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

INCOME TAX APPEAL NO.1879 OF 2017

Pr. Commissioner of Income Tax-2 ...Appellant
vs.
Yes Bank Limited ...Respondent

Mr. Suresh Kumar for the Appellant.
Mr. Madhur Agrawal i/b Mr. Atul K. Jasani for the Respondent.

CORAM : K. R. SHRIRAM AND
AMIT B. BORKAR, JJ.

DATE : 26 OCTOBER 2021

P. C. :

Order under Section 143(3) of the Income Tax Act 1961 (for short, IT Act) was passed on 15/11/20210 determining the assessee's income of Rs.3,37,70,08,315/- after disallowance of provision on investment under Section 14A and disallowance under Section 35D of the IT Act. Audit scrutiny revealed that the assesssee has claimed deduction under Section 36(1) (viia) of the I-T Act, 1961 for an amount of Rs.200734588/-. Assessee created provision for standard asset/advances under the General loan loss provision excluding provision for NPA and claiming deduction under Section 36(1) (viia) of the I-T Act, 1961. In this way the assessee banking company was putting aside money by creating provision for standard asset/advances to meet unascertained liability.

2. The case was reopened and notice dated 5/3/2013 under Section 148 of the Act was issued. By order dated 17/2/2014 Assessing Officer reassessed the income under Section 143(3) of the Act. Aggrieved by this order appeal was filed with the Commissioner of Income Tax(Appeals) (for short, CIT (A)) by respondent. CIT(A) by order dated 30/12/2014 partly allowed the appeal filed by respondent but upheld reopening of assessment being valid. Aggrieved by the order of CIT (A) respondent as well as the Appellant preferred an appeal before Income Tax Appellate Tribunal (for short, ITAT). By order dated 24/8/2016 ITAT dismissed the appeal of the Revenue allowing the appeal of Respondent holding that reopening of assessment was bad in law. It is this order which is impugned in this appeal and the following substantial questions of law have been proposed:

a) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in annulling the reopening of the assessment under Section 147 of the Act without appreciating the fact that after substitution of the section 147 by direct tax laws (amendment) act 1987, w.e. 1/4/1989 the assessing officer has power to reopen the assessment if there is tangible material to come to conclusion that there is an escapement of income from assessment and that the reasons recorded has a link with the formation of belief ?

b) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in annulling the reopening of the assessment under Section 147 of the Act merely by giving undue importance to the trivial issue of preliminary reply sent to the audit which was without forming a concrete opinion on escapement of income and ignoring the core issue of assessee wrong claim of deduction under Section 36(1) (viia) of the IT Act, 1961 ?

c) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in annulling the reopening of the assessment under Section 147 of the Act without appreciating the fact that the assesee is not entitled for the deduction under section 36(1) (viia) of the I. T. Act, 1961 amounting to Rs.17,95,94,700/-within the meaning of sub clause (a) of Section 36(1) (viia) of the I. T. Act, 1961 in the absence of any advance made by the rural branches of the assessee bank ?

d) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has failed to appreciate the fact that reopening of the assessment was not done in view of the Revenue Audit Objection per se but in view of the clear position of law regarding the applicability of the deduction under Section 36(1) (viia) of the I.T. Act. 1961 ?

3. If one considers the orders passed by the Assessing Officer

as well as CIT(A), reopening of assessment has been decided only because of audit objections. Of course the Assessing Officer, in his order has mentioned that compulsory scrutiny of the record has revealed, there was a statement of income but reopening has been because of audit objection. We have also noted that Assessing Officer had taken a stand contrary to the view expressed in the audit objection and had even addressed a letter to the Director of Audit intimating that objections raised by audit authority were not acceptable. Nevertheless the Assessing Officer reopened and issued notice under Section 148 of the Act.

4. It is settled law that the opinion of the Internal Audit party of the Income Tax Department cannot be recorded as information within the meaning of section 147(b) of the Act for the purpose of opening the assessment. The courts have also held that notice of reassessment cannot be issued based on information received from audit objection. The Apex Court in ***Indian & Eastern Newspaper Society vs. Commissioner of Income Tax***[1] in paragraph 20 has held as under:-

> *"20. Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income-tax Department are co-extensive with that of receipt audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual Vol. 2, we hold that the opinion of an internal audit*

1 *(1979) 2 Taxman 197 (SC)*

party of the Income-tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income-tax Act, 1961"

5. In *Indian and Eastern Newspaper Society (supra)*, the court further held that in every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has not become aware. The opinion rendered by the audit party to the law cannot, for the purpose of such belief, add to or colour the significance of such law.

6. In another unreported judgment of this Court in ***Jainam Investments vs. Assistant Commissioner of Income Tax, Central Circle-8 (1) and Ors***[2], it is held that the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. Therefore, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer. Considering this proposition of law, ITAT came to the conclusion that reopening of assessment was not correct and allowed the appeal filed by respondent.

7. We have no reason to take a different view from the view expressed by our own High Court. In our view, ITAT has not

2 *Writ Petition No.2760/2019 Dated 24/8/2021*

committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raised any substantial question of law.

8. Appeal is devoid of merit and is dismissed with no order as to costs.

(AMIT B. BORKAR, J) **(K. R. SHRIRAM, J.)**