

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI
BEFORE SHRI R.C. SHARMA (ACCOUNTANT MEMBER) AND
SHRI PAWAN SINGH (JUDICIAL MEMBER)
ITA NO. 5324/MUM/2015 (ASSESSMENT YEAR : 2009-10)

M/s Comet Investments Pvt Ltd, 2 nd Floor, Office No.3, Kothari House, 5/7, Oak Lane, Above Gokul Restaurant, Fort, Mumbai-400 023 PAN : AAACC2051Q	Vs	DCIT 4(1), Aayakar Bhawan, M.K. Road, Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Shri Ajay R Singh Advocate
Respondent by	Shri Abi Rama Kartikeyan Sr DR
Date of hearing	03-09-2019
Date of pronouncement	23-09-2019

O R D E R

Per Pawan Singh, Judicial Member:

1. This appeal by assessee is directed against the order of CIT (A)-9, Mumbai dated 21-09-2015 which in turn arises from assessment order dated 236-04-2014 u/s 143(3) r.w.s. 147 for the assessment year 2009-10. The assessee has raised following grounds of appeals:-

I. Reopening of Assessment:

1. The Learned CIT(A) erred in upholding the reopening of assessment made u/s.147 of the Act without considering facts that it is based on the conjectures, surmises and assumptions and not on any tangible material, even if some information was received the AO failed to apply his independent mind to such material before reopening the completed assessment u/s. 143(3) dt. 25/10/2011.

2. The learned CIT(A) failed to appreciate the fact, that the A.O. had not furnished the copy of recorded reasons on the basis which case was reopened. Therefore, A.O. has failed to follow the due process of law. This fact was raised in the grounds of appeal before the Id. CIT (A).

II. Violation of Natural Justice:

3. The CIT (A) erred in upholding the asst order passed by the A.O. without providing a copy of the Statement of Mr. Mukesh Choksi on the basis of which the assessment was reopened and further no opportunity was granted to the Assessee for cross examination, inspite of specific request was made by the Assessee before AO as well before CIT (A).

4. The CIT(A) erred in confirming the action of the A.O. in relying on the assessment of another assessee without providing copy of order, nor providing statement/ information/opportunity for cross examination of the said alleged party. Hence the principle of natural justice is violated at time of assessment as well as before appellate authority.

III. Addition of Rs. 76,09,694/- as undisclosed income

5. The learned CIT (A) erred in confirming the addition of Rs. 76,09,694/- [Rs. 1,26,21,585/- minus Rs 50,11,891/-] without appreciating that the profit earned from the derivative transactions entered by the appellant was duly offered to the tune of Rs. 50,11,891/- which were genuine and were duly supported by all the supporting evidence like the details of bank statements showing transaction, Copy of contract notes, Form 10DB etc were furnished, thus the addition made on basis of some alleged information may be deleted.

6. The learned CIT(A) erred in treating Rs.76,09,694/- as undisclosed income without establishing that any transaction over and above Rs. 50,11,891/- have taken place by the assessee. Hence, the addition may be deleted.

IV. Addition of Rs.3,80,485/- towards alleged commission paid.

7. The learned CIT(A) erred in confirming that the appellant had paid commission of 5% of 3,80,485/- for alleged purchase of engineered gains and making addition without bringing any records or evidence,

hence the addition IS on .assumption and conjectures, the same may be deleted.

8. The Assessee denied the penal interest levied u/s 234A, 234B and 234C.

2. The brief facts of the case are that assessee is a company carrying on the business of trading in shares, shares derivatives and commodity derivatives filed its return of income for AY 2009-10 on 30-09-2009 declaring total loss of Rs.71,26,634/- including speculation loss of Rs.32,47,320/-. Initially, the return of income was processed u/s 143(1) u/s on 23-10-2010. Subsequently, the return was selected for scrutiny and assessment was completed u/s 143(3) on 25-10-2011 by making the disallowance of dividend stripping, marked to market loss. Thereafter, the case was reopened on the basis of information received from DGIT (Inv), Mumbai that a search operation was conducted in case of Mahasagar Securities and Mukesh Choksi group on 25-01-2009. During the search action, Shri Mukesh Choksi admitted to have engaged in fraudulent billing activities and in providing accommodation entries of short term capital gain, speculation profit and loss and providing share application money. Mukesh Choksi also admitted to have provided the entries to assessee. On the basis of information, the AO reopened the assessment. The AO completed the assessment u/s 147 r.w.s. 143(3) on 26-03-2014. The AO, while

passing the assessment order, made addition of Rs.76,09,694/- on account of undisclosed income and addition of Rs.3,80,485/- on account of commission paid for availing accommodation entries towards bogus transaction found to have been made with Allianz Intermediaries & Network Pvt Ltd which was allegedly controlled by Shri Mukesh Choksi. On appeal before CIT(A), the action of AO in reopening as well as on making addition on account of undisclosed income and commission payment was upheld. Further aggrieved, the assessee has filed present appeal before us.

3. We have heard the submission of Ld.AR of the assessee and the Ld. DR for revenue and perused the material available on record. The Ld.AR of the assessee submits that the original assessment was completed on 25-10-2011 u/s 143(3) wherein certain addition and disallowances were made. Notice u/s 148 on 26-03-2013 on the basis of information received from DGIT (Inv) about the search action conducted on Mukesh Choksi group. The assessee filed objection against the reopening interalia objecting to the notice that the assessee has not done any transaction with Mahasagar Securities. The assessee was not supplied the reasons for reopening. The assessee specifically submitted that entries relating to Rs.50,11,891/- were fully backed by

contract notes and entry in the books of account. Copies of ledger accounts were submitted. Copy of bank accounts and statements were also submitted. There was no entry and supporting evidence of any receipt of Rs.76,09,637/-. The AO made addition without any supporting evidence or verification of fact. No finding on the documentary evidence furnished by the assessee was given by the assessing officer. The assessee brought all materials on record in relation to transaction before the AO. The assessing officer made addition on the basis of presumption and assumption. The Ld.CIT(A) confirmed the action of AO without appreciating the facts. The Ld.AR further submits that on similar set of facts Tribunal restored the case of assessee for AY 2008-09 to the file of the AO in ITA No.5253/Mum/2015 dated 11-10-2017. The Ld.AR further submits that facts of the year under consideration are different. The re-assessment for this year is absolutely not valid as reasons recorded was not supplied to the assessee. The Ld.AR also furnished his written comments on the validity of reopening as well as on merits of the case.

4. On the other hand, the Ld. DR for the revenue supported the order of lower authorities. The Ld. DR further submits that the assessing officer has sufficient and tangible material to make a belief that income

of assessee to the extent of Rs.76,09,673/- which was a result of accommodation entry availed by assessee from Mukesh Choksi. The Ld. DR supported the action of AO in reopening as well as on addition of Rs.76,09,634/-.

5. We have considered the rival submissions of both the parties and perused the material available on record. We have noted that besides challenging the validity of reopening, the assessee has vehemently argued that the AO has made addition of Rs.76,09,634/-. The Ld.AR also vehemently submitted that entries relating to Rs.50,11,891/- are fully supported by contract notes and entry in the books of account. Perusal of assessment order reveals that assessee furnished various documents to substantiate about the genuineness of transaction which consists of copies of bills of Goldstar Finvest P Ltd, copy of bank statement, etc. The AO has not given any finding on those documentary evidences. We have further noted that on similar alleged bogus entries in the case of assessee for AY 2008-09 was restored to the file of the AO in ITA No.5253/Mum/2015 dated 11-10-2017 with the following directions:-

“6. We have considered the rival submission of the parties and have gone through the orders of authorities below in re-assessment proceeding observed that in the search operation in case of Mahasagar Securities Pvt. Ltd., it was revealed that the assessee has availed accommodation entries

from Mukesh Choksi group. The assessee was asked to produce the detailed of Commodity derivatives, party wise details of loss, Security Transaction Tax certificate, master summary of transaction and details of any other transaction carried out with Mukesh Choksi. The assessee in response to the queries of AO submitted his reply dated 13.02.2014 and submitted the details of cumulative share trading report for loss incurred from derivatives operation of Rs. 1,81,74,2487- for Assessment Year 2008-09. The assessee further furnished the detailed of transaction and contended that all the transactions were genuine. The assessee further contended that they have paid the Security Transaction Tax of Rs. 52,44,9677- and eligible for rebate under section 88E of the Act. The contention of the assessee was not accepted by the AO holding that during the course of search from the seized computer data, list of beneficiary was taken and the assessee is reported to one of the beneficiary and the assessee has availed final accommodation entries of Rs. 1,13,76,3637-. The Assessing Officer, thus, made the addition of Rs. 1,13,76,6367- and further added commission payment @ 5% on such unexplained money. The Id. CIT(A) confirmed the action of Assessing Officer holding that transaction made with Alliance Intermediary and Network Pvt. Ltd. (group concerned of Mukesh Choksi) were found to be bogus by the Investigation Wing of the Income-tax Department and that the assessee has not been able to furnish report under section 10DB in support of Security Transaction Tax. The addition on commission payment was also sustained holding that there cannot be any doubt that assessee can get any Entry from any other business entity without any payment of commission of money.

7. *We have seen that neither the Assessing Officer nor the Id. CIT(A) made any comment on the various documentary evidences furnished by assessee. The assessee vide his letter dated 01.09.2010 furnished the Ledger Account of transaction charges and the detailed of Security Transaction Tax paid along with the Ledger copies to Form 10DB (copy of which available on page no. 41 & 42 of the Paper Book). The assessee furnished the Ledger Account derivative trading ledger (page No.*

42 of Paper Book). We have further seen that no independent investigation was carried out by AO before making addition in the income of assessee. The assessee vide its letter dated 11.09.2013 (Page 53 & 54 of Paper Book) that assessee has not made any transaction with Mahasagar Securities Pvt. Ltd. and that all transaction were made through M/s Goldstar Finvest (P) Ltd.

8. In our view, the Assessing Officer has passed the assessment order without giving any finding on the submission and documentary evidences furnished by assessee. The Assessing Officer has relied upon the statement of Mukesh Choksi. No opportunity of cross-examination was provided to the assessee nor was the copy of statement given to assessee on which the Assessing Officer relied. Considering the decision of Hon'ble Apex Court in case of ITO vs. M. Pirai Choodi (supra), we deem it appropriate to restore the ground no. 5,6 &7 to the file of Assessing Officer to decide the same afresh in accordance with law. Needless to say the assessing officer shall grant sufficient opportunity of hearing to the assessee before passing the order afresh. The Assessing Officer is also directed to consider the documentary evidences furnished by the assessee and further to provide all the material which may be used against the assessee. Hence, the ground No. 5 to 7 of the appeal is allowed for statistical purpose.”

6. Considering the decision of Tribunal, the addition made by AO is restored to the file of AO to examine the facts afresh by considering the documentary evidences furnished by assessee. Though, the Ld.AR for the assessee made his submission on the validity of reopening; however, the issue of validity of reopening is kept open as we have restored the addition on merit to the file of the AO. The AO is directed to consider the contention of assessee that Rs.50,11,891/- is fully recorded in the books of assessee were verifiable. The AO shall pass a

speaking order on the contentions of the assessee, after giving opportunity of hearing to the assessee.

7. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 23-09-2019.

Sd/-

Sd/-

(R.C. Sharma)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 23rd September, 2019

Pk/-

Copy to :

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

By order

Asstt. Registrar, ITAT, Mumbai