

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.9343/Del./2019
(ASSESSMENT YEAR : 2010-11)**

M/s. Gangeshwari Metals Pvt. Ltd., vs. ITO, Ward 11 (3),
Shop No.4, 169, Shivkhanda, New Delhi.
Vishwakarma Nagar, Jhilmil,
Delhi – 110 032.

(PAN : AABCG4856A)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Sandeep Sapra, CA
REVENUE BY : Ms. Parul Singh, Senior DR

**Date of Hearing : 12.10.2020
Date of Order : 22.10.2020**

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Gangeshwari Metals Pvt. Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 07.10.2019 passed by the Commissioner of Income-tax (Appeals)-15, New Delhi qua the assessment year 2010-11 on the grounds inter alia that :-

“1. That the impugned assessment order dated 29/12/2017 passed under section 143(3) r.w.s. 147 of IT Act deserves to be quashed/annulled as initiation of proceedings u/s 147/148 is bad in law inter alia because:

a) AO has not applied his mind so as to come to an independent satisfaction that he had reason to believe that income has escaped assessment as Reasons have been recorded on borrowed satisfaction viz. letter dated 27.03.2017 alongwith report of the Investigation Wing, Unit 3(1), Kolkata without making an independent enquiries.

b) The figures recorded in the reasons viz. buying, selling and profit are factually incorrect which also shows non application of mind on the part of the AO.

c) There was no proper valid and legal service of notice under section 148 of the IT Act on the Appellant.

d) Requisite sanction as required from the competent authority under section 151 of IT Act has been granted in a mechanical manner.

e) The reasons recorded indicate that the AO has acted on mere surmises and suspicion for making fishing and roving enquires. The requirement of law is "reason to believe" and not "reason to suspect".

f) There is no nexus between the reasons recorded and escapement of income.

g) There is no failure on the part of the Assessee to disclose fully and truly all material facts necessary for assessment.

2. That the Ld. CIT (A) erred on facts and in law in confirming the addition of Rs.1,31,08,895/- u/s 68 read with section 115BBE of I.T. Act as against profit of Rs.1,49,19,900 declared on account of commodity trading.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Original return of income of assessee at taxable income of Rs.1,88,519/- was processed under section 143(1) of the Income-tax Act, 1961 (for short ‘the Act’). Thereafter, the assessment was reopened after recording reasons

after a period of four years on receipt of certain information from Investigation Wing of the Income-tax Department for initiation of proceedings u/s 147/148 of the Act for AY 2010-11. It is the case of the AO that from the reports of Forward Market Commission (FMC), it was found that on the National Multi Commodity Exchange (NMCE) platform, there were bogus clients who were used to make market artificially increased and the clients who used the platform booked contrived losses through the pre-mediated synchronized trades and it was also found that such contrived losses booked on NMCE were used to set off the other genuine profits booked on other well regulated exchanges in order to evade the taxes. Consequently, Directorate of Investigation, Ahmedabad put under scrutiny 85 entities who booked losses more than Rs.10 crores on NMCE. Investigation Wing prepared the list of beneficiaries as per information provided by the Investigating Directorate and the assessee was found to be one of the beneficiaries of taking bogus profit as per transactions undertaken in AY 2010-11. AO accordingly recorded the reasons that bogus profit has been taken by the assessee to adjust the brought forward losses and no tax has been paid. Even in MAT provision, no tax has been paid by the assessee and proceeded to have reasons to believe that on account of failure on the part of the assessee to

disclose truly and fully all material facts necessary for AY 2010-11, the income chargeable to tax to the extent of accommodation entry amounting to Rs.1,37,250/- has escaped assessment within the meaning of section 147/148 of the Act and thereby framed the assessment by making addition of Rs.131,08,895/- u/s 68 of the Act and accordingly framed the assessment u/s 143 (3) read with section 147 of the Act.

3. Assessee carried the matter before the Id. CIT (A) by way of filing the appeal who has upheld the reopening u/s 147/148 of the Act and has also confirmed the addition by way of dismissing the appeal. Feeling aggrieved by the order passed by the Id. CIT (A), the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

5. Before proceeding further, the reasons recorded by the AO to initiate proceedings u/s 147/148 of the Act for AY 2010-11 are extracted for ready perusal as under :-

“Reasons recorded in the case of M/s. Gangeshwari Metals Pvt. Ltd. – A.Y. 2010-11 for initiating proceedings u/s 147/148 of the Income-tax Act, 1961

Name of the assessee	M/s. Gangeshwari Metals Pvt. Ltd.
PAN	AAACM0267E
Status	Company
Assessment Year	2010-11

The assessee company had filed return of Income on 17.09.2010 declaring a total income of Rs.1,88,519/-, which has been adjusted against brought forward losses and net taxable Income of Rs Nil has been returned. Even the Book Profit u/s 115JB has been declared at Rs Nil. The return was processed u/s 143(1) and the case of the year under consideration was not completed in scrutiny assessment.

Investigation Wing, Unit-3(1), Kolkata. vide letter dated 17.03.2017 has forwarded a report on systematic evasion of taxes during the FY 2009-10 (AY 2010-11) through bogus commodity trading. As per this report, a survey action u/s 133A of the IT Act was conducted by Pr Director of Income Tax (Investigation). Ahmedabad at the premise of National Multi Commodity Exchange (NMCE) and backup of the NMCE trade was taken. After analysis of this data, 85 entities were identified who had booked contrived losses In excess of Rs.40 Crores and information was shared With Director General of Income Tax (Inv), Kolkata. On the basis of above information, investigation were carried out in the case of 50 entities which revealed the following :

- (i) Summons u/s 131 of I.T. Act, 1961 were issued to all the 50 concerned entities to furnish details of their business/profession, Balance Sheet. P/L account, ITR etc Most of the summons return unserved
- (ii) In some cases Inspector was deputed to serve the summons but the same could not be served as the entities were not found at their address
- (iii) Further, it was found that most of them did not file Income Tax Return for the concerned AY and some of them who filed ITR did not claim this loss in their return of income.
- (iv) Many of the entitles such as Barbarik Oealcorn Pvt Ltd., Avenue Dealers Pvt Ltd, Anand Share Broking Pvt Ltd, Darpan Commosales Pvt Lid. Dignity Tie up Pvt Ltd., Fairdeal Vincom Pvt. Ltd. Gulistan Vanijya Pvt. Ltd., Jackson Investments Ltd., Sinna Infra Build Pvt. Ltd., Quiscope Dealers Pvt. Ltd., Gitanjali Udyog

Pvt. Ltd., Matribhumi Commerce Pvt. Ltd., Pinnacle Commodities Pvt. Ltd. are found to be shell companies which are managed and controlled by the various Kolkata based entry operators like Shri Devesh Upadhyay, Shri Pankaj Agarwal, Shri Subhash Agarwal, Shri Prakash Jajodia etc.

- (v) It was found that most of the trading were done through member/broker of NMCE who was penalized/suspended because they were found to be involved in artificial trading of shares by misuse of NMCE platform like Hanu Commodities Pvt. Ltd., M/s. Kissan Commodities Pvt. Ltd., Jackson Investments Ltd., Shyam Shree Commodities Private Limited, Marina Comtrade Private Limited, Motisons Commodities Private Limited, D.M. Finance, Jet Air Agencies Pvt. Ltd. etc. Further these members/brokers created dummy entities to accommodate bogus loss.
- (vi) Some of the entities/beneficiaries who took especially profit from these 50 entities was checked randomly and it is found that they had not filed their Income Tax and did not show income earned through commodities profit for the concerned assessment year.

Based upon investigation, the Investigation wing has prepared a list of beneficiaries and as per information provided by the Investigation directorate, the assessee is one of the beneficiary and has taken bogus profit as per following transactions during AY 2010-11 :-

Total buying	Rs.37,26,450/-
Total Selling	Rs.38,63,700/-
Total Profit	Rs. 1,37,250/-

The above Information provided by the Investigation Wing was examined the regard to the record of the assessee. It is seen that the assessee has shown profit on commodity transaction in excess of the above mentioned amount. Further, it is seen that the above bogus profit has been taken to adjust the brought forward business losses and no tax has been paid by the assessee. Even in the MAT provisions no tax has been paid by the assessee. Thus by this process, the assessee has introduced its unaccounted money into books of accounts, without paying any taxes, It is apparent that there has been a failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment for above assessment year 2010-11.

Keeping in view the above facts, I have reason to believe that on account of failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment for above assessment year 2010-11, the income chargeable to tax to the extent of above mentioned accommodation entry amounting to Rs.1,37,250/- as mentioned above has escaped assessment within the meaning of section 147/148 of the Act.

Moreover, as the case pertains to a period beyond four years from the end of relevant assessment years for issuing the notice u/s 148, necessary approval/ sanction may kindly be accorded by the Pr. Commissioner of Income Tax-4 Delhi, in view of the amended provision of section 151 w.e f. 01.06.15.

Submitted for kind perusal and approval as per provision of section 151 (2) of the Income-tax Act, 1961.

Sd/-

ITO, Ward 11(3). New Delhi

Dated: 27/03/2017”

6. Referring to the reasons recorded by the AO for the purpose of reopening of assessment u/s 147/148 of the Act, Id. AR for the assessee contended inter alia that the AO has not applied his mind by verifying the information received from the Investigation Wing or by making independent enquiries before recording the reasons; that information received from the Investigation Wing is not a tangible material per se and as such, the reasons have been recorded on borrowed satisfaction; that sanction / approval by the Principal CIT has also been accorded in mechanical manner; that there is no specific allegation against the assessee that he has failed to disclose all material facts necessary for framing assessment; that even on merits addition made u/s 68 is not sustainable and relied upon the decision rendered by the coordinate Bench of the Tribunal

in case of **Randeep Investment Pvt. Ltd. vs. ITO** in ITA No.4991/Del/2014 order dated 06.07.2018.

7. On the other hand, ld. DR for the Revenue relied upon the order passed by the AO as well as ld. CIT (A) and further contended that modus operandi of the assessee and other members of the NMCE is to book the bogus profits and adjust the same against brought forward losses and relied upon the decision rendered by **Hon'ble Supreme Court in case of Raymond Woolen Mills Ltd. vs. ITO (1999) 236 ITR 34 SC.**

8. Bare perusal of the reasons recorded extracted in the preceding para goes to prove that name of the assessee as a broker has nowhere mentioned in the reasons recorded. Reasons have been recorded by the Investigating Officer without making any verification of facts and figures forwarded by the Investigation Wing what to talk of conducting independent enquiry. Because in the reasons recorded assessee is shown to have earned profit of Rs.1,37,250/- from trading commodities allegedly as bogus profit during 2010-11 which is extracted as under :-

Total buying	Rs.37,26,450/-
Total Selling	Rs.38,63,700/-
Total Profit	Rs. 1,37,250/-

9. Ld. AR for the assessee to prove the fact that the reasons recorded are vague and factually incorrect taken us to the audited balance sheet, profit & loss account and Schedule IX, Sales and Other Income, available at pages 13 to 32 of the paper book, particularly Schedule IX depicting sales and other income, available at page 27 of the paper book, which shows that assessee has booked profit from commodities at Rs.149,19,900/- and not Rs.1,37,250/-. This fact goes to prove that the AO has proceeded merely on the basis of report given by the Investigation Wing and has not preferred to verify the same from the audited financials brought before him by the assessee and in these circumstances, it is difficult to believe that he has applied his mind before recording the reasons requires for initiating the proceedings u/s 147/148 of the Act.

10. Aforesaid fact of non-application of mind by the AO is further strengthened from the approval accorded by the Principal CIT for initiating proceedings u/s 147/148, available at page 39 of the paper book. Ld. Principal CIT accorded the approval as under:-

“On going through the material available and the reasons recorded by the assessing Officer, I am satisfied that it is a fit case for issue of notice u/s 148 of the I.T. Act, 1961.”

11. We are of the considered view that when AO was not even aware as to the actual profit earned by assessee from commodities and this fact has also not been verified by the Principal CIT from audited financials of the assessee, then it is difficult to believe as to how and under what circumstances he has made himself satisfied to proceed against the assessee u/s 147/148 of the Act. So, the entire process as to initiating the reopening is merely mechanical without any application of mind by the AO as well as sanctioning authority, Principal CIT, which has vitiated the entire proceedings.

12. Hon'ble Delhi High Court in case of **Pr. CIT vs. Meenakshi Overseas Pvt. Ltd. 395 ITR 677 (Del.)** while deciding the identical issue held that, *“after receipt of report from the Investigating Officer, AO who form the “reasons to believe” must have applied independent mind and not to represent the report of investigation”*.

13. Hon'ble Delhi High Court in case of **Principal CIT vs. RMG Polyvinyl (I) Ltd. 396 ITR 5 (Del.)** held that information received from Investigation Wing cannot be considered as tangible material per se for further enquiry made by the AO by returning following findings :-

“Held, dismissing the appeal, that no link between the tangible material and the formation of the reasons to believe that income had escaped assessment, could be discerned. The information

received from the Investigation Wing was not tangible material per se without a further enquiry having been undertaken by the Assessing Officer, who had deprived himself of that opportunity by proceeding on the erroneous premise that the assessee had not filed a return for the assessment year, 2004-05, when in fact it had. In his assessment order, the Assessing Officer had, instead of adding a sum of Rs.78 lakhs, even going by the reasons for reopening of the assessment, added a sum of Rs. 1.13 crores and the basis for such addition had not been explained. No error was committed by the Appellate Tribunal in holding that reopening of the assessment under section 147 was bad in law. No question of law arose.”

14. So, in view of what has been discussed above and following the aforesaid decisions rendered by Hon'ble Delhi High Court, we are of the considered view that firstly “reasons to believe” recorded by the AO, which is replica of information received from the Investigation Wing, cannot be a tangible material per se sufficient to form reasons to believe; that even figures of buying, selling and profit booking qua commodity trading, recorded at page 2 of “reasons to believe”, are not in accordance with the audited financials of the assessee company which shows that there is absolutely no application of mind on the part of the AO before recording the reasons to believe; that in the third last para of reasons to believe, the AO recorded the fact that the income chargeable to tax to the extent of aforementioned accommodation entry amounting to Rs.1,37,250/- has no nexus with the addition of Rs.1,31,08,895/-; that when the assessee has shown to have earned the profit of Rs.1,49,19,900/- on account of commodity trading, the

addition on this account of Rs.1,31,08,895/- u/s 68 is part and parcel of total profit earned by the assessee which has been declared as income, the very initiation of proceedings u/s 147/148 of the Act is bad in law, hence not sustainable.

15. In view of what has been discussed above, we are of the considered view that the reopening u/s 147/148 of the Act for the AY 2010-11 was not legal, hence quashed and ground no.1 is determined in favour of the assessee.

GROUND NO.2

16. Ld. AR for the assessee contended that even the addition made by the AO u/s 68 to the tune of Rs.1,31,08,895/- is not sustainable on merits for the reasons inter alia that the addition has been made merely on the basis of report of Investigation Wing which has never been confronted to the assessee; that documentary evidences brought on record by the assessee to prove the profit on commodity trading have neither been examined nor controverted by the AO; that there is not an iota of evidence on file to prove that the assessee has routed his own unaccounted money in the garb of profit on commodity trading; that the copies of replies filed by R.K. Commodities Services (P) Ltd., relied upon by the AO, have never been supplied to the assessee nor he has been confronted with the same.

17. As discussed in the preceding paras, it is undisputed fact that the assessee has declared profit of Rs.149,19,900/- on account of commodity trading during the year under assessment whereas AO/CIT (A) have made/confirmed addition on account to the tune of Rs.1,31,09,895/- u/s 68 read with section 115BBE of the Act. Addition made by the AO/CIT (A) on account of alleged profit in commodity trading to introduce its unaccounted money and to evade taxes is merely on the basis of surmises because figure of Rs.1,31,08,895/- made as addition does not find mention in any of the audited financials of the assessee. Assessee has shown to have earned the profit on account of commodity trading at Rs.1,49,19,900/- as is evident from the financials/schedule, available at page 27 of the paper book on which income-tax has been paid.

18. Assessee has duly brought before the AO/CIT (A) the documents viz. copy of account of the assessee company in the books of R.K. Commodities (P) Ltd. as well as copies of accounts of assessee company in the books of Smrat Commodity Broker Pvt. Ltd. with whom trading of Rs.59,56,410/- and Rs.89,63,490/- respectively was made and these documents are available at pages 75 to 118 of the paper book. Surprisingly, all these documents have not been examined nor controverted by the AO as well as ld.

CIT(A). Moreover, all these transactions are proved to have been made through banking channels from the assessee's HDFC Bank statement, available at pages 119 to 133 of the paper book.

19. AO reported to have issued notices u/s 133 (6) on 07.12.2017 to NMCE Head Office, Ahmedabad and MCX but reply received thereto have never been confronted to the assessee nor copies thereof have been supplied. This issue was specifically raised by the assessee before the Id. CIT (A), as is evident from the submissions made to Id. CIT (A), available at pages 1 to 10 of the paper book, to direct the AO to supply copy of said replies but no cognizance has been taken by the Id. CIT (A) on the request of the assessee.

20. When assessee has specifically proved on record that it has earned profit of Rs.59,56,410/- on commodity trading through R.K. Commodities (P) Ltd. registered with NMCE but AO has wrongly taken this amount as Rs.41,45,405/- and treated the same as the profit earned by the assessee through manipulations without examining the evidence available on file, it is proved on record that all these documents were placed before the AO by the assessee vide letters dated 06.12.2017 and 29.12.2017, available at pages 73 & 74 and 134 to 136 respectively of the paper book, but he has not drawn any adverse inference against the claim of the assessee.

Rather AO as well as ld. CIT (A) kept on essay writing spree on the basis of surmises in making the impugned addition by completely ignoring the evidence available on record, hence addition made by the AO and confirmed by the ld. CIT (A) is not sustainable on merit also. So, this ground is determined in favour of the assessee.

21. Resultantly, the appeal filed by the assessee is hereby allowed.

Order pronounced in open court on this 22nd day of October, 2020.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 22nd day of October, 2020
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-15, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**