IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1113 OF 2015

The Principal Commissioner of Income Tax-2 ..Appellant

v/s.

ICICI Bank Ltd. .. Respondent

Mr. Suresh Kumar for the appellant
Ms. A. Vissanji for the respondent

CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.

DATED : 7th MARCH, 2018.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 18th February, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2002-03.

2. The Revenue urges only the following substantial question of law:-

Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the CIT(A) order in holding that the reopening of proceedings u/s 148 of the I.T. Act, *1961 made by the Assessing Officer are invalid as it was merely due to change of opinion?*

3. The respondent assessee filed its return of income for the Assessment Year 2002-03 declaring an income of Rs.351.23 crores. The assessment was completed on 25th February, 2005 under Section 143(3) of the Act, determining the total income at Rs.899.06 crores. Thereafter, by notice dated 26th March, 2007 issued under Section 148 of the Act, the Assessing Officer sought to reopen the assessment for subject assessment year. The reasons recorded in support of the notice dated 26th March, 2007 read as under :-

> *"The assessee company had claimed deduction of Rs.3,39,96,92,465/- as Misc. Expenditure. This amount was not passed to the P&L A/c. The Assessing Officer disallowed only Rs.2,42,22,50,540/- on account of issue expenses on rupee loan / debenture/ fixed deposits and foreign currency loan and balance amount of Rs. 97,74,41,925/- remained to be disallowed. As this expenditure was not routed through the P&L A/c, the same was not subjected to scrutiny of the statutory auditors of the assessee company nor the relevant evidences for allow-ability of the same were submitted before the Assessing Officer for proper verification"*

4. The respondent in response to the reopening notice pointed out that there is no reason to believe that the income chargeable to tax has

escaped assessment, as the notice is based on mere change of opinion. It was pointed out that the reasons recorded in reopening notice were the very issues which were subject matter for consideration by the Assessing Officer while passing the order dated 25th February, 2005 under Section 143(3) of the Act. The Assessing Officer did not accept the same and passed an order on 31st December, 2007 determining the appellant's income at Rs.97.74 crores.

5. Being aggrieved, the respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 4th December, 2012, the appeal of the respondent was allowed. This by holding that the reasons recorded for reopening were a subject matter for consideration by the Assessing Officer in the assessment order passed on 25th February, 2005 under Section 143(3) of the Act and in particular in paragraph 7 thereof. In the above view, it held that the reopening notice was based on mere change of opinion and hence could not be sustained. Accordingly, the assessment order dated 31st December, 2017 under Section 143(3) r/w Section 147 of the Act was annulled.

6. The Revenue preferred further appeal before the Tribunal. The

Tribunal upheld the findings of the CIT(A) and held that the reasons for reopening the assessment for the subject assessment year on mere change of opinion. Thus, without jurisdiction.

7. We find that the basis of the reopening notice is that the amount of Rs.97.74 lakhs had remained to be disallowed in the regular proceedings leading to assessment order dated 25th February, 2005 as the expenses were not routed through profit and loss account. This basis is incorrect as the assessment order dated 25th February, 2005 under Section 143(3) of the Act, in fact, at paragraph no.7 examines the entire claim of Rs.339.96 crores, which includes Rs.97.74 crores. In fact, the impugned order records the fact that the order dated 25th February, 2005 under Section 143(3) of the Act records that Rs.339.96 crores is not been routed through the profit and loss account and yet disallowed only a part of the claim to the extent of Rs.242 crores. Thus, it is self-evident from the order of the assessment dated 25th February, 2005 that the Assessing Officer had applied his mind over the issue which forms the basis of the reopening notice dated 26th March, 2007. It is settled position in law that the the reopening notice based on mere change of opinion is not sustainable as held by the Apex Court in ***Commissioner of Income Tax Vs. Kelvinator India, 320 ITR 561***.

8. In the above view, the impugned order of the Tribunal has only applied the decision of the Apex Court in *Kelvinator India* (supra) thus, the question of law as proposed does not give rise to any substantial question of law. Thus, not entertained.

9. Therefore, the appeal is dismissed. No order as to costs.

(SANDEEP K. SHINDE, J.) **(M.S. SANKLECHA, J.)**