DDR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1361 OF 2017

Pr. Commissioner of Income Tax-Central 4 ..Appellant
vs.
M/s. J.M. Financial Institutional Securities Ltd. ..Respondent

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Mr. Suresh Kumar for appellant.
Mr. Jehangir Mistri, Senior Counsel a/w. Mr. Atul K. Jasani for respondent.

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CORAM : NITIN JAMDAR &
M.S.KARNIK, JJ.

DATE : 6 JANUARY 2020

P.C.:-

Heard learned counsel for the parties.

2. The Appellant has challenged the order dated 11/8/2016 passed by the Income Tax Appellate Tribunal ('the Tribunal' for short) in Income Tax Appeal No.179/Mum/2016 (Assessment Year 2006-07).

3. The present Appeal relates to Assessment Year 2006-07.

4. The Appellant – Revenue has framed following questions as substantial questions of law :-

(A) Whether under the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in holding the re-assessment proceedings as invalid, without appreciating the fact that the issue was not a subject matter of verification in the original assessment proceedings hence re-assessment is not based on "change of opinion"?

(B) Whether under the facts and circumstances of the case, when there is no discussion in the assessment order on the issue of sundry creditors and when there is no finding positive or negative in the original assessment order on this issue, whether Hon'ble Income Tax Appellate Tribunal was justified in not appreciating that there is no "change of opinion" and in denying the applicability of decision in the case of Ess Ess Kay Engineering Co. P. Ltd. vs. CIT [247 ITR 818 (SC) ?"

5. The Appeal arises from the proceeding taken out in respect of the notice for re-assessment issued on 22 March 2013 under Section 148 of the Income Tax Act, 1961. The note was admittedly issued beyond the period of four years. As per the Section 147, since the note was issued beyond period of four years, the proceedings could have been initiated if there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

6. The Tribunal, after considering the material on record and reasons for re-opening the assessment, which are reproduced in impugned order, observed thus :-

"7. The above facts show that the assessee has disclosed all material facts at relevant places during original assessment proceedings u/s. 143(3) of the Act. The AO himself asked for specific questions and full details were supplied by the assessee. AO examined these documents and framed the assessment only after proper application of mind. There was no failure on the part of the assessee to fully and truly disclose all the material facts. Thus, reassessment is being sought by the AO on mere change of opinion and apparently on the basis of Audit Memo, which is not permissible. No new tangible material has come to the knowledge of the AO so as to justify the reopening. The following observation of the Hon'ble Apex Court in the case of CIT vs.Kelvinator of India Ltd. 320 ITR 561 would be relevant here :-

> *"Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to be conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."*

Further, the Hon'ble apex Court in the case of CIT vs. Foramer France (2003) 264 ITR 566(SC) has clearly laid down the principle that where there is no failure on the part of the assessee to disclose material facts, the reassessment proceedings after the expiry of four years is not possible in view of the provisions of Sec.147 of the Act. In the circumstances of the case and after appreciating the statutory provisions and judicial pronouncements, we conclude that reassessment proceedings are bad in law and the same are set aside. Accordingly, the appeal of the assessee is allowed. ”

7. In view of the clear finding of the Tribunal that there was no failure on the part of the Respondent – Assessee to disclose fully and truly all material facts and that nothing contrary is demonstrated as to why this finding is incorrect, the questions of law proposed do not give rise to any substantial question of law. The Appeal is dismissed.

(M.S.KARNIK, J.) **(NITIN JAMDAR, J.)**

Diksha Rane
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