

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.3858/Del/2016  
Assessment Year: 2011-12

M/s. Modi Industries Ltd., Modi Nagar, Uttar Pradesh	<b>Vs.</b>	ACIT, Central Circle-31, New Delhi
<b>PAN :AAACM2063Q</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Shri Rohit Jain, Adv. Ms. Deepashree Rao, CA
Respondent by	Shri Sankar Naskar, Sr.DR

Date of hearing	30.10.2019
Date of pronouncement	07.01.2020

**ORDER**

**PER O.P. KANT, AM:**

This appeal by the assessee is directed against order dated 28/04/2016 passed by the Ld. Commissioner of Income-tax (Appeals)-30, New Delhi, for assessment year 2011-12 raising following grounds:

1. *That the Commissioner of Income Tax (Appeals) [‘CIT(A)’] erred on facts and in law in not holding that the assessment order passed by the assessing officer under section 147/143(3) of the Income-tax Act, 1961 (“the Act”) is beyond jurisdiction, bad in law and void-ab-initio.*

- 1.1 *That the CIT(A) erred on facts and in law in upholding validity of re-assessment proceedings without appreciating that the same were initiated without there being 'reason to believe' that income of the appellant had escaped assessment and were based on incorrect inference drawn from documents already available on record.*
- 1.2 *That the CIT(A) erred in not appreciating that reassessment proceedings under section 147 of the Act having been initiated merely on the basis of certain third party information, without independent application of mind by the assessing officer, is illegal and bad in law.*

**Without Prejudice**

2. *That the CIT(A) erred on facts and in law in upholding the disallowance of travel expenditure amounting to Rs.1 1,00,000, incurred by the appellant for availing services of a chartered flight on the ground that the appellant had failed to substantiate that such expenditure was incurred wholly and exclusively for the purpose of business.*
  - 2.1 *That the CIT(A) erred on facts and in law in concluding that the chartered flight services were not availed for business purposes, disregarding the evidences filed by the appellant during the course of assessment/ appellate proceedings.*
  - 2.2 *That the CIT(A) erred in not appreciating that the expenditure was incurred in relation to travel of directors/executives of the appellant-company, which undoubtedly was a business expenditure incurred wholly and exclusively for the purposes of business.*
  - 2.3 *Without prejudice, the CIT(A) erred in not restricting the amount of disallowance to Rs.9,97,280, being the actual amount of expenditure claimed as deduction by the appellant in the relevant assessment year.*

**2.** Briefly stated facts of the case are that the assessee filed return of income on 29/09/2011, declaring total income at nil. The assessment under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 16/12/2013 at nil income after set off of brought forward losses of earlier years amounting to Rs.3,79,34,262/- and after making following additions:

1.	Income from house property	Rs.1,77,89,974/-
2.	Expenses disallowed under section 14A of the Act	Rs.3,99,055/-
3.	Out of expenses	Rs.85,000/-

**3.** Subsequently, the Assessing Officer issued notice on 07/04/2014 under section 148 of the Act in view of reason to believe that the payment of Rs.11 lakh made to Mrs. J.K. Lakshmi Cement Ltd., on account of hiring of a chartered flight was not incurred for business purposes. The assessee objected to the issue of notice under section 148 of the Act and also filed a letter dated 06/03/2014 stating that return of income filed on 29/09/2011 might be treated as return filed in response to notice under section 148 of the Act. The Assessing Officer completed assessment under section 143(3) read with section 147 of the Act on 05/05/2014 after making disallowance of hiring charges for chartered flight amounting to Rs.11 lakhs. The assessee filed appeal before the Ld. CIT(A) and made detailed submissions objecting the legality of issuing notice under section 148 of the Act as well as on merit. The detailed submission of the assessee have been reproduced by the ld. CIT(A) on pages 8 to 28 of the impugned order. According to the assessee, the Assessing Officer has formed his reasons to believe on the basis of suspicion that the expenditure incurred was not business expenditure and there was no tangible material before him and it was based on enquiry to be conducted in future. The assessee relied on the decision of the Allahabad High Court in the case of Indra Prastha Chemicals

Private Limited Vs. CIT, 271 ITR 113, wherein it is held that reason to believe must be in good faith and should have a rational connection. The assessee also contested that there was no fresh tangible material for forming reasons to believe that income escaped in the case of the assessee. The ld. CIT(A), however, rejected the grounds challenging issue of notice under section 148 observing as under:

*“4.3 Findings: The findings are as under:-*

*4.4 I have carefully considered the reasons recorded for issuing notice u/s 148, objections filed by the assessee before the A.O. and the objections dealt by the A.O., assessment order, written submissions, case laws relied upon and oral arguments of Ld. AR. The objections/arguments of the appellant are discussed as under:-*

*(i) In the assessment proceedings, assessee filed the objections before the A.O. which has been disposed off vide letter dated 07.4.2014 and has been reproduced in the reassessment order dated 05.5.2014 at para 2 at page no. 1 to 4.*

*(ii) In the assessment proceedings, A.O. has dealt all the objections raised against the action initiated u/s 148 and after considering the same, the objections were rejected. On perusal of the same, it is clear that reason to believe, is based on the fact that the alleged expenses of Rs. 11,00,000/-, has been claimed in the P & L account for hiring the unscheduled-chartered flights for travelling by the directors, which is found to be unusual for the business purposes of the assessee company and therefore, there was no suspicion and presumption for this fact. Based on these facts, the reason to believe, for incurring alleged expenses on travel by the director and other senior level officers, not incurred wholly and exclusively for business purposes, was re-affirmed.*

*In view of the above facts, I do not agree with the arguments of the appellant and therefore, I do not find any infirmity in the action of the A.O. for issuing notice u/s 148.*

*Accordingly, ground no. 1, is hereby dismissed.”*

**3.1** The Id. CIT(A) also rejected the contention of the assessee on merit of the addition observing as under:

*“5.4 Findings : The findings are as under:-*

*5.5 I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of Ld. AR. The objections/arguments of the appellant are discussed as under:*

*(i) In the re-assessment proceedings, the assessee was asked vide questionnaire dated 07.4.2014 to provide the details and justification to prove that the expenses on hiring of non-scheduled chartered flight (from Delhi to Tuticorin via Coimbatore and back to Delhi by same route), have been incurred wholly and exclusively for business purposes, which was used by the director and GM/DGM. In response to this query, the assessee filed written submission vide letter dated 14.4.2014 and relevant portion has been reproduced by the A.O. in the assessment order at para 4 at page 5 (supra). However, these submissions did not find favour with the A.O. and it was held by the A.O. that services of chartered flights availed by the director, Shri Mamsh Modi, were not wholly for the purpose of the business needs of the assessee company. Accordingly, the expenditure of Rs. 11,00,000/- disallowed and added back to the total income.*

*(ii) In the appellate proceedings, it has been submitted that the appellant is a multi unit product company and operates from various location across India and therefore, in order to undertake their business operations, the employees/Directors have to travel to various locations. It has also been submitted by the appellant that the appellant is a sick company, there are numerous legal proceedings pending before various forums, which also involves travelling by senior staffs, executive and director to different locations. Accordingly, it is submitted that Rs. 11,00,000/- was incurred by the appellant in relation to travel by one of the director of the appellant company, for discharging certain business commitment. It has also been submitted that total expenditure aggregating to Rs. 326.21 lacs, is in respect of tour and travelling, which constitutes nearly 1.37% of the total turnover.*

*(iii) In the appellate proceedings, it has also been submitted by the appellant that the A.O. has no corroborative evidence to support that the chartered flight service was not availed for business purposes and the A.O. has not held that the expenditure of Rs. 11,00,000/-, is excessive or unreasonable and therefore, the A.O. has wrongly given findings that expenditure under consideration has not been incurred wholly and exclusively for business purposes.*

*(iv) During the appellate proceedings, the appellant was required to prove the business activity carried out at the places of destinations,*

*travelled by chartered flight on 18.02.2011. In this regard, the appellant has submitted vide letter dated 30.10.2015, the tour reports dated 25.02.2011 only and for sake of clarity, the same is reproduced as under:-*

*"TOUR REPORT*

*With a view to improve Modi Arc Electrodes Co. 's presence in Southern India, efforts are being made to motivate dealers of the area near Coimbatore and Tuticorin.*

*As suggested by Mr. Sukumaran of M/s Universal Agency, Trichy, an emergent meeting of our advisor Mr. Manish Modi and other marketing executives from Head Office was fixed with BHEL, Eversendai, Edac Engineering, Essae Associates and many more.*

*BHEL-Trichy and Eversendai engineering are big consumer of product of Modi Arc Electrodes and other Welding consumables of all types.*

*Since the meeting was fixed with a very short notice and no regular flight was available, so as to reach the destination in time, a chartered plane had to be hired.*

*The following Executives traveled to Coimbatore and Tuticorin in the plane on dt. 18/2/2011.*

- 1. Mr. Manish Modi, Marketing Advisor*
- 2. Mr. Sanjay Bhatia, CEO*
- 3. Mr. Lajpat Yadav, GM Marketing*
- 4. Mr. U.K. Sharma, DGMR &D*
- 5. Mr. Kapil Singh, GMHRD*

*Meeting were held with the following parties of the nearby area:-*

*1. BLACKSMITH.COIMBATORE 1/314-B, HAPPY GARDEN COLONA  
METTUPALAYAMROAD, COIMBATORE,T.N COIMBA TORE-641031  
PHONE-0422-2462480*

*2. ESSAE ASSOCIATES  
BHARATHIYAR RD..433.D. SUGUNABUILDING, NEAR WOMEN'S  
POLYTECNIC, PAPPANICHKEN PALAYAM COIMBATORE-641037  
PHONE-0422-2240733/9344934855*

*3. JAYAHARI TRADERS  
1/196-8, POORNIMA COMPLEX, KTVRENGG. COLLEGE ROAD,  
MADDAMPALAYAM COIMBATORE-641019  
Phone-09865894562*

*4. VIGNESH AGENCIES  
G-1, VIGNESH PARK RAMNAGAR COIMBATORE, TAMIL NADU  
COIMBATORE-641009 Phone-0422-2233455/09787772733*

*5. UNIVERSAL AGENCY-TRICHY*

45 A/2C, TANJORE ROAD, OPPOSITE MARIAMMAN TEMPLE-TRICHY,  
T.N TRICHY-620008 Phone-9443136185

6. SANDHYA ENGINEERING

NO 4/123 K/2, MUTHAMMAL COLONY ETTAYA PURAM ROAD,  
TUTICORIN, T.N TUTICORIN-628004 Phone-0461-2347600/5532400

7 EDAC ENGINEERING LTD.

C/0 COASTAL EN.P.LTD.2X600 MWMUTIARA T.P.P VILLAGE  
MELAMARUDUR, OTTAPR, TUTICORIN,  
TUTICORIN-628105 Phone-044-22301941

8 EVERSENDAI CONSTRUCTION PVT. LTD.

PLOT NO:B5 & B6,B6,B7,B8,B18 ATGKINDSTL PARK REDDIMANGUD1,  
LALGUDI TALUK, TRICHY-621105 Phone-044-40701230

9 B.H.E.L-TRICJY

FOSSIL BOILERS, B.H.KL, BOILER PLANT PROJECT P.O.-  
TIRUCHIRAPALLI, (T.N)  
TRICHY-620014

*The meeting were quite useful and the parties showed their interest in  
Modi Arc's product.*

*(Sanjay Bhatia) (Lajpat Yadav)"*

*Besides the above, no evidence/correspondence have been filed for the  
alleged discussion/business related activities, carried out at Coimbatore  
and Tuticorin with customers, as claimed in the tour report. As per the  
tour report, 5 persons have travelled in the chartered plane on  
18.02.2011, but neither exigency have been proved for hiring the  
chartered flight nor business activities carried out at the places of  
destinations.*

*(v) Further, as per journal voucher filed at page 78 of the paper book, the  
narration has been mentioned as "EXPS. OF CEO BY JK LAKSHMI  
CEMENT FROM DEL- CJB-TCR-CJB-". However, the CEO in the tour  
report, is Shri Sanjay Bhatia, whereas no mention about other  
employees/directors of the appellant company.*

*(vi) During the appellate proceedings, the appellant was also required to  
file details of sales made with 9 parties mentioned in the tour report for  
F.Y. 2010-11 to F.Y. 2012-13, to prove the benefits in the form of  
increase in the sales, as a result of alleged tour conducted for business  
purposes. In response to this, the appellant has filed details vide letter  
dated 26.4.2016 and same are reproduced as under:-*

SI. No.	PARTY & ADDRESS	YEARS			Remarks
		2010-11	2011-12	2012-13	

1	B.H.E.L.-TRICHYFOSSIL BOILERS,BH.EL, BOILER, PLANT PROJECT P.O.TIRUCHIRAPALLI(T.N) TRICHY-620014	17,744,593	13,707,518	13,510,885	WELDING ELECTRODE
2	UNIVERSAL AGENCY-TRICY 45A/2C TANJORE ROAD OPPOSITE MARIAMMAN TEMPLE- TRICHY T.N. TRICHY-620008	13,263,516	17,787,115	19,425,932	WELDING ELECTRODE
3	SANDHYA ENGINEERING NO.4/123KJ2 MUTHAMMAL COLONY ETTAYA PURAM-ROAD TUTICORIN T.N TUTICORIN-628004	4,903,268	9,759,573	7,551,941	WELDING ELECTRODE
4	EDAC ENGINEERING LTD C/O COASTAL EN. P. LTD 2X600 MW MUTIARA T.P.P.VILLAGE MELAMARUDUR OTTAPR, TUTICORIN, TUTICORIN-628105		4,278,620	5,285,199	WELDING ELECTRODE
5	JAYAJIARI TRADERS 1/196-8 POORNIMA COMPLEX KVR ENGINEERING COLLEGE ROAD MADDAMPALA YAM COIMBATORE-641019	335,223	1,985,223	2,351,968	WELDING ELECTRODE
6	BLACK SMITH COIMBATORE B HAPPY GARDEN COLONY METTUPALAYAM ROAD COIMBATORE T.N. COIMBATORE-6410131	3,214,450	1,434,315	1,957,246	WELDING ELECTRODE
7	ESSAE ASSOCIATES BHARATHIYAR RD. 433 D, SUGUNA BUILDING, NEAR WOMEN POLYTECHNIC PAPPANICHKEN PALA YAM COIMBA TORE-641037	2,618,363	985,462	328,919	WELDING ELECTRODE
8	VIGNESH AGENCIES G-1 VIGNESH PARK RAMNAGAR COIMBATORE TAMIL NADU COIMBATORE-641009		493,667	NIL	WELDING ELECTRODE
9	EVERSENDIA CONSTRUCTION PVT LTD PLOT NO"-B-S & B6,B7,B8,B18 AT GKINDSTL PARK REDDIMANGUDI, LALGUDI TALUK TRICHY- 621105	699,246	29,521	NIL	WELDING ELECTRODE

On perusal of the above, there is a decrease in the sales made in subsequent 2 F.Ys. (for which data was provided by the appellant) BHEL, Trichy; M/s Black Smith, Coimbatore; M/s Essae Associates, Bharathiyar and M/s Eversendia Construction Pvt. Ltd., Reddimangudi. Therefore, claim by the appellant in the tour report that meeting was quite useful and the party showed their interest in Modi Arc's product (A Unit of M/s Modi Industries Ltd.), is not substantiated.

(vii) The appellant has also taken alternate argument without prejudice to the above objections raised (supra) that the disallowance should be restricted to Rs. 9,97,280/-, on the ground that this amount is debited in the P&L account, excluding the element of service tax. On perusal of the Invoice dated 22.02.2011, raised by M/s J.K. Lakshmi Cement Ltd., it is clear that the total amount of invoice is at Rs. 11,00,000/-, which includes service tax, education cess, secondary and higher education cess of Rs. 1,02,720/-. However, on perusal of Journal voucher, the total amount of Rs. 11,00,000/-, has been debited, under 4 different heads, which includes service tax, education cess, secondary and higher education cess of Rs. 1,02,720/- also. Therefore, claim of the

*appellant is wrong, since total invoice amount of Rs. 11,00,000/-, has been paid and claimed in P & L account.*

*In view of the above, the alternate argument of the appellant, is not correct and accordingly, not acceptable.*

*From the above, following facts emerged:-*

- > *During assessment proceedings, appellant failed to prove before the A.O. that the alleged expenditure of Rs. 11,00,000/-, on account of hiring of chartered flight, were incurred for business purposes.*
- > *During the appellate proceedings also the appellant was given adequate opportunity to substantiate its claim, by filing the documents of correspondence etc. prior to and/or subsequent to the date of travel to prove that tour to these destinations was exclusively for business purposes. However, only tour report dated 25.02.2011 was filed, in which it is claimed that the meeting was held on 18.02.2011 with 9 alleged parties and no other independent documents, were submitted to prove the claim that the alleged meetings were for business purposes. Therefore, the appellant failed to substantiate the claim that tour was wholly and exclusively conducted for business purposes.*

*In view of the above, it is clear that the alleged expenditure of Rs. 11,00,000/-, incurred on tour by directors and other employees, is not proved to have been incurred wholly and exclusively for business purposes, in terms of section 37 of the Act. Accordingly, I hold that the alleged expenditure of Rs. 11,00,000/-, was not incurred wholly and exclusively for business purposes and therefore, I do not find any infirmity in the findings given by the A.O. in the assessment order. Therefore, the addition of Rs. i 1,00,000/-, is hereby confirmed on account of alleged hire charges for chartered flight.*

*Accordingly, ground no. 2 and 3, are hereby dismissed.”*

**3.2** Aggrieved with the finding of the ld. CIT(A), the assessee is in appeal before the Tribunal, raising the grounds as reproduced above.

**4.** Before us, the Ld. counsel of the assessee filed a paper book containing pages 1 to 111. He referred to page 46 of the paper-book, which is a copy of the reasons recorded for reopening the

assessment and submitted that belief has been formed merely on the basis of suspicion without any tangible material. He particularly referred to the sentence where the Assessing Officer recorded that it appeared to him that the expenses were not allowable under section 37 of the Act and certain inquiries might have to be done in that matter. He submitted that no assessment can be reopened based on merely suspicion and assessment needs to be quashed as *void ab intio*.

**5.** On the contrary, the ld. DR supported the finding of the ld. CIT(A).

**6.** We have heard rival submissions of the parties and perused the relevant material on record. The reasons recorded by the Assessing Officer for the reopening of the assessment, available on page 46 of the paper book are reproduced as under:

*“Assessment in the above noted case was completed u/s 143(3) of Income Tax Act, 1961 vide order dated 16.12.2013 at NIL income after adjusting brought forward loss of earlier years to the tune of Rs.3,79,34,262/-. Subsequently it came to notice that during the financial year 2010-11 relevant to the assessment year 2011-12, the assessee company M/s Modi Industries Limited had availed the sendees of non-scheduled flights (chartered flights) as under:*

<i>Date</i>	<i>From - To</i>	<i>Amount paid</i>	<i>Date of payment</i>	<i>Mode of payment</i>	<i>Name of passenger</i>
<i>18.02.2011</i>	<i>DEL-CJB TCR-DEL</i>	<i>Rs.1 1,00,000/-</i>	<i>04.03.2011</i>	<i>By cheque</i>	<i>Mr. Modi</i>

*It is also noticed that the above payment was made by the assessee company M/s Modi Industries Limited to M/s J.K. Lakshmi Cement Limited. This expense has been claimed as business expense by the assessee. It appears that the expenses in respect of such other non-chartered flights might have been claimed by the assessee company as business expenses in the profit and loss account which are not allowable under section 37 of the Income Tax Act, 1961. Besides above, enquiries in respect of other similar booked chartered flights may also have to be made in this case.*

*In view of the above mentioned facts I have reason to believe that income in respect of which the above named assessee is*

*assessable/chargeable to tax for the assessment year 2011-12 has escaped assessment within the meaning clause (c) of Explanation-2 of section 147 of the I.T. Act, 1961.*

*I am therefore, satisfied that this is a fit case for re-opening of the assessment .and issuance of notice u/s. 148 of the I.T. Act for the assessment year 2011-12. Therefore, Notice u/s. 148 of the Act is issued.”*

**6.1** We find that assessment in the case of the assessee was completed under section 143(3) of the Act and thereafter, the Assessing Officer has issued notice under section 148 of the Act for reopening of the assessment. The Assessing Officer in the reasons recorded has mentioned that subsequently, it came to his notice that the assessee has made payment of Rs.11 lakh to M/s. JK Lakshmi Cement Ltd. for hiring services of non-scheduled flight (chartered flights) and claimed this expenses as business expenditure. While forming the reason to believe that income has escaped the Assessing Officer mentioned that it appeared to him that expenses were not allowable under section 37 of the Act and besides inquiries in respect of other similar booking of chartered flights might also required to be made.

**6.2** In view of the reasons recorded, it is undisputed that there was no fresh tangible material before the Assessing Officer on the basis of which he formed his belief that income escaped in the case of the assessee. The only reason which has been recorded by the Assessing Officer is that it appeared to him that those expenses were not allowable under section 37 of the Act. In our opinion, this is mere change of opinion based on the suspicion without any tangible information that said expenditure was not allowable under section 37 of the Act. The Assessing Officer was not sure whether the said expenditure was not allowable under

section 37 of the Act. We find that Hon'ble Gujarat High Court in the case of Nitin P Shah Vs DCIT, 146 Taxman 536 (Guj.) quashed the reopening of the assessment, where the Assessing Officer only stated that note attached to return of income indicated "possible escapement of income" and was not sure about it. The relevant para of the decision is reproduced as under:

*"The reasons recorded went to show that the Assessing Officer had no information with him. All that the Assessing Officer stated 'was that in the light of the note attached to the return of income which was reproduced by him, it would also indicate "possible escapement of income". In the circumstances, the impugned notice seeking to reopen could not be permitted to stand. The reasons recorded must disclose the material and the basis, which reflect the process by which the authority had formed belief. Even if sufficiency of such reasons could not be eone into. it is equally well established that the Court can always examine whether, on such material as disclosed in the reasons, there was a rational nexus for the formation of belief In other words, whether a reasonable person could have arrived at such a belief. The reasons recorded failed the objective test. The Assessing Officer was also not sure that any income had escaped assessment - only a possible escapement of u assume jurisdiction. [Para 63]"*

**6.3** Respectfully, following the above decision, we are of the opinion that the notice issued for reopening of the assessment under section 148 of the Act was not validly issued by the Assessing Officer and it was based merely on suspicion without any tangible material and accordingly, we quash the reassessment proceeding in the case of the assessee. The grounds of the assessee challenging the reassessment proceedings are accordingly allowed.

**6.4** As we have already quashed the reassessment proceedings, we are not adjudicating the grounds of the assessee challenging the merit of addition as same are rendered merely academic.

**7.** In the result, the appeal of the assessee is allowed.

*Order is pronounced in the open court of 7<sup>th</sup> January, 2020.*

**Sd/-**  
**(BHAVNESH SAINI)**  
**JUDICIAL MEMBER**

Dated: 7<sup>th</sup> January, 2020.

RK/-(D.T.D.)

Copy forwarded to:

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

**Sd/-**  
**(O.P. KANT)**  
**ACCOUNTANT MEMBER**

Asst. Registrar, ITAT, New Delhi