

HC sets aside reassessment order as it was passed by AO in haste without considering objections of assessee

Summary – The High Court of Mumbai in a recent case of Aroni Commercials Ltd., (the Assessee) held that where Assessing Officer being satisfied with explanation offered by assessee with regard to its claim that purchase/sale of shares offered to tax under head 'capital gain' was a result of investment activity passed assessment order under section 143(3) upon assessee and subsequently he reopened said assessment on plea that assessee had so manipulated its account that normal business profit in share trading was claimed as short-term capital gain so as to attract lower rate of tax, since very issue of taxability of sale of shares was considered by Assessing Officer during original assessment proceedings, entire proceeding for reopening assessment was based on change of opinion.

Facts

- The assessee-company was engaged in the business of financing, trading and investment in shares and securities. In the return of income filed for the assessment year 2008-09, it had disclosed income from business and profession besides disclosing short-term capital gain and long-term capital gain.
- During the course of assessment proceedings, the Assessing Officer issued on the assessee a notice under section 143(2) on 17-8-2009 calling upon it to attend his office and produce the copies of the balance-sheet, profit and loss account, computation of income and audit report. He also asked the assessee to furnish details in respect of its activities.
- Thereupon the assessee by its letter dated 9-7-2010 pointed out to the Assessing Officer that it was engaged in the business of financing, trading and investment in shares and securities. By communication dated 8-9-2010, it also explained in detail as to why its profit on sale of investment should be taxed as capital gain and not as profit and gains of business. Further by communication dated 13-9-2010, it furnished sample contract notes, Demat accounts and shareholding pattern of the companies to whom loans were advanced.
- The Assessing Officer was satisfied with the explanation offered by the assessee with regard to its claim that purchase/sale of shares offered to tax under the head 'capital gain' was a result of investment activity. He passed the assessment order under section 143(3) upon the assessee on 12-10-2010.
- Subsequently the Assessing Officer issued on the assessee a notice under section 147 read with section 148 on 28-3-2013 seeking to reopen the above assessment. He recorded the reasons to the effect that the assessee had so written/manipulated its account that the normal business profit in share trading was claimed as short-term capital gain so as to attract the lower rate of tax.
- Thereupon the assessee filed the objections stating that the very issue viz. whether gain arising from sale/purchase of shares was assessable as capital gain or business profit had been examined by the Assessing Officer during the course of assessment and, therefore, the reopening was only on the basis of change of opinion.

- The Assessing Officer by his order dated 20-11-2013 rejected the objections by holding that the reopening of the assessment was valid and justified. The reopening was not due to any change of opinion but on clear observation that the assessee did not carry out any business activity other than share trading. Further no details regarding computation of short-term capital gain or sample copies of the purchase/sale note were furnished during the assessment proceeding. Further the Assessing Officer passed the assessment order under section 143(3) read with section 147 upon the assessee on 19-12-2013.
- On writ:

Held

- The Bombay High Court in the case of *Asian Paints Ltd. v. Dy. CIT* [\[2008\] 296 ITR 90](#) has clearly laid down that when an assessment is sought to be reopened under section 148 and the objections of the assessee have been overruled by the Assessing Officer, then in such a case the Assessing Officer will not proceed further in the matter for a period of four weeks from the date of receipt of the order rejecting the objections of the assessee.
- It is axiomatic that the law declared by the High Court is binding on all authorities functioning within its jurisdiction. It is not open to the Assessing Officer to feign ignorance of the law declared by the High Court and pass orders in defiance of the law laid down by it. It is averred in the petition that the Assessing Officer was informed at the hearing held on 10-12-2013 that the assessee is preparing a petition to challenge the reopening for the assessment year 2008-09 on identical grounds as done in earlier assessment year 2007-08 which is pending in the High Court and *ad interim* relief has also been granted restraining the revenue from proceeding with the assessment for the assessment year 2007-08. The passing of an order on 19-12-2013 by the Assessing Officer in undue haste and thereafter contending that in view of alternative remedy the writ petition should not be entertained does not appear *bona fide*. This undue haste in passing the impugned order dated 19-12-2013 is an attempt to overreach the Court and to thwart the assessee's challenge to the impugned order dated 20-11-2013 pending before the High Court.
- In the above circumstances, the order dated 19-12-2013 passed by the Assessing Officer under section 143(3) read with section 147 was liable to be set aside.
- The power of the Assessing Officer under sections 147 and 148 to reopen an assessment is classified into two:
 - (a) Reopening of assessment within a period of four years from the end of the relevant assessment year and
 - (b) Reopening of assessment beyond a period of four years from the end of the relevant assessment year.
- The common jurisdictional requirement for reopening of assessment both within and beyond a period of four years has to be on the basis of reason to believe that income chargeable to tax has escaped assessment and the reasons for issuing a notice to reopen are recorded before issuing a notice. However, there is one additional jurisdictional requirement to be satisfied while seeking to

reopen the assessment beyond the period of four years from the end of the relevant assessment year viz. that there must have been a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings. Thus the primary requirement to reopen any assessment is a reason to believe that income chargeable to tax has escaped assessment. However, as observed by the Supreme Court in the case of *CIT v. Kelvinator of India Ltd.* [2010] 320 ITR 561/187 Taxman 312 in the context of sections 147 and 148 that reason to believe found therein does not give arbitrary powers to reopen an assessment. The concept of change of opinion is excluded/omitted from the words reason to believe. Thus a change of opinion would not be reason to believe that income chargeable to tax has escaped assessment. Besides the power to reassess is not a power to review. Further reopening must be on the basis of tangible material.

- Therefore, the power to reassess cannot be exercised on the basis of mere change of opinion. If all facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the Assessing Officer notice under sections 147 and 148 is not permissible. The powers under sections 147 and 148 cannot be exercised to correct errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under sections 147 and 148 only on satisfaction of the jurisdictional requirements. Further the reasons for reopening an assessment have to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under section 148 seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and/or oral submissions.