

No reassessment by AO on change of opinion that profit from share dealings was taxable as business income

Summary – The High Court of Bombay in a recent case of Bharat Jayantilal Patel, (the Assessee) held that where at time of making assessment, assessee gave complete details regarding name of scrip, purchase and sale quantities, period of holding, selling price etc., Assessing Officer could not initiate reassessment proceedings merely on basis of change of opinion that profit earned on sale of shares taxed earlier as capital gain, was liable to be taxed as business income

Facts

- The assessee was a member of the Bombay Stock Exchange. He carried out transactions in shares on behalf of his clients on which he received brokerage that constituted his income.
- The assessee also made investments in shares on which he received dividend and on the sale of the said shares, he earned capital gains.
- The assessment in case of the assessee was completed under section 143(3) wherein the treatment of the gains arising to the assessee on sale of shares held by him by way of investment as long-term capital gains and short-term capital gains was accepted.
- After expiry of four years from end of relevant year, the Assessing Officer sought to reopen assessment mainly on ground that assessee was a trader holding shares as stock-in-trade and, thus, income from sale of shares was to be taxed as business income.
- The assessee's objections to proposed reopening of assessment were set aside.
- On writ :

Held

- In the present case, the earlier/original assessment order under sub-section (3) of section 143 was passed on 14-12-2009. The notice under section 148 is dated 29-3-2014.
- For the first contention of the assessee to be considered, it is material to note that on 11-9-2014 the assessee addressed a detailed communication setting out his objections to the recorded reasons. Thereafter, the assessee pointed out on 8-12-2014 that he was required to attend the office of the Deputy Commissioner 9-12-2014. He pointed out as to how the reasons were supplied and how they have been dealt with and objected to by him. The assessee specifically requested the Assessing Officer not to proceed with the scheduled hearing till the objections raised to the reasons have been disposed of by a speaking order.
- On 5-3-2015 a communication was addressed to the assessee which purported to reject his objections. The objections have not been referred to in detail but what has been stated is that the case has not been reopened merely on the basis of a change of opinion. The fact that came to light during the assessment proceedings for assessment year 2011-12 are the basis for reopening the case pertaining to the assessment year 2007-08. Since the assessee is stated to have filed a new

return of income, he was called upon to attend the office with the information required on 13-3-2015. The assessee addressed a letter on 12-3-2015 and pointed out that the communication dated 5-3-2015 was received on 12-3-2015, but no speaking order has been passed rejecting the objections.

- The assessee specifically invited the attention of the Assessing Officer to the directions in the case of *Asian Paints v. Dy. CIT* [[2009](#)] [308 ITR 195 \(Bom.\)](#) and to the effect that if the Assessing Officer does not accept the objections to the reopening of the assessment or the reasons recorded, he shall not proceed further in the matter within a period of four weeks from the date of receipt or service of the said order on the assessee. Since the order dated 5-3-2015 is stated to be rejecting the objections, then, the assessee prayed that for a period of four weeks from that order, no steps should be taken.
- However, as has been rightly contended by assessee, ignoring this mandate in the decisions of this Court the impugned assessment order has been passed, that is dated 27-3-2015. That is clearly within the period of four weeks from 5-3-2015. The first contention of assessee therefore, deserves acceptance as nothing contrary to the same has been placed on record.
- Coming to the merits of the case, the assessment is sought to be reopened for the assessment year 2007-08. The assessment order was passed on 14-12-2009. The impugned notice is dated 29-3-2014. Therefore, the requirement in law is that the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for the relevant assessment year and in this case on account of failure of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year. Thus, the argument is that the assessment cannot be reopened on mere change of opinion.
- In the instant case the reasons for reopening the assessment indicate that the electronic return was filed for the assessment year 2007-08. The short-term capital gains are disclosed. The scrutiny assessment under section 143(3) has been completed after making additions on account of disallowance under section 14A.
- The reasons furnished to the assessee in support of reopening of the assessment refer to the figures. The reasons conclude that the assessee is earning from business or profession. He has also earned income from the capital gains. The assessee is investor or trader but he is required to be examined on certain grounds and which are indicated in detail. The grounds *inter alia* are that the correct characterization of securities in the books of the assessee in balance sheet and stock-in-trade or investment has to be examined.
- This aspect though relevant is not conclusive. The shares held as investment may be treated as stock-in-trade because of the extensive dealing and other circumstances of the case, then, the substantial nature of the transaction, magnitude of purchase and sale and ratio between purchase and sale, the holding of share is taken as a price to determine the nature of transaction. All these aspects and which have been set out in the reasons disclose that the revenue intends to revisit the

conclusion in the assessment order. They are also sought to be revisited, without reference to the order passed by the Commissioner (Appeals).

- Further, if from the record it is evident that the assessee has earned interest income amounting to Rs. 14,67,288/-, then, how that interest income has to be treated and assessed in law is a matter which cannot be gone into and in such details after the assessment order was passed. If these facts have not been examined while passing the assessment order, then, it is clear change of opinion on the part of the respondents. Nothing prevented the Assessing Officer from treating the income and in the manner suggested in these reasons. The reasons recorded did not indicate as to what aspects of the assessee's case could not be examined or were not examined for failure on the part of the assessee to fully and truly disclose material facts relevant to the assessment.
- In that regard the assessee has rightly placed reliance upon the proviso and which has been referred to above. The assessee has brought to notice a copy of the communication rather it is a notice under section 142 calling upon the assessee to remain present and produce or sought to be produced the accounts, documents specified in the said notice. The item-wise details which have been sought pertain to the books of account and related documents and papers. They also refer to the stock valuation methods. Then, the assessee complied with this and produced the tax audit report, balance-sheet, profit and loss account along with schedules, TDS certificates and copy of tax payment challans.
- Subsequently, the assessee pointed out the details of the office and residential address. He also clarified that the *Explanation* to section 73 is not applicable as the assessee is an individual and not a company. He also mentioned that the profit is earned on the sale of shares, hence explanation is not applicable. The stock exchange membership, the card and complete details of payment made to persons specified under section 40A(2a)(b) are given in the auditor's report, stock details were also furnished. The assessee also pointed out as to how the investment in shares has been made for which he received dividend and capital gain income.
- The assessee also explained the details of the rent received, the earnings by way of long-term capital gains, complete details giving the names of scrip, purchase quantity, amount, sale quantity, amount and profits earned have been enclosed to this letter. Similar details with regard to short-term capital gains and shares are also set out. Thus, everything that was relevant for the purpose of the assessment came to be disclosed and prior to the assessment order.
- Further, the legal position has been summarised that the capital gains earned by the assessee should be assessed as such and not as business income. Thus, each of the queries which have been raised came to be replied and, then, there is a further communication under which the assessee furnished the details of profits on share credit and calculated in the manner set out in this communication. The share transactions on which the short-term capital gains and long-term capital gains were computed were thus available.
- In the assessment order a reference was made to the membership of the assessee of the Stock Exchange and the gains which have been declared so also the total income. There is further

reference to all the communications from the assessee. Thus, the issues and which are subject matter of the impugned notice have been examined and duly considered in the assessment order.

- Thus, when there is a reference to all the details which were supplied, then, there was no reason at all for reopening the assessment. The break-up of income is extensively referred even in the assessment order. Thus, the present one is a clear case of reopening of the assessment on a mere change of opinion and that such a course is impermissible in law.