IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'B', HYDERABAD

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No. 192/H/2019 Assessment Year: 2010-11		
Union Bank of India, (Erstwhile Andhra Bank), Hyderabad. PAN – AABCA 7375C	Vs.	Dy. Commissioner of Income-tax, Circle – 1(1), Hyderabad.
(Appellants)		(Respondent)
ITA No. 315/H/2019 Assessment Year: 2010-11		
Dy. Commissioner of Income-tax, Circle – 1(1), Hyderabad	Vs.	Union Bank of India, (Erstwhile Andhra Bank), Hyderabad. PAN – AABCA 7375C
(Appellants)		(Respondent)

Assessee by:	Shri S. Anantham
Revenue by:	Smt. Amisha S. Gupt
Date of hearing:	17/05/2021
Date of pronouncement:	20/05/2021

O R D E R

PER L.P. SAHU, AM:

Both these appeals are cross appeals by the assessee as well as revenue for AY 2010-11 are directed against the CIT(A) - 1, Hyderabad's order, dated

13/12/2018 involving proceedings u/s 143(3) rws 147 of the Income Tax Act, 1961 ; in short “the Act”.

2. Briefly the facts of the case are that the assessee is a Government of India Undertaking engaged in banking business and governed by Banking Companies (Regulation) Act, 1949. Return of income for assessment year 2010-11 was originally filed on 31.08.2010 declaring income of Rs.917,60,29,790/-. Later revised Return was filed on 29.03.2012 declaring income of Rs.750,28,41,861/-. The case was selected for scrutiny u/s 143(3) and was heard on various dates. Assessment was completed by order dated 28.01.2013 determining the total income at Rs. 1228,80,67,890/-. Subsequently, the AO had issued notice u/s 148 dt: 30.03.2017. In response to the said notice, Appellant had filed return of income on 29.04.2017 declaring income of Rs. 781,51,68,997/-.

2.1 After filing the return in response to notice u/s 148, assessee requested for reasons for reopening the assessment which were communicated to the assessee by AO's letter dated 22.12.2017. Reason for reopening the assessment is stated to be as under:

> *"As per the Schedule 8 in respect of investment an amount of Rs. 25,10,37,0001- was actually decreased from total investment as Depreciation on Investment. It was also seen from the Para 10.2 of*

schedule 18- Notes on a/c that the same figure was taken as depreciation on Investment. An amount of Rs.385, 78,19,8851- was claimed as deduction as per revised computation of income sheet. It is pertinent to mention here that the CBDT circular No. 1712008 dt.26.11.2008 states that the actual deduction made in the books of e/c shall only be debited in r/o any provision u/s36(vii) & 36(vii-a). On the same line, as the actual debited amount is only Rs.25,10,37,000/-, the deduction claimed as Rs. 385,78, 19,885/- is not in order. The differential amount of Rs. 362,67,82,885/- needs to be added back as taxable income. Accordingly the assessment has been reopened within the provisions of section 147 of IT Act 1961."

2.2 In response thereto the Appellant submitted its objections for reopening the assessment, which are as under:

"1. Disallowance of claim of depreciation on investments:

The assessing officer while completing the assessment disallowed a sum of Rs. 360,67,82,885/- representing depreciation on investments stating as under in paras 5 to 5.5 of the assessment order.

5.2 "After careful consideration, AO has mentioned that, as per schedule 8 of financial accounts, an amount of Rs. 25,10,37,0001- was actually decreased from total investment depreciation on investment. It was also seen from the para 10.2 of schedule 18 notes on account that the same figure as taken as depreciation on investment but an amount of Rs. 385,78, 19,8851- was claimed as deduction as per revised computation of income. "

5.4 "AO submitted that the HTM category is the investments capital in nature and has to be treated as a capital asset and do not constitute stock in

trade as per the RBI guidelines vide circular no. OBOO no. BPIBC.32121.04.0481200o-01 dated 16.10.2000. The assessee bank has not suffered any loss on account of fall in value of HTM securities as these are valued at cost in the books of accounts and are considered as investments to mature over usually longer periods of time. "

5.5 "Further, it is also noticed that the assessee company claimed depreciation of value of assets in respect of HTM securities but has not considered the appreciation of value of assets of HTM securities. Therefore, there is no real loss hence, the difference of amount of Rs.360,67,82,885/- is disallowed and accordingly assessment is completed."

In the light of the above, we invite your kind attention to the proviso to section 147 of the I.T. Act which reads as under.

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of relevant assessment year, unless any income' chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year."

Therefore as could be seen from the above proviso where an assessment was already completed u/s.143(3) such assessment cannot be reopened after the expiry of four years from the end of the relevant assessment year in which the assessment was completed. Therefore in our case, since our assessment was completed u/s 143(3) on 28.01.2013 the same cannot be reopened after four years of the

relevant assessment year i.e., the assessment cannot be reopened beyond 31.03.2015 unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee in disclosing fully and truly all material facts necessary for completion of assessment for that assessment year.

In view of the above we submit that since the notice u/s. 148 was issued on 30.03.2017 which is after four years of relevant assessment year i.e., 2010-11, the reopening of assessment for the assessment year 2010-11 is bad in law.

In this connection we rely on the decision of Hon'ble Supreme Court in the case of CIT Vs. Foramer France [264 ITR 566] for the proposition that "where an assessment was already completed Uls 143(3) such assessment cannot be reopened after the expiry of four years from the end of the relevant assessment year in which the assessment was completed" when there is no failure to file return or to disclose fully and truly all material facts. We also rely on the decision of Andhra Pradesh High Court in the case of Mahalakshmi Motors Ltd. Vs DCIT [265 ITR 53] wherein it was held that issue of notice u/s.148 is not valid when all the material facts for completion of assessment are filed by the assessee.

We also rely on the proposition approved by various Hon'ble Courts as discussed hereunder.

The Supreme Court and also several High Courts and the Andhra Pradesh High Court in the cases of V.S.L.Narasimha Rao Vs. Asst. Contr. of E.D., [80 ITR 662 (AP)] and YV.Anjaneyulu Vs. ITO [182 ITR 242 (AP)] held that the information must have come to the possession of the Assessing Officer after he had passed the original assessment order, and it is only on such information that he is entitled to act. If the information was already with him, then section 147

would not permit him to apply his mind to the same assessment with a view to correct his own mistakes.

It is submitted that the Gujarat High Court in the case of Garden Silk Mills Ltd., Vs. DCIT [222 ITR 27] and Garden Silk Mills Ltd., Vs. DC IT [222 ITR 68] had taken a similar view even after the amended 147/148 sections came into force. The Gujarat High Court further held in the case second referred above that mere change of opinion is not sufficient to reopen the assessment and reassessment was not valid.

Therefore we submit that since all the information relating to depreciation on investments were there before the then Assessing Officer at the stage of original assessment, there was no failure on our part to disclose fully and truly all material facts necessary for completion of the assessment. Therefore we submit that no new material which was not furnished by us at the time of original assessment with regard to the above issues has come on record after the assessment is completed and therefore reopening of assessment is only due to mere change of opinion and that too beyond the time limit as specified in the proviso to section 147 of the Act which is bad in law.

We rely on the following cases for the proposition that "assessment cannot be reopened U/s 147 of the Act on change of opinion of the Assessing Officer when the assessee has already disclosed all the information necessary for completion of original assessment".

1) CIT Vs. Bhavji Lavji [79 ITR 582 (SC)]
2) CIT Vs. Kelvinator of India Ltd. [256 ITR 1 (Delhi)(FB)]
3) JCIT Vs. George Williamson (Assam) Ltd.[258 ITR 126 (Gauhati)]
4) CIT Vs. Rajasthan Patrika Ltd. [258 ITR 300 (Raj)]

5) Jindal Photo Films Ltd. Vs. DCIT [234 ITR 170 (Delhi)]
6) Garden Silk Mills (P) Ltd. Vs. DCIT [237 ITR 668 (Guj)]
7) General Mrigendra Shum Sher Jung Bahadur Rana Vs. ITO [123 ITR 329,335 (Delhi)]

We therefore submit that since all details regarding depreciation on investments are available on record to the then Assessing Officer, there is no occasion for reopening our assessment for the assessment year 2010-11 beyond four years from the end of said assessment year.

2.3 However the assessing officer after rejecting the objections of the above quoted supra determined the income of the Assessee at Rs.1427,99,37,451/- after disallowing depreciation of Rs.360,67,82,885/- on investments.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the CIT(A).

4. The assessee before the CIT(A), inter-alia, submitted that the coordinate bench of this Tribunal has already decided similar issue in assessee's own case in earlier AYs.

5. Following the orders of ITAT in assessee's own case, the CIT(A) directed the AO to re-workout the depreciation allowance by considering earlier years opening stock and closing balances into consideration and allow accordingly.

6. Aggrieved by the order of the CIT(A) both the assessee and revenue are in appeals before us by raising the following grounds of appeal:

6.1 Assessee has raised the following grounds of appeal:

> *"1. The order of the learned Commissioner of Income Tax (Appeals) is bad in law and against the facts of the case.*
>
> *2. The learned Commissioner of Income Tax (Appeals) erred in upholding the re-opening of assessment u/s 147.*
>
> *2.1. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the re-opening beyond 4 years is hit by the first Proviso to Section 147 as there was no allegation in the notice issued u/s 148 about the wilful non-disclosure of facts by the appellant.*
>
> *2.2. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the re-opening was a mere change of opinion and as such, bad in law.*
>
> *2.3. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the re-opening was based on existing material and evidences and not based on any new evidences.*
>
> *2.4. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that order of the learned Assessing Officer is liable to be quashed as the learned Assessing Officer has not passed a speaking order on the objection raised by the*

appellant against the initiation of reassessment proceedings u/s 147.

3. The learned Commissioner of Income Tax (Appeals) erred in law and on facts in partly allowing the depreciation on HTM securities which are stock-in-trade of the Bank amounting to Rs. 360,67,82,885/- by remitting back the issue to the learned Assessing Officer to re-work the depreciation allowance by considering earlier years opening stock and closing balances.

3.1. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the investments of the appellant Bank are stock in trade and the appellant Bank is eligible to claim the loss arising out of the valuation of the stock at cost or market value whichever is lower.

3.2. The learned Commissioner of Income Tax (Appeals) erred in not allowing the depreciation after taxing the entire income under the head Business or Profession.

3.3. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that once an income is taxed under the head Business 1 Profession, then the closing stock should be considered as stock in trade and the valuation loss arising by valuing the same at lower of cost or market value is an allowable deduction.

3.4. The learned Commissioner of Income Tax (Appeals) erred in not following the decision of the Hon'ble Tribunal in the case of Appellant Bank's own case.

3.5. The learned Commissioner of Income Tax (Appeals) erred in not following the binding decisions of the Hon'ble Supreme Court.

For all these and other grounds, which may be urged at the time of hearing, the appellant prays that its appeal be allowed."

6.2 Revenue has raised the following grounds of appeal:

"1. Commissioner of (Appeals) erred in directing the A.O to re-workout the disallowance of depreciation on investments Rs.360,67,82,855f- wrt 'HTM' category of securities holding them to be stock in trade.

Commissioner(Appeals) erred in directing the A.O to re-workout the disallowance of depreciation on investments Rs.360,67,82,855/- wrt 'HTM' category securities without verifying from the records of bank the purpose for which they were purchased by bank initially to determine nature of securities whether they are in nature of stock in trade or Investments.

3. Commissioner (Appeals) erred in directing the A.O to re-workout the disallowance of depreciation on Investments Rs.360,67,82,855f- wrt 'HTM' category of securities without calling for details of recategorization of securities made by bank during the year under consideration i.e. from AFS to HTM, HFT to HTM etc.

4. Commissioner (Appeals) erred in directing the A.O re-workout the disallowance of depreciation on Investments Rs.360,67,82.855/- wrt 'HTM' category of securities without verifying whether entire 'HTM' category of securities are held to meet SLR purposes or not.

5. CIT(A) erred in ignoring the fact that Revenue's appeal on identical issue in assessee's own case for A.Y.2006-07 is pending adjudication before Hon'ble High Court.

6. Any other ground that may be urged at the time of hearing."

7. Before us, the ld. AR of the assessee submitted that In this regard without prejudice to the above, the Assessing Officer grossly erred in disallowing depreciation of Rs.360,67,82,885/- on investments in reassessment since all the information/details for depreciation on investments was submitted during the course of original assessment proceedings and no new information had comes into the possession of the assessing officer after completing the original assessment. He further submitted that since investments in its business are stock in trade and therefore fall in market value is an allowable deduction and such diminution in their value during the year is arrived at Rs.385,78,19,885/-.

8. The ld. DR, on the other hand, contended that Commissioner(Appeals) erred in directing the A.O to re-workout the disallowance of depreciation on investments Rs.360,67,82,855/- wrt 'HTM' category securities without verifying from the records of bank the purpose for which they were purchased by bank initially to determine nature of securities whether they are in nature of stock in trade or Investments.

9. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. It is a settled position of law that the assessment can be reopened under section 147/148 on the basis of 'reason to believe' and not 'reason to suspect'. Unless the reasons to believe about the escapement of income exist, no recourse can be taken to the provisions of section 147. An Assessing Officer ventures to initiate reassessment proceedings with an object of finding some material about the escapement of income, such reassessment cannot legally stand and the law does not permit the Assessing Officer to conduct inquiries after the initiation of reassessment proceedings, to find if there is an escapement of income. The scope of section 147 cannot encompass such an action under which certain examination is to be conducted for forming a reason to believe as to the escapement of income. It is well settled by a number of judgments of the Hon'ble Supreme Court that the twin conditions which are required to be fulfilled before an Assessing Officer can exercise his jurisdiction under clause (a) of section 147 of the Act are (a) that the Assessing Officer must have reason to believe that income, profits or gains chargeable to tax had either been underassessed or had escaped assessment and (b) that the Assessing Officer must have reason to believe that such escapement or underassessment was caused by reason of omission or failure on the part of the

assessee to disclose fully and truly all material facts necessary for his assessment for that year.

9.1 In the case on hand, all the information relating to depreciation on investments were there before the AO at the stage of original assessment, as there was no failure on the part of the assessee to disclose fully and truly all material facts that are necessary for completion of the assessment and further we observe in the reasons recorded, there is no reason to believe, allegation on the assessee that the income of the assessee underassessed or had escaped assessment.

9.2 The contention of the assessee is that no new material has been found by the AO in the reassessment proceedings and therefore reopening of assessment is only due to change of opinion and that too beyond the time limit as prescribed in the proviso to section 147 of the Act which is bad in law.

9.3 In this connection, we refer to the following decisions:

> *"(1) In Deputy Commissioner of Income Tax Vs. Manak Shoes Co. P. Limited, (2011) 11 ITR (Trib) 673 (Del), the Tribunal held that where regular assessment had been made under Section 143(3) allowing depreciation of factory building, plant and machinery, and reassessment proceedings were initiated on the ground that depreciation was not admissible since the assessee had no manufacturing activity during the year, the Tribunal found that the*

matter had been examined during the assessment stage and that there was no fresh information to justify a different inference and notice under Section 148. Though action was initiated within the four year time limit, it was found that it was based on mere change of opinion and reassessment proceedings was, therefore, not justified.

(2) In Consolidated and Fin vest Limited Vs. Asst. Commissioner of Income Tax, (2006) 281 ITR 394 (Delhi), the High Court held that the doctrine of change of opinion could not be a basis for reopening completed assessments and would be applicable only to situations where the Assessing Officer had applied his mind (in earlier assessment) and taken conscious decision on a particular matter in issue, and it would have no application, where the order of assessment did not address itself to the aspect which was the basis for re-opening of the assessment. The High Court further held that mere production of books of account or other evidence from which the Assessing Officer could have, with due diligence, discovered the material evidence does not necessarily amount to a disclosure within the meaning of the proviso to Section 147 of the Act.

(3) In Jai Hotels Co. Limited Vs. Asst. DIT, (2009) 24 DTR 37 (Del), the Delhi High Court has held that there being no new material in the hands of the Revenue leading to view that there was reason to believe that income had escaped assessment, the case is a classic instance of a change of opinion. The High Court further observed that when copies of statement of income, trading account, profit and loss account, audit report etc., were appended to the return filed by the assessee, taking resort to Section 147/148 was unwarranted as it constituted a change of opinion, since the material acted upon had been made available along with return of income.

(4) In Satnam Overseas vs. Addl. Commissioner of Income Tax, (2010) 329 ITR 237 (Delhi), the High

Court held that the only reason which has been given seeking reopening of the assessment for the years 1997-98 and 1998-99 is that suppression of sales has taken place on account of the fact that when average price of the closing stock is multiplied with the quantity of the sales in the year then the value of the sales would be at a higher figure, than declared by the assessee. Clearly, there is no new material which is alleged to have come to the notice of the Assessing Officer which has caused him to seek reopening of the assessment. Admittedly, the reasons given for seeking reopening of the assessment contains the expression 'perusal of the case record reveals' clearly showing that it is on the basis of the same assessment record as was filed by the assessee, during the relevant assessment years and also scrutinised by the Assessing Officer before passing the orders under Section 143(3). Further, the new logic, rationale and opinion which has been formed by the Assessing Officer for seeking reopening of the assessment is nothing but a change of opinion and a new approach to the existing facts and material which the Assessing Officer could well have done during the regular assessment proceedings of the relevant assessment years.

(5) In Commissioner of Income Tax Vs. Eicher Limited, (2007) 294 ITR 310 (Del), the High Court has taken a view that since the facts and materials were before the Assessing Officer at the time of framing of the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounted to a change of opinion, which would not form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee. The Honourable High Court further observed that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then

merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income had escaped assessment and, therefore, the assessment needed to be reopened. The assessee had no control over the way an assessment order is drafted.

(6) In Commissioner of Income Tax Vs. Kelvinator of India Limited, (2010) 320 ITR 561, the Supreme Court observed that post 01-04- 1989, the power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen the assessments on the basis of 'mere change of opinion' which cannot be per se reason to reopen. The conceptual difference between the power to review and power to reassess is to be kept in mind. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre conditions and if the concept of 'change of opinion' is removed, in the garb of re-opening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing officer. Hence, after 01-08-1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief If the facts of the present case including especially the reasons recorded b y the Assessing Officer for reopening the assessment are considered in the light of the decision of the Coordinate Bench of this Tribunal in the case of Deputy Director of income Tax (International Taxation)-21, Mumbai – vs.- Societe International De Telecommunication (supra), I am of the view that the initiation of reassessment proceeding itself was bad in law and the assessment completed by the Assessing Officer under section 143(3) read with section 147 in

pursuance of such invalid initiation is liable to be cancelled. I order accordingly.

9.4 In view of the above discussion, the reopening of assessment can be quashed on two counts, i) no new material was brought on record by the AO in the reopening of assessment to establish that the income of the assessee has escaped assessment as the assessee has already disclosed all the information necessary for completion of original assessment and ii) the reopening of assessment made beyond four years from the AY under consideration. We are of the view that the AO reopened the assessment based on change of opinion, which is not acceptable as per the decisions quoted supra. Therefore, we quash the reopening of assessment made by the AO and the grounds raised by the assessee on this issue are allowed.

10. As we have quashed the reopening of assessment made by the AO, on the legal grounds and, therefore, the appeal of the revenue is against the order passed by the CIT(A), which is based upon the reassessment made u/s 143(3)/147 of the Act and, hence, the appeal of the revenue becomes infructuous and the same is dismissed as infructuous.

11. In the result appeal of the assessee is allowed and the appeal of the revenue is dismissed. The copy of the order should be placed in the respective files.

Pronounced in the open court on 20th May, 2021.

Sd/-	Sd/-
(S.S. GODARA)	(L.P. SAHU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 20th May, 2021
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1	*Union Bank of India, Central Accounts Department, 6th Floor, Union Bank Bhavan, 239, Vidhan Bhavan Marg, Nariman Point, Mumbai – 400 021*
2	*DCIT, Circle – 1(1), Hyderabad.*
3	*CIT(A) - 1, Hyderabad.*
4	*Pr. CIT – 1, Hyderabad.*
5	*ITAT, DR, Hyderabad.*
6	*Guard File.*