आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ई , मुंबई ।

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

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री राजेन्द्र, लेखा सदस्य, के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Rajendra, Accountant Member

ITA NO.6405/Mum/2011
Assessment Year:2005-06

ACIT, Circle-3(3), Room No.609, 6th Floor, Aaykar Bhavan, M.K.Road, Mumbai-400020	बनाम/ Vs.	M/s SICOM Housing Development Finance Ltd. C/o- SICOM,1st Floor, Nirmal Nariman Point, Mumbai-400021
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		P.A. No.AABCS1131L

राजस्व **की ओर से** / Revenue by	Shri Neil Philip-DR
निर्धारिती **की ओर से** / Assessee by):	Shri Jayant Bhatt

सुनवाई की तारीख / **Date of Hearing :**	**09/02/2015**
आदेश की तारीख /Date of Order	**09/02/2015**

आदेश / O R D E R

PER JOGINDER SINGH (Judicial Member):

The Revenue is aggrieved by the impugned order dated 28/06/2011 of the ld. First Appellate Authority, Mumbai. The Revenue has raised the following grounds

1. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in annulling the assessment, reopened u/s. 148, on the ground that change of opinion is not a valid ground for reopening the *assessment, without appreciating the fact that the assessment was reopened not in view of any change of opinion but on the basis of reasons to believe that income of the assessee chargeable to tax has escaped assessment as the assessee has not disclosed truly and fully all facts, thus fulfilling the basic conditions of reopening the assessment as envisaged as per the provisions of Sec. 147".*

2. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in treating the loss of Rs.2,65,04,985/ - arising out of sale of housing finance portfolio as business loss as against capital loss without appreciating the fact that the assessee has ceased to conduct the housing finance business as such the loss incurred on business closed down is a capital loss and not revenue loss".

2. At the time of hearing, Shri Neil Philip, ld. DR, contended that the ld. Commissioner of Income tax (Appeals), without assigning any reason, annulled the reopening of assessment u/s 148 of the Income tax Act, 1961(hereinafter the Act) on the basis of change of opinion, without appreciating the fact that the assessment was reopened on the basis of proper reason to believe that income chargeable to tax had escaped assessment as the assessee had not disclosed the material facts truly and fully.

2.1. On the other hand, ld. Counsel for the assessee, Shri Jayant Bhatt, defended the conclusion arrived at in the impugned order by contending that since the material facts were duly disclosed before the Assessing Officer and after considering the same, the assessment was framed, consequently, it was merely on the basis of change of opinion, which is not permissible.

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee company was engaged in the business of financing mainly house finance activities. During the relevant period, the assessee sold its housing finance portfolio, incurring loss of Rs.1,96,36,046/-. The assessment was framed u/s 143(3) of the Act that too after due deliberation on the subject, allowing the loss to the assessee. On the basis of audit query, the assessment was reopened mentioning that the loss occurred on sale of portfolio was to be treated as capital loss. The Assessing Officer issued notice to the assessee to show-cause as to why the impugned loss should not be treated as capital loss. The claim of the assessee was that since the assessee was in the business of advancing loan and merely selling the particular portfolio, the assessee's business, has not come to an end, rather the assessee widened its activities in the other field and further the housing finance portfolio was nothing but stock in trade and not the investment as such, thus, it was rightly claimed as a revenue loss. The assessee also challenged reopening of the assessment merely on the basis of audit query.

2.3. On appeal, before the ld. Commissioner of Income tax (Appeals), it was held that such reopening was merely a change of opinion, which is not permissible. The relevant portion from the impugned order is reproduced hereunder for ready reference:-

> *" I have taken note of the A.O.'s order as well as the appellant's A/R submission. Having taken note of the same, I am of the considered view that the A.O. was not justified in his action for reopening of the assessment as*

> *all the details were available on record. Further to that once the appellant has made all the disclosure of all sales of housing finance portfolio, which resulted into loss then in may considered view reopening was not justified as it merely amounts to change of opinion by the A.O. Thus, taking note of the decisions referred above as well as also taking note of all the facts of the case, I consider it proper and appropriate to hold that the A.O. was not justified in reopening the assessment in the instant case. Accordingly, the order of the A.O.'s is annulled.*
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> *xxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that the appellant was engaged in the business of housing finance portfolio before its decision to part away to said business and consequently the appellant sold out its finance business, which resulted loss to the appellant company. Taking note of the appellant's submission, I am of the considered view that the appellant was engaged in the housing finance business therefore the loan, which was transferred by the appellant to the transferee was a current asset and trading item. In view of the same that the appellant discontinued the business will not amounts that the appellant's loss is capital loss. In my considered view the A.O. was not correct to hold that the said loss as business loss, as the same resulted due to sale of current asset and also a trading item. Accordingly, this ground of appeal is allowed."*

If the reasons of the reopening by the Assessing Officer, conclusion drawn in the impugned order, material available on record and the assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, there is uncontroverted finding in the impugned order that necessary details/material facts were duly available before the Assessing Officer while framing the original assessment. During original assessment stage, the claim of the assessee was duly allowed by the Assessing Officer. The reopening of duly framed assessment was merely based upon the query raised by the audit party.

In a landmark decision the Hon'ble Apex Court in Kelvinator of India Ltd (2010) 320 ITR 561 has evolved a broad principle. Likewise in Green World Corporation vs ITO (2009) 314 ITR 81 (SC), the Hon'ble Apex Court held that 'the order passed by the Assessing Officer at the dictate of the CIT is 'nullity'. Likewise the Hon'ble High Court of Rajashthan Syntex Ltd. (2009) 313 ITR 221 held that 'initiation based on the opinion of the Assessing Officer of other party, is 'borrowed satisfaction' not sufficient reason to believe escapement of income. Further, the Hon'ble Apex Court dismissed the SLP of the Department (C No.8167 of 2009) against the aforesaid decision from Hon'ble Rajashthna High Court. We note that there is no finding in the assessment order that any independent enquiry was made by the Assessing Officer of the present assessee rather he reopened the assessment merely on the basis of query raised by the audit party and there was no new tangible material came to the light of the Assessing Officer and he acted merely on the borrowed satisfaction/query raised by the audit party, thus, the ratio laid down in the aforementioned cases supports the case of the assessee. The ratio laid down in Indian and Eastern Newspaper Society vs CIT (119 ITR 996)(SC) further supports the case of the assessee. The Hon'ble Apex Court has held as under:-

> "*Thus, contrary to the decision of the Supreme Court, the instruction of the Board directs that merely on raising of audit objection remedial action by initiating proceedings of reassessment be taken notwithstanding that the authority vested with power to exercise jurisdiction for issuing notice is not satisfied about*

> *existence of such circumstances which may warrant exercise of such power. To say the least, such ultra vires instructions cannot be pressed into service to save the initiation of proceedings under section 147, in the absence of holding of any belief by the Assessing Officer, by arrogating the power to itself by the Board by issuing such directions contrary to the provisions of law at the pain of subjecting the officer to pain of exposing him to charge of insubordination."*

Even otherwise, the important words u/s 147 of the Act are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable or in other words, it must be based on reasons, which are relevant and material. The Court, of course, may not investigate into the adequacy of sufficiency of the reasons which have weighed with the Assessing Officer incoming to such belief but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which the Assessing Officer is required the entertain the belief before issuance of notice u/s 147. Such belief must be in good faith and cannot pretence. The word "Omission or failure to disclose truly and fully all material facts necessary for his assessment for that year" postulate a duty on the assessee to disclose fully and truly all material facts necessary for assessment. The disclosure must be full and also true which are in the knowledge of the assessee at the relevant time, thus, material facts means primary facts. In the present appeal the assessee duly disclosed all material facts before the Assessing Officer and that's why the assessment was framed u/s 143(3) of the Act and it was reopened by the

Assessing Officer merely on the change of opinion, which is not permissible. Even on the basis of reply of the assessee on 08/05/2008, the Assessing Officer was of the opinion that the claim of the assessee and the loss on sale of housing loan portfolio was revenue in nature. It is not the case that any new material came to the possession of the Assessing Officer at the later stage which was not made available during original assessment proceedings. In view of these facts, we find no infirmity in the conclusion drawn by the ld. Commissioner of Income tax (Appeals). It is affirmed.

Finally, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides, at the conclusion of the hearing, on 09/02/2015.

Sd/-	***Sd/-***
(Rajendra)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 09/02/2015

Shekhar, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
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**