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

INCOME TAX APPEAL NO.1287 OF 2016

The Principal Commissioner of Income Tax-8 … Appellant

V/s.

Motilal R. Todi … Respondent

Mr.N.C.Mohanty for the Appellant.
Mr.Ryan Saldanha for the Respondent.

CORAM : AKIL KURESHI AND
SANDEEP K. SHINDE, JJ.
DATE : JANUARY 28, 2019.

P.C.:-

1. This appeal is filed by the Revenue challenging the judgment of Income Tax Appellate Tribunal ("the Tribunal" for short) dated 22nd September, 2015.

2. Following questions are presented for our consideration:-

> "(a) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in not following the binding judgment of Jurisdictional High Court in the case of Export Credit Corporation of India Vs. Addl.

CIT & Others, in WP No.502/2012, where the Court held that something tangible need not be new?

(b) Whether, in the facts and circumstances of the case and in law, the ITAT failed to appreciate that fact of the case are distinguishable in as much as the reopening of the assessment has been made within 4 years?

(c) Whether, in the facts and circumstances of the case and in law, ITAT failed to appreciate that reason to believe that income has escaped assessment on some tangible material is sufficient for reopening of assessment?

(d) Whether, on the facts and in the circumstances of the case and in law, the Tribunal is justified in not giving finding on merits on the assessee's claim of treating income from share transaction as Short Term Capital Gain, instead of business income based on the frequency and quantum of transactions?"

3. Brief facts are as under:

The respondent-assessee is an individual. For the assessment year 2006-07 the assessee had filed the return of income which was taken in scrutiny by the Assessing Officer. He passed an order under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 15th December, 2008. To reopen such assessment, the Assessing Officer issued a notice on 23rd February, 2011. In the reasons recorded for issuing such notice he had raised following three grounds:-

(i) The assessee had derived dividend income, but no disallowance under Section 14A of the Act was made to.

(ii) The assessee had returned capital gain to the tune of Rs.91.28 lakhs. The same was also assessed. However, according to the Assessing Officer, looking to the transactions of the assessee of sale and purchase of shares said gain should have been taxed as business income.

(iii) The assessee had not deducted tax at source though required and hence, expenditure of Rs.24,000/- should have been disallowed under Section 40(a)(ia) of the Act.

4. Despite resistance from the assessee to the process of reopening of assessment, the Assessing Officer passed order under section 143(3) r/w 147 of the Act on 31st December, 2011. In such order he made no disallowance under Section 14A of the Act. The income of Rs.91.28 lakhs was treated as assessee's business income and he also disallowed expenditure of Rs. 24,000/- under Section 40(a)(ia) of the Act.

5. The assessee carried the matter in appeal. CIT (Appeals)

first tested the validity of the notice of reopening. He held that the question of sale of shares leading to capital gain or business income was subjected to scrutiny assessment and that therefore, qua such issue, there was a change of opinion. He, however, did not agree with the assessee that the notice of reopening was otherwise bad in law. Since on other two grounds there was no scrutiny. On merits, he upheld the Assessing Officer's order upon which the assessee carried the matter in further appeal of the Tribunal.

6. The Tribunal by the impugned judgment only touched on the question of validity of the notice of reopening of assessment. In a detailed judgment the Tribunal held that the notice was bad in law since there was no fresh tangible material in the possession of the Assessing Officer while recording reasons for issuing the notice. The Tribunal was of the opinion that this was the prime condition to be satisfied before examining the other aspects. The Tribunal placed heavy reliance on the decision of the High Court in case of **CIT Vs. Orient Craft Ltd.**[1] and declared that the

1 (2013) 354 ITR 536

notice of reopening of assessment was bad in law.

7. Having heard learned counsel for the parties, we cannot persuade ourselves to accept the view of the Tribunal. In the present case, the notice of reopening of assessment was issued within the period of four years from the end of relevant assessment year. Therefore, insisting that the Assessing Officer must have some material outside of the assessment records which would provide him tangible material to form a belief that income chargeable to tax had escaped assessment, would amount to bringing the element of true and full disclosures.

8. When an assessment has been reopened within four years from the end of relevant assessment year and the original assessment has been framed after scrutiny, as held by the Supreme Court in case of **CIT Vs. Kelvinator India Ltd**[1], concept of change of opinion would apply. In other words, if the grounds on which the notice of reopening of assessment is issued, was subjected to scrutiny assessment, in absence of any tangible

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1 320 ITR 561(SC)

material outside the case records coming within the possession of the Assessing Officer, reopening of assessment would not be permissible. The Tribunal has however, not gone along this line. It is undisputed that only the question of income arising out of sale of shares was examined by the Assessing Officer during the scrutiny assessment, out of the three grounds mentioned by him in the reasons recorded. In other words, the remaining two grounds were never subjected to scrutiny during the original assessment.

9. The view expressed by the Tribunal would run contrary to series of judgments of different High Courts including larger bench judgment of Delhi High Court in case **Commissioner of Income Tax-VI, New Delhi Vs. Usha International Limited** [1] and division bench judgment of Gujarat High Court in case of **Inductotherm (India)(P) Ltd. Vs. M. Gopalan, Deputy Commissioner of Income Tax**[2] and several judgments of this our Court itself. In fact, we may record that the judgment of Delhi High Court in the case of **Orient Craft Ltd.(supra)** came

1 (2012) 348 ITR 485 (Del)
2 (2013) 356 ITR 481(Guj)

up for consideration before the said High Court in case of **Inductotherm (India)(P) Ltd.(supra)** and the earlier judgment was explained in this decision.

10. In facts of the present case, however, despite above discussion, we are not inclined to interfere. It is for the following reasons.

11. The CIT (Appeals) had recorded that the issue of income arising out of sale of shares was examined in the original assessment. In fact, the reasons recorded also proceed on this admitted fact. If during such assessment the Assessing Officer treated the income arising from such source as capital gain, any attempt on this part to tax the same as business income would be a change of opinion. When admittedly no new material is available with the Assessing Officer to do so, permitting him to reassess the same income would amount to recognizing the review powers which he did not possess. There was no addition made by the Assessing Officer himself in the assessment order with respect to the disallowance under section 14A of the Act. The

remaining addition made by the Assessing Officer was of minuscule sum of Rs.24,000/-. For such a small sum we find it wholly unnecessary to admit the appeal. We clarify that other than these three items recorded in the reasons, during reassessment proceedings the Assessing Officer had not made any other addition.

12. In the result, Income Tax Appeal is dismissed.

(SANDEEP K. SHINDE, J.) **(AKIL KURESHI,J.)**

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