आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"L" BENCH, MUMBAI

श्री आर.एस. स्याल, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 360/Mum./2009

(निर्धारण वर्ष / Assessment Year : 2000–01)

Calyon Bank
(Formerly Credit Agricole Indosuez)
Hoechst House, 11th, 12th & 14th Floor
Nariman Point, Mumbai 400 021

..... अपीलार्थी / Appellant

बनाम v/s

DCIT (International Taxation)–1(2)
Scindia House, Mumbai 400 038

..... प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AACCC38728

आयकर अपील सं. / ITA no. 758/Mum./2009

(निर्धारण वर्ष / Assessment Year : 2000–01)

DCIT (International Taxation)–1(2)
Scindia House, Mumbai 400 038

..... अपीलार्थी / Appellant

बनाम v/s

Calyon Bank
(Formerly Credit Agricole Indosuez)
Hoechst House, 11th, 12th & 14th Floor
Nariman Point, Mumbai 400 021

..... प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AACCC38728

निर्धारिती की ओर से / Assessee by : Mr. P.J. Pardiwala a/w Mr. Madhur Agarwal

राजस्व की ओर से / Revenue by : Mr. Mahesh Kumar

सुनवाई की तारीख / Date of Hearing – 13.12.2012	आदेश घोषणा की तारीख / Date of Order –

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा / PER AMIT SHUKLA, J.M.

The present cross appeals are directed against the impugned order 14th November 2011, passed by the learned Commissioner (Appeals)–XXXI, Mumbai, for the quantum of assessment made under section 143(3) r/w section 147 of the Income Tax Act, 1961 (for short *"the Act"*) for assessment year 2000–01. Since the grounds raised by either party are inter–connected, common and the assessee being same in both these appeals, therefore, these were clubbed together and, as a matter of convenience, are being disposed off by way of this consolidated order. We now proceed to dispose off all these appeals on merit one by one.

We first take up assessee's appeal in ITA no.360/Mum./2009, for assessment year 2000–01.

2. The assessee, in its appeal, has raised a preliminary ground wherein validity of re-opening of assessment under section 147, has been challenged besides other grounds on merits.

3. The relevant facts, apropos the issue of re-opening under section 147 of the Act, are that the assessee is a non-residential banking company having its headquarters in Paris, France. In India, it is involved in normal banking activities which include financing of foreign trade and foreign exchange transactions. The return of income was filed on 30th November 2000, showing total loss of ₹ 30,07,480. Even the profit, as per section 115JA, was shown at nil. The said return of income was selected for scrutiny and the assessment was passed under section 143(3), at an income of ₹

6,19,01,373, vide order dated 26th March 2003 under section 143(3). Thereafter, at the fag end of 6th year from the end of the relevant assessment year, the assessee's case was re-opened under section 147, by issuance of notice dated 29th March 2007, passed under section 148, after recording the following reasons:-

> *"29/3/2007*
>
> *Return of income showing total loss of ₹ 3,00,07,480 was filed on 30/11/2000. Profit as per section 115JA was shown at ₹ NIL. The assessment order u/s 143(3) of the I.T. Act, 1961 was passed on 24/3/2003 computing total income at ₹ 6,19,01,370.*
>
> *a) A perusal of assessment records in this case shows that loss on sale of investments (net) of ₹ 6,15,66,000, has been reduced from other income. The details of this debit are not available on records. Also, loss on sale of investments being capital loss, is not an allowable deduction. Therefore, there is an under assessment of ₹ 6,15,66,000.*
>
> *b) Assessee has shown profit on sale of shares of ₹ 90,86,453 (as per computation). The amount is not identifiable in the P&L account. Hence it is not clear whether the profit is credited to P&L account.*
>
> *c) Assessee has shown long term capital gain on sale of shares of ₹ 88,64,245, on which tax leviable is worked out at ₹ 8,86,425 being 10% of long term capital gain. Assessee has worked out the long term capital gain after deducting index cost of acquisition which is not admissible to foreign companies.*
>
> *I have reason to believe that income has escaped assessment to the turn of more than rupees one lac within the meaning of section 147 of the I.T. Act, 1961 and, therefore, notice under section 148 of the I.T. Act, 1961, is required to be issued in this case.*
>
> *Necessary approval has been obtained from the DIT (IT), Mumbai, on 28/3/2007.*
>
> *Issue notice u/s 148 of the I.T. Act, 1961.*
>
> *Sd/–*
> *(Y.P. VERMA)*
> *DDIT (IT)–1(2), Mumbai"*

4. Against the aforestated reasons recorded and service of notice under section 148, the assessee filed detail objections before the Assessing Officer,

vide letter dated 23rd November 2007. However, the said objections were rejected by the Assessing Officer in the following manner:-

> *"Vide letter dt. 23.11.2007 the company has objected to the reopening of the assessments on all the grounds of reopening, a copy of which was made available to you. In this context your attention is drawn to the ground no.5 of reopening which states that the assessee had shown long term capital gain on sale of shares at ₹ 8864245. The assessee had worked out the long term capital gain after deducting indexed cost of acquisition which is not admissible to foreign companies as per provisions of sec. 48 of I.T.Act. It is true that sec. 48 provides mode of computation of capital gain on which vide explanation* (v) of sec.48 indexation has to be allowed on account of "Cost Inflation Index" as per notification in the Official gazette.
>
> *However it is further provided in second proviso to sec. 48 that where long term capital gain arises from the transfer of a long term capital asset, other than capital gain arising to a non resident from the transfer of shares in, or debentures of an Indian company referred to in the first proviso the provisions of clause ii shall have effects as !f for the words "cost of Acquisition " and "Cost of any Improvement", the words "Indexed Const of Acquisition" and "Indexed Cost of any Improvement" had respectively been submitted.*
>
> *From the plain reading of the said second proviso of sec. 48, it is thus amply clear that non-resident foreign companies are not entitled to the indexed cost on improvements and acquisitions. Accordingly the income of the assessee has been under assessed by allowing the benefit of cost indexation and the same was the principal reason for reopening of assessment.*
>
> *With regard to other issues contained in the grounds for reopening, since the same were related to fresh assessment purposes, the same were also incorporated by my predecessor while recording the reasons for reopening the case for reassessment purposes.*
>
> *In the light of above, your objection to the grounds for reopening stands replied as income in your case has been underassessed by allowing excessive relief you are accordingly requested to co-operate in reassessment proceedings which are pending and time barring in nature."*

5. Thereafter, he proceeded to complete the assessment, vide order dated 18th December 2007, at an income of ₹ 10,81,67,386.

6. The learned Sr. Counsel, Mr. P.J. Pardiwala, on behalf of the assessee, challenging the validity of re-opening of assessment under section 147,

submitted before us that, in the present case, the original assessment was completed after a detail scrutiny under section 143(3) and such an assessment has been sought to be re-opened after expiry of four years from the end of the relevant assessment year in violation of conditions laid down in proviso to section 147. From a bare perusal of the *"reasons recorded"*, he submitted that it can be seen that no where the Assessing Officer has held that the income chargeable to tax has escaped assessment by the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary. Hence, in view of the proviso to section 147, such an action of re-opening is barred by limitation and the impugned notice issued under section 148, is void ab-initio

7. The learned Sr. Counsel, further on the validity of *"reasons recorded"*, submitted that the three grounds which have been raised in the *"reasons recorded"*, cannot be said to be in the realm of *"reason to believe"* as none of the grounds taken can be held to be income chargeable to tax having escaped assessment. On the first ground of the reasons that loss on sale of investment of ₹ 6,15,66,000, is a capital loss, he submitted that the same is wholly erroneous as the law is now well settled by the Hon'ble Supreme Court in UCO Bank v/s CIT, [1999] 240 ITR 355 (SC) and the judgment of Jurisdictional High Court in CIT v/s Bank of Baroda, [203] 262 ITR 334 (Bom.), that loss on sale of investments in case of banks has to be treated as business loss. He further submitted that there are various other decisions passed by the Tribunal on this issue which has been taken note of Commissioner (Appeals) in his order. Therefore, the first ground for re-opening the case in the reasons recorded is not maintainable.

8. Regarding second ground that the amount of profit on sale of shares of ₹ 90,86,453, is not identifiable in the Profit & Loss Account, he submitted that this presumption is wholly erroneous which is evident from the fact that in the computation of total income, the assessee has shown income as per Profit & Loss Account and from such profit, sale of share has been added back. In support, he drew our attention to the copy of computation of

income given at Pages-2 to 4 of the paper book filed along with the return of income and submitted that the total sale consideration of the shares was ₹ 92,43,363, and the cost of acquisition was at ₹ 1,56,910, and the same is deducted from the sale consideration and the net amount comes to ₹ 90,86,453 [92,43,363 (-) 1,56,910 = 90,86,453]. Thus, this presumption of the Assessing Officer and the grounds for re-opening the case is untenable on facts.

9. Regarding third ground which relates to non-availability of index cost of acquisition in the working of long term capital gains on sale of shares in view of the proviso to section 48, he submitted that the very interpretation of the Assessing Officer with regard to the second proviso to section 48 is misconceived, as he has interpreted that the second proviso to section 48 relates to a non-resident and it includes indexation in case of those non-resident which are referred to in the first proviso. He submitted that provisions of the second proviso to section 48, carves out the exception to those non-resident which were referred to in the first proviso and the first proviso covers non-resident utilising foreign currency for purchasing the capital asset being transferred. The assessee, in the present case, has purchased the shares in Indian currency and, therefore, the first proviso does not apply in the present case and, hence, the entire basis of the Assessing Officer is untenable and erroneous. Thus, even on merits, three grounds raised by the Assessing Officer for entertaining *"reasons to believe"* that income chargeable to tax has escaped assessment on these counts gets defeated and, therefore, he looses the jurisdiction to re-open the case under section 147.

10. The learned Departmental Representative, on the other hand, submitted that the Commissioner (Appeals) has not dealt this issue as he has decided the appeal on merits and insofar as the validity of re-opening under section 147 is concerned, he has held it to be academic in nature and, therefore, the matter should be restored back to the file of the Commissioner

(Appeals) to pass a speaking order on this point. Alternatively, he relied upon reasoning given in the order of the Assessing Officer on this score.

11. We have carefully considered the rival contentions, perusal of the order passed by the Assessing Officer as well as the material available on record on the issue of validity of re-opening the assessment under section 147. In the present case, the assessment was completed under section 143(3), vide order dated 26th March 2003, after detailed scrutiny and the income was computed at ₹ 6,19,01,373, as against the returned loss of ₹ 3,00,07,480. Such a case has been sought to be re-opened after the expiry of four years at the end of the relevant assessment year i.e., on 29th March 2007. On bare perusal of the *"reasons recorded"*, as reproduced in Para–3 above, it is seen that nowhere the Assessing Officer has ascribed any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. This is one of the main conditions precedent for acquiring the jurisdiction under section 147, once the case is reopened beyond the period of four years in case of assessment having been completed under section 143(3). Once this preliminary condition is not satisfied the entire initiation and conclusion of proceedings becomes bad in law. On this count alone, the entire proceedings under section 147 initiated vide notice dated 29th March 2007, under section 148 has become void-ab-initio. Even otherwise also, on perusal of the *"reasons recorded"*, it is observed that the Assessing Officer has mainly taken three grounds to entertain his *"reasons to believe"* that income chargeable to tax has escaped assessment.

12. Insofar as ground (a) raised by the Assessing Officer that loss on sale of investment of ₹ 6,15,66,000, is a capital loss and is not allowable as deduction, is untenable in law in view of the judgment of Hon'ble Supreme Court and High Court. The Bombay High Court in Bank of Baroda (supra), after following the judgment of Hon'ble Supreme Court in UCO Bank (supra), held that the depreciation in value of investments held by a Bank is allowable as deduction as business loss. The assessee being a banking company which is governed by Banking Regulation Act and Reserve Bank of India is required

to make investment in securities for its capital growth purpose, apart from compliance of SLR requirement. Such an investment is a part of banking business only and any loss arising on sale thereof will be in the nature of business loss. These deposits in Government securities is not an option of the bank but a business compulsion as per the requirement prescribed by the Reserve Bank of India which is intended to provide stability and liquidity to the bank for carrying on banking operation and any loss claimed by the bank either on valuation of securities and sale thereof is to be allowed as deduction in computing the taxable income. Thus, in view of the law laid down by the aforesaid decisions of Hon'ble Supreme Court and the Bombay High Court, we hold that the first ground for *"reason to believe"* is not maintainable or is justified for re-opening the case under section 147.

13. The second ground, as raised by the Assessing Officer, is that the profit on sale of shares of ₹ 90,86,453, is not identifiable in the Profit & Loss Account. We find that the Assessing Officer's observation is wholly misconceived, as pointed out by the learned Sr. Counsel that, the assessee has computed its total income as per the Profit & Loss Account and thereby has added the profit on sale of shares separately by ₹ 90,86,453. In the computation of long term capital gains, the assessee had shown sale consideration of ₹ 92,43,363, and the cost of purchase of shares was at ₹ 1,56,910. Accordingly, the profit on sale of shares of ₹ 90,86,453 [₹ 92,43,363 (-) ₹ 1,56,910] has already been added back in the computation of income. There is no infirmity in the Profit & Loss account as the assessee has added back in the computation of income. Therefore, such a ground is also misconceived and cannot be a *reason to believe"* for re-opening the assessment u/s 147.

14. The last ground taken by the Assessing Officer in the *"reasons recorded"* that the assessee has wrongly deducted the indexed cost of acquisition, it is seen from the assessee order that the Assessing Officer proceeded on the premise that the first proviso to section 48, deals with capital gain arising to all kind of non-residents and the second proviso to

section 48 excludes such indexation in the case of non-resident. Such interpretation by the Assessing Officer is apparently not correct. For better appreciation statutory provisions under section 48 along with the first and second proviso is reproduced herein below:-

> *"Mode of computation.*
>
> *48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—*
>
> *(i) expenditure incurred wholly and exclusively in connection with such transfer;*
>
> *(ii) the cost of acquisition of the asset and the cost of any improvement thereto;*
>
> *Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company :*
>
> *Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted."*

15. Provisions of section 48 provide the mode of computation in deducting the cost of acquisition of the asset and the expenditure incurred in connection with transfer of such asset. The first proviso provides that in case of non-resident, capital gains shall be computed by converting the cost of acquisition and expenditure and the value of consideration received into

foreign currency and the capital gain so computed in foreign currency, shall be re-converted into Indian currency. The mode of computation as provided in section 48, will be thus applicable. Thus, the first proviso covers non-resident utilizing foreign currency for purchasing the capital asset being transferred. The second proviso provides that where long term capital gains arises to a non-resident from the transfer of shares other than capital gain arising to non–resident (on transfer of shares of an Indian company) referred to in first proviso, indexation benefit is denied. This, inter-alia, means that under second proviso, benefit of indexation under section 48, will not be available to those non-resident who enjoy the concession available in the first proviso. In this case, undisputed fact that the assessee has purchased shares in Indian currency and even the Assessing Officer has not made any allegation that the assessee ha used foreign currency. Thus, neither the first proviso nor the second proviso is applicable in the case of assessee and we fully agree with the contentions raised by the learned Sr. Counsel that this ground is wholly misconceived by the Assessing Officer who has gone by the erroneous interpretation of the statutory provisions. Accordingly, this ground also fails to clothe the Assessing Officer to entertain *"reason to believe"*.

16. Thus, on all the three counts, of which *"reasons"* have been recorded we hold that the Assessing Officer could not have entertained the *"reason to believe"* to re-open the assessment under section 147 and, accordingly, the "reasons recorded" by the Assessing Officer do not meet the requirement of law and no jurisdiction can be conferred based on such *"reasons"*. Therefore, the entire proceedings based on such *"reasons recorded"* are void-ab-initio and, consequently, the entire assessment order is hereby quashed. All other additions on merits have become purely academic. Thus, assessee's appeal is allowed based on the ground no.1 itself.

17. परिणामतः निर्धारिती की अपील स्वीकृत की जाती है ।

17. In the result, assessee's appeal is allowed.

18. In Revenue's appeal in ITA no.758/Mum./2009, we are of the opinion that this appeal, in the wake of the findings given above, has no legs to stand, as the grounds raised are on the merits of the addition and chargeability of interest thereof. As the entire assessment order is quashed on the validity of jurisdiction under section 147, all the grounds raised by the Revenue are, therefore, treated as dismissed.

19. परिणामतः राजस्व की अपील खारिज स्वीकृत की जाती है ।

19. In the result, Revenue's appeal is dismissed.

आदेश की धोषणा खुले न्यायालय में दिनांकः 23rd January 2013 को की गई ।
Order pronounced in the open Court on 23rd January 2013

Sd/-	**Sd/-**
आर.एस. स्याल	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
R.S. SYAL	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED: 23rd January 2013

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

(1) निर्धारिती / The Assessee;
(2) राजस्व / The Revenue;
(3) आयकर आयुक्त(अपील) / The CIT(A);
(4) आयकर आयुक्त / The CIT, Mumbai City concerned;
(5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
(6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai