

IN THE INCOME-TAX APPELLATE TRIBUNAL “E” BENCH MUMBAI  
BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 4278/Mum/2012 (Assessment Year 2005-06)

Mr. Vivek Vijay Nair C/o Pangea Shipping Agencies P. Ltd. 309, Skylark Building, Sector-11, CBD Belapur, Navi Mumbai-400614. <b>PAN: ADFPN8491C</b>	Vs.	ACIT-2(2), IT Office, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.
Appellant		Respondent

ITA No. 4279/Mum/2012 (Assessment Year 2005-06)

Smt. Sindhu Vijay Nair C/o Pangea Shipping Agencies P. Ltd. 309, Skylark Building, Sector-11, CBD Belapur, Navi Mumbai-400614. <b>PAN: AABPN7907N</b>	Vs.	ACIT-2(2), IT Office, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri M. Subramanian (AR)

Respondent by : Shri V. Justin (DR)

Date of Hearing : 13.06.2018

Date of Pronouncement : 12.09.2018

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. These appeals by two assessee (husband and wife) under Section 253 of Income-tax Act (the Act) are directed against the separate orders of Id. CIT(A)-5, Mumbai dated 14.03.2012 for Assessment Years 2005-06. In both the appeal, the assessee(s) have raised identical grounds of appeal except variation of amount in figure. The facts of both the appeals are almost identical, the appellants have raised identical grounds of appeal, and

therefore, both the appeals were clubbed heard together and are decided by a common order. For appreciation of facts, we are referring the facts and grounds of appeal raised in ITA No. 4278/Mum/2012:

1. On the facts and in the circumstances and in law, the proceedings initiated u/s 147 is invalid and bad in law.
  2. On the facts and in the circumstances and in law, the assessment order passed u/s 143(3) r.w.s. 147 is invalid and bad in law.
  3. On the facts and in the circumstances and in law, the learned C.I.T. (A) erred in dismissing the appeal.
  4. On the facts and in the circumstances and in law, the learned C.I.T. (A) erred in dismissing the appeal and that too without appreciating the facts and circumstances of the case fully and properly.
  5. On the facts and in the circumstances and in law, the learned C.I.T. (A) erred in confirming the action of the A.O. in making an addition of an amount of Rs. 1,38,600/- as 'unexplained investments'.
2. Brief facts of the case are that the assessee filed his return of income for Assessment Year 2005-06 on 10.08.2005 declaring an income of Rs. 23,873/-. In the return of income, the assessee claimed Long Term Capital Gain (LTCG) of Rs. 1,06,200/- on sale of 6000 share of Suryadeep Salt Refinery and Chemicals Works Ltd. The assessee has shown the sale consideration of Rs. 1,22,400/- and cost of investment at Rs. 16,200/-. The assessment was re-opened under section 147. Notice under section 148 date 12 .11.2011 was issued to the assessee. Following reasons were recorded and intimated to the assessee;

“1. Information has been received from the office of ITO 12(3)(4) that according to a list of beneficiary of hawala operated by Sh. Narendra R. Shah (list circulated by the office of CCIT Central,I, Mumbai), the assessee was one of the beneficiary of entry pertaining to transaction of shares of Suryadeep Salt Refinery and Chemicals Works Ltd. During the assessment proceeding for AY 2003-04, it is noted that assessee has done the transaction in share as under-

Purchase			Sale			LTCG
Date	Quantity	Amount	Date	Quantity	Amount	Rs.
20.06.2002	6000	16200	22.2.2004	6000	122400	106200

2. During the assessment proceeding for AY 2003-04, the whole transaction in the above-mentioned shares was proved that bogus transaction to claimed long-term capital gain. As from the above, it is noted that date of sale is 22.12. 2004, the assessment for AY 205-06 needs to be reopened. In the light of evidence on record pertaining to the hawala operator Shri Narendra R Shah reservists the assessee, it is apparent that assessee has concealed particular of his income in relation to the about transaction.

3. For the above reasons, in the light of tangible material available on record and anyway of the express provision of section 147 rws Explanation 1 and 2 thereof, I have reason to believe that income of assessee chargeable to tax has escaped assessment for AY 2005-06. Hence notice under section 148 is called for, read with section 151(2) of the Income tax Act.”

3. The assessee filed his reply in response to the notice under section 148 vide his reply dated 25.01.2011 and contended that return of income filed with ITO-Ward No. 15(3)(4) may be treated as return in response to the notice under section 148. The Assessing Officer issued the show-cause notice to the assessee vide order-sheet entry dated 21.09.2011 to treat the said transaction as unexplained money under section 69A. The assessee vide his reply dated 26.09.2011 contended that the assessee has earned genuine capital gain on sale of shares of Suryadeep Salt Refinery and Chemicals Works Ltd. and that he has furnished the details of LTCG, Capital Account, Balance-sheet and various supporting details for confirming genuineness of the capital gain. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer made the addition of total sale consideration as unexplained money under section 69. The assessing officer also reopened

the assessment for assessment year 2003-04 and made the similar addition on protective basis in the assessment year 2003-04. On appeal before the Id. CIT(A), the action of Assessing Officer was confirmed for the year under consideration. However, addition in the assessment year 2003-04 was deleted. Therefore, aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

4. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. The Id. AR of the assessee submits that the assessee has furnished all details while filing the original return of income. The assessee again during the re-assessment furnished all documentary evidences before the lower authorities. While making re-opening for the Assessment Year under consideration, the Assessing Officer also re-opened the assessment for Assessment Year 2003-04. The learned Commissioner (Appeals) deleted the addition in the assessment year 2003 -04. The learned Commissioner (Appeals) confirmed the addition in the assessment year under consideration. The assessee challenged the reopening before the learned Commissioner (Appeals). No finding was given by learned Commissioner (Appeals) on the validity of reopening of the reassessment. The learned AR of the assessee further submits that in the re-assessment proceedings all details were furnished before the lower authorities related with the transaction of shares of Suryadeep Salt Refinery and Chemicals

Works Ltd. The lower authority has not given any finding on the documentary evidences furnished by assessee.

5. On the other hand, the Id. DR for the Revenue supported the order of lower authorities. The Id. DR further submits that there was sufficient material before the assessing officer for treating the transaction of share is unexplained investment of the assessee.
6. We have considered the rival submission of the parties and have gone through the orders of authorities below. Ground number one and two relates to validity of reopening. We have noted that the assessment year under consideration is assessment year 2005-06. The assessing officer issued notice under section 148 dated 12 January 2011. The notice was issued after four years from the end of relevant assessment year. Admittedly the assessment was reopened after four year from the end of relevant assessment year. Therefore, the first proviso section 147 applicable on the facts of the present case. We have noticed that there is no satisfaction of assessing officer that there was any failure on the part of assessee to disclose fully and truly all material facts necessary for assessment. In the reasons of reopening the assessing officer has not referred that there was any failure on the part of assessee in disclosing fully and truly all the fact that assessee for the assessment of any income.
7. The Hon'ble Bombay High Court in NYK Line (India) Ltd Vs DCIT [2012] 28 taxmann.com 229 (Bom) held that where assessee had

disclosed all material facts relating to amount received as container detention charges at time of making assessment, mere fact that Assessing Officer had come to a different conclusion in respect of said income in subsequent assessment year would not justify reopening of assessment.

8. In *Idea Cellular Ltd Vs Deputy Commissioner of Income-tax* [2008] 301 ITR 407 (Bom) held that once all material was before Assessing Officer and he chose not to deal with several contentions raised by assessee in his final assessment order, it could not be said that he had not applied his mind; and in such a case reopening of assessment after four years could not be said to be justified.
9. In *Titanor Components Ltd Vs ACIT* [2012] 343 ITR 183(Bom) it was held that the Assessing Officer had not recorded the failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment year 1997-98. What was recorded was that the assessee had wrongly claimed certain deductions which he was not entitled to. There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material facts fully and truly. It is only in the latter case that the Assessing Officer would be entitled to proceed under section 147.

10. In Hindustan Liver Ltd Vs R.B. Wadkar (268 ITR 332) (Bombay) it was held:

“ 20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside.

22. Since we are setting aside the impugned notice only on the first ground of challenge, in our opinion it is not necessary to go to the other question and record our findings in that behalf.”

11. Considering the above referred legal position as settled by Hon'ble jurisdictional High Court, we find that the assessing officer has not recorded valid reasons for reopening of assessment. Therefore, the subsequent action

in re-assessing the transaction of capital gain as unexplained money is void ab-initio. In the result the ground number one and two of the appeals are allowed.

12. Even on merit we have noted that the assessee has placed sufficient documentary evidence to prove the genuineness of the transaction. The assessee has furnished the computation of total income, wherein the assessee has furnished complete detail about the transaction of share, on the sale of which the assessee earned capital gain. The assessee has filed the credit note, confirmation of the broker and the receipt of cash voucher, demat form etc. however, neither the assessing officer nor the learned Commissioner appeal discussed the evidence value of the documentary evidence furnished by assessee. The assessing officer relied upon the information of third-party without bringing any cogent material evidence against the assessee. Therefore in our view the assessee is liable to be succeeded even on merit.

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

**ITA No. 4279/M/2012**

14. The assessee has raised identical ground of appeal as raised in the case of her husband in ITA No.4278/M/2012. As we have allowed the appeal of assessee in ITA No.4278/M/2012, therefore following the principle of consistency the grounds of appeal raised in this appeal is also allowed with similar observations.

15. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 12/09/2018.

**Sd/-**  
**B.R. BASKARAN**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

Mumbai, Date: 12.09.2018

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**Copy of the Order forwarded to :**

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|-------------------------------|----------------------|
| 1. Assessee                   | 2. Respondent        |
| 3. The concerned CIT(A)       | 4. The concerned CIT |
| 5. DR "E" Bench, ITAT, Mumbai |                      |
| 6. Guard File                 |                      |

**BY ORDER,**  
**Dy./Asst. Registrar**  
**ITAT, Mumbai**