

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member)

ITA No. 2377/Kol/2017
Assessment Year: 2009-10

Naveen Bhatler.....Appellant

C/o. Subash Agarwal & Associates

Siddha Gibson

1, Gibson Lane

2nd Floor

Suite -213

Kolkata - 700 069

[PAN : AEEPB 9697 N]

Assistant Commissioner of Income Tax, Circle-35, Kolkata.....Respondent

Appearances by:

Shri Subash Agarwal, Advocate, appeared on behalf of the assessee.

Shri Satyajit Mondal, Addl. CIT, D/R. appearing on behalf of the Revenue.

Date of concluding the hearing : June 28th, 2018

Date of pronouncing the order : July 20th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals)- Siliguri, (hereinafter the 'Ld. CIT(A)'), dt. 09/11/2017, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2013-14.

2. The assessee is an individual. During the year under consideration he claimed speculation loss from trading in shares and securities. The Assessing Officer passed an order u/s 143(3) r.w.s. 147 of the Act, on 08/12/2016 and at para 12 of his order concluded as follows:-

"12. We rely on the decision and reasoning given by Hon'ble High Court, so in the present case Rs.8,04,915/- is treated as bogus and added to the total income of the assessee firm as unexplained cash credit u/s 68 of the Income-tax Act, 1961 and accordingly a sum of Rs.16,098/- being 2% of Rs.8,04,915/- is added as undisclosed expenditure with the meaning of Section 69C of the Income-tax Act, 1961.

Penalty proceedings u/s 271(1)(c) r.w.s. 274 of the Income Tax Act is initiated separately in this regard for furnishing inaccurate particulars and concealment of income."

2.1. On appeal, the Id. First Appellate Authority upheld the findings of the Id. Assessing Officer.

3. Aggrieved, the assessee is before us, on the following grounds:-

"1. For that the assessment framed by the Ld. A.O. u/s 147 is liable to be quashed inasmuch as notice u/s 143(2) was neither issued nor served upon the assessee.

2. For the re-opening proceedings u/s 147 is invalid and the entire assessment framed vide order dated 08.12.2016 is liable to be quashed for want of reasons recorded.

3. For that without prejudice to ground no. 2, the reopening proceedings u/s 147 is invalid and the assessment framed pursuant thereto is liable to be quashed due to invalid "reasons to belief".

4. (a) For that on the facts and in the circumstances of the case, the Ld, CIT(A) erred in confirming the addition of Rs. 8,04,915/- made by the A.O. as unexplained cash credit u/s 68 of the I.T. Act, 1961.

(b) For that the Ld. CIT(A) wrongly upheld the action of the A.O. by holding that the assessee had obtained accommodation entries by misusing the client code Modification facility of Rs. 8,04,915/-.

5. For that on the facts and in the circumstances of the case, the Ld. CIT(A) erred in confirming the addition u/s 69 of Rs. 16,098/- treating the same as unexplained expenditure.

6. The appellant craves leave to add further grounds of appeal or alter the grounds at the time of hearing."

4. Heard rival contentions. After perusing the papers on record, orders of the authorities below as well as the case-law cited, I hold as follows:-

4.1. The first issue is whether the notice u/s 143(2) of the Act, was issued and served on the assessee. The second issue whether the re-opening of assessment is valid in law.

5. The reasons recorded by the Assessing Officer for reopening of assessment are as follows:-

"A letter No. CCIT-5/Kol/Misc. (Tech)/2015-16/3296-98 dated 18.03.2016 has been received from the office of the Ld. CCIT -5, Kolkata enclosing an information (Vide: PDIT(Inv)/AHD/CCM/Dissemination/15-16 dated 08.03.2016.) regarding a Survey conducted by the ADIT(Inv) Unit 1(3), Ahmedabad, with regards to Client Code Modification (CCM) - Dissemination of beneficiary clients who have taken losses and shifted out profits during the F. Y.s 2008-09 to 2011-12.

On perusal of the above, the following may be taken into consideration:

Modification of the client codes is a practice under which brokers change the client codes in sale and purchase orders of securities after the trades are conducted. While it is legally permitted to

rectify inadvertent errors in punching the orders, there were concerns that such modifications could be misused for manipulative activities in the market. SEBI conducted a probe into 'modification of client codes' brokers, pursuant to observations by the Finance Ministry about many such modifications taking place in derivatives transactions at the National Stock Exchange during March 2010.

On the basis of the above, a survey was conducted at the premises of 12 brokers and few of their clients across India on 23.03.2015, by the Ahmedabad Investigation Directorate. A survey report was prepared by the ADIT (Inv) Unit-1(3), Ahmedabad on the basis of the data received from the National Stock Exchange. It seems that on analysis of such data and after consideration of the contention of the brokers, it was concluded by the ADIT that Client Code Modification has been used as a tool for tax evasion. In the Survey Report, only the settled trades have been considered to arrive at the beneficiaries.

Taking into consideration the above and on going through the list of beneficiaries it is seen that the following name appears in the list of beneficiaries under the jurisdiction of Circle 35, Kolkata:

Sl No.	Name of Beneficiary Client / PAN	Address of Beneficiary	Name of Broker	F.Y. 2008-09		
				When OC (Ascertain ed Profit Shifted Out)	When MC (Ascertain ed losses Shifted in (Rs.)	Net reduction in Income due to CCM (Rs.)
1.	Naveen Bhatler / AEEP9697N	Flat No. 9B-Shakespeare Court -21A Shakespear Sarani-Kolkata -700 017 Off.-18, N.S. Road, Kol-1	Guinness Securities Limited	0	-804915	-804915

Thus, on the basis of the report received from PDIT (Investigation), Ahmedabad, and other relevant enclosures, I have reasons to believe that the assessee has understated his income at least to the extent of Rs. (-) 804915/- through "Client Code Modification" thereby understating income chargeable to tax which has escaped assessment U/S 147 of the I T Act, 1961. Thus, it is imperative that remedial measure be initiated by issuing Notice u/s 148 of the I T Act, 1961. "

6. A perusal of these reasons demonstrates that there is no independent application of the mind by the Assessing Officer to the information received from the ADIT, Inv., Unit 1(3). The information is general in nature. The aspects of income of Rs.8,04,915/-, does not, in any way, match with the transactions carried out by the assessee in the relevant Financial Year 2008-09 with the broker M/s. Genius Securities. The assessee had furnished before the Assessing Officer details of his transactions and this mismatch/anomaly is not addressed by the Assessing Officer. There is no application of mind by the Assessing Officer to the information received.

7. This Bench of the Tribunal in the case of *M/s. Cygnus Investments & Finance Pvt. Ltd v. Assistant Commissioner of Income Tax, Central Circle 3(3), Kolkata I.T.A. No. 117/Kol/2018 Assessment Year: 2008-09; order dt. 18th May, 2018*, held as follows:-

"7. Further a perusal of the reasons recorded shows non-application of mind by the Assessing Officer. Directions have been given by the DDIT (Inv.) Unit-2(1), Kolkata, vide communication cited in the reasons recorded and based on such directions, the reopening was done. The Hon'ble Delhi High Court in the case of *Commissioner of Income-tax, IV v. Insecticides (India) Ltd [2013] 357 ITR 330 (Delhi)* upheld the order of the ITAT Delhi Bench in ITA Nos. 2332-2333/Del/2010, holding as follows:-

"7. We may point out at this juncture itself that the Tribunal did not go into the question of merits. It only examined the question of the validity of the proceedings under Section 147 of the said Act. The Tribunal, in essence, held that the purported reasons for reopening the assessments were entirely vague and devoid of any material. As such, on the available material, no reasonable person could have any reason to believe that income had escaped assessment. Consequently, the Tribunal held that the proceedings under Section 147 of the said Act were invalid.

8. The Tribunal gave detailed reasons for concluding that the proceedings under Section 147 were invalid. Instead of adding anything to the said reasons, we think it would be appropriate if the same are reproduced:—

"In the case at hand, as is seen from the reasons recorded by the AO, we find that the AO has merely stated that it has been informed by the Director of Income-tax (Inv.), New Delhi, vide letter dated 16.06.2006 that the above named company was involved in giving and taking bogus entries/transactions during the relevant year, which is actually unexplained income of the assessee company. The AO has further stated that the assessee company has failed to disclose fully and truly all material facts and source of these funds routed through bank account of the assessee company. In the reasons recorded, it is nowhere mentioned as to who had given bogus entries/transactions to the assessee or to whom the assessee had given bogus entries or transactions. It is also nowhere mentioned as to on which dates and through which mode the bogus entries and transactions were made by the assessee. What was the information given by the Director of Income-tax (Inv.), New Delhi, vide letter dated 16.06.2006 has also not been mentioned. In other words, the contents of the letter dated 16.06.2006 of the Director of Income-tax (Inv.), New Delhi have not been given. The AO has vaguely referred to certain communications that he had received from the DIT (Inv.), New Delhi; the AO did not mention the facts mentioned in the said communication except that from the informations gathered by the DIT (Inv.), New Delhi that the assessee was involved in giving and taking accommodation entries only and represented unsecured money of the assessee company is actually unexplained income of the assessee company or that it has been informed by the Director of Income-tax (Inv.), New Delhi vide letter dated 16.06.2006 that the assessee company was involved in giving and taking bogus entries/transactions during the relevant financial year. The AO did not mention the details of transactions that represented unexplained income of the assessee company. The information on the basis of which the AO has initiated proceedings u/s 147 of the Act are undoubtedly vague and uncertain and cannot be construed to be sufficient and relevant material on the basis of which a reasonable person could have formed a belief that income had escaped assessment. In other words, the reasons recorded by the AO are totally vague, scanty and ambiguous. They are not clear and unambiguous but suffer from vagueness. The reasons recorded by the AO do not disclose the AO's mind as to what was the nature and amount of transaction or entries, which had been given or taken by the assessee in the relevant year. The reasons recorded by the AO also do not disclose his mind as to when and in what mode or way the bogus entries or transactions were given or taken by the assessee. From the reasons recorded, nobody can know what was the amount and nature of bogus entries or transactions given and taken by the assessee in the relevant year and with whom the transaction had taken place. As already noted above, it is well settled that only the reasons recorded by the AO for initiating proceedings u/s 147 of the Act are to be looked at or examined for sustaining or setting aside a notice issued u/s 148 of the Act. The reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No addition can be made to those reasons. Therefore, the details of entries or amount mentioned in the assessment order and in respect of which ultimate addition has been made by the AO, cannot be made a basis to say that the reasons recorded by the AO were with reference to those amounts mentioned in the assessment order. The reasons recorded by the AO are totally silent with regard to the amount and nature of bogus entries and transactions and the persons with whom the transactions had taken place. In this respect, we may rely upon the decision of Hon'ble jurisdictional Delhi High Court in the case of *CIT v. Atul Jain [2000] 299 ITR 383*, in which case the information relied upon by the AO for initiating proceedings u/s 147 of the Act did indicate the source of the capital gain and nobody knew which shares were transacted and with whom the transaction has taken place and in that case there were absolutely no details available and the information supplied was extremely scanty and vague and in that light of those facts, the Hon'ble Jurisdictional Delhi High Court held that initiation of proceedings u/s 147 of the Act by the AO was not valid and justified in the eyes of law. The recent decision of Hon'ble jurisdictional High Court of Delhi in the case of *Signature Hotels (P.) Ltd. (supra)* also supports the view we have taken above."

9. We do not see any reason to differ with the view expressed by the Tribunal. No substantial question of law arises for our consideration. The appeals are dismissed. There shall be no order as to costs.

8. *Respectfully following the propositions of law laid down in the judgments cited above to the facts of the case, we have no other alternative but to hold that the reopening of the assessments is bad in law."*

8. Applying the propositions of law laid down by the Tribunal in the above referred case-law to the facts of the case on hand, I hold that the re-opening is bad in law. Accordingly, the re-assessment is quashed.

As we have held so, we do not adjudicate the issue of non-service of notice u/s 143(2) of the Act, though the assessee has filed copies of the order sheet entries etc. to prove that no notice u/s 143(2) was served.

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

Kolkata, the 20th day of July, 2018.

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Dated : 20.07.2018
 {SC SPS}

Copy of the order forwarded to:

1. ***Naveen Bhatler***
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2. ***Assistant Commissioner of Income Tax, Circle-35, Kolkata***

3. CIT(A)-
 4. CIT- ,
 5. CIT(DR), Kolkata Benches, Kolkata.

True copy
 By order

Senior Private Secretary
 Head of Office/ D.D.O. ITAT, Kolkata Benches