

आयकर अपीलीय अधीकरण, न्यायपीठ –“C(SMC)” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C(SMC)” BENCH: KOLKATA
[Before Shri A. T. Varkey, JM]

I.T.A. No. 2142/Kol/2019
Assessment Year: 2013-14

| | | |
|--|-----|--------------------------|
| Jai Prakash Gupta (PAN: AGJPG 5316 J) | Vs. | ITO, Ward-37(1), Kolkata |
| Appellant | | Respondent |

| | |
|---------------------------|-----------------------------------|
| Date of Hearing (Virtual) | 29.04.2021 |
| Date of Pronouncement | 18.06.2021 |
| For the Appellant | Shri K. M. Roy, A.R |
| For the Respondent | Shri Jayanta Khanra, JCIT, Sr. DR |

ORDER

This is an appeal preferred by the assessee against the order of Ld. CIT(A)-11, Kolkata dated 26.07.2019 for Assessment year 2013-14.

2. At the outset, the Ld. A.R of the assessee Shri K. M. Roy assailed the jurisdiction of the AO to reopen the assessment u/s 147 of the Income Tax Act, 1961 (*hereinafter referred to as the Act*) without satisfying the condition precedent i.e. “*reason to believe, escapement of income*”, in the reasons recorded by him before re-opening the assessment of AY 2013-14. Therefore according to Ld. A.R, the reopening itself is bad in law and without jurisdiction, so consequent framing of assessment order is null in the eyes of law.

3. I note that since the assessee has raised a legal issue challenging the jurisdiction of AO to reopen, which issue if found to be correct, then will go to the root of the re-assessment order dated 21.12.2017 itself and therefore need to be adjudicated at the first instance; and since it is a legal issue it is noted that it can be raised for the first time even before this Tribunal as held by the Hon’ble Supreme Court in National Thermal Power Co. Ltd. vs. CIT in [1998] 229 ITR 383 (SC).

4. Brief facts of the case is that the assessee had filed the return of income showing Rs. 2,84,100/-. The return of income (ROI) was processed u/s 143(1) of the Act. Thereafter in March 2017, the AO issued notice u/s 148 of the Act conveying his desire to reopen the assessment u/s 147 of the Act. Pursuant to the assessee seeking the reasons for reopen, the assessee was given a copy of reason recorded for reopening and thereafter the AO passed the reassessment order u/s 147/143(3) of the Act on 21.12.2017 wherein he treated the long term capital gain (*hereinafter referred to as* LTCG) earned by the assessee on sale of shares of M/s Essar India Ltd. as bogus and added back the LTCG earned by assessee of Rs. 9,70,583/-.

5. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the order.

6. Aggrieved the assessee is before us.

7. The Ld. A.R. assailing the action of AO to reopen challenges the very initiation to reopen u/s 147 of the Act. According to him, the AO has merely reproduced the information which he received from the investigation wing in the reasons recorded u/s 147 of the Act. And that he has neither given the details of the information on the basis of which he proposed to reopen nor has he applied his mind and merely concluded that the transactions as bogus. Thus according to him, these reasons are therefore not in fact reasons but only his conclusion and that too without any basis. Further according to him, the AO has not brought any material on record on the basis of which any nexus could have been established between the material and the escapement of income. Thus according to him, the reasons recorded by AO, fail to demonstrate the link between the alleged tangible material and formation of the reason to believe that income has escaped assessment. So, he submitted that the very basis/foundation which enables an officer to assume jurisdiction u/s 147 is absent; so according to him, the AO has no jurisdiction to reopen the assessment. Further according to Ld. A.R. from a perusal of assessment order it can be seen that the AO has added a sum of Rs. 9,73,583/-. However, on a perusal of the reasons-recorded for re-opening assessment, AO has alleged that a sum of Rs. 5,55,624/- has

escaped assessment. So according to Ld. A.R, the apparent discrepancy in the two figures which forms the bedrock to re-open the assessment shows the whimsical/lackadaisical attitude adopted by AO and therefore for non-application of mind, the reasons- recorded for re-opening assessment itself is bad in law. And therefore the action of AO to re-open the assessment was without jurisdiction, so consequent framing of assessment order is null in the eyes of law needs to be quashed.

8. Per contra, the Ld. D.R Shri Jayanta Khanra opposing the arguments of the Ld. AR submitted that the assessee has not challenged the legal validity of reopening either before the AO or Ld. CIT(A) and therefore the assessee should not be allowed to assail the action of reopening for the first time in this Tribunal. And according to him, in this financial year the assessee has dealt with the penny stock of M/s Essar India and has made huge gain which is per se bogus and therefore on receipt of information from DIT(Inv) has rightly reopened the assessment and made addition of bogus LTCG and so he does not want this Tribunal to interfere in the action of AO / Ld. CIT(A).

9. I have heard both the parties and perused the records. The assessee has raised the legal issue of reopening the assessment u/s 147 of the Act. One has to bear in mind that the concept of assessment is governed by the time barring rule and the assessee acquired a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence regarding undisclosed income or AO had tangible material/ information in his possession showing escapement of income. So if the AO has reason to believe that in an assessment year, if there is an escapement of income, he can reopen the assessment provided the legal requirements as prescribed in the Statute is satisfied. The legal requirement as prescribed by section 147 of the Act is that AO should have "*reason to believe, escapement of income*". In this regard it is settled principle of law that that reason to believe postulates a foundation based for information and a belief based on reason. After a foundation based on information is made, there still must be some reason which should warrant holding of belief that income chargeable to tax has escaped assessment; and in this context it should be kept in mind that information adverse may trigger "*reason to suspect*", then AO to make reasonable enquiry and collect

material which would make him form the belief that income has escaped assessment. And further it is settled that when there is a challenge to the validity of the reasons recorded by the AO to re-open, then it (*reasons recorded by the AO*) should be examined on a standalone basis; meaning that nothing can be added or omitted in the *reasons recorded by the AO*. The reasons should speak for itself and there is no scope for guess work. Further in the Hon'ble Supreme Court in the case of Ganga Saran and Sons P Ltd. vs. ITO in 130 ITR 1 (SC) held that the expression "*reason to believe*" as occurring in section 147 of the Act is "*stronger*" than the expression "*is satisfied*" which is the requirement of law for the AO to reopen the assessment. Keeping the aforesaid legal principles in mind let me have a look at the reason recorded by the AO to reopen the assessment which is reproduced as under:

"In the instant case, there is information on record from investigation regarding suspicious transactions of Long Term Capital Gain in shares amounting to Rs. 10,67,310/- by the assessee Shri Jai Prakash Gupta on different dates during the financial year 2012-13 ranging in a sham script namely Essar India. The Director of Income Tax (Investigation) in his communication had reported that the assessee had made bogus transactions with Essar India and had shown bogus long term capital gains by way of accommodation entry and subsequently claimed it as exempt income u/s 10(38) of the Act.

Since the transactions carried out by the assessee is a bogus one, the amount of income that has escaped assessment in the instant case is Rs. 5,55,624/- and in view of the above, I have substantial reasons to believe that income has escaped assessment in the instant case.

In view of the above I have reasons to believe that income has escaped assessment during the financial year 2012-13 relevant to assessment year 2013-14 and remedial measure for opening the case u/s 147 of the Act is proposed for kind approval."

10. A perusal of the aforesaid reasons recorded shows that the AO received an information for investigation regarding suspicious transaction of LTCG in shares amounting to Rs. 10,67,310/- by the assessee on different dates during the financial year 2012-13 in sham script namely M/s Essar India. According to AO, the DIT (Investigation) has communicated that the assessee has made bogus transaction with M/s Essar India and shown bogus LTCG by resorting to accommodation entry. Thereafter, the AO concludes that the assessee has carried out bogus transaction and thereby the amount of Rs. 5,55,624/- has escaped assessment for which he has reopened the assessment u/s 147 of the Act. From a mere perusal of the aforesaid reasons recorded it is clear that the AO has borrowed the satisfaction of the Director of Income Tax that the assessee has transacted in

bogus shares of M/s Essar India and thereby there has been an escapement of income of Rs. 5,55,624/- which prompted him to reopen the assessment. However it has been pointed out to me that when the AO framed the assessment order he has stated that the amount of LTCG in respect of shares of M/s Essar India was to the tune of Rs. 9,70,583/- and not Rs. 5,55,624/- as he has recorded in the reasons for reopening, which difference in the figures shows non-application of mind by the AO while recording the reasons of reopening. As I have taken note (supra) that any adverse information may trigger only “*reason to suspect*” and not “*reason to believe escapement of income*” when there is reason to suspect, then AO has to make reasonable enquiry and collect material which would make him form a belief that there is escapement of income. I find that AO has simply borrowed the satisfaction of DIT (Inv.) and believed it as Gospel truth and has concluded that there is an escapement of income without even making a preliminary enquiry as to whether there is any escapement of income. Therefore, the reasons recorded by AO to usurp jurisdiction to re-open is not satisfied and for saying so, I rely on the following case laws:

- i) *Decision of Hon’ble Delhi High Court in the case of Pr. CIT vs. Meenakshi Overseas Pvt. Ltd. 395 ITR 677.*
- ii) *Decision of Hon’ble Delhi High Court in the case of Pr. CIT vs. G & G Pharma India Ltd. 387 ITR 147.*
- iii) *Decision of Hon’ble Delhi High Court in the case of Pr. CIT vs. RMG Polyvinyl (I) Ltd. 396 ITR 5*
- iv) *Decision of Hon’ble Delhi High Court in the case of Sab Infrastructure Ltd. vs. ACIT 2017-(9)-TMI-1589. ITA No. 366/Del/2016 M/s Key Components (P) Ltd., Delhi.*
- v) *Decision of Hon’ble Delhi High Court in the case of CIT vs. Atul Jain 299 ITR 383.*
- vi) *Decision of Hon’ble Delhi High Court in the case of Shiv Sai Infrastructure Pvt. Ltd. vs. DCIT 2018-(8)-TMI-205.*
- vii) *Order of ITAT, Delhi Bench in the case of M/s MRY Auto Components Ltd. vs. ITO, in ITA No. 2418/Del/2014, dated 15.09.2017.*

11. As well as the decision of the Delhi Tribunal in the case of M/s Key Components P Ltd. vs. ITO, New Delhi in ITA No. 366/Del/2016 dated 12.02.2019 wherein it was held as follows:

30.1. In Commissioner of Income Tax, New Delhi v. High gain Finvest (P) Limited (2007) 164 Taxman 142 (Del) it was noted that the reasons to believe read as under: "It has been informed by the Additional Director of Income Tax (Investigation), Unit VII, New Delhi vide letter No. 138 dated 8th April 2003 that this company was involved in the giving and taking bogus entries/ transactions during the financial year 1996-97, as per the deposition made before them by Shri Sanjay Rastogi, CA during a survey operation conducted at his office premises by the Investigation Wing. The particulars of some of the transaction of this nature are as under:

| Date | Particulars of cheque | Debit Amt. | Credit Amt |
|----------|-----------------------|------------|------------|
| 18.11.96 | 305002 | | 5,00,000 |

Through the Bank Account No. CA 4266 of M/s. Mehram Exports Pvt. Ltd. in the PNB, New Rohtak Road, New Delhi. Note: It is noted that there might be more such entries apart from the above. The return of income for the assessment year 1997-98 was filed by the Assessee on 4th March 1998 which was accepted under Section 143 (1) at the declared income of Rs. 4,200. In view of these facts, I have reason to believe that the amount of such transactions particularly that of Rs. 5,00,000 (as mentioned above) has escaped the assessment within the meaning of the proviso to Section 147 and clause (b) to the Explanation 2 of this section. Submitted to the Additional CIT, Range -12, New Delhi for approval to issue notice under Section 148 for the assessment year 1997-98, if approved."

30.2. The AO was not merely reproducing the information received from the investigation but took the effort of referring to the deposition made during the survey by the Chartered Accountant that the Assessee company was involved in the giving and taking of bogus entries. The AO thus indicated what the tangible material was which enabled him to form the reasons to believe that income has escaped assessment. It was in those circumstances that in the case, the Court came to the conclusion that there was prima facie material for the AO to come to the conclusion that the Assessee had not made a full and true disclosure of all the material facts relevant for the assessment.

31. In Commissioner of Income Tax v. G&G Pharma (supra) there was a similar instance of reopening of assessment by the AO based on the information received from the DIT (I). There again the details of the entry provided were set out in the 'reasons to believe'. However, the Court found that the AO had not made any effort to discuss the material on the basis of which he formed prima facie view that income had escaped assessment. The Court held that the basic requirement of Section 147 of the Act that the AO should apply his mind in order to form reasons to believe that income had escaped assessment had not been fulfilled. Likewise in CIT-4 v. Independent Media P. Limited (supra) the Court in similar circumstances invalidated the initiation of the proceedings to reopen the assessment under Section 147 of the Act.

32. In *Oriental Insurance Company Limited v. Commissioner of Income Tax 378 ITR 421 (Del)* it was held that "therefore, even if it is assumed that, in fact, the Assessee's income has escaped assessment, the AO would have no jurisdiction to assess the same if his reasons to believe were not based on any cogent material. In absence of the jurisdictional pre-condition being met to reopen the assessment, the question of assessing or reassessing income under Section 147 of the Act would not arise."

33. In *Rustagi Engineering Udyog (P) Limited (supra)*, it was held that "...the impugned notices must also be set aside as the AO had no reason to believe that the income of the Assessee for the relevant assessment years had escaped assessment. Concededly, the AO had no tangible material in regard to any of the transactions pertaining to the relevant assessment years. Although the AO may have entertained a suspicion that the Assessee's income has escaped assessment, such suspicion could not form the basis of initiating proceedings under Section 147 of the Act. A reason to believe - not reason to suspect - is the precondition for exercise of jurisdiction under Section 147 of the Act. "

34. Recently in *Agya Ram v. CIT (supra)*, it was emphasized that the reasons to believe "should have a link with an objective fact in the form of information or materials on record..." It was further emphasized that "mere allegation in reasons cannot be treated equivalent to material in eyes of law. Mere receipt of information from any source would not by itself tantamount to reason to believe that income chargeable to tax has escaped assessments."

35. In the decision of this Court dated 16th March 2016 in W.P. (C) No. 9659 of 2015 (*Rajiv Agarwal v. CIT*) it was emphasized that "even in cases where the AO comes across certain unverified information, it is necessary for him to take further steps, make inquiries and garner further material and if such material indicates that income of an Assessee has escaped assessment, form a belief that income of the Assessee has escaped assessment."

36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'. The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.

37. For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law.

38. The question framed is answered in the negative, i.e., in favour of the Assessee and against the Revenue. The appeal is, accordingly, dismissed but with no orders as to costs".

5.1. In this case, the reasons for reopening are also reproduced in the judgment of the Hon'ble Delhi High Court in which similarly information has been received from Director of Income Tax (Investigation), New Delhi that assessee has received amount of Rs.5 lakhs. The A.O. on going through the information found that it is an accommodation entry and reopened the assessment. In the instant case under appeal, the A.O. has reproduced the precise information he has received from Investigation Wing of the Revenue and reproduced the same in the reasons recorded under section 148 of the I.T. Act. This information shows that assessee has received the amount of credit through banking channels by mentioning names of the parties and cheque nos. with amount. This information by itself cannot be said to be tangible material. The A.O. has not gone through the details of these information and has not even applied his mind and merely concluded that he has reason to believe that income chargeable to tax has escaped assessment. The reason to believe are therefore, not in fact reasons but only conclusion of the A.O. The expression "accommodation entry" is used to describe the information set-out without explaining the basis for arriving at such conclusion. In the case of Meenakshi Overseas Pvt. Ltd., (supra), the A.O. in the reasons has even mentioned that he has gone through the information so received which is lacking in the instant case. The A.O. being a quasi-judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. The A.O. however, merely repeated the report of Investigation Wing in the reasons and formed his belief that income chargeable to tax has escaped assessment without arriving at his satisfaction. The reason to believe contain no reason but the conclusion of A.O. without any basis. Thus, there is no independent application of mind by the A.O. to the report of Investigation Wing which form the basis for reasons to believe that income has escaped assessment. The conclusion of the A.O. in the reason are at best reproduction of conclusion of the Investigation report. It is borrowed satisfaction not permissible in law. The reasons fail to demonstrate the link between the alleged tangible material and the formation of the reason to believe that income has escaped assessment. The issue is therefore, identical in the present appeal as has been considered and decided by the Hon'ble Delhi High Court in the case of Meenakshi Overseas Pvt. Ltd., (supra). The issue is therefore, covered in favour of the assessee by the judgment of Hon'ble Delhi High Court in the case of Meenakshi Overseas Pvt. Ltd., (supra). 5.2. The Hon'ble Bombay High Court in the case of General Electoral Trust vs., ITO (supra) held as under:

"Non-filing of return of income and/or not obtaining of PAN does not ipso facto give jurisdiction to reopen an assessment under section 147/148, prima facie jurisdiction even in case of non-filing of the return of income, to issue notice of reopening notice is a reasonable belief of the Assessing Officer that income chargeable to tax has escaped assessment."

5.3. The Learned Counsel for the Assessee also relied upon the order of ITAT, Delhi "G" Bench in the case of Mrs. Sonia Choudhary vs. ITO (supra), in which on identical facts the reopening of the assessment have been quashed.

5.4. In view of the above, reopening of assessment in the facts and circumstances of the case are not justified and have to be quashed.

6. Considering the facts and circumstances of the case, in the light of above discussion and decision of the Hon'ble Delhi High Court in the case of Meenakshi Overseas Pvt.

Ltd., (supra), we set aside the orders of the authorities below and quash the reopening of the assessment under section 147/148 of the I.T. Act. Resultantly, the entire additions of Rs.27,54,000 are deleted. Since the reopening of the assessment is quashed, therefore, there is no need to decide the addition on merit.

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

12. Relying on the aforesaid decision of Hon’ble Courts it is clear that in the instant case the AO has simply reproduced the information from DIT(Inv) that since the assessee has transacted in this financial year in the scrip of M/s Essar India, the LTCG claim is bogus; and the AO while recording the reason concluded that by doing the said transaction there was an escapement of income of Rs. 5,55,624/- whereas when the assessment order was framed the AO has found that assessee has made LTCG of Rs. 9,70,583/-. It has to be borne in mind that when the AO got adverse information from the DIT(Inv) as a prudent and responsible officer, the AO should have made preliminary enquiry and collected materials which could have made him form the belief that there is escapement of income. It is noted that AO based on the information from DIT(Inv) neither furnished a copy of the same to assessee nor even recorded the gist of the information from DIT in the reasons recorded by him to conclude that LTCG on M/s Essar India is bogus. In the facts and circumstances discussed it is noted that the legal requirement to reopen i.e. “*reason to believe escapement of income*” has not been satisfied. Since the requirement of law prescribed u/s 147 of the Act has not been met in the reasons recorded in the case of assessee, the AO did not have jurisdiction to reopen the assessment and therefore the very action of issuing notice u/s 148 is bad in law and consequently all action taken by the AO is null in the eyes of law and therefore quashed.

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

Order is pronounced in the open court on 18th June, 2021.

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 18.06.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Jai Prakash Gupta, Room No. 18, 1st Floor, Krishna Sadan, 26, P.K. Tagore Street, Jorabagan, Kolkata-700006.
2. Respondent – ITO, Ward-37(1), Kolkata
3. The CIT(A)- 11, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata