IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'SMC' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER,

ITA No. 4558/DEL/2019
[Assessment Year: 2009-10]

Magan Behari Lal, S-89, Greater Kailash II, New Delhi-110048	DCIT, Circle-16(2), C.R. Building, I.P. Estate, New Delhi-110002
	PAN-AAQPL1792A
Appellant	Respondent

Assessee by	Shri Salil Kapoor, Ms. Ananya Kapoor & Shri Sumit Lal Chandani,
Revenue by	Shri S.L. Anuragi

Date of Hearing	**11/09/2019**
Date of Pronouncement	**16/09/2019**

ORDER

This appeal by the assessee is preferred against the order of the CIT(A)-6, Delhi, dated 28/03/2019, pertaining to Assessment Year 2009-10.

2. The grievance of the assessee is twofold. Firstly, the assessee is aggrieved by the action of the CIT(A) to uphold the proceedings initiated u/s 148 of the Act as valid and lawful proceedings and secondly, the assessee is aggrieved by the addition of Rs.46,05,594/- made by the AO to the returned income of the assessee.

3. Representatives of both sides were heard at length. Case records were carefully perused and the judicial decisions relied upon by the representatives were carefully considered.

4. Briefly, stated the facts of the case are that the returned income of Rs.2,45,888/- was accepted u/s 143(1) of the Act. Later on proceedings were initiated u/s 148 of the Act the reasons for reopening of the assessment read as under:-

Reason for issue of Notice u/s 148 for the A.Y. 2009-10 in the case of Shri Magan Behari Lal.

1. The assessee is a director of the company which was incorporated on 23.02.1998 under the Company Act, 1956. The business of the assessee company not mentioned in the return of income for the assessment year 2009-10. The details of the directors of the assessee company are hereunder:-
(a) Magan Behari Lal.

The assessee filed its return of income on 04.08.2009 for the assessment year 2009-10 declaring income of Rs.2,45,890/-. No security assessment was made in this case.

Details of information received regarding escapement of income and analysis:-

2. The information in this case has been received from the Pr. Director of Income Tax (Investigation). Ahmedabad that the 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. 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 by brokers, pursuant to observations by the Finance Ministry about many such modifications taking placed in derivatives transactions at the National Stock Exchange during March, 2010.

The Ahmedabad Investigation Directorate, as an institutional response to be orchestrated misuse for client code modification for tax evasion, carried out coordinated limited purpose surveys u/s 133A of the I.T. Act, 1961 at the premises of 12 brokers and few of their clients across India on 23.03.2015.

The survey repost has been prepared by the ADIT(Inv.) Unit-1(3), Ahmedabad on the basis of data received from National Stock Exchange (NSE). After analysis of data received from NSE and after considering the contention of brokers, it is concluded by the ADIT that CCM has been used as a tool for tax evasion. The genuine contentions of brokers have been duly addressed in the Survey Report. Only settled trades have been considered to arrive at the beneficiaries.

The name of the assessee, Shri Magan Behari Lal, appears in the list of beneficiaries who have taken accommodation entries in the garb of fictitious losses /profit operated by the brokers. The accommodation entries have been taken provided in lieu of certain percentage of commission paid, mostly in cash, by the beneficiaries of such entries.

I have perused the information received from the Investigation Wing. The report explains at length the modus operandi of the entry operators along with the relevant evidence unearthed during the Survey u/s 133A of the I.T Act, 1961. The report brings out the fact that the flow of funds from between these share broking entities/concerns and the beneficiaries do not represent any genuine or actual business transaction.

The aggregate reduction in income of the assessee comes to Rs.46,05,094/- on account of such Client Code Modification. Having perused and considered the information received from the Investigation Wingh, as discussed above and in the circumstances of the case. I have reason to believe that income of the assessee to the extent of Rs.46,05,094/- has escaped assessment and the case is fit for issuing notice u/s 148 of the Income Tax Act, 1961.

Income Tax Return in the case for the A.Y. 2009-10 was filed by the assessee company on 04.08.2009 declaring income of Rs.2,45,890/- vide acknowledgment no.209. the assessee has intentionally avoided furnishing true and complete particulars of this transaction. In view of the above, I therefore have reason to believe that the income of Rs.46,05,094/- has escaped assessment as defined by Section 147 of the I.T. Act, 1961.

Reasons for formation to belief.

10. Considering the information received from the Pr. Director of Income Tax (Investigation), Ahmedabad and in the light of contents of the return of income filed by the assessee for the assessment year under consideration, it is a case where income to the extent to sum of Rs.46,05,094/- by way of shifting out the ascertained profit of Rs. NIL and by way of shifting in ascertained loss of Rs.46,05,094/- as appearing in the details supplied by the Investigation Wing (Ahemdabad) has been suppressed in its books of accounts and return of income for the year under consideration by the assessee with the connivance of the share brokers in consideration of commission paid thereon in cash to the brokers. Hence, I have reason to believe that the income of the assessee to the extent of Rs.46,05,094/- has escaped assessment.

Prior to 1989 section 147 provided for two grounds to reopen concluded assessments:-

i. *On basis of information received by the Assessing Officer assessment could be reopened. This had to be within four years.*
ii. *Where facts material for assessment are not disclosed in the course of assessment, whether within or beyond four years.*

Supervening these two requirements in the alternative, the initial condition is that the Assessing Officer has reason to believe that there is escapement of income. The first requirement regarding information is now dropped by 1989 amendment and therefore for reopening of assessment within a period of 4 years form the end of assessment year the only requirement is ''reason to believe''. For a period beyond 4years in case where an original assessment by was made u/s 143(3), further, requirement is the non-disclosure of material facts necessary for assessment by the assessee. However, in cases where no scrutiny assessment

has been made even beyond period of 4years the only requirement is reason to believe"

In this case return of income was filed for the year under consideration but no ***Scrutiny assessment u/s 143(3)*** *of the Act was made accordingly, in this case, the only requirement to initiate proceedings u/s 147 is reason to believe as recorded above. Since, the assessee has filed return of income for the year but no scrutiny assessment was made clause (b) of explanation 2 to section 147 is applicable and this is a deemed to be case where income chargeable to tax has escaped assessment.*

In this case the four years but not more than six years have elapsed from the end of the assessment year under consideration and income chargeable to tax which has escaped assessment is more than 1 lakh necessary sanction to issue notice u/s 148 of the Act is being obtained separately from the Pr. Commissioner of Income Tax-06, Delhi under amended provisions of section 151 of the Act w.e.f. 01.06.2015.

5. At the very outset, the counsel for the assessee drew my attention to the aforementioned reasons recorded for the reopening of the assessment and pointed out that the AO has simply relied upon the information received from Pr. DIT(Inv.), Ahmeadabad without applying his own mind. It is the say of the counsel that in plethora of judgments, the Hon'ble High Courts and the Tribunals have quashed the reassessment proceedings on such stereo type reasons devoid of any application of mind.

6. Per contra, the Ld. DR stated that at the stage of reopening the assessment all that the AO has to see is whether there is a prima facie case. For this proposition, strong reliance was placed on the decision of the Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd. vs ITO & Ors. [236 ITR 34] and decision of the Hon'ble Delhi High Court in the case of Paramount Communication (P.) Ltd. [392 ITR 444](Delhi). The Ld. DR also relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of Rakesh Gupta vs CIT [93 taxmann.com 271](P & H).

7. I have given a thoughtful consideration to the orders of the authorities below qua the issue. The reasons for reopening of assessment have been exhibited elsewhere. It can be seen from the reasons that the assessment has been reopened solely on the basis of information received from Pr. DIT(Inv.), Ahmedabad. It seems that the AO has been carried away by the report of the investigation wing without making any independent verification to justify the reopening. The Hon'ble High Court of Bombay in the case of Coronation Agro Industries Ltd. vs DCIT [390 ITR 464](Bom.) had an occasion to consider an identical issue with identical set of facts has held that notice u/s 148 of the Act is without jurisdiction. The relevant finding of the Hon'ble High Court is read as under:-

> *"**2.** This petition challenges notice dated 31st March, 2016 issued under Section 148 of the Income Tax Act, 1961. The impugned notice seeks to reopen the assessment for Assessment Year 2009-10. The regular assessment proceedings were completed on 28th December, 2011 under Section 143(3) of the Act.*
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> ***3.** The reasons in support of the impugned notice relies upon the information received from the Principal Director of Income Tax that the petitioner has benefited from a client code modification by which a profit of Rs.22.50 lakhs was shifted out by the petitioner's broker, resulting in reduction of the petitioner's taxable income. The only basis for forming the belief is the report from the Principal Director of Income Tax and the application of mind to the report of the Assessing Officer along with the record available with him. This information and application of mind has led the Assessing Officer to form a reasonable belief that there is not only an escapement of income but there has been failure to truly and fully disclose all material facts and information as the modus operandi of shifting profits was not known to the Revenue as not disclosed by the petitioner when the Assessing Officer passed the order in regular assessment proceedings.*
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> ***4.** We note that the reasons in support of the impugned notice accept the fact that as a matter of regular business practice, a broker in the stock exchange makes modifications in the client code on sale and / or purchase of any securities, after the trading is over so as to rectify any error which may have occurred while punching the orders. The reasons do not indicate the basis for the*

> *Assessing Officer to come to reasonable belief that there has been any escapement of income on the ground that the modifications done in the client code was not on account of a genuine error, originally occurred while punching the trade. The material available is that there is a client code modification done by the Assessee's broker but there is no link from there to conclude that it was done to escape assessment of a part of its income. Prima facie, this appears to be a case of reason to suspect and not reason to believe that income chargeable to tax has escaped assessment.*
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> ***5.*** *In the above view, prima facie, we are of the view that the impugned notice is without jurisdiction as it lacks reason to believe that income chargeable to tax has escaped assessment."*

8. The Hon'ble High Court of Gujarat in the case of Harikishan Sunderlal Virmani vs DCIT [303 CTR (Guj.) 214] again had the occasion to consider similar issue on identical set of facts and has quashed the notice issued u/s 148 of the Act. The relevant findings of the Hon'ble High Court read as under:-

> *"5.3. Thus from the reasons recorded, the reopening of the assessment is on the information/data supplied by the office of the Principal Director of Income Tax (Investigation), Ahmedabad and the information received from the Principal Director of Income Tax (Investigation), Ahmedabad vide his confidential letter dated 8/3/2016. From the information received, it appears that though the client code of the assessee with the broker - Guinness Securities Limited was WW/2647, modified client code was found to be WW/2108 and therefore, to verify the genuineness of the modification of the client code, by applying Lavenshtein Distance Analysis or digit edit analysis utility, distance was found to be 3 and therefore, it is believed that the code is not wrongly typed and it is termed as deliberate change and establishing non-genuineness and contrived nature of the code change. From the reasons recorded, it does not appear that verification of the material on record there is independent formation of opinion by the A.O. and that any income has escaped assessment due to any failure on the part of the assessee in not disclosing truly and correct facts/material necessary for assessment. From the reasons recorded, it appears that the impugned reopening proceedings are on the borrowed satisfaction. No independent opinion is formed. On the plain reading of the reasons recorded what emerges is that the A.O. on considering the information received from the Principal Director of Income Tax (Investigation), Ahmedabad, reassessment proceedings have been initiated on the ground that the income escaped assessment. However, there is no assertion regarding the basis on which material on record, he has come to such conclusion. Therefore, the material on the basis of which the A.O. seeks to assume the*

jurisdiction under section 147 if the Act is the information received from the external source viz. the Principal Director of Income Tax (Investigation), Ahmedabad. It cannot be disputed that on the basis of the information received from another agency, there cannot be any reassessment proceedings. However, after considering the information/material received from other source, A.O. is required to consider the material on record in case of the assessee and thereafter is required to form an independent opinion on the basis of the material on record that the income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment for the verification.

5.4 *At this stage it is required to be noted that even in the reasons recorded, there is no allegation that there was any failure on the part of the assessee in not disclosing truly and fully material facts necessary for assessment. Under the circumstances, the assumption of the jurisdiction to reopen the assessment beyond the period of four years in exercise of powers under section 147 of the Act is bad in law and contrary to the provisions of section 147 of the Act. Under the circumstances, on the aforesaid ground alone, the impugned reassessment proceedings deserve to be quashed and set aside.*

5.5 *In view of the above and for the reasons stated above, present petition succeeds. The impugned notice issued under section 148 of the Income Tax Act, 1961 and reopening of the proceedings for A.Y. 2009-2010 cannot sustain and the same deserves to be quashed and set aside and are hereby quashed and set aside. Rule is made absolute accordingly. In the facts and circumstances of the case, there shall be no order as to costs."*

9. The Hon'ble High Court of Delhi in the case of PCIT vs Meenakshi Overseas (p.) Ltd. 395 ITR 677 (Del.) was seized with the following question of law for consideration as.

"Whether the ITAT erred in law and on facts in quashing the assessment proceedings u/s 147/148 of the Act ?"

And the Hon'ble High Court answered the question in negative i.e. in favour of the assessee and against the Revenue. The relevant findings of the Hon'ble High Court read as under:-

"22. *As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information*

set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow therefrom.

23. *Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.*

24. *The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.*

25. *At this stage it requires to be noted that since the original assessment was processed under Section 143 (1) of the Act, and not Section 143 (3) of the Act, the proviso to Section 147 will not apply. In other words, even though the reopening in the present case was after the expiry of four years from the end of the relevant AY, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment.*

26. *The first part of Section 147 (1) of the Act requires the AO to have "reasons to believe" that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre- condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment."*

10. Respectfully following the decision of the Hon'ble High Courts (supra), I am of the considered view that the reasons recorded for reopening of the assessment are devoid of any independent application of mind by the AO and therefore, the notice issued u/s 148 of the Act deserves to be quashed.

11. Since, the reopening of the assessment has been quashed by me thereby making assessment order bad in law, I do not find it necessary to dwell into the merits of the additions.

12. Before closing, I have to say that all the decisions relied upon by the Ld. DR are misplaced as they are clearly distinguishable on the facts of the case in hand.

13. In the result, appeal filed by the assessee is allowed on the point of law.

The order is pronounced in the open court on 16/09/2019

Sd/

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Delhi; Dated: 16/09/2019.
Shekhar, Sr. P.S
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi