IN THE INCME TAX APPELLATE TRIBUNAL, "A" BENCH, KOLKATA

Before : **Shri N.V. Vasudevan, Judicial Member, and**
Shri Shri M. Balaganesh, Accountant Member

ITA No. 1039/Kol/2011
A.Y : 2006-07

Mohan Jhangiani	Vs.	A.C.I.T Cir-32, Kolkata
(Appellant)		(Respondent)

For the Appellant : Shri D. S Damble, FCA, ld.AR

For the Respondent: Shri Debasish Banerjee, JCIT/ ld.DR

Date of Hearing: 15-10-2015

Date of Pronouncement: 6-11 -2015

ORDER

SHRI M.BALAGANESH, AM

This appeal of the assessee arises out of the order of the learned CIT(A), XIX, Kol in Appeal No. 118/CIT(A)-XIX, ACIT,Circle-32,Kol/10-11 dated 16-05-2011 for the assessment year 2006-07 against the order of assessment framed u/s. 147/143(3) of the Income Tax Act 1961 (hereinafter referred to as the 'Act').

2. The assessee had raised a basic ground on assumption of jurisdiction u/s 147 of the Act apart from the merits of the additions made in the assessment. Accordingly, first the issue regarding assumption of jurisdiction is adjudicated herein. The grounds raised by the assessee on assumption of jurisdiction is reframed as under:-

> *Whether, in the facts and circumstances of the case, the action of the Learned AO in reopening the assessment within the meaning of section 147 of the Act when the details of claim of long term capital loss of Rs. 3,48,579/- arising out of extinguishment of assessee's rights as a*

shareholder were filed in the return of income itself, more so, when the original assessment has been completed u/s 143(3) of the Act ?

3. The brief facts of this issue is that the assessee held the following shares in the following companies :-

Name of the Company	No. of Shares	Date of purchase
PAN Services Pvt Ltd	40	1980-81
Cemcoat India Pvt Ltd	800	25.3.1985
Cemcoat India Pvt Ltd	750	19.5.1988

The assessee is a shareholder and director in the aforesaid companies. The said companies in view of the fact that they were not engaged in the operations chose to avail the easy exit scheme or simplified exit scheme brought out by the Ministry of Corporate Affairs, wherein pursuant to the application made thereon, the name of the companies would be struck off from the records of the Registrar of Companies in terms of section 560 of the Companies Act, 1956. The said scheme mandates that there should not be any asset or liability in the balance sheet and balance sheet should only contain share capital of the companies in the liabilities side represented by the accumulated losses in the asset side. The companies went into liquidation and the shares held by the assessee herein got extinguished. Admittedly, no consideration was paid by the companies to the shareholder i.e the assessee herein on extinguishment of shares. Accordingly , the assessee claimed the long term capital loss duly indexed amounting to Rs. 3,48,579/- to be eligible to be carried forward to subsequent years. The detailed workings of the same had been filed along with the return of income by the assessee.

3.1. The Assessment was completed u/s 143(3) of the Act accepting the income returned. No finding was given in the said assessment order with regard to examination of the veracity of the long term capital loss claimed by the assessee and with regard to the eligibility of the same to be carried forward to subsequent years.

3.2. Later this assessment was sought to be reopened by issuance of notice u/s 148 of the Act. In the reassessment proceedings, the Learned AO found that the affidavits were filed by the assessee in the capacity of a director stating that the companies does not have any assets and liabilities and also filed indemnity bonds assuring to indemnify any person for any loss arising out of this exit u/s 560 of the Companies Act, 1956. The Learned AO found that the companies had stated before Registrar of Companies that there were no liabilities in the companies on the date of application for closure. The Learned AO observed as below:-

> *With reference to section 2(47) of the act, it is seen that the case is not one of sale, exchange or relinquishment of the shares held by the assessee. Neither is it a case where the rights of the assessee have been extinguished, since his rights as investor are indemnified by himself, in his capacity of the erstwhile director. In view of the above, I hold that there has been no transfer as such. Consequently, no capital loss is to be computed or allowed. Since the said loss was not claimed to be set off against any other current incomes, the total income is assessed at Rs. 10,20,972/-.*

This action of the Learned AO was upheld by the Learned CITA. Aggrieved, the assessee is in appeal before us.

4. The Learned AR argued that the following facts are undisputed and indisputable:-

a) Assessee had to extinguish his rights in the shares held in the companies pursuant to companies filing application under simplified exit scheme in terms of section 560 of the Companies Act, 1956.
b) No consideration was received by the assessee from any person for the shares held by him.
c) Affidavits were filed by him in the capacity of director that there were no assets and liabilities in the company.

d) Indemnity bond was filed by him in the capacity of director only to safeguard the interests of any other person (ie. Any third person) who might be affected by the closure of the company.

e) Company went into liquidation in terms of section 560 of the Companies Act, 1956. No dispute as to the fact whether the company is dissolved or not. In other words, the fact of dissolution of the company has been accepted by the revenue.

f) Assessee claimed indexed cost of acquisition of shares held by him in the companies which are not disputed by the revenue.

4.1. The Learned AR argued that the formation of belief of the Learned AO which led him to believe that income has escaped assessment has got no linkage with the relevant provisions of the Act. He argued that the relevant provisions to be looked into in the facts of the case is section 46(2) of the Act, which reads as under:-

> **Section 46(2) of the Income- Tax Act, 1961**
> *(2) Where a shareholder on the liquidation of a company receives any money or other assets from the company, he shall be chargeable to income- tax under the head" Capital gains", in respect of the money so received or the market value of the other assets on the date of distribution, as reduced by the amount assessed as dividend within the meaning of sub- clause (c) of clause (22) of section 2 and the sum so arrived at shall be deemed to be the full value of the consideration for the purposes of section 48.*

He argued that the relevant provision to be looked into is section 46(2) of the Act which has not been applied by the Learned AO while forming an opinion of reason to believe that income has escaped. He further argued that formation of belief for reopening the assessment without considering the relevant provisions of the Act is bad in law. He placed reliance on the decision of the Gujarat High Court in the case of *Devesh Metcast Ltd vs JCIT reported in (2011) 338 ITR 130 (Guj)* in support of this contention. He further argued that the provisions of section 46(2) of the Act is a deeming provision and hence full effect has to be given to the same. He further argued

that the assessee is entitled for capital loss as per section 46(2). As per sec 46(2), the capital gain arising out of extinguishment of capital assets pursuant to liquidation of company shall be chargeable to tax in the hands of the shareholders as company could not be in existence after liquidation. In this regard, he placed reliance on the decision of Gujarat High Court in the case of *CIT vs Jaykrishna Harivallabhdas reported in (2000) 112 Taxman 683 (Guj)* in support of this contention.

4.2. He further argued that the reopening is bad in law in the facts of the case as even though it is done within 4 years but still all the details were already on record before the Learned AO and hence there is no tangible material with the Learned AO which enables him to form an opinion that income has escaped assessment. It only amounts to revisiting of existing materials already available on record which is not permissible in law. Hence it only amounts to change of opinion.

5. In response to this , the Learned DR argued that the assessee as a director had filed affidavit before the Registrar of Companies that there are no liabilities in the company. Hence it could be concluded that the assessee had received consideration for his extinguishment of rights in the shares held by him which is not disclosed by the assessee and hence the long term capital loss could not be allowed to be carried forward.

6. We have heard the rival submissions and perused the materials available on record. We find that the provisions of section 46(2) of the Act are squarely applicable in the facts of the instant case. Hence the Learned AO had reopened the assessment without considering the provisions of section 46(2) of the Act and hence his basic formation of belief that income has escaped assessment fails. It is settled law that formation of belief by the Learned AO should have direct nexus with the provisions of the Act and in this case, it fails directly. We hold that non-consideration of the relevant provisions of the Act while forming a belief that income has escaped assessment is not

permissible as per law. In this regard, the reliance on the decision of Gujarat High Court in the case of *Devesh Metcast Ltd vs JCIT reported in (2011) 338 ITR 130 (Guj)* is very well placed and is directly on the point, wherein it was held that:-

Pages 146 of the judgment:

"18. In so far as the reference to sub-section (2) of section72 of the Act on which reliance had been placed upon by the learned counsel for the respondent is concerned, section 72(2) only gives priority to setting off of carried forward loss as against unabsorbed depreciation, presumably in the light of the fact that prior to the amendment, losses could be carried forward for a period of eight years only whereas unabsorbed depreciation could be carried forward indefinitely. The said provision does not prescribe the manner in which unabsorbed depreciation allowance is to be computed under sub-section (2) of section 32 of the Act and as such, reliance placed upon the said provision is misconceived.

19. As submitted by the learned counsel for the respondent, it may be that the Assessing Officer has reopened the assessment under an honest belief that income chargeable to tax has indeed escaped assessment, however, if such honest belief is entertained on an erroneous interpretation of the relevant statutory provisions, the assessee should not be required to face the rigours of reassessment merely because the Assessing Officer entertains an honest belief. Such honest belief should be based upon the material on record and should, in fact, give rise to the belief that income has escaped assessment. In the facts of the present case as discussed hereinabove, no income can be stated to have escaped assessment so as to vest in the Assessing Officer the jurisdiction to reopen the assessment under section 147 of the Act.

20. In the light of the aforesaid discussion, it is not possible to state that any income chargeable to tax has escaped assessment as is sought to be contended on behalf of the respondent-Assessing Officer who has reopened the assessment on the ground that the unabsorbed depreciation for the assessment years 1993-94 to 1996-97 could not be set off against short-term capital gain in the year under consideration. The reopening by the Assessing Officer is based upon an erroneous interpretation of the provisions of sub-section (2) of section 32 of the Act, and in fact, as discussed hereinabove, no income chargeable to tax can be stated to have escaped assessment. The very assumption of jurisdiction by the Assessing Officer under section 147 of the Act is, therefore, invalid. The impugned notice under section 148 of the Act, therefore, cannot be sustained.

21. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated March 28, 2000, seeking to reopen the assessment of the petitioner for the assessment year 1997-98 (exhibit B to the

petition) is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs."

6.2. We find that the assessee had not received any consideration on his extinguishment of rights in shares held by him in the companies which went on liquidation. When the fact of liquidation is not disputed on record and there is no evidence brought on record as to whether any consideration was indeed received by the assessee on extinguishment of rights in shares, the assessee's claim of long term capital loss needs to be allowed to carried forward to subsequent years. In this regard, reliance on the decision of Gujarat High Court in the case of *CIT vs Jaykrishna Harivallabhdas reported in (2000) 112 Taxman 683 (Guj)* is very well placed and is directly on the impugned issue, wherein it was held that :-

" By virtue of section 46, a legal fiction has been created according to which firstly, a shareholder of the company-in-liquidation is chargeable to income-tax under the head ' Capital gains' and, secondly, the money received or the market value of other assets received on the date of distribution, as reduced by the amount assessed as dividend within the meaning of section 2(22(c), is to be deemed to be the full value of the consideration for the purpose of section 48. These two legal fictions inhere the import, the necessary ingredients of calculation of capital gains under section 48.

Thus, for the purpose of computing capital gains, there has to be existence of a capital asset. A transaction has to be treated as transfer resulting in sale or extinguishment of any right therein and the full value of the consideration has to be adjusted against cost of acquisition of the assets so transferred and the balance is to be treated in accordance with the provisions of the Act. For giving effect to the fiction enacted under section 46(2), all the necessary requirements too have to be assumed to be existing, if the fiction is to be carried to its logical end. Ordinarily, section 45, to consider any transaction to be a transfer of capital asset by any of the modes referred to in section 2(47), apart from the legal fiction created therein, envisages passing of consideration from one hand to another and passing of rights, notwithstanding extinguishment in the hands of the transferor to the transferee, whether in the form of tangible gain or augmentation of the existing rights of others. It was because of this that on liquidation, return of corpus to the

shareholders, who were otherwise entitled to the same as a matter of right, was not held to be transfer within the meaning of section 2(47). It was so because on extinguishment of their rights in the shares and on their receiving cash or assets in the place of rights which they held in the shares, no corresponding rights accrued to anyone for that consideration. However, once a legal fiction is created to treat the receipt of money or assets on distribution on liquidation in the hands of a shareholder, it inheres transfer of assets by extinguishment of rights by the recipient of consideration and once that fiction comes into existence, it must lead to its logical conclusion in the computation of capital gains in accordance with the provisions of the Act, whether the ultimate result is found to be a gain or loss. The instant case was concerned with the return of capital of shareholder, which is a final act in the process of winding up. The conclusion reached was that even extinguishment of the right of a shareholder amounts to transfer for the purposes of section 48. In this context the words ' on liquidation' must necessarily refer to the date on which the company is would up or the winding up process is complete. Liquidation simpliciter in the context of winding up of company may mean winding up of a corporation where the assets are disturbed to those entitled to receive them and the process of reducing assets to cash discharging the liabilities and dividing the surplus or loss amongst contributories or members. The stage of distribution of surplus amongst contributories or members, so called owners of the company, is the final stage of liquidation, as until discharge of the liabilities and cost of liquidation the members are not entitled to any return of their contribution. Until the company is finally wound up, the right of shareholders or members to receive the surplus, if any, remains intact, which is the only right that survives in a shareholder of a company-in-liquidation. It comes to an end or gets extinguished only on completion of winding up.

Viewed from the aforesaid angle, one must reach the conclusion that as on the date the affairs of the company are fully wound up and the entitlement of the shareholder to any return of its capital comes to an end, any disbursement made to a shareholder either by way of cash or asset has to be treated in the hands of the recipient shareholder as the full value of consideration on deemed transfer of his capital asset as a result of extinguishment of all rights and has to be deemed to be resulting in capital gain or loss, as the case may be, as per the result of computation made under section 48, though the value of the asset has to be taken at its market value as on the date of actual receipt as a result of joint reading of section 46(2) and section 55(2)(iii) which provides for determination of cost of acquisition in the hands of the recipient for

determination of capital gains in his hands whenever he transfers such asset after its receipt by him.

The contention that this provision should apply to actual receipt only also could not be accepted for yet another reason, because acceptance of that would lead to an incongruous and anomalous result in that whereas even in a case where a sum is received, however, negligible or insignificant it may be, it would result in the computation of capital gains or loss, as the case may be, but in a case where nothing is disturbed on liquidation of a company, the extinction of rights would result in total loss with no consequence. So, once a conclusion is reached that extinguishment of rights in shares on liquidation of a company is deemed to be transfer for operation of section 46(2), read with section 48, it is reasonable to carry that legal fiction to its logical conclusion to make it applicable in all cases of extinguishment of such rights, whether as a result of some receipt or nil receipt, so as to treat the subjects without discrimination. A shareholder who has incurred total loss in a transaction of sale of shares would be entitled to claim set-off or carry forward as the cased may be , in respect of capital loss suffered by virtue of section 45 read with section 48, 71 and 74. There is, therefore, no reason why a shareholder, who is in distribution of assets has not received any deemed consideration in satisfaction of his rights and interests in the holding and has thereby suffered a total loss, cannot claim the benefit of set-off or carry forward of the loss suffered by him. Otherwise, a starling and unjust situation may arise where the receipt of even one paise would enable him to claim set-off or carry forward of capital loss as worked out under section 48, while a shareholder who is a shade worse off and gets nothing in the event of such total loss should be denied the effect of section 46(2) read with section 71 and 74 and be put to a perpetual loss. Therefore, even where the receipt was ' nil' on the date of distribution on the liquidation of the company, the case of such shareholder would fall under section 46(2) and the deemed full value of the consideration for the purpose of section 48 would be regarded as 'nil' and on that basis the income chargeable under the head ' Capital gains' would have to be computed under section 48."

6.3. We also find that the Learned AO had originally completed the assessment u/s 143(3) of the Act and the details of computation of long term capital loss is part and parcel of the memo of income filed along with the return of income by the assessee.

Even though the reopening in this case was done within the period of 4 years, we find that there is absolutely no tangible material available with the Learned AO to come to a conclusion that income has escaped assessment. It only amounts to revisiting of the existing materials already available on record. It only amounts to change of opinion on which ground reopening is not permissible as per law. In this regard, we place reliance on the following decisions :-

a) **In *CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC)*** [affirming *CIT vs. Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) (FB)]* J. Kapadia held that **the concept of 'change of opinion' must be treated as an in-built test to check abuse of power by Assessing Officer and that the reasons must have a live link with formation of belief. Important extracts of the decision is reproduced hereunder**:

"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 assessments on the basis of 'mere change of opinion', which cannot be per se *reason to reopen. One must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess, but the reassessment has to be based on fulfilment of certain pre-conditions and if the concept of 'change of opinion' is removed as contended on behalf of the department, then in the garb of reopening 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 1-4-1989 ,* ***the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment.*** *Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However, on receipt of representations from the companies against omission of the words 'reason to believe', the Parliament reintroduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer."*

The Delhi High Court in CIT vs. Kelvinator of India Limited [2002] 256 ITR 1 (Del.) [decision affirmed by the Supreme Court in [2010] 320 ITR 561 (SC)] held that if two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favoured. In the event it is held that by

reason of section 147 if the ITO exercises his jurisdiction for initiating a proceeding for reassessment only upon a mere change of opinion, the same may be held to be unconstitutional. We are therefore of the opinion that section 147 of the Act does not postulate conferment of power upon the A.O. to initiate reassessment proceeding upon his mere change of opinion. If "reason to believe" of the A.O. is founded on an information which might have been received by the A.O. after the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act, 1872, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.

b) ***It has been held in CIT vs. Bhanji Lavji [1971] 79 ITR 582 (SC)*** *that when the primary facts necessary for assessment are fully and truly disclosed, the ITO will not be entitled on change of opinion to commence proceedings for reassessment. Similarly, if he has raised a wrong legal inference from the facts disclosed, he will not, on that account, be competent to commence reassessment proceedings. Similar view was taken in* ***ITO vs. Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239 (SC)*** *where the Hon'ble Apex Court held that having second thoughts on the same material, and omission to draw the correct legal presumption during original assessment, do not warrant the initiation of a proceeding u/s 147.*

c) **In *CIT, Central I vs M/s Kanoi Industries (P) Ltd in ITA No. 108 of 2012 dated 15.6.2012 rendered by the Jurisdictional Calcutta High Court,*** *it was held that where there was no new material or information which came to the knowledge of the AO to re-initiate proceedings and since he had derived the facts and materials placed by the assessee himself during the original assessment proceedings , that did not constitute new information.*

When on the same set of facts and materials Assessing Officer takes bonafide decision, it is not open for the subsequent officer to reopen the same just because he does not agree to the decision of the previous officer. In this case

the Tribunal has recorded that a mere change of opinion between two officers in reopening the assessment and it is not legally permissible. We, therefore, do not find any infirmity and illegality in the impugned judgement and order dated 12th January 2012 passed by the Learned Tribunal.

Since in this case, a regular assessment was made u/s 143(3) of the act, presumption can be drawn that such an order has been passed on application of mind and the subsequent action of the AO is nothing but a change of opinion.

d) ***In ACIT vs ICICI Securities Primary Dealership Ltd , the Apex Court in Civil Appeal No. 5960 of 2012 dated 22.8.2012*** *held as under :-*

" Leave granted.

We have heard counsel on both sides.

The assessee had disclosed full details in the Return of Income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas, according to the revenue, the loss incurred was a speculative loss. Rejection of the objections of the assessee to the re-opening of the assessment by the assessing officer vide his order dated 23.6.2006, is clearly a change of opinion. In the circumstances, we are of the view that the order re-opening the assessment was not maintainable.

The civil appeal is, accordingly, dismissed.

No order as to costs."

e) ***In Parveen P. Bharucha vs DCIT (2012) 348 ITR 325 (Bom)****, it was held that it is settled that in absence of new material, reopening of assessment on the basis of material already on record at the time of assessment was completed cannot stand even within the normal period of 4 years.*

From the facts and circumstances of the instant case and respectfully following the judicial precedents on the impugned subject including that of Supreme Court, Jurisdictional High Court and other High Courts, we hold that the assumption of jurisdiction u/s 147 by the Learned AO, is based only on change of opinion ; made

without any tangible material that constituted new information, formation of belief for assumption of jurisdiction made without considering the relevant provisions of the Act and hence the reopening of assessment u/s 148 and consequential reassessment order passed u/s 147 is bad in law and accordingly the reassessment proceedings stand quashed. Accordingly, Ground Nos. 1 to 6 raised by the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 6 /11 /2015

Sd/-	Sd/-
(N.V. Vasudevan , Judicial Member)	(M. Balaganesh, Accountant Member)

Date 6/11 /2015

FIT FOR PUBLICATION

Sd/-	Sd/-
NVV	MBG

Copy of the order forwarded to:

1.. The Appellant/Assessee: Shri Mohan Jhangiani 4B, Wood Street, Kolkata-16..

2 The Respondent/Department-Assistant Commissioner of Income Tax, Cir-32, Kolkata 10B Middleton Row,2nd Fl., Kol-71.

3 /The CIT,
/

4.. The CIT(A)

5. DR, Kolkata Bench

6. Guard file.

True Copy, By order, Asstt Registrar