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

WRIT PETITION NO. 129 OF 2022

Housing Development Finance Corporation Ltd. ....Petitioner

V/s.

Deputy Commissioner of Income Tax Circle 1(1)(1), Mumbai and Ors. ...Respondents

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Mr. Nitesh Joshi i/b Mr. Atul K. Jasani for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATED : 15th FEBRUARY, 2022

P.C. :

1. Petitioner is impugning a notice dated 31st March, 2021 issued under Section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2013-14 alongwith order dated 15th November, 2021 rejecting the objections.

2. Mr. Joshi's submissions are - (a) Notice under Section 148 of the Act is unsigned. In the notice digital signature is missing. Mr. Joshi says even manually signed notice has not been served and on this ground alone the notice has to be set aside, and (b) The reasons recorded clearly indicate change of opinion which is not permissible in law to re-open the assessment.

3. On the first point of no digital signature or manual signature in the notice issued under Section 148 of the Act, we have to observe that in

another matter, viz., Writ Petition No.11 of 2022 also the same officer Mr.Neeraj Kumar Agarwal, Circle 1(1)(1) Mumbai had issued the notice where there was no digital signature.

4. On the second argument of Mr. Joshi that reasons are based on change of opinion, having considered the reasons recorded we are in agreement with Mr. Joshi. The relevant portions of the reasons are as under:

> *"xxxxxxx*
>
> *In the assessment, the assessing office had reworked the ratio of above mentioned allocation of expenses. In respect of interest expenses the ratio was reduced to 59.77:40.23 treating part of interest cost relatable to tax free income and capital gains as well. In respect of other expenses (such as staff expenses, establishment expenses and other miscellaneous expenses) due to non submission of specific details by the assessee, 80% of such expenses were adopted to be relatable to main business before tax at Rs.2805,07,20,574 and allowed deduction of Rs.561,01,44,115 u/s. 36(1)(iii) computed at 20% of 2805,07,20,574.*
>
> *On verification of the records, it was observed that the Assessing Officer, vide para no. Para 3.10 and 3.13 of Assessment Order had discussed that the incidental charges received by the assessee amounting to Rs.8,50,04,633 was not an income derived from its main business hence was required to be excluded for the purpose of computing deduction u/s 36(1)(viii). However, while computing the income from the main business, it remained included in the income from main business eligible for the said deduction (point no.9 of Annexure A of the Assessment Order).*
>
> *xxxxxxx*
>
> *However the Assessing Officer, although applied ratio of 90% in respect of other components of the other expenses did not allocate any portion of the aforesaid provision under income of main business at all the entire amount of this provision was shown as a deduction against the other income only. This led to enhanced profit before tax and thereby excess computation*

of deduction u/s. 36(i)(vii) to the extent of allocation not done then the said provision.

xxxxxxx

As the housing finance was the main business of the assessee it had himself allocation part of the provisions against the main business made a reduced claim u/s. 36(1)(viii), hence instead of enhancing this allocation in the ratio of 80% adopted by it for other expenses, the treatment given by the department to not allocate any portion of this provision to main business was not in order. This resulted in enhanced profit before tax under the head of main business by at least the amount already allocated by assessee i.e., Rs.100,63,00,000.

xxxxxxx"

5. From the quoted portion above, it is obvious that the officer who proposes to re-open the assessment has a different opinion on the assessment order passed. It is settled law that the Assessing Officer has power to re-open the assessment under Section 147 of the Act provided there is a tangible material to come to a conclusion that there is escapement of income from assessment. Further when a power under Section 147 of the Act is to be exercised, concept of change of opinion must be treated as an inbuilt test to check abuse of power of Assessing Officer and hence "reason to believe" in context of Section 147 of the Act cannot be bound on mere change of opinion of Assessing Officer. It is also settled law that oversight, inadvertence or mistake of Assessing Officer or error discovered by him on the reconsideration of material is mere change of opinion and does not give him power to re-open the concluded assessment. ***[Dell India (P.) Ltd. vs. Joint Commissioner of Income Tax, LTU, Bangalore[1]]***

1 [2021] 123 taxmann.com 468 (Karnataka)

6. In the circumstances, we are satisfied that it is a fit case to interfere by this court in its jurisdiction under Article 226 of the Constitution of India. Therefore, petition is allowed in terms of prayer clause – (a) which reads as under :

> *(a) that this Hon'ble Court may be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and, after examining the legality and validity of the impugned notice dated 31.03.2021 issued under section 148 of the Act (being Exhibit 'K' hereto) and the impugned order dated 15.11.2021 (being Exhibit 'O' hereto) quash and set aside the same.*

7. Petition disposed.

(N. J. JAMADAR, J.) **(K.R. SHRIRAM, J.)**