आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "L", MUMBAI

श्री आर.सी. शर्मा, लेखा सदस्य एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

Before Shri R.C.Sharma, AM and Shri Amit Shukla, JM

ITA No.3721/Mum/2014: Asst.Year 2006-2007

Investeringsforeningen BankInvest I Afd Indien & Kina (now known as Investeringsforeningen BankInvest Asien), Sundkrogsgade 7 DK – 2100 Copenhagen Denmark PAN : AAATI4695M.	**बनाम**/ Vs.	The Dy.Director of Income-tax – 3(1) (International Taxation) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

ITA No.3722/Mum/2014: Asst.Year 2006-2007

Investeringsforeningen BankInvest I Afd Fjernosten, Sundkrogsgade 7 DK – 2100 Copenhagen Denmark PAN : AAATI4692N.	**बनाम**/ Vs.	The Dy.Director of Income-tax – 3(1) (International Taxation) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

ITA No.3723/Mum/2014: Asst.Year 2006-2007

Investeringsforeningen BankInvest I Afd Indien & Kina, Sundkrogsgade 7 DK – 2100 Copenhagen Denmark PAN : AAATI4695M.	**बनाम**/ Vs.	The Dy.Director of Income-tax – 3(1) (International Taxation) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी **की ओर से /Appellant by : Shri Girish Dave & Ms.Kadambari Dave**

प्रत्यर्थी **की ओर से /Respondent by : Shri Ajay Shrivastava**

सुनवाई की तारीख / **Date of Hearing : 09.10.2014**		घोषणा की तारीख / **Date of Pronouncement : 31.10.2014**

आदेश / O R D E R

Per Bench :

The aforesaid appeals have been filed by three different but connected assessees, against separate orders passed by the Commissioner of Income-tax (Appeals) – 10, Mumbai, [CIT(A) for short] of even date 27.12.2013 for the quantum of assessment passed u/s 143(3) read with section 147 of the Income-tax Act, 1961, for the assessment year 2006-2007.

2. Since the issues involved in all the three appeals are common, therefore, the same were heard together and are being disposed off by this consolidated order, for the sake of convenience.

3. We will first take up ITA No.3721/Mum/2014, vide which the following grounds have been raised:-

"1. Reassessment is bad in law.

(a) The learned Assessing Officer (AO) erred in invoking the provisions of section 147 of the Income-tax Act, 1961 (the Act).

(b) The impugned reassessment order dated 13 December 2011 is bad in law and ought to be quashed as the learned AO failed to issue a notice under section 143(2) of the Act.

2. Exemption under Article 14 of the tax treaty between India and Denmark.

The learned AO erred in denying the exemption provided under Article 14 of the tax treaty between India and Denmark in relation to capital gains of Rs.48,64,47,646.

3. Exemption under section 10(38) of the Act.

Without prejudice, the learned AO ought to have allowed exemption under section 10(39) of the Act in respect of long-

term capital gains of Rs.38,61,16,073 arising on sale of shares subject to securities transaction tax.

4. Interest under section 234B of the Act.

The learned AO erred in levying interest under section 234B of the Act

The appellant craves leave to add to, alter, amend, vary omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as it may be advised."

4. Besides this, an additional ground has also been raised, challenging the reopening of assessment proceedings on the ground of "change of opinion".

5. The brief facts of the case are that the assessee is a Foreign Institutional Investor (FII) and a tax resident of Denmark. The assessee is a Fund, which made capital gains both long term and short term on shares of listed Indian companies. In the return of income filed for the assessment year 2006-2007, the capital gains, earned were claimed as exempt under Article 14 of Indo-Denmark DTAA. Alternatively it was claimed that, so far as the long term capital gains, are concerned the same should be treated as exempt u/s 10(38). The return of income was filed at 'Nil' income on 26.07.2007 and such a return of income was also processed u/s 143(1) vide intimation dated 28.03.2008. Thereafter on 16.03.2011, such an assessment was reopened u/s 148, mainly on the following reasons recorded:-

"16.03.2011 : Reasons for reopening the assessment

Return of income for A.Y.2006-07 was filed by the assessee on 26.07.2006 declaring total income of Rs.Nil/-. Assessment u/s. 143(1) of the I.T.Act was completed on 28.03.2008 de3termining the total income at Rs.Nil/-.

As per article 14.5 of the DTAA between India and Denmark, any gains from the alienation of shares (other than shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in the contracting state) in a company which is resident of a contracting state may be taxed in that state provided to the condition that the person is a taxable unit under the taxation of laws in force in the state of its residence.

In the present case the assessee registered as `FUND' for dealing in Indian stock market with SEBI and also taken PAN for taxation in India in the status of AOP (Trust) whose beneficiaries are indeterminate.

From the above facts, it is clear that in order to avail the benefit under the provisions of the DTAA that the AOP (Trust) should be a tax resident of Denmark and also liable to tax as AOP under the taxation laws in force in Denmark.

In case, the Fund is not taxable unit under the taxation law in force in Denmark (as many countries do not recognize the "AOP" (trust) as a taxable unit for exempt the tax law of Luxumberg). Then the assessee is taxable in India in respect of the capital gain earned in India during the previous year relevant assessment year 2006-07.

The possibility of AOP is not a taxable unit under the tax law of Denmark may not be ruled out. Accordingly possibility of loss of revenue of Rs.46214144 (11.2% of 411890769) may also not be ruled out.

In view of these, I have reason to believe that income chargeable to tax of Rs.46214144 (11.2% of 411890769) has escaped assessment within the meaning of provision of section 147. Issue notice u/s.148 of the I.T.Act.

Sd/-
(Dr.Satya Pal Kumar)
D.D.I.T. (IT), 3(1), Mumbai."

6. In response to notice u/s. 148, the assessee vide letter dated 26th April, 2011 and later on vide letter dated 25th November, 2011, raised objections for reopening the case u/s 147 and also made submissions on merits that the assessee is not liable to be taxed in India, in view of Article 14(5) of Indo-Denmark DTAA. Copy of tax residency certificate was also filed. The relevant submission made by the assessee vide letter dated 25th November, 2011 is reproduced hereunder:-

> *"1. Background*
>
> *Investeringsforeningen BankInvest I Afd. Pension Indien & Kina (PAL) is an approved sub-account of AmagerBanken Aktieselskab, a Foreign Institutional Investor (FII) registered with Securities and Exchange Board of India (SEBI). Accordingly, and with respect to Regulation 13(3) of the Securities and Exchange Board of India (Foreign Institutional Investor) Regulations, 1995, the Fund is a FII for the purpose of section 115AD of the Act. The Fund is tax resident of Denmark.*
>
> *2. Submissions*
>
> *In the subject year, the Fund had claimed that capital gains are not taxable in view of Article 14(5) of the agreement for Double Taxation Avoidance Agreement between India and Denmark (`the Treaty') read with section 90(2) of the Act.*
>
> *In this connection we draw your attention to Article 1 of the Treaty which reads as under:*
>
> *Article 1 : Personal scope – The Convention shall apply to persons who are residents of one or both of the Contracting Stages.*
>
> *Article 1 extracted above says that the Treaty shall apply to persons who are residents of one or both of the Contracting States.*

Clause (c) of Para 1 of Article 3, the term "Contracting State and other Contracting State" means India or Denmark, as the context requires.

Clause (e) of para 1 of Article 3 defines the term "person" as under:

"the term `person' includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States".

From the above definition of "person" it follows that `any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting Stages' is eligible to avail the terms of the Treaty.

Applying this cope of the treaty, the Fund is a person resident in Denmark and hence is covered under the Treaty to avail the terms of the Treaty.

In this connection, we attach the Tax Residency Certificate (`TRC') wherein the Danish Tax Authorities have allotted number as CVR-/SE-nr. (VAT.No.)12.12.75.61 to the Fund. As a rule in Denmark, income earned by a tax resident of Denmark from abroad is taxable according to Danish regulations. In other words the Fund is liable to tax in Denmark.

Further, we refer to Articled 14(5) of the Treaty wherein it is provided that gains from the alienation of shares in a company shall be taxed in the country in which the Fund is resident. However, gains from the alienation of shares will be taxable in the country in which the company is resident only if such shares represent at least 10 per cent of the share capital of that company.

Based on the above, it is submitted that as the Fund is resident of Denmark as evidenced from the TRC and is liable to tax therein, it is eligible to avail the terms of the Treaty.
Should you need any further clarification, please let us know."

7. The Assessing Officer, however held that such a contention of the assessee cannot be upheld, that it is not liable to tax in India under the DTAA, because the assessee is an AOP-Trust being a FUND and in Denmark the AOP-Trust is not taxable, and therefore, the assessee is not eligible for DTAA benefit. Accordingly, he taxed the capital gain.

8. Before the CIT(A), the assessee raised various objections with regard to the reopening of the case u/s 147 and also on the merits of the case. However, the learned CIT(A) too dismissed the assessee's contention not only on the legal issues of reopening u/s 147, but also on merits.

9. Before us, the learned Counsel Shri Girish Dave submitted that the assessee along with the return of income had duly filed the Tax Residency Certificate issued by the Danish Tax Authority. All such information for claiming benefit under the DTAA was furnished alongwith the return of income itself. Once such an information was there in the return of income, then the Assessing Officer was not justified in reopening the case, merely on some kind of possibility that the assessee may not be a taxable unit under the tax law of Denmark. Before the A.O., vide letter dated 25.11.2011, the assessee had again furnished the Tax Residency Certificate and also made its submission that how it is eligible for benefit under Article 14 of the DTAA. From the perusal of the "reasons recorded", he submitted that it can be seen that the A.O. has sought to reopen the case merely on presumption and on hypothetical ground, which is completely divergent from the facts and material on record. While recording the reasons, the Assessing Officer himself was not sure whether under the tax laws in force in Denmark, the assessee was taxable unit or not, and secondly, the reasons recorded by

him do not fall within the realm of `reason to believe' as contemplated in section 147 but is based on conjectures. Thus, the entire reopening on the basis of such reasons is bad in law.

10. On the other hand, the learned Departmental Representative submitted that, what the Assessing Officer is required to do is, to have *prima facie* belief that income chargeable to tax has escaped assessment. In the reasons, the Assessing Officer is not required to establish the facts and the actual escapement of income, but he is only required to have `reasons to believe' that income chargeable to tax has escaped assessment. In support of his contention, he relied upon the decision of the Hon'ble Gujarat High Court in the case of Praful Chunilal Patel v. ACIT [(1999) 236 ITR 832 (Guj.)]. Thus, he strongly relied upon the order of the Assessing Officer.

11. We have heard the rival submissions and also perused the relevant material placed on record. The assessee is a FUND and a resident of Denmark. Along with its return of income, in India, the assessee had submitted 'Tax Residency Certificate' issued by the Danish Authorities in order to claim the benefit of Article 14 of India-Denmark DTAA. From the plain reading of the `reasons recorded', it is seen that the Assessing Officer is first of all, is not clear whether the assessee is tax resident of Denmark or not, and secondly, whether AOP-Trust is taxable unit in Denmark or not. This is evident from the reasons where he observes that, there is a possibility that AOP is not a taxable unit under the tax laws of Denmark and because of this, there is possibility of loss of revenue. The relevant observations made in the `reasons recorded' by the A.O. to this effect, which reads as under:-

"In case, the Fund is not taxable unit under the taxation law in force in Denmark (as many countries do not recognize the "AOP" (trust) as a taxable unit for exempt the tax law of Luxumberg). Then the assessee is taxable in India in respect of the capital gain earned in India during the previous year relevant assessment year 2006-07.

The possibility of AOP is not a taxable unit under the tax law of Denmark may not be ruled out. Accordingly possibility of loss of revenue of Rs.46214144 (11.2% of 411890769) may also not be ruled out."

12. It is a trite law that for assuming the jurisdiction to reopen the case u/s 147, the A.O. must have `reasons to believe' that any income chargeable to tax has escaped assessment. The words `reasons to believe' are stronger than the words 'satisfied' as held by the Hon'ble Supreme Court in the case of Ganga Saran and Sons Pvt. Ltd. v. ITO [(1981) 130 ITR 1 (SC)]. The belief entertained by the Assessing Officer must not be irrational or hypothetical but must be held in good faith and not merely as a pretence. The formation of belief must have rational connection with or relevant bearing from the material on record having live link nexus with income escaping assessment. The reasons recorded by the A.O. clearly shows that the reopening has been done merely on some kind of a possibility for which he himself is not sure. There is even no reference to any material that assessee's claim for benefit under Article 14 of DTAA is false or incorrect. He is even not sure whether assessee is a tax resident when TRC was there in the return of income. It appears that the reopening is merely pretence to examine, whether the assessee is a taxable unit or not and whether there could be possibility of loss of revenue. Once the Tax Residency Certificate was there in the record, then there could not have been any ground for presumption

that the assessee is not a taxable entity in Denmark. He has not referred to any other information or material that the assessee is not a tax resident of Denmark and there was loss of revenue because the assessee has falsely claimed the benefit under Article 14 of the DTAA. The reasons as recorded by the A.O. falls in the realm of surmises and presumption *de hors* any material fact having live link nexus with the formation of `reasons to believe' that income chargeable to tax has escaped assessment. Thus, we are of the opinion that on the face of the "reasons recorded", the Assessing Officer cannot assume jurisdiction to reopen the case in the case of the assessee. Thus, the entire proceedings initiated vide notice u/s 148 is bad in law and deserves to be quashed. Thus, the entire proceedings u/s 147 are held as null and void, as reasons recorded by the A.O. do not give him jurisdiction to reopen the case u/s 148. Accordingly on this preliminary ground alone, we quash the assessment order and the appeal of the assessee is treated as allowed.

13. In view of the aforesaid finding, there is no need for giving finding on merits, as the reopening of assessment itself is held to be invalid.

14. In ITA Nos.3722/Mum/2014 and 3723/Mum/2014, exactly similar "reasons" have been recorded without any change of words or phrases and the issues are arising out of similar set of facts, therefore, the finding given in aforesaid appeal will apply *mutatis mutandis* in these appeals also and accordingly, in both the years, the impugned proceedings u/s 148 is quashed, and the appeals of the assessee are treated as allowed.

15. परिणामतः निर्धारिती की अपीलें स्वीकृत की जाती है । In the result, assessee's appeals are allowed.

Order pronounced on this 31st day of October, 2014.
आदेश की घोषणा दिनांकः को की गई ।

Sd/-	**Sd/-**
(R.C.Sharma)	**(Amit Shukla)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 31st October, 2014.
Devdas*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)-10, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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