

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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I.T.A.No.393 of 2015

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JUDGMENT(Per the Hon'ble Sri Justice Ramesh Ranganathan)

This appeal, under Section 260A of the Income Tax Act, 1961 ('the Act', for brevity), is preferred against the order passed by the Income Tax Appellate Tribunal ('the Tribunal', for short) in ITA.No.1292/Hyd/2013 dated 27.06.2014. The appeal before the Tribunal was preferred by the Revenue against the order passed by the Commissioner of Income Tax (Appeals) on 16.07.2013 setting aside the order passed by the Assessing Officer in the exercise of his jurisdiction under Section 147 of the Act.

Facts, to the limited extent necessary, are that the assessee is a Company carrying on business in investments and securities. They filed a return of income on 30.10.2005, for the assessment year 2005-06, declaring a loss of Rs.2,30,08,266/- which was processed under Section 143(1) of the Act. Thereafter, the assessee's return was selected for scrutiny, and an order, under Section 143(3) of the Act, was passed on 20.07.2007 determining 'NIL' income after setting off the brought forward losses of Rs.1,54,88,864/-, and long term capital loss of Rs.2,30,08,266/-. On verification, the Assessing Officer noticed that the assessee had derived short term capital gains of Rs.68,94,886/- from the sale of shares which was set off against long term capital loss of Rs.2,99,03,153/-, and a net long term capital loss of Rs.2,30,08,266/- was carried forward. The Assessing Officer was of the view that long term capital loss could not be set off against the short term capital gain as per Section 74(i)(b) of the Act; and the assessee had set off income of Rs.1,13,83,250/- from the sale of property against brought forward business loss which, according to the Assessing Officer, should have been assessed as short term capital gain. The Assessing Officer reopened the assessment under Section 147 of the Act, and issued a notice under Section 148 of the Act on 26.03.2012. In reply, the assessee submitted a letter dated 20.11.2012 requesting that the return filed on 30.10.2005 be treated as a reply to the notice issued under Section 148 of the Act. During

assessment proceedings, the assessee objected to the initiation of proceedings under Section 147 of the Act after expiry of a period of four years from the end of the assessment year. The objections were rejected, and the Assessing Officer completed assessment under Section 143(3) read with Section 147 of the Act bringing to tax the profit derived from the sale of shares and sale of property treating them as short term capital gain which could not be set off against long term capital loss and brought forward business loss.

In appeal, the Commissioner of Income Tax (Appeals) held that reopening of the assessment, by the Assessing Officer, was bad in law; there was no new information on record; the Assessing Officer had not brought out any details showing how income had escaped assessment, what was the default committed by the assessee, and what inaccurate information had been provided by them; the Assessing Officer had taken a conscious decision regarding the issue at hand and, after six years, the assessment could not be reopened on the basis of the very same information as it was nothing but a change of opinion. The order of the Assessing Officer was set aside. Aggrieved thereby, the Revenue carried the matter in appeal to the Tribunal.

In the order under appeal, the Tribunal held that, in terms of the *proviso* to Section 147 of the Act, an assessment, completed under Section 143 or 147, could not be reopened after expiry of four years from the end of the relevant assessment year, unless such escapement of income was attributable to the failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment; the reasons recorded by the Assessing Officer, for forming a belief that the income had escaped assessment, were already mentioned in the assessment order; it was evident that, on re-examination of the computation of income and other statements filed by the assessee along with the return, the Assessing Officer had formed an opinion that set off of short term capital gain, derived from the sale of shares, against long term capital loss was not permissible; and the gain, derived from the sale of house property, had to be assessed as short term capital gain and could not be set off against brought forward business loss as the assessee was engaged in the business of dealing with securities. The Tribunal held that neither in the reasons recorded, nor anywhere in the assessment order, was there any allegation by the Assessing Officer that there was failure on the part of the assessee to disclose truly and fully all material facts necessary for completing the assessment;

and the condition precedent for reopening the assessment, beyond four years, was not satisfied in the present case. The Tribunal further held that reopening of assessment, in the present case, was not only on a mere change of opinion but also amounted to review of the assessment order passed earlier under Section 143(3) of the Act. The order of the Commissioner of Income Tax (Appeals) was affirmed, and the appeal preferred by the Revenue was dismissed.

Sri B. Narasimha Sarma, learned Senior Standing Counsel for the Income Tax Department would submit that the Assessing Officer was justified in exercising jurisdiction under Section 147 of the Act as the assessee has failed to disclose, fully and truly, all material facts.

Both the Commissioner of Income Tax (Appeals) and the Tribunal have held that the Assessing Officer had re-examined the assessment order passed earlier under Section 143(3) on 20.12.2007; and, on re-examination of the computation of income and other statements, he had formed an opinion that set off of short term capital gains, derived from sale of shares, against long term capital loss was not permissible; and the gain derived from sale of house property had to be assessed as short term capital gain and could not be set off against brought forward business losses as the assessee was engaged in the business of dealing with securities.

Exercise of jurisdiction under Section 147 of the Act, in the present case, is not for the failure of the assessee to disclose fully and truly all material facts necessary for his assessment, but because the Assessing Officer was of the opinion that the set off claimed by the assessee earlier, and which was accepted by him while passing an assessment order earlier under Section 143(3) of the Act, necessitated re-computation and re-determination. As has been rightly held by the Tribunal such an exercise could not have been undertaken beyond the period of four years in view of the limitation prescribed under the *proviso* to Section 147 of the Act. The exercise undertaken by the Assessing Officer not only amounted to a change of opinion, but also a review of the earlier assessment order passed under Section 143(3) of the Act. We find no infirmity in the order of the Tribunal, much less can a substantial question of law be said to have arisen, necessitating interference in proceedings under Section 260A of the Act.

The appeal fails and is, accordingly, dismissed.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

RAMESH RANGANATHAN, J

M. SEETHARAMA MURTI, J

18th November, 2015

Vjl

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(Judgment of the Bench delivered by
Hon'ble Sri Justice Ramesh Ranganathan)

18th November 2015

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