IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI
BEFORE SHRI N. K. CHOUDHRY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 1809/Mum/2023 (A.Y.2015-16)

DCIT Circle – 3(3)(1),
R. No. 609, Aayakar Bhavan,
M. K. Road, Churchgate,
Mumbai – 400 020 ..... Appellant

Vs.

Small Industries Development Bank of India
SME Development Centre,
C-11, G-Block, Bandra Kurla
Complex, Bandra East,
Mumbai-400 051
PAN – AABCS3480N ..... Respondent

Appellant by	:	Dr. Kishor Dhule, Ld. DR
Respondent by	:	Shri Gaurav Kabra, Ld. AR

Date of hearing	:	18/12/2023
Date of pronouncement	:	26/02/2024

ORDER

PER GAGAN GOYAL, A.M:

This appeal by revenue is directed against the order of National Faceless Appeal Centre (for short "NFAC") dated 21.03.2023 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2015-16. The revenue has raised the following grounds of appeal:-

1. "The Ld. CIT (A) erred in holding that the reopening was made on the ground of change of opinion when no opinion was formed by the AO on the issue of re-computation of the deduction u/s 36(1) (viii) of the Act after reducing the deduction u/s. 36(1) (viia) of the Act from the proportionate profit from long term activity during the original assessment proceeding?

2. "The Ld. CIT (A) erred in not appreciating the ratio of the Delhi High Court in the case of M/s. Consolidated Photo & Finvest Ltd. Vs. ACIT (2006) 151 Taxman 41 (Delhi) wherein it is held that action under section 147 was permissible even if the Assessing Officer gathered his reasons to believe from the very same record as had been the subject matter of completed assessment proceeding?

3. the appellant craves leave to add, amend and/ or vary the grounds of Appeal before or during the course of hearing"

2. The brief facts of the case are that the assessee company is engaged in the business of functioning as a principal financial institution for the promotion, financing and development of the Micro, Small and Medium Enterprises and coordinates the functions of institutions engaged in similar activities. Return of income declaring income of Rs. 1506, 09, 36,510/- under the normal provisions of the Act and Rs. 1912, 58, 92,986/- as book profit under the provisions of section 115JB of the Act vide dated: 29.09.2015. During the assessment proceedings itself, the assessee filed a revised return of income on 14.02.2017 declaring total income at Rs. 1505, 38, 12,270/- and Rs. 1912, 58, 92,986/- respectively. Original assessment order u/s. 143(3) of the Act was passed on 09.03.2017.

3. Subsequently, the case of the assessee was reopened by issuing notice u/s. 148 of the Act vide dated: 23.01.2019. In response to this notice issued u/s. 148 of the Act, the assessee filed a return and asked for a supply of reasons. Reasons were supplied to the assessee vide page no. 77 to 79 of the paper book and the same are reproduced herein below for ready reference as under:-

सत्यमेव जयते

भारत सरकार
GOVERNMENT OF INDIA

कार्यालय, आयकर उप आयुक्त ३(३)-1, मुंबई

DY. COMMISSIONER OF INCOME-TAX 3(3)-1, MUMBAI

6TH FLOOR, ROOM NO. 609, AAYAKAR BHAVAN, MAHARSHI KARVE ROAD, MUMBAI - 20.
(022) 2208 2295 (Direct), E-mail: mumbai.dcit3.3.1@incometax.gov.in

No.Dy.CIT-3(3)(1)/Reopen/Supply of Reasons/2018-19 Date : 20.02.2019

To
The Principal Officer
M/s. Small Industries Development Bank of India
C11, G Block
MSME Development Centre
Bandra Kurla Complex,
Bandra East, Mumbai-400051
PAN: AABCS3480N

Sub: Re-Assessment Proceedings in your case for A.Y.2015-16 – Supply of reasons recorded for reopening of the assessment - regarding.

Please refer to the above.

2. In connection with the ongoing re-assessment proceedings in your case for the captioned assessment year, I am enclosing herewith a copy of the reasons recorded for reopening the assessment in your case for above referred assessment year, for your information.

Please acknowledge the receipt of the same.

CERTIFIED TRUE COPY
CA VINITA S. SHAH
M. No. 120661

(MADHAV DESHMUKH)
Jt. Commissioner of Income Tax (OSD)
3(3)(1), Mumbai

Encl: As above.

1.	Name & Address of the assessee	:	Small Industries Development Bank of India SME Development Centre C-11, G Block, Bandra Kurla Complex Bandra East, Mumbai-400051
2.	Permanent Account No.	:	AABCS3480N
3.	Status	:	Company
4.	District/Circle	:	Dy.CIT-3(3)(1), Mumbai
5.	Assessment Year in respect of which it is proposed to issue notice u/s 148	:	2015-16

REASONS FOR REOPENING OF THE ASSESSMENT U/S.147 OF THE ACT

In this case, the scrutiny assessment proceedings were completed u/s.143(3) of the Income Tax Act, 1961 on 09.03.2017, assessing the total income of the assessee at Rs.1602,49,00,370 under the normal provisions of the Act and book profit u/s.115JB at Rs.1916.66.37.499 as against the total income declared of Rs.1505,38,12,270 under the normal provisions of the Act and book profit at Rs.1912,58,92,986.

2. On a perusal of the assessment records, it is seen that the assessee company has claimed deduction u/s.36(1)(viii) amounting to Rs.80,00,00,000 and has also claimed deduction u/s.36(1)(viia)(c) of the Act at Rs.79,39,60,401 @ 5% of the total income limited to actual provision made in the return. In the assessment order, said deductions were allowed at Rs.80,00,00,000 and Rs.84,46,95,341 considering the enhancement of total income subject to certain disallowances/ additions made therein.

3. However, since the assessee is eligible for deduction u/s.36(1)(viii) and also the deduction u/s.36(1)(viia) of the Act, in the order of precedence, for calculating the deduction u/s.36(1)(viii), the deduction u/s.36(1)(viia) of the Act needs to be considered while computing the deduction allowable u/s.36(1)(viii), which amount being allowed to the assessee u/s.36(1)(viia) of the Act has to be reduced from the proportionate profit from long term activity, to ensure that the assessee is not allowed double deduction on account of same amount u/s.36(1)(viii) and separately u/s.36(1)(viia) of the Income Tax Act, 1961. Since the same has not been done in the assessment order, the assessee has been allowed double deduction leading to escapement of income, which is worked out as under:

Particulars		Amount (₹)
Profit and gains of business or profession before allowing deduction u/s 36(1)(viii)	(A)	1620,07,40,945
Total Revenue on long term financing activities	(B)	1458,32,40,760
Total revenue from operations	(C)	5526,20,31,870
Proportionate Profit from long term financing activity D=(A X B)/C	(D)	427,52,55,500
Less: Deduction u/s.36(1)(viia) worked out on (B) i.e, 5% of Rs. 1458,32,40,760	(E)	72,91,62,038

(D)-(E)	(F)	354,60,93,462
Amount deductible u/s 36(1)(viii) E=' 20% or D		70,92,18,692
Amount allowed as deduction in the order u/s.143(3)		80,00,00,000
Income escaped assessment by way of excess allowance of deduction u/s.36(1)(viii)		9,07,81,308

3. In the light of the above, I have reason to believe that the assessee has been allowed excess deduction u/s.36(1)(viii) to the tune of Rs.9,07,81,308 and therefore, the income chargeable to said extent has escaped assessment within the meaning of Sec.147 of the Income Tax Act, 1961 and hence, it is a fit case for initiation of proceedings under Sec 147 of the Income Tax Act, 1961, in order to frame proper assessment to bring to tax appropriate income attributable to the above, which has escaped assessment. Accordingly, I hereby reopen the assessment by issuing a notice u/s.148 of the Income Tax Act, 1961 for the year under consideration i.e., AY 2015-16.

4. Necessary approval of the Addl. Commissioner of Income Tax, Range-3(3), Mumbai has been obtained for initiation of proceedings u/s.147 of the Income Tax Act, 1961 vide letter No. Addl.CIT-Rg.3(3)/Reopening u/s. 147/2018-19 dated 22.01.2019.

Notice u/s.148 of the Income Tax Act, 1961 is issued accordingly.

(MADHAV DESHMUKH)
Jt. Commissioner of Income Tax (OSD)
3(3)(1), Mumbai

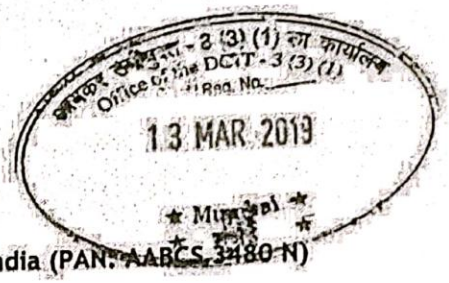
23.01.2019

4. The assessee objected to the reasons supplied, vide pages 80 to 84 of the paper book and the AO disposed of the objection of the assessee vide pages 85 to 87 of the paper book. Both papers are reproduced herein below:-

Shah & Taparia
Chartered Accountants

12, Navjeevan Wadi, Dhobi Talao, Mumbai – 400002
Tel.: 022-4022 0301 - 06 , Fax : 022-40220314
E-Mail : info@shahtaparia.com

To,
The Deputy Commissioner of Income Tax,
Circle - 3 (3) (1),
6th Floor, Aayakar Bhavan,
M. K. Road,
Mumbai - 400 020.



Dear Sir,

Reg: M/s. Small Industries Development Bank of India (PAN: AABCS3180N)

Sub: Objection for reopening of assessment u/s.147 of I T Act, 1961 for A.Y. 2015-16.

With reference to above we would like to submit that our above clients are in receipt of reasons for reopening for A Y 2015-16. The reason recorded by your goodself for reopening the assessment was as under:

"In this case, the scrutiny assessment proceedings were completed u/s.143(3) of the Income Tax Act,1961 on 09.03.2017, assessing the total income of the assessee at Rs.1602,49,00,370 under normal provisions of the Act and book profit u/s.115JB at Rs.1916,66,37,499 as against the total income declared of Rs.1505,38,12,270/- under the normal provisions of the Act and book profit at Rs.1912,58,92,986/-.

2. On the perusal of the assessment records, it is seen that the assessee company has claimed deduction u/s.36(1)(viii) amounting to Rs.80,00,00,000 and has also claimed deduction u/s.36(1)(viia)(c) of the Act at Rs.79,39,60,401/- @5% of the total income limited to actual provision made in the return. In the assessment order, said deductions were allowed at Rs.80,00,00,000 and Rs.84,46,95,341 considering the enhancement of total income subject to certain disallowances/additions made therein.

However, since the assessee is eligible for deduction u/s.36(1)(viii) and also the deduction u/s.36(1)(viia) of the Act, in the order of precedence, for calculating the deduction u/s.36(1)(viii), the deduction u/s.36(1)(viia) of the Act needs to be considered while computing the deduction allowable u/s.36(1)(viii), which amount being allowed to the assessee u/s.36(1)(viia) of the Act has to be reduced from the proportionate profit from long term activity, to ensure that the assessee is not allowed double taxation on account of same amount u/s.36(1)(viii) and separately u/s.36(1)(viia) of the Income Tax Act, 1961. Since the same has not been done in the assessment order, the assessee has been allowed double deduction leading to escapement of income, which is worked out as under:

Particulars		*Amount (Rs.)*
Profit and gains of business or profession before allowing deduction u/s. 36(1)(viii)	*(A)*	*1620,07,40,945*
Total Revenue on Long Term Financing Activities	*(B)*	*1458,32,40,760*
Total Revenue from operations	*(C)*	*5526,20,31,870*
Proportionate Profit from Long Term Financing	*(D)*	*427,52,55,500*

Shah & Taparia
Chartered Accountants

12, Navjeevan Wadi, Dhobi Talao, Mumbai – 400002
Tel.: 022-4022 0301 - 06 . Fax : 022-40220314
E-Mail : info@shahtaparia.com

*Activity D= (A*B)/C*		
Less: Deduction u/s. 36(1)(viia) worked out on (B) i.e. 5% of Rs. 1458,32,40,760	*(E)*	*72,91,62,038*
(D)-(E)	*(F)*	*354,60,93,462*
Amount Deductible u/s. 36(1)(viii) E='20% or D		*70,92,18,692*
Amount allowed as deduction in the order u/s. 143(3)		*80,00,00,000*
Income escaped assessment by way of excess allowance of deduction u/s. 36(1)(viii)		*9,07,81,308*

4. In the light of the above, I have reason to believe that the assessee has been allowed excess deduction u/s.36(1)(viii) to the tune of Rs.9,07,81,308 and therefore the income chargeable to said extent has escaped assessment within the meeting of Sec.147 of the Income Tax Act,1961 and hence, it is a fit case of initiation of proceedings under Sec.147 of the Income Tax Act,1961, in order to frame proper assessment to bring to tax appropriate income attributable to the above, which has escaped assessment. Accordingly, I hereby reopen the assessment by issuing a notice u/s. 148 of the Income Tax Act,1961 for the year under consideration i.e. AY 2015-16.

5. Necessary approval of the Addl. Commissioner of Income Tax, Range-3(3), Mumbai has been observed for initiation of proceedings u/s. 147 of the Income tax Act, 1961 vide letter No. Addl. CIT- Range3(3)/ Reopening u/s. 147/ 2018-19 dated 22.01.2019.

Notice u/s. 148 of the Income Tax Act, 1961 is issued accordingly"

We strongly object to the reopening of the assessment u/s.147 of the Income Tax Act, 1961 for following reasons:

At the onset, it is humbly submitted that the case of your above assessee was assessed u/s.143(3) of the Act and the assessed income has been determined after submission of and examination and verification of all details. Moreover, the said year has been assessed u/s.143(3) of the Act implying that the order has been passed after due consideration and appreciation of all relevant facts. Hence, the assessee objects to the said reopening of assessment on the issue which has already been examined and decided. There had been full and true disclosure of all material facts during the course of the assessment proceedings itself. It would be appreciated that the said assessment order passed was passed u/s.143(3) of the Act after examining all relevant facts.

In this regard, we prefer to rely on the following decisions of various courts including jurisdictional High Court:

- ✓ ***Bhagwati Shankari Karkhana (2004) 269 ITR 186 (Bom)***
- ✓ ***Western Outdoor Interactive (2006) 286 ITR 620 (Bom)***
- ✓ ***Hindustan Lever Ltd. (2004) 267 ITR 161 (Bom)***
- ✓ ***Prashant Project Ltd. vs. Asst. CIT (2011) 333 ITR 368 (Bom)***
- ✓ ***Hindustan Petroleum Corporation Ltd. vs. Dy. CIT (2010) 328 ITR 534 (Bom)***
- ✓ ***Nihilent Technologies (P) Ltd v Dy CIT (2011) 59 DTR 281 (Bom)***
- ✓ ***Shriram Foundry Ltd v. Dy.CIT(2012) 250 CTR 116 (Bom.)***
- ✓ ***Monitor India (P) Ltd V. UOI (2012) 68 DTR 313 (Bom)***
- ✓ ***HCL Corporation Ltd. v. ACIT (2012) 66 DTR 473 (Delhi)(High Court)***

Shah & Taparia
Chartered Accountants

12, Navjeevan Wadi, Dhobi Talao, Mumbai – 400002
Tel.: 022-4022 0301 - 06 . Fax : 022-40220314
E-Mail : info@shahtaparia.com

✓ *Kimplas Trenton Fittings Ltd. v.ACIT (2012) 340 ITR 299 (Bom.)*

Further, the assessee also is raising objection for the said assessment proceedings having been initiated merely on the basis of certain technical matter which has in fact been examined and accepted by the Ld. AO in the Assessment Order passed.

It would be appreciated that the reason to believe cannot merely mechanically stem out of a notion. The Ld. AO is entitled to reopen the assessment after forming his own belief but cannot change the stand / opinion formed by his predecessor which too would be one of the possible stands to take. The action of re-opening in such a scenario which too is been based on incorrect appreciation and interpretation of facts and position of law would be vitiated.

Reopening was made without application of mind by Assessing Officer:

From the above reason it is clear that the notice u/s.148 of the Act has been issued merely on the basis of surmises and whims of the Ld. AO on a well settled issue, which was being otherwise examined and worked out as per law in the past. No particular reasons or judgements have been mentioned for the same except for merely an alleged aspect of "precedence". The basis prescribed for working out the said respective deductions allowable to the assessee as per law.

The reopening of the case without application of mind is not valid under the Act. With regard to the same, reliance is placed on the following judgment of:

ACIT vs. Dhariya Construction Co.[2011] 197 Taxman 202 (SC) where the Hon'ble Supreme Court has held that before reopening of any assessment the AO has to apply his mind to the information, if any, collected and must form a belief thereon.

In this regard, provisions of section 36(1)(viia) and section 36(1)(viii) of the Act are being reproduced hereunder:

Other deductions.

36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28.

..."

"36(1)(viia) in respect of any provision for bad and doubtful debts made by
(a) a scheduled bank not being a bank incorporated by or under the laws of a country outside India or a non- scheduled bank [or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank, an amount not exceeding eight and one-half per cent of the total income (computed before making any deduction under this clause and Chapter VIA) and an amount not exceeding ten per cent of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner :

..."

Shah & Taparia
Chartered Accountants

12, Navjeevan Wadi, Dhobi Talao, Mumbai – 400002
Tel.: 022-4022 0301 - 06 . Fax : 022-40220314
E-Mail : info@shahtaparia.com

"36(1)(viii) in respect of any special reserve created and maintained by a specified entity, an amount not exceeding twenty per cent of the profits derived from eligible business computed under the head Profits and gains of business or profession (before making any deduction under this clause) carried to such reserve account:
Provided that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of the paid up share capital and of the general reserves of the specified entity, no allowance under this clause shall be made in respect of such excess.
..."

Perusal and bare reading of the above 2 specified provisions would reveal that the mode / basis of working out the respective deduction / claim have been clearly specified with no ambiguity as regards the same.

The deduction u/s.36(1)(viia) is to be worked out and allowed as a percentage of ***the total income (computed before making any deduction under this clause and Chapter VIA).***
It is nowhere mentioning to allow in piecemeal with only specified exclusions being the deduction allowable under the said section itself and the deductions allowable under chapt. VI-A of the Act.

Moreover, the provision for working out the allowable claim for deduction u/s.36(1)(viii) of the Act has also specified the basis of working out the said deduction. The same is to be worked out @ 20% ***of the profits derived from eligible business computed under the head Profits and gains of business or profession (before making any deduction under this clause) carried to such reserve account.***

Thus, the Act itself has made it amply clear as to how and when the said deductions have to be worked out and leave nothing for imagination or making presumption as is being done in the present case.

The order of precedence being suggested in the reasons recorded for the reopening is just a figment of imagination of the Ld. AO and nowhere is the same being suggested in the Act. Rather, the pecific instance when and how the respective deduction is to be computed are very clearly mentioned in the respective provisions and the same have to be followed. Thus, the said reasons recorded are incorrect and based merely on personal assumption which is not enough for reopening of an assessment and framing addition merely on surmises.

There is no judgement or case reference also that has been brought out for forming the said basis.

It would be appreciated that from the reasons recorded by your goodself as provided to the assessee, there is no fresh tangible material available with you to form your said basis for reopening of the said assessment. It would be appreciated that review in the garb of reassessment is not permitted.
CIT vs. Amitabh Bachchan (Bombay High Court) www.itatonline.org
NYK Line (India) Ltd. v. Dy. CIT (2012) 68 DTR 90 (Bom)(High Court)

The same is merely a change of opinion since both the said deductions had been re-worked out after making necessary disallowances. So it is not the case that the Ld. AO was not aware of the said deductions being claimed and allowed during the course of the assessment proceedings

Shah & Taparia
Chartered Accountants

12, Navjeevan Wadi, Dhobi Talao, Mumbai - 400002
Tel.: 022-4022 0301 - 06 . Fax : 022-40220314
E-Mail : info@shahtaparia.com

for the year under consideration. It certainly also cannot be a case that the Ld. AO who passed the earlier order u/s.143(3) of the Act was not aware of the provisions of the Income Tax Act clearly.

It has been held by various courts including the Apex court that reopening of an assessment that too after all material facts were fully and truly disclosed by the assessee at the time of the original assessment proceedings was not valid.

It has been held by the High Court, Bombay, in the case of ***BalakrishnaHiralalWani vs. ITO (2010) 321 ITR 519 (Bom.)*** that since there was no tangible material before the Assessing Officer to form the belief that the income had escaped assessment and therefore, reopening of assessment under section 147 was not valid.

It has been held by the High Court, Bombay, in the case of ***Aventis Pharma Ltd. vs. ACIT (2010) 323 ITR 570 (Bom)*** that the power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power.

Most importantly, it would be appreciated that it would be necessary for the Ld. AO to first state that there is a failure to disclose fully and truly all material facts which has not been done so in the present case. If he does not record such a failure he would not be entitled to proceed u/s 147 of the Act. (As held in the case of Titanor Components Limited vs ACIT (2011) 60 DTR 273 (Bom.) (High Court))

Hence, in view of the above facts and circumstances of the case and on the basis of the various judicial pronouncements relied upon above, we place our strong objection to the said reopening of the present assessment.

Further in the reasons recorded though you have mentioned that necessary approval u/s.151 of the Act was obtained from concerned authority, however the same has not been shared with the assessee, therefore you are requested to kindly provide such approval to the assessee, so that we can deal with the said approval also.

In view of the above facts and circumstances of the case and position of law, we humbly submit that the reassessment proceedings initiated in the present case may kindly be dropped.

Thanking you,

Yours sincerely,
For SHAH & TAPARIA
Chartered Accountants

Partner
Encl: As Above.

CERTIFIED TRUE COPY
FOR SHAH & TAPARIA

भारत सरकार
GOVERNMENT OF INDIA
कार्यालय, आयकर उप आयुक्त ३(३)-१, मुंबई
DY. COMMISSIONER OF INCOME-TAX 3(3)-1, MUMBAI
6TH FLOOR, ROOM NO. 609, AAYAKAR BHAVAN, MAHARSHI KARVE ROAD, MUMBAI - 20.
(022) 2208 2295 (Direct), E-mail: mumbai.dcit3.3.1@incometax.gov.in
सत्यमेव जयते

Ref.No.Dy.CIT-3(3)(1)/Obj/Reopen/SIDBI-15-16/2018-19 Date : 18.03.2019

To
The Principal Officer
M/s. Small Industries Development Bank of India
C-11, G Block,
MSME Development Centre
Bandra Kurla Complex,
Bandra East, Mumbai-400051
PAN: AABCS3480N

सं./No. CAV/22.03.2019/IW/RP/15..
निगमित लेखा उदभाग
Corporate Accounts Vertical
22 MAR 2019
भारतीय लघु उद्योग विकास बैंक
Small Industries Development Bank of India

Sub;- Objections for reopening of assessment for A.Y.2015-16 – regarding.
*****

Please refer to the above and your letter dated 13.03.2019.

2. In connection with the on-going re-assessment proceedings, you have raised certain objections vide your above AR's letter filed in this office on 13.03.2019. The same are dealt with and disposed off hereinbelow;

3. The main objections raised by you against initiation of the proceedings u/s.147 of the Act are as under:

i). The return was assessed u/s.143(3) of the Act and the assessed income has been determined after submission of and examination and verification of all details implying that the order was passed after due consideration and appreciation of all relevant facts, hence, the assessee objects to reopening of assessment on the issue which has been examined and decided.

ii). The proceedings u/s.147 are initiated merely on the basis of certain technical matter which has in fact been examined and accepted by the AO in original assessment order.

iii). Reasons to believe cannot be merely mechanically stem out of a notion. AO is entitled to reopen the assessment after forming his own belief but cannot change the stand/ opinion formed by his predecessor which too would be one of the possible stands to take.

iv). Notice u/s.148 has been issued merely on the basis of surmises and whims of the AO on a well settled issue, which was being otherwise examined and worked out as per law in the past. No reason or judgments have been mentioned for the same except for merely an alleged aspect of 'precedence'.

v). Reopening, without application of mind is not valid under the Act.

vi). The deduction u/s.36(1)(viii) is to be worked out and allowed as a percentage of total income (computed before making any deduction under this clause and chapter VIA) and it is nowhere mentioned to allow in peace-meal with any specified exclusions being the deduction allowable under the said section itself and the deductions allowable under ch.VIA.

vii). Order of precedence suggested in the reasons is just a figment of imagination of the AO and nowhere the same is suggested in the Act, rather, the specific instance when and how respective deduction is to be computed are very clearly mentioned in the respective provisions and the same have to be followed. Thus, said reasons recorded are incorrect and based merely on personal assumption which is not enough for reopening of an assessment and framing addition merely on surmises.

4. Your above objections for reopening of your assessment for AY 2015-16 have been considered, however the same are not acceptable. Firstly, it is to state that the decisions relied upon by you are not identical to that of the assessee as in your case, the in the original proceedings, the assessment records show that the AO had never called for any details/ explanation with regard to re-computing the deduction u/s.36(1)(viii) after considering deduction u/s.36(1)(viia) of the Act, therefore, you cannot presume that the belief formed by the undersigned is due to change of opinion. It is clear that in the original proceedings, the AO had not at all considered the issue and hence, it can be said that he had not formed opinion in this regard. Further, it is to state that the assessment has been reopened after forming a belief that the income chargeable to tax has escaped assessment on specific issue of allowance of deductions u/s.36(1)(viii) and 36(1)(viia) of the Act, which prove that the act of reopening is not on mere surmises of whims and is not without application of mind as contended by you.

5. Further, it is to mention that when there is no discussion on the issue in the Assessment order and no details were called for by the AO or filed by the assessee on the issue, no finding either positive or negative can be said to have been arrived at during the course of original assessment proceedings. Hence, there is no question of change of opinion as held in the judgments (i) Kalyanji Mavji & Co. vs. CIT 102 ITR 287 (SC); (ii) Esskay Engineering P. Ltd. vs. CIT 247 ITR 818 and (iii) ITO vs. Purushottam Das Bangur & Anr. 224 ITR 362 (SC). Accordingly, your objections against the initiation of proceedings u/s.

147 of the Act for AY 2015-16 are hereby rejected and you are requested to cooperate with this office by complying with the notices issued u/s.142(1) of the Act.

6. As regards the objections regarding the allowance of deduction section 36(1)(viii) an 36(1) (viia) and how the same has to be allowed, the same is not a figment of imagination, but the process of allowing the deduction and you will appreciate that the deduction u/s.36(1) (viia) stand allowed to the company twice while working out the deduction u/s. 36(1)(viii) as the profits do include the amount being claimed as deduction u/s.36(1)(viia) and again the deduction u/s.36(1)(viia) is allowed to you from gross total income after allowance of deduction u/s.36(1)(viii) of the Act. Therefore, it is not mere imagination and the working given in the reasons point out that the said element proves that the assessee has been allowed excess deduction to the tune of Rs.9,07,81,308 for the year under consideration.

7. It is to clarify in the above discussion, the submissions on the merits of the case are not discussed in detail as the same will be taken up in the re-assessment proceedings, however, in order to deal with all the contentions raised by you in your letter, the issue of deduction u/s.36(1)(viii) and 36(1)(viia) are discussed in brief, restricted the disposal of objections only to validity of reopening of the assessment and your contentions and submissions on the merits of the case will be considered in total, in the assessment order while finalizing the proceedings, which may please be noted.

18/3

(MADHAV DESHMUKH)
JT. COMMISSIONER OF INCOME TAX(OSD)
3(3)(1), MUMBAI

5. The AO was not satisfied with the reply of the assessee and finally reassessed the income of the assessee u/s. 143(3) of the Act r.w.s. 147 of the Act. The Assessee was aggrieved with the same order and preferred an appeal before the Ld. CIT (A), who in turn declared the assessment as bad in law and quashed the proceedings carried out in response to notice issued u/s. 148 of the Act. Now,

revenue is not satisfied with the order of Ld. CIT (A) and preferred this present appeal before us.

6. We carefully considered the order of AO passed u/s. 143(3) of the Act, Reasons taken for reopening of the case, objections of the assessee against reopening and AO's disposal of the same, order of the AO passed u/s. 143(3) r.w.s. 147 of the Act and order of the Ld.CIT (A) passed u/s. 250 of the Act. The moot question before us is whether the issue raised by the revenue in reassessment proceedings was already discussed and dealt with during the original assessment proceedings or not. If the issue had already been dealt with by the revenue during the original assessment proceeding itself, reopening the matter would be tantamount to a change of opinion; otherwise, there is nothing wrong in these proceedings carried out by the department.

7. In addition to the above communication between the assessee and the AO, we are reproducing herein below the submissions of the assessee before us as under:

> *"2. In response to the first ground raised by the DR, the AR pointed out to page 88 of the paperbook wherein it can be seen that from the notice issued u/s. 142(1) at the time of original assessment proceedings, the Ld. AO in point iii) of the notice asked the assessee to submit the working of deduction u/s. 36(1) (viia) of the Act and deduction u/s. 36(1) (viii) of the Act. After considering the same and the additions made thereunder, the Ld. AO in Para 38 of the original assessment order passed u/s. 143(3) dated 09.03.2017 mentioned that the total income of the assessee will undergo a change and hence re-worked the deduction u/s. 36(1) (vii) and 36(1) (viia) (c) of the Act after taking into consideration relevant disallowance/additions. The relevant portion is reproduced as under:*
>
> > *"38. On account of the above disallowance/additions, the total income of the assessee will undergo a change and hence the deduction u/s. 36(1) (vii) as well as 36(1) (viia) (c) allowable to the assessee are re-worked and allowed accordingly."*

3. Therefore, in view of the above, it is clear that the aforesaid issue was already dealt by the AO during the course of original assessment proceedings u/s 143(3) of the Act. There had been full and true disclosure of all material facts during the course of the assessment proceedings itself. Thus, reopening the said case on same facts is nothing but a mere change of opinion. It is now a well decided judicial pronouncement that no reopening is possible on the basis of change of opinion. Copies of following decisions were provided during the course of hearing:

- *Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC)*
- *Court of Bombay in case of HDFC Bank Ltd Vs ACIT (WP 1787 of 2014).*

In addition to the above, reliance is also placed on the following cases laws:

- *HIGH COURT OF GUJARAT In The Case Of Saurabh Natvarlal Soparkar Vs Assistant Commissioner of Income-Tax, Circle 4(2) [2021] 131 Taxmann.Com 63*
- *[2021] 131 Taxmann.Com 166 (Bombay) HIGH COURT OF BOMBAY In The Case Of Hindustan Unilever Ltd Vs Deputy Commissioner Of Income-Tax, Circle-1(1)(2), Mumbai*
- *[2021] 133 Taxmann.Com 270 (Orissa) HIGH COURT OF ORISSA In The Case Of Sri Jagannath Promoters & Builders Vs Deputy Commissioner Of Income-Tax*

4. Thereafter, in rebuttal of ground 2, the AR submitted that the ruling of Full Bench of Hon'ble Delhi High Court in the case of CIT Vs USHA INTERNATIONAL LTD (348 ITR 485) in the Para 11 of the order has mentioned that the observations and ratio laid down by the Delhi High Court in the case of M/s. Consolidated Photo & Finvest Ltd. Vs. ACIT (2006) 151 Taxman 41(Delhi) does not reflect the correct legal position. The full bench of Delhi High Court has observed that the aforesaid judgment of M/s. Consolidated Photo & Finvest Ltd is in contrary to the full bench decision in case of Kelvinator Of India Ltd (supra) and others. Therefore, the reliance placed by DR on the ruling of M/s. Consolidated Photo & Finvest Ltd. vs. ACIT (supra) is not tenable.

5. Thereafter, the Ld. DR placed reliance on the decision of SC decision of ALA Firm vs. CIT (Civil No. 570 of 1976). In this regard, it is submitted that the SC was dealing with the assessment year is 1961-62. Subsequent to the said decision, there are a plethora of decision passed subsequently, wherein it is clearly emerging from the reasons so recorded by the Assessing officer which establishes the fact that there is no new material brought on record by the Assessing subsequent to completion of original proceedings u/s. 143(3) and the matter was duly examined during the original assessment proceedings and it is

therefore clearly a case of change of opinion where on the same facts and material on record, the Assessing officer wishes to take a different view than the view taken earlier and a mere change of opinion cannot per se be a reason for reopening. In fact we would like to place reliance on following decision of tribunal which has rejected the department contention with regards to placing reliance on the decision of A.L.A Firm vs. CIT as under:

•Latest decision of Hyderabad Tribunal announced on 17.10.2023 in the case of DCIT vs. M/s. DRS Logistics Private Limited (ITA 1718/Hyd./2018) (Copy attached)

•M/s. Crescent Construction Co vs. ACIT - 22(3) (ITA No. 658/Mum/2014)."

8. We have thoroughly considered the submissions of both the sides' alongwith original assessment order passed u/s. 143(3) of the Act and found that issue under consideration for the purposes of section 148 was discussed and deliberated in length. Further, there was no concealment or escapement of information on the part of the assessee. The AO was well versed and have full access to the information relevant for assessment. Rather, he himself calculated the figure of deduction and certain changes were incorporated in the order. In view of the above, case of the revenue is not sustainable as there is no fault at the end of the assessee and the AO already applied his mind during the assessment proceedings. This action of AO u/s. 147 of the Act will tantamount to change of opinion which is not permissible on the given set of facts. **Grounds raised by the revenue are dismissed.**

9. **In the result, appeal of the Revenue is dismissed.**

Order pronounced in the open court on 26th day of February, 2024.

Sd/-	Sd/-
(N. K. CHOUDHRY)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 26/02/2024

Sr. PS (Dhananjay)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai