

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA BENCH, AGRA**

**BEFORE : SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER**

**ITA No.282/Agra/2013
Asstt. Year : 2004-05**

Income-tax Officer, 2(1), Agra. (Appellant)	vs.	Shri Haresh Chand Agarwal, HUF, 19-A, Keshav Kunj, Pratap Nagar, Agra(PAN: AAAHH 9390 G) (Respondent)
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Appellant by	:	Shri K.K. Mishra, Jr. D.R.
Respondent by	:	Shri Deependra Mohan, C.A.

Date of hearing	:	17.12.2013
Date of pronouncement of order	:	20.12.2013

ORDER

Per Bhavnesh Saini, J.M.:

This appeal by the Revenue is directed against the order of Id. CIT(A)-I, Agra dated 06.03.2013 for the assessment year 2004-05, challenging the quashing of the re-assessment proceedings u/s. 147/148 of the IT Act.

2. Briefly, the facts of the case are that in this case, assessment order under appeal has been passed u/s.147 read with section 143(3) vide order dated 03.12.2009. The assessment proceeding was reopened u/s. 147 after it has been found by the AO that the assessee had sold a property no.21/35, Freeganj, Hariparwat, Agra for Rs.6 lac against the stamp valuation of the property at,

Rs.25,89,000/-. The AO found that in the original assessment order, the long term capital loss or sale of this property was worked out at Rs.42,668/- taking into consideration the 'actual sale value of the property amounting to RS.6 lac and the AO has not applied the provision of section 50C of the Act while passing the original assessment order. The assessment proceedings has been opened by the AO after considering the fact that while computing the capital gain sale value of the property should have been considered as stamp valuation of the property at Rs.25,89,000/-. He has also discussed that in the original assessment order itself, the basic facts as to capital gain arose to the assessee, as a result of transfer of property, has been discussed but the applicability of provision of section 50C has been lost a sight and therefore, the AO recorded the reasons to believe that there was an income escaping assessment and accordingly, the assessment proceeding u/s.147 was reopened and notice U/s. 148 was dated 08.07.2008 was issued to the assessee (appellant) with prior approval of Addl. CIT, Range-2, Agra. During the course of re-assessment Proceeding, the AO did not accept the submission of the assessee that the property was rented and the assessee was in need of funds and therefore, he had to sell the property to its tenants and he has held that the provision of section 50C are clearly attracted in case of the assessee. The AO has also not accepted the cost of construction declared by the assessee at Rs.6,42,558/- for computation of capital gain. He has stated in the assessment order that the

assessee claimed an amount of Rs.1, 08,760/- was invested up to 31.03.2009 in the property but no evidence of making of this investment in the property has been given by the assessee either during the original assessment proceeding or during the re-assessment proceeding initiated by the AO. Therefore, he rejected the investment of Rs.1,08,760/- claimed to have been made by the assessee in the house property and the cost of investment in the property has been taken only at Rs.30,000/-, for which the indexed cost of acquisition has been computed at Rs.1,38,900/-. After deducting the Indexed cost of acquisition computed at Rs.1,38,900/- from the stamp valuation of the property taken at Rs.25,89,000/-, the AO has determined the long term capital gain at Rs.24,50,100/- which has been added in the income of the assessee assessed in the original assessment order u/s.143(3) dated 19.12.2005 at Rs. 51,475/- and thus, the total assessed income has been determined in the assessment order dated 03.12.2009 passed u/s 147/143(3) at Rs.25,01 ,570/- which is under appeal.

3. The assessee challenged the reopening of assessment and addition on merits before the Id. CIT(A) and it was mainly contended that the original assessment order was passed u/s. 143(3) and the AO considered all the material and evidence with regard to capital gains and accepted the explanation of the assessee. Therefore, on mere change of opinion, reopening of assessment is bad in law.

Certain decisions in support of the same were also relied upon. The Id. CIT(A) accepted the contention of the assessee regarding change of opinion involved for reopening of assessment. The Id. CIT(A) found that the AO has considered the same sale deed which he had considered at the original assessment and accepted the sale consideration declared by the assessee. For reopening of assessment proceedings u/s. 147, there is no outside material which could be said to have come to the knowledge of the AO after the original assessment order was passed. It was, therefore, found that it is a case of mere change of opinion. The assessee also relied upon certain decisions of the Tribunal, in which identical issue was considered and the action of the AO for reopening of assessment was not found justified. The Id. CIT(A) held that AO had discussed the issue of capital loss in the original assessment order and accepted the capital loss declared by the assessee after calling the details from the assessee. Mere non-discussing of provisions of section 50C would not amount to presume that the AO has not applied his mind while accepting the sale consideration shown by the assessee. Since the AO did not have any tangible material in its possession except the sale deed, which has already been produced before the AO at the stage of original assessment proceedings, therefore, reopening of assessment on mere change of opinion was held to be non-permissible in view of the decisions of Hon'ble Delhi High Court in the case of

Kelvinator India Ltd., 256 ITR 1 (Del) and Usha International Ltd., 210 Taxman 188. The reassessment proceedings were accordingly quashed.

4. The ld. DR relied upon the order of the AO. On the other hand, the ld. counsel for the assessee reiterated the submissions made before the ld. CIT(A) and referred to Paper book, in which computation of income, original assessment order and copy of reasons for reopening of assessment have been filed.

5. We have considered rival submissions and material available on record. Hon'ble full Bench of Delhi High Court in the case of Kelvinator of India Ltd. , 256 ITR 1 by following circular no.549 of CBDT held that on mere change of opinion of AO cannot be a ground for re-assessment and that amendment of sec. 147 w.e.f. 1.4.89 has not altered the position. Hon'ble Gujrat High Court in the case of Garden Silk Mills P. Ltd., 237 ITR 668 held that "however wide the scope of taking action u/s 148 of IT Act, it does not confirm jurisdiction on change of the interpretation of a particular provision earlier adopted by the assessing authority. For coming to the conclusion that there has been excessive loss or depreciation allowance or that there has been under assessment or assessment at a lower rate or for applying other provisions of explanation 2 to sec. 147, it must be on material and it should have nexus for holding such opinion contrary to what has been

expressed earlier. Even after the amendment of sec. 147, mere change of opinion does not confirm jurisdiction on the ITO to initiate proceeding for reassessment merely by resorting to explanation 1 to sec. 147.” Hon’ble Calcutta High Court in the case of Berger Paints India Ltd., 245 ITR 648 held when any particular issue has been considered by the ITO and CIT(A) and when there is no failure to disclose the facts, the reassessment proceedings are not valid. Hon'ble Supreme Court in the case of CIT vs. Foraner France, 264 ITR 566 held reassessment – not on basis of mere change of opinion – law same before and after amendment by direct tax laws. Hon'ble Supreme Court in the case of Indian Oil Corporation, 159 ITR 956 held that no case u/s 148 is made out when the facts were known all along with to the revenue while making the original assessment. Hon'ble Supreme Court in the case of Associated Stone Industry Ltd., 224 ITR 560 held that the assessee shall have to disclose only the primary facts. Considering the above legal propositions decided in the above cases, it is clear that AO is not justified in reopening the assessment on mere change of opinion. It is admitted fact that there is no material available with the AO to form his opinion that income has escaped assessment. All material evidences were available at the stage of original assessment proceedings and the AO merely following the provisions of section 50C, as was not considered in the original assessment proceedings, reopened the assessment order. The assessee has disclosed all the facts which were known all

along to the Revenue. Section 50C is not final determination to prove that it is a case of escapement of income. The report of approved valuer may give estimated figure on the basis of facts of each case. Therefore, on mere applicability of section 50C would not disclose any escapement of income in the facts and circumstances of the case. The AO at the original assessment stage considered all the documents and material produced before him and has accepted the cost of property as was declared by the assessee. Therefore, on mere change of opinion, the AO was not justified in reopening the assessment. The Id. CIT(A) on proper appreciation of facts and law correctly quashed the reassessment proceedings. The departmental appeal has no merits and is accordingly dismissed.

6. In the result, the departmental appeal is dismissed.

Order pronounced in the open court.

Sd/-
(PRAMOD KUMAR)
Accountant Member

Sd/-
(BHAVNESH SAINI)
Judicial Member

*aks/-

Copy of the order forwarded to :

1. Appellant
2. Respondent
3. CIT(A), concerned
4. CIT, concerned
5. DR, ITAT, Agra
6. Guard file

By order

Sr. Private Secretary

True copy