. So the action of AO is bad in law.

4. Before we advert to examine the legal issue raised by the assessee against the validity of the re-opening made by the AO, first of all let us have a look at the section 147 of the Act.The concept of assessment is governed by the time- barring rule; and an assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence regarding undisclosed income or AO has information in his possession

showing escapement of income as stipulated u/s 147 of the Act. As per Section 147 of the Act, if the AO intends to re-open the assessment, then AO has to record the reason to reopen the assessment, wherein he should record the *"reason to believe, escapement of income"*. It is settled principle of law that *"reason to believe"* postulates a foundation based on information and belief based on reason. After a foundation based on information is there, still, there must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In other words, before the AO issues notice u/s 148 of the Act, he must have recorded the *reason to believe escapement of income*. It is no doubt true that this Tribunal cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the AO on the point as to whether action should be initiated for re-opening the assessment. At the same time, we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant or remote and far-fetched, which would warrant the formation of belief relating to escapement of income. It is well settled in law that reasons as recorded by AO for re-opening the assessment, are to be examined on a stand-alone basis. Neither anything can be added to the reasons so recorded, nor can anything be deleted from the reason so recorded. The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom) has inter alia observed that *"*.....*it is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded by him. He has to speak through the reasons"*. Their Lordship added *"The reasons recorded should be self-explanatory and should not keep the assessee guessing for reason. Reason provide link between conclusion and the evidence..."*. So as held by the jurisdictional High Court that

while examiningthe jurisdiction of AO to have re-opened the assessment, we have to only consider the *reasons recorded* by the AO on a stand-alone basis and adjudicate as to whether AO has satisfied in the reasons recorded, the condition precedent i.e,*reason to believe escapement of income*) to validly reopen the assessment. And for re-opening the assessment after four year from the end of the relevant assessment year, an assessment which has undergone scrutiny assessment and additional condition also need to be satisfied i.e. the assessee failed to disclose fully and truly all material facts necessary for assessee's assessment =. It would be gainful to reproduce section 147 of the Act as it stood:-

"147. Income escaping assessment.-If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment" for any assessment year, he may", subject to the provisions of sections 148 to 153, assess or reassess" such" income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings" under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

> ***Provided** that 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."*

5. In order to examine the validity of the re-opening, first of all let us have a look at the reasons recorded by the AO to have re-opened the assessment.

Order sheet

<u>Reasons recorded for reopening</u>

M/s State Bank of Indore (Merged with SBI)

A.Y. 2008-09 (PAN : AAECS7776C

Date:- 30.03.15

The assesse filed return of income on 29.09.2008 declaring total income Rs.3,56,52,97,040/-. The scrutiny assessment w/s 143(3) of the I. T. Act, 1961 was completed on 28/12/2010 at the income of Rs. 5,12,39,20,130/-.

As per section 41(1) (a) of the income Act. Where an allowance or deduction has been made in assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently during the previous year the assessee has obtained whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to the profit and gains of business or profession and accordingly chargeable to income tax as the income of the previous year, whether the business or profession in respect of which the allowance or deduction has been made in existence in that year or not.

As per para 4(a) & 4 (b) of schedule 17 of Balance Sheet as on 31.03.08.

4(a) As per Reserve bank of India Guidelines, all investment in securities have to be classified under viz "Held to Maturity (HTM), "available for sale (AFS)"and "Held for three categories Trading (HFT)."*

4(b) The valuation of securities in these classification has been done as per RBI guidelines as detailed here-in-under:

(i) Investment in "Held to Maturity " category are carried at acquisition cost unless it is more than the face value, in which case the premium is amortized over the residual period of maturity using constant Yield Method and book value of each scrip is adjusted accordingly.

(ii) Investment held in "Available for sale " and "Held for Trading " are marked to market, the net depreciation in each classification is provided and the net appreciation under each classification is ignored.

Reason No. 1.-During the verification, it is noticed that the assesseee co. constantly claimed andwas allowed a provision for deprecation on investment on securities being "Held for Trading " or "Held for sale " in previous year as per RBI guidelines. It is further noticed that during the year assessee company decreased the provision for depreciation on investment to Rs. 17.91 crore from Rs. 99.31 crore (Para 3.2 of notes on account sch. 18 of Balance sheet) Rs. 6.01 crore on account of write off / write back of excess provision & Rs. 75.39 crore on account of used for investment / securities from "Available for sales," to"Held to Maturity." As per para 4(1) of Sch. 17 of Balance Sheet, investment under category "held to Maturity, should be taken at acquisition cost only. Provision for depreciation on investment can be provided only on investment under category, "Available for sale " or "Held for

Trading." An amount of Rs. 75.39 crore being provision for depreciation on investment was wrongly used in the investment under category "Held to Maturity" and in oppose of RBI guidelines. Hence provision for depreciation investment Rs. 75.59 crore was not more required and to be taxed us 41(1) which was not done.Omission to this resulted in under assessment of income to the extent of Rs.75.39 crore.

Reason No. 2.-

Case was assessed at Rs.5,12,39,20,130/- u/s 143(3) after addition of Rs.1,57,48,24,370/- on account of disallowance of broken period interest Rs. 1,54,95,69,454/- and expenses incurred for earning tax free income and consider the revised return income Rs. 3,54,90,95,760/-. The main reason for reducing income in revised return that an amount of Rs. 1,39,87,200/- was interest on fixed Deposits (System having 0 % rate of interest Disallowed u/s 40(a) (iia).

As per section 139(5) of the I.T. Act, if any person, having furnished a return under sub section(1), or in pursuance of a notice issued under sub section (1) of section 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, which even is earlier.

On verification of the record, it is noticed that revised return was considered while assessment made u/s 143(3) dated 28.12.2010. In spite of revised return was filed after the assessment made u/s. 143(1). Omission to consider original return income resulted in under assessment of income to the extent of Rs. 1,62,01,280/- (Rs. 3,56,52,97,040/- minus 3,54,90,95,760/-)

Further the during the assessment proceeding the assessee failed to produce the relevantdetails. Therefore, there is failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment.

In view of the above, I have reason to believe that assessee's income amounting to Rs. 80.39/- crore has escaped assessment within the meaning of section 147 of the I. T. Act and the same is required to be brought to tax as well as any other income which may be found to have escaped assessment as per the explanation 3 to section 147 of the Income Tax act, 1961."

6. According to Ld. AR, since four years have elapsed, the AO can re-open the assessment only if there was a tangible material which has come to the possession of the AO to show that due to the failure on the part of the assessee, the true and

correct facts could not be disclosed during the earlier assessment completed under section 143(3) of the Act.

7. He also drew our attention to the order of the Hon′ble Bombay High Court in the case of Hindustan Lever Ltd. reported in 268 ITR 332 (Bombay) wherein the Hon′ble High Court has observed as under:

> *"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of dust assume year. It is less to mention that the reasons are required to the read us they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer so reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material faces necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He mint disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary fin assessment of that assessment year, so as to establish vital link between the reasons and evidence That vital link is the safeguard again arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the nests which wore lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.*
>
> *21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the Assessing Offer had no jurisdiction to re-open the assessment proceedings which were*

concluded on the basis of assessment under section 143(3) of the Act On this short com alone the impugned notice in Table to be quashed and set aside."

8. In the light of the binding decision of the Hon'ble High Court and on perusal of the reasons recorded by AO in the instant case reveals that there was no new tangible material to reopen the assessment for AY. 2008-09 which has already undergone scrutiny assessment u/s 143(3) of the Act dated 28.12.2010. Therefore, first proviso to Section 147 of the Act would come into play, and therefore the additional condition precedent that while recording the reasons recorded for reopening of the assessment has to not only state his reasons to believe escapement of income, he has to also additionally record and specify what was the failure on the part of the assessee to disclose truly and wholly the relevant fact which facilitated the escapement of income. After going through the reasons recorded (supra), we note that the AO has culled out the facts that has been already stated in the Tax Audit Report, balance-sheet, profit and loss account and other information given by the assessee during the earlier assessment proceedings. We find that there is no new provisions from any outside agencies. Once the assessee's return of income has already undergone scrutiny assessment u/s 143(3) of the Act and four (4) years has elapsed, then AO has to specify/spell out the relevant fact which has not been disclosed by the assessee during the original assessment/return of income/balance-sheet/profit and loss account/tax audit report. Failure of the AO, not to specify it vitiate the reasons recorded. Mere bald allegation that the assessee failed to disclose truly and complete facts necessary for assessment is not sufficient. Even though, we during hearing we asked the Ld. DR to point out any new fact which has not been disclosed by the assessee during the original assessment u/s 143(3) of the Act, he could not do so. No new facts are emerging from the reasons recorded to justify re-opening the assessment of AY 2008-09. And the law is settled; we can only look into the reasons recorded as such (stand-

alone basis). Nothing can be added or subtracted. We cannot infer anything which is not available in the reasons recorded. Therefore, in the light of the discussion as well as judicial precedent cited (supra) we find that the reasons recorded does not muster the requirements of the law as necessary for reopening of the assessment. Coming to the averments of the AO that the assessee had filed revised return after the intimation was received u/s 143(3) of the Act to justify the re-opening, we note that the AO while framing the assessment u/s 143(3) of the Act dated 28.12.2010 has taken into consideration the revised return of income filed by assessee. Even it there is any error/mistake on the part of the predecessor AO while doing so, it cannot give power to the present AO to review the action of the earlier AO. This power is vested only with the PCIT/Ld. CIT u/s 263 of the Act and cannot be used to reopen the assessment. Therefore, we are inclined to accept the grounds of appeal raised by the assessee and hold that the reopening is bad in law.

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

Order pronounced in the open court on 30/03/2023.

Sd/-	Sd/-
(OM PRAKASH KANT)	(ABY T VARKEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 30/03/2023

Vijay Pal Singh, (Sr. PS)

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

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

BY ORDER,

//True Copy**//**

(Dy.**/**Asstt**.** Registrar**)**
ITAT, Mumbai