

IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.3963/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)

Hubtown Ltd. Plaza Panchseel, A Wing, 5 th Floor, 501 Hughes Road, Behind Dharam Palace, Grant Road (W), Mumbai- 400007.	बनाम/ Vs.	DCIT CEN CIR 5(1) R. No.1928 19 th Floor, Air India BLDG, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACA6191D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Anuj Kisnadwala (AR)	
Revenue by:	Shri S. Michael Jerald (DR)	

सुनवाई की तारीख / Date of Hearing: 26/11/2019
घोषणा की तारीख /Date of Pronouncement: 14/02/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 21.03.2018 passed by the Commissioner of Income Tax (Appeals) -53, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2011-12.

2. The assessee has raised the following grounds: -

- “ On the fact and circumstances of the case and in law, the Ld. CIT(A) 53 has erred in confirming addition u/s 69A of the Act of an alleged bogus loan of Rs.2,76,75,000/- received from Cello Group.
2. The order under appeal is not only bad in law and invalid, but also against the natural law of equity and justice.
3. That the appellant reserves its right to amend, alter or raise any other additional grounds of appeal before or during the course of appellate proceedings.”



3. The assessee has raised the following additional grounds: -

“The Ld. CIT(A) has erred in law and on facts in upholding the reopening of assessment u/s 147 of the Act and the consequential order passed by the AO u/s 143 r.w.s 147 of the Act. The appellant craves leave to add to, amend or alter, the foregoing ground of appeal.”

4. The brief facts of the case are that the assessee filed its return of income on 07.02.2013 declaring total loss to the tune of Rs.31,29,867/- for the A.Y. 2011-12. The return was processed u/s 143(1) of the I. T. Act, 1961. Thereafter, the assessment was completed u/s 143(3) of the Act was passed on 28.03.2014 determining the loss at Rs.56,90,01,301/- under normal provisions and book profit at Rs.21,64,54,535/- u/s 115JB after making certain additions. Thereafter, CIT(A) has deleted the addition vide order dated 28.10.2014. After giving effect to the CIT(A) order, the income of the assessee was assessed at Rs.53,10,45,465/- u/s 115JB of the Act. The case was reopened u/s 147 of the I. T. Act, 1961 and accordingly notice u/s 148 of the I. T. Act dated 28.03.2016 was given. The following the reasons were recorded for reopening the case.: -

“During the year under consideration, it is noticed that Shri Pradeep Rathod of cello Group advanced the cash loan to Akruti City Ltd. of Rs.2,58,75,000/- on 20.04.2010. Out of this amount Rs.1,00,000/- was returned back in cash by M/s. Akruti City Ltd. and the balance was still lying with it.

Further, it has been noticed that, Memorandum of Understanding was signed between M/s. Cello Pens and Stationary Pvt. Ltd. in November 2010. Out of this, Rs,50, Cr. Rs.15 cr was paid back in December, 2010. However, it has been found that M/s. akruti city Ltd. has not repaid the balance amount of Rs.34cr.



On the basis of the aforesaid tangible material. I have reason to believe that income chargeable to tax has escaped assessment for AY 2011-12 wit Rs.2,58,75,000/- hin the meaning of section 147 of the I.T. Act, 1961.

5. Thereafter, notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee and unexplained cash credit of Rs.2,58,75,000/- was added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.54,13,26,300/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us

6. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The Ld. Representative of the assessee has argued that the information of belief that the income has escaped assessment is not good ground to reopening the case, therefore, notice u/s147 is not justifiable, hence, liable to be set aside. It is also argued that the AO nowhere applied the mind on information receipt, therefore, reopening is unjustifiable and in this regard the Ld. Representative of the assessee has placed reliance upon the decision of the Hon'ble ITAT Agra Bench bearing ITA. No.41/Agra/2017 dated 01.06.2018 and Sagar Enterprises Vs. ACIT Hon'ble Gujarat High Court (2002). However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. Before going further, we deem it necessary to advert the reasons of the reopening u/s 147/148 of the Act on record. The following reasons has been given.: -

During the year under consideration, it is noticed that Shri Pradeep Rathod of cello Group advanced the cash loan to Akruti City Ltd. of Rs.2,58,75,000/- on 20.04.2010. Out of this



amount Rs.1,00,000/- was returned back in cash by M/s. Akruti City Ltd. and the balance was still lying with it.

Further, it has been noticed that, Memorandum of Understanding was signed between M/s. Cello Pens and Stationary Pvt. Ltd. in November 2010. Out of this, Rs,50, Cr. Rs.15 cr was paid back in December, 2010. However, it has been found that M/s. akruti city Ltd. has not repaid the balance amount of Rs.34cr.

On the basis of the aforesaid tangible material. I have reason to believe that income chargeable to tax has escaped assessment for AY 2011-12 wit Rs.2,58,75,000/- hin the meaning of section 147 of the I.T. Act, 1961.

7. On appraisal of the above mentioned reasons, we observed that the AO nowhere form the basis to believe upon the information received that the income has escaped assessment. The formation of the belief is absent. There is no application of mind by AO to the tangible material which he had received. The notice nowhere seems justifiable and in accordance with law. In this regard, we placed reliance upon the decision in the case of Hon'ble ITAT Agra Bench bearing ITA. No.41/Agra/2017 dated 01.06.2018. The relevant finding is hereby reproduced as under.:-

“15. Heard. A bare perusal of the ld. CIT(A)'s order, as extracted hereinabove, shows that the ld. CIT(A) has gone by the mere factum of receipt of material by the AO from the Investigation Wing of the Department. In 'Meenakshi Overseas' (supra), under similar facts and circumstances, relying on 'Signature Hotels (P) Ltd. Vs. ITO', 338 ITR 51 (Del), it has been held that the reasons must be self evident and they must speak for themselves; that the tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons; and that where the link between the information made available to the AO and the formation of belief is absent, the reasons are not sustainable. It has further been held that where there is no independent application of mind by the AO to the



tangible material which forms the basis of the reasons and the reasons fail to demonstrate the link between the tangible material and the formation of the reasons to believe escapement of income, the reasons are unsustainable.

16. In the present case, like in 'Meenakshi Overseas' (supra), the link between the information available with the AO and the formation of belief by the AO is missing. No independent application of mind by the AO to the material forming the basis of the reasons recorded is evincible from the reasons. The AO, in the reasons, has just stated the information received and his conclusion about the alleged escapement of income. As to what the AO did with the information made available to him, is not discernible from the reasons. As such, 'Meenakshi Overseas' (supra), is squarely applicable.

17. 'Meenakshi Overseas' (supra) is by the Hon'ble Delhi High Court, whereas the decisions cited by the ld. DR are from other different High Courts. Of all these, 'Brij Mohan Agarwal' (supra) is by the Hon'ble Allahabad High Court, i.e., the jurisdictional High Court qua the assessee. However, that decision is essentially fact-specific. It does not lay down any proposition of law, as such. The Civil Writ Petition filed by the assessee was decided by the Hon'ble High Court on merits, having taken into consideration the investigation report of the Investigation Wing of the Department, as conveyed to the AO, the assessee's record, the Department's counter-affidavit (alongwith its annexures) to the Writ Petition and the rejoinder affidavit filed by the assessee. It was held that from the findings of the Investigation Wing and as per the record, the AO of the assessee (Respondent No.1 in the Writ Petition) had reason to believe that the assessee had diverted and, thus, concealed his income by disclosing it to be sale proceeds of shares, which was not correct, as no real transaction of shares had ever taken place. It was held that in view of the investigation made by the Investigation Wing, relevant and very material facts had come before the AO that the assessee was concealing his income by indulging in bogus transactions. It was, accordingly, held that the belief of the AO was an honest and reasonable belief based on the material which he had received from the Investigation Wing. The Hon'ble High Court refused to accept the assessee's contention that it was a case of a mere change of opinion. The Writ Petition was dismissed as having no merit.

18. In the case at hand, however, the issue raised is altogether different. Here, the challenge of the assessee is that since in the reasons recorded, the AO has not spelt out as to what he did with the information received by him from the Investigation Wing, the reasons are hit by the vice of non-application of mind to the information so received.

19. From the above, it is evident that there is no parity whatsoever between 'Brij Mohan Agarwal' (supra) and the present case. Accordingly, 'Brij Mohan Agarwal' (supra) is of no help to the Department.



20. Now, in a situation like the present one, as is trite, where there is a cleavage of opinion between different High Courts on an issue and none of the decisions has been rendered by the jurisdictional High Court, the view in favour of the assessee needs to be followed. Hence, in deferential keeping with 'Meenakshi Overseas' (supra), the reasons recorded by the AO to form belief of escapement of income are found to be no reasons in the eye of the law.

21. Then, in "Sabh Infrastructure Limited" (supra), the Hon'ble Delhi High Court has, vide para 19 of the report, laid down the guidelines as follows, in the matters of re-opening of assessment: (i). while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the Assessee. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided (ii). the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment – especially in those cases where the first proviso to Section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AO on the same and if so, the conclusions thereof; (iii). where the reasons make a reference to another document, whether as a letter or report, such document and/or relevant portions of such report should be enclosed along with the reasons; (iv) the exercise of considering the Assessee's objections to the reopening of assessment is not a mechanical ritual. It is a quasi judicial function. The order disposing of the objections should deal with each objection and give proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed."

22. Thus, in deference to "Sabh Infrastructure Limited" (supra), it is incumbent on the AO, while communicating the reasons for the reopening of the assessment, to provide the standard form, used for obtaining approval of the superior officers. Merely stating the reasons in a letter addressed by the AO, is not enough. Then, the reasons to believe escapement of income need to spell out all the reasons and grounds available with the AO for reopening the assessment. The reasons must also paraphrase any investigation report, which may form the basis of the reasons and any enquiry conducted by the AO thereon, as also the conclusions thereof. Further, and this is most relevant for the case at hand, where the reasons make a reference to any document, such document and / or relevant portion thereof must be enclosed along with the reasons. The Hon'ble High Court has underlined that consideration of the assessee's objections to the reopening of assessment is not a mechanical ritual, but it is a quasi judicial function. It has been mandated that the order disposing of the objections should deal with each objection, giving proper reasons for the conclusion and no attempt should be made to improve or add to the reasons, as recorded and disclosed.



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23. *In the case of the present assessee, it remains undisputed that though the reasons recorded by the AO for belief of escapement of income contain reference to material forming the basis thereof, such material, despite written request by the assessee to the AO in this regard, was never supplied by the AO to the assessee. This is in direct contravention of the principle of natural justice, as reiterated in “Sabh Infrastructure Limited” (supra). As noted, in the present case, the alleged material was only supplied to the assessee in the remand proceedings, where too, the objections of the assessee were not met. The ld. CIT(A) also did not deal with these objections of the AO.*

24. *Therefore, the reasons recorded by the AO are found to be not in accordance with law. Accordingly, they are cancelled. Too, in view of “Sabh Infrastructure Limited” (supra), none of the other decisions cited by the Department are of any aid to it. Consequently, the reassessment proceedings, culminating in the order under appeal, are also not sustainable in the eye of law and they too are cancelled. Nothing further survives for adjudication.”*

8. The facts of the present case is quite similar to the facts of the case which has been decided by Hon’ble Agra ITAT Bench ITA. No.41/Agra/2017. Taking into account all the facts and circumstances, we are of the view that the finding of the CIT(A) is not justifiable and sustainable in the eyes of law. Accordingly, we set aside the finding of CIT(A) on the issue and decide this issue in favour of the assessee against the revenue. Since the proceeding has been set aside by us while deciding the issue of additional ground above, therefore, there is no need to decide the case on merits being the same would be academic in nature. Accordingly, this issue is decided in favour of the assessee against the revenue.

9. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on 14/02/2020

Sd/-

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER



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मुंबई Mumbai; दिनांक Dated : 14/02/2020
Vijay Pal Singh/Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai