

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "SMC-1": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA.No.9742/Del./2019
Assessment Year 2011-12

Vikas Chowdhary C/o Kapil Goel, Adv., F-26/124, Sector-7, Rohini, New Delhi. PAN No. ANHPC3520H	vs.	ITO Ward 36(4) Room No. 810, E-2 Block, Pratyaksh Kar Bhawan, Civic Centre, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Adv.
For Revenue :	Shri Prakash Dubey, Sr. DR

Date of Hearing :	04.01.2021
Date of Pronouncement :	01.02.2021

ORDER

This appeal by assessee has been directed against the order of Ld. CIT(Appeals)-12, New Delhi dated 30.10.2019 for AY 2011-12, challenging the reopening of the assessment u/s 147/148 of the IT Act and addition of Rs. 11,49,060/- u/s 69 of the IT Act.

2. I have heard Ld. Representatives of both the parties through Video Conferencing and perused the material on record.

3. Briefly the facts of the case are that in this case, AIR Information available on record shows that assessee had made share and commodity transactions with Multi Commodity Exchange amounting to Rs. 107,89,34,900/- during assessment year under appeal and no return has been filed. The AO, therefore, initiated reassessment proceedings u/s 147 of the IT Act and issued notice u/s 148 to the assessee on 31.03.2018. The AO noted that there is no compliance to the statutory notices. The AO further noted that during the assessment year under appeal assessee had made transactions in commodity with Multi Commodity Exchange (MCX) amounting to Rs. 107,89,34,900/-. Further information was called from MCX u/s 133(6) of the IT Act which shows that assessee had trading in Market to Market (MTM) and result is showing loss of Rs. 16,747/-. This loss is not declared in the return of income. The AO, therefore, estimated the income of assessee at Rs. 5 lakhs for doing the business activity. The AO also observed that generally it is seen that the broker takes/uses the margin money for trading which is provided by the client for initial trading given to the broker to exposure upto ten times of the margin money. AO further observed that the first transaction of the assessee was to the tune of Rs. 1,14,90,600/-. Hence, the amount of Rs. 11,49,060/- is considered reasonable amount be given by

assessee to the broker for transaction in MCX. The AO, accordingly, made the addition of Rs. 11,49,060/-.

4. The assessee challenged the reopening of the assessment as well as both the additions before Ld. CIT(A). The submission of the assessee are reproduced in the impugned order in which the assessee briefly explained that there was no tangible material which give rise to believe that income has escaped assessment. Since assessee did not have any taxable income in assessment year under appeal, therefore, assessee was not liable to file the return of income u/s 139(1) of the Act. In fact in MCX transaction for assessment year under appeal, assessee has suffered loss of Rs. 16,747/- which would not disclosed any escapement of income. Thus, the AO did not apply his mind for recording the reasons for reopening of the assessment. The reasons are based on guess work only. No exact amount is specified in the reasons for escapement of income. No bank account or any tangible material is brought on record for recording the reasons for reopening of the assessment. No prior enquiry is made u/s 133(6) of the IT Act or 142 of the Act prior to recording the reasons. Since no amount is quantified, therefore, it could not be unexplained investment made by assessee. When foundation fails, the super structure falls. The assessee relied upon judgment of the Delhi High Court in the case of G&G Pharma India (ITA No. 545/2015) and Meenakshi Overseas (ITA No. 692/2016),

etc. It was submitted that there is no nexus or live link between the material which had come to the notice of AO to form the belief that there was escapement of income in the case of the assessee. Both the additions are made without bringing any material against the assessee. The assessee paid only Rs. 100/- for opening the DMAT account in M/s Karobaar Commodities Pvt. Ltd. from his saving bank account. The assessee has given petty amount in cash as margin money which is non-taxable quantum income up to Rs. 1,60,000/- for intraday transaction. This would indicate that as per annexure obtained from MCX the amount was only Rs. 71,360/-, therefore, margin money which could have given by the assessee can never be more than Rs. 1 lakh, therefore, margin money taken by the AO of Rs. 11,49,060/- is absolutely baseless and based on mere imagination only. The Ld. CIT(A) did not accept the contention of the assessee and confirm the reopening of the assessment. However, Ld. CIT(A) noted that addition of Rs. 5 lakh is made merely on guess work because the AO has obtained information from MCX that assessee suffered loss amounting to Rs. 16,747/- u/s 133(6), therefore, addition of Rs. 5 lakh was deleted. The Ld. CIT(A), however, confirm the addition of Rs. 11,49,060/- because complete details of the broker have not filed.

5. Ld. Counsel for assessee reiterated the submissions made before authorities below and has referred to copy of the

reasons recorded for reopening of the assessment, copy of which is filed at page 37 of the appeal paper which is reproduced as under:

Name of Assessee	SH. VIKAS CHOWDHARY
Address of Assessee	C-5/14, MODEL TOWN-III, DELHI-110 009
PAN	ANHPC3520H
Assessment Year	2011-12
Details of the Assessing Officer having jurisdiction over the Assessee	Income Tax Officer, Ward 36(4), New Delhi.

Reasons for reopening of assessment in the case of Sh. Vikas Chowdhary AY 2011-12 u/s 147 of Income Tax Act, 1961

Sh. Vikas Chowdhary S/o Sh. Surender Singh Chowdhary R/o C-5/14, Model Town, Delhi-110 009. The assessee has not filed his Income Tax Return (ITR) for AY 2011-12.

2. In this case, NMS information was pushed into the ITD system that the assessee during the FY 2010-11 had made transactions amounting to Rs. 07,89,34,990/- with National Multi Commodity Exchange. It has been noticed that the assessee had not filed his ITR for AY 2011-12. Since the assessee had not filed his ITR for AY 2011-12, the source of investment/profit/loss from the said investment/tax implication/Income tax liability cannot be examined/verified.

3. As the assessee has not furnished his ITR for the assessment year under consideration, the verification of the information vis-à-vis the assessee's ITR is not feasible.

4. Letter has been issued on 20/11/2014, 26/02/2015, 01/07/2016 and 06/10/2017 to the assessee for furnishing his/her response in Compliance Module on the e-filing portal at <http://incometaxindiafiling.gov.in>. It was categorically stated in all the above-referred letters that the response has to be submitted electronically and the procedure for the same was also explained.

5. In this case, no return of income was filed for the year under consideration and the assessee has not responded to the letters issued by the undersigned to file the ITR by the assessee. In view of the information that the assessee had made transactions amounting to Rs. 107,89,34,990/-

with National Multi Commodity Exchange during the FY 2010-11, the assessee's case is clearly covered by the Explanation 2 to Section 147 of the IT Act, 1961. Hence, it is a case where it shall be deemed to be the case where the income chargeable to tax has escaped assessment, which amounts to or is likely to amount to Rs. 1 lakh or more for above mentioned assessment year.

6. In view of the findings stated in para 5 above, the undersigned has reason to believe that the assessee's income for AY 2011-12 has escaped assessment within the meaning of section 147 of the IT Act, 1961.

7. In this case, no return of income was filed for the year under consideration. Accordingly, in this case, no assessment was made and the only requirement to initiate proceedings u/s 147 is reason to believe which has been recorded above.

8. It is pertinent to mention here that in this case the assessee has chosen not to file return of income for the year under consideration although the total income of the assessee had exceeded the maximum amount which is not chargeable to tax as discussed in paragraphs 2 to 6 above and the assessee was assessable under the Act. In view of the above, the provisions of clause (a) of Explanation 2 to Section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

9. In this case more than four years have lapsed from the end of assessment year under consideration. Hence, the matter is put up before the Pr. CIT, Delhi-12 for obtaining sanction within the meaning of section 151 of the Income Tax Act, 1961.

*Sd/-
(Income Tax Officer)
Ward 36(4), New Delhi."*

6. He has submitted that AO has not mentioned any figure of amount in the reasons which has escaped assessment. AO made estimate of turnover and income only which is not based on any tangible material and ultimately the AO received the

information u/s 133(6) from MCX that assessee has suffered loss of Rs. 16,747/- and, as such, there were no escapement of income in the case of the assessee. The AO recorded incorrect and non-existing facts in the reasons for reopening of the assessment. AO did not apply his mind to the information. The AO did not bring any material on record as to how much investment is made by assessee for doing MCX business. He has submitted that issue is covered by several decisions of the Tribunal, copies of which are filed in the PB. He has, however, heavily relied upon the order of ITAT Delhi 'E' Bench in the case of Shri Natarajan Monie vs. ITO in ITA No. 1817/Del/2017 dated 07.12.2020. He has submitted that even addition on merit u/s 69 is without any basis. Since, the Ld. CIT(A) has already deleted the addition of Rs. 5 lakhs, therefore, on the same reasoning further addition of Rs. 11,49,060/- shall have to be deleted.

7. On the other hand, Ld. DR relied upon the orders of the AO and submitted that AO was having sufficient material on record to record the reasons for reopening of the assessment.

8. I have considered the rival submission and perused the material on record. It is well settled law that validity of the reassessment proceedings is to be determined on the basis of the reasons recorded for reopening of the assessment. The reasons are reproduced above. The AO as per NMS information which was pushed into the ITD system came to

know that assessee has made transactions amounting to Rs. 107.89 crores with National Multi Commodity Exchange. No return has been furnished by assessee. The AO, therefore, deemed that income chargeable to tax assessment in a sum of Rs. 1 lakh or more has escaped assessment. The AO, however, in the assessment order has clearly mentioned that he has also called for information from MCX u/s 133(6) of the IT Act intimating that assessee has suffered loss of Rs. 16,747/-. Thus, assessee did not earn any income or profit from MCX transaction. The loss suffered by assessee out of MCX transaction could never be considered as income chargeable to tax has escaped assessment. The AO did not refer to this statement in the reasons recorded for reopening of the assessment. The AO has not brought any tangible material on record which gives rise to believe that income has escaped assessment. The AO merely on hypothecation of figures estimated that there is a deemed escapement of income of the amount which is likely to amount Rs. 1 lakh or more. No exact amount of income escaping assessment has been mentioned in the reasons for reopening of the assessment. No bank statement or any tangible material or report of investigation conducted u/s 133(6) has been mentioned in the reasons. The AO merely presumed that since assessee did not file the return of income, therefore, there is a deemed escapement of income. This fact is also incorrect and non-

existing because the authorities below have accepted in the impugned orders that ultimately assessee has suffered loss of Rs. 16,747/- in MCX transaction in the assessment year under appeal. Thus, assessee was not required to file the return of income u/s 139 of the Act in respect of the loss suffered by assessee in assessment year under appeal. Section 149(1)(b) of the Act provides that “no notice u/s 148 shall be issued for relevant assessment year, -- if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to Rs. 1 lakh or more for that year”. The AO in the present case, based his reasons for reopening of the assessment as per NMS information pushed into ITD system and information called u/s 133(6) from MCX. None of these information have provided if assessee has earned income of Rs. 1 lakh or more. Rather it merely provides the amount of the transaction conducted by assessee on MCX and ultimately assessee suffered loss in MCX transaction, therefore, there was no reason for the AO to believe that income chargeable to tax for Rs. 1 lakh or more have escaped assessment. Thus, the conditions of section 149(1)(b) of the Act are not satisfied in the present case. It is condition precedent before invoking jurisdiction u/s 147/148 of the Act that the AO has reason to believe that income chargeable to tax has escaped assessment

for any assessment year. However, in the present case, there is no material what to say of tangible material is available on record to establish that AO has reason to believe if income chargeable to tax has escaped assessment. The information of loss receipt from MCX was not deliberately mentioned by the AO in the reasons. Thus, the AO did not have any definite material or information to record/reasons that there is an escapement of income in the case of the assessee. The AO recorded incorrect and non-existing facts in the reasons recorded for reopening of the assessment. The AO did not apply his mind to the material on record before recording reasons for reopening of the assessment. The AO also failed to verify the information so received due to non-application of mind, therefore, reopening of the assessment would be unjustified and is liable to be quashed. The same view has been taken by ITAT Delhi 'E' Bench in the case of Shri Natarajan Monie Vs. ITO (supra) in which it was held as under:

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA.No.1817/Del./2017
Assessment Year 2011-2012

Shri Natrajan Monie, S-19/001, The Close South, Nirwana Country, Sector-50, Gurgaon. PAN AAFPN2890N	vs.	The Income Tax Officer, Ward – 2 (5), Gurgaon.
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Advocate
For Revenue :	Ms. Rinku Singh, Sr.DR

Date of Hearing :	03.12.2020
Date of Pronouncement :	07.12.2020

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-1, Gurgaon, Dated 30.01.2017, for the A.Y. 2011-2012, challenging the reopening of the assessment under section 147/148 of the I.T. Act, 1961, addition of Rs.59,50,000/- on account of cash deposit, confirming addition of Rs.1,50,000/- out of Rs.9,85,000/- and addition of income of Rs.7,72,461/- from MCX Business.

2. *We have heard the Learned Representative of both the parties through video conferencing and perused the material available on record.*

3. *Briefly the facts of the case are that this is a NMS Case. Notice under section 148 of the I T Act, 1961 was issued to the assessee on 11.02.2015, after duly recording the reasons. The assessee did not file his return of income. The A.O. issued statutory notice for completion of the assessment. The assessee filed information before A.O. which were discussed by the A.O. with the Counsel for Assessee. The A.O. noted that as per information available with him, assessee had received salary on which TDS had been deducted by the employer. The assessee has also made investment of Rs.10 lakhs in the purchase of Mutual Funds and deposited cash of Rs.52 lakhs in his ICICI Bank account in assessment year under appeal. Further the assessee had also made contract in commodity exchange exceeding Rs.10 lakhs. During the course of assessment proceedings the assessee furnished copy of Form No.16, Form No 26AS, statement of his bank accounts maintained with different Banks, copy of the computation of income and documents relating to MCX business*

made with Aditya Birla Commodities Broking Ltd. The assessee also filed copy of the sale deed of property at Gurgaon Dated 21.03.2011 sold by assessee for a consideration of Rs.1.20 crores. The A.O. issued detailed show cause notice to the assessee and after considering the reply of the assessee, made certain additions and computed the total income at Rs.84,37,210/-. The net income of the assessee is computed as under :

1.	Income from salary as discussed in para 3.1.	Rs. 4,34,338/-
2.	Income from interest as discussed in para 3.2.	Rs. 1,59,237/-
3.	Income from MCX business as discussed in para 3.3.	Rs. 7,72,461/-
4.	Income from unexplained cash deposits as discussed in para 3.4	Rs. 59,50,000/-
5.	Income from unexplained cash credits as discussed in para 3.5(i).	Rs. 9,85,000/-
6.	Income from profit on redemption of MF/FD as discussed in para 3.5(ii)	Rs. 1,32,174/-
	TOTAL	Rs.84,37,210/-

3.1. The assessee challenged the reopening of the assessment as well as additions on merit before the Ld. CIT(A). However, the appeal of assessee has been partly allowed.

4. Learned Counsel for the Assessee referred to the reasons recorded for reopening of the assessment which have been provided to the assessee under RTI Act, copy of which is placed on record. He has submitted that A.O. in the reasons mentioned that assessee has made investment of Rs.2 lakhs for purchase of mutual fund and transaction of commodities exchange contract of Rs.10 lakhs in assessment year under appeal. He has submitted that A.O. has recorded wrong, incorrect and non-existing reasons and did not apply his mind to the material on record before recording reasons for reopening of the assessment. He has submitted that assessee did not make any fresh investment during subject period in mutual fund and even the A.O. did not make any addition on account of investment of Rs.2 lakhs for purchase of mutual funds. He has submitted that as regards transaction of commodity exchange contract of Rs.10 lakhs, A.O. has made addition

of Rs.7,72,461/- on account of profit on the MCX business instead of Rs.11,80,571/- as mentioned in the show cause notice. The A.O. thus, recorded wrong, incorrect, non-existing facts / reasons and did not apply his mind to the information, which itself is also incorrect. He has referred to page-14 of the PB which is the details supplied to the assessee which may be the basis for reopening of the assessment and referred to item Nos.5, 6 and 9 which are information received from CIB Code for deposit of cash of Rs.2 lakhs with the Bank, contract of Rs.10 lakhs or more in commodity exchange and payment of Rs.2 lakhs or more for purchase of units of mutual funds. He has submitted that these are incorrect information and did not relates to the assessee. He has, therefore, submitted that reopening of the assessment is illegal and bad in law and as such reopening of the assessment is liable to be quashed. He has submitted that no notice under section 142(1) or any query under section 133(6) have been issued. No letter have been delivered to the assessee.

5. On the other hand, Ld. D.R. relied upon the Orders of the authorities below as regards reopening of the assessment.

6. We have considered the rival submissions and perused the material on record. It is well settled Law that validity of the re-assessment proceedings is to be judged with reference to the reasons recorded for reopening of the assessment. The copy of the reasons for reopening of the assessment are placed on record which reads as under :

1.	Name and Address of the Assessee	Monie Natrajan 1408, Beverley Part-II, DLF-II, Gurgaon.
2.	PAN	AAFPN2890N
3.	Status	INDL
4.	Ward/Circle/Range	Ward-2(5), Gurgaon
5.	Assessment Year	2011-12
6.	Date	11.02.2015

Reasons for initiating proceedings u/s. 147/148 of the Income Tax Act, 1961.

Information has been received through NMS (P-1 category that during the period under consideration, the assessee had made investment of Rs.200000/- for purchase of mutual fund and transaction in commodity exchange contract of Rs.10,00,000/- during the assessment year 2011-12. As per record assessee do not have file return of income for the Assessment year 2011-12. The income chargeable to tax amounting to Rs.1200000/- which is chargeable to tax has escaped assessment and any other income found during the course of assessment proceedings which is chargeable to tax has escaped assessment. I have reasons to believe that the above said income/transaction of Rs.1200000/- and any other income found during the course of assessment proceedings which is chargeable to tax has escaped assessment which needs examination in the light of the information in my possession.

Notice under section 148 of the Income Tax Act, 1961 is being issued.

*Sd/-
Shamsher Singh
Income Tax Officer
Ward 2(5), Gurgaon.”*

6.1. In view of the above reasons, the A.O. has mentioned that he has information received through NMS that assessee has made investment of Rs.2 lakhs for purchase of mutual funds and transaction of commodity exchange contract of Rs.10 lakhs in assessment year under appeal and thus, there is an escapement of income of Rs.12 lakhs. The A.O. also noted in the reason that this information needs examination. However, no material is produced before us if the A.O. made any investigation on the information supplied to him through NMS if there is any escapement of income in the case of assessee. Learned Counsel for the Assessee categorically stated at Bar that assessee has not made any fresh investment in assessment year under appeal in mutual fund. The written submissions to that effect is also placed on record. Learned Counsel for the Assessee has also categorically stated that A.O. has not made any addition of Rs.2 lakhs in assessment year under appeal which fact is corroborated by the net income computed by A.O. as reproduced above. It is, therefore, clear that neither assessee has made any investment of Rs. 2 lakhs for purchase of mutual fund in assessment year under appeal nor the A.O. has made any such addition in the

assessment year. Therefore, such information received by A.O. was totally wrong, incorrect and non-existing and thus the fact mentioned in the reasons recorded for reopening of the assessment as regards investment made in purchase of mutual fund is wrong, non-existing and incorrect. The A.O. has recorded wrong, incorrect and non-existing reasons for reopening of the assessment which is not permissible under Law. As regards the transaction in commodity exchange contract of Rs.10 lakhs, Learned Counsel for the Assessee referred to para-3.3 of the assessment order in which the A.O. has made addition of Rs.7,72,461/- on account of profit on the MCX business. The A.O. has also mentioned in the same para that in the show cause notice he has mentioned such income at Rs.11,80,571/- which is appearing at page-3 of the assessment order, but, after examination this figure was also found incorrect and A.O. has ultimately restricted the addition to Rs.7,72,469/- i.e., for income only but no addition is made of transaction of MCX Investment. Therefore, A.O. has recorded wrong, incorrect and non-existing facts in the reasons recorded for reopening of the assessment that assessee has made transaction in commodity exchange contract of Rs.10 lakhs. It may also be noted here that A.O. in the assessment order in para-2 has mentioned that assessee has made investment of Rs.10 lakhs in purchase of mutual funds which fact is also incorrect and is contradictorily recorded in the reasons for reopening of the assessment for Rs.2 lakhs only. The A.O. in the assessment order has also recorded same statement that assessee has made contract in commodity exchange exceeding Rs.10 lakhs which fact was ultimately found incorrect by the A.O. himself and he has made part addition as against the income mentioned in the show cause notice. These facts clearly show that A.O. did not apply his mind to the information received through NMS and also recorded wrong, incorrect and non-existing facts in the reasons recorded for reopening of the assessment. Learned Counsel for the Assessee has also referred to page-14 which is supplied to the assessee under RTI which according to assessee was asked under the RTI Act. The first page of the RTI reply PB-10 shows that assessee has asked for the copy of the reasons for reopening of the assessment as well as details which are basis of reopening of the case under section 148 of the I.T. Act, 1961. Page-14 is the material supplied by the A.O. which is the information summary in which information is supplied to assessee through CIB Code that there is a deposit in cash aggregating to Rs.2 lakhs or more with the Banking company, contract of Rs.10 lakhs or more in commodities exchange ,Rs. 2

lakhs or more paid for purchase of units of Mutual Fund. Rule 114E of the I.T. Rules provides the statement of financial transactions required to be furnished under sub-section (1) of Section 285BA of the Act in Form 61-A. This Rule provides that return or the statement shall be provided in respect of receipt from any person of an amount of Rs.2 lakhs rupees or more for acquiring units of mutual fund and other statements in different cases of the amount more than Rs.10 lakhs in different categories. It, therefore, appears that the information which A.O. has received as per page-14 of the PB was the details to be submitted under Rule 114E of the I.T. Rules. It may not be actual figure received by the A.O. as per NMS information. The actual figure might be different as is noted above. Therefore, such information received by the A.O. is not in accordance with Law and would not provide any information to the A.O. to record reasons for reopening of the assessment as regards escapement of income for making the investment in purchase of mutual funds or transaction of different commodity exchange contract. Thus the entirety of facts clearly show that A.O. recorded wrong, incorrect and non-existing reasons for reopening of the assessment without application of mind. It may also be noted that A.O. himself has mentioned in the reasons that whatever information he has received through NMS needs examination in the light of information in his possession, but, he did not make any examination prior to recording reasons for reopening of the assessment and totally vague, non-existing, wrong and incorrect facts have been mentioned in the reasons recorded for reopening of the assessment. Further, the reopening of the assessment would be invalid if the A.O. wanted to make investigation out of information. Such exercise should have been prior to recording of the reasons. In support of our findings, we rely upon the following decisions.

6.2. *The Hon'ble Punjab & Haryana High Court in the case of CIT vs., Atlas Cycle Industries [1989] 180 ITR 319 (P&H) held as under :*

"Held, (i) that the Tribunal was right in cancelling the reassessment as both the grounds on which the reassessment notice was issued were not found to exist, and, therefore, the Income-tax Officer did not get jurisdiction to make the reassessment."

6.3. *The Hon'ble Delhi High Court in the case of Pr. CIT vs., SNG Developers Ltd., [2018] 404 ITR 312 (Del.) in which it was held as under :*

"Held, dismissing the appeal, that the reasons recorded by the Assessing Officer for reopening the assessment under section 147, issuing a notice under section 148 did not meet the statutory conditions. As already held by the Appellate Tribunal, there was a repetition of at least five accommodation entries and the total amount constituting the so-called accommodation entries would therefore, not work out to Rs.95,65,510. It was unacceptable that the Assessing Officer persisted with his "belief" that the amount had escaped assessment not only at the stage of rejecting the assessee's objections but also in the reassessment proceedings, where he proceeded to add the entire amount to the income of the assessee. Therefore there was non-application of mind on the part of the Assessing Officer. The Appellate Tribunal was justified in confirming the order of the Commissioner (Appeals) and holding that the reopening of the assessment was bad in law."

6.4. *The Hon'ble Delhi High Court in the case of Shamshad Khan vs., ACIT [2017] 395 ITR 265 (Del.) in which it was held as under :*

"Held, allowing the petition, that the form for recording the reasons for initiating the proceedings under section 148 of the Act for obtaining approval of the Commissioner itself proceeded on the erroneous basis that the quantum of income which had escaped assessment was Rs.28,75,000 whereas the assessee had filed returns showing income of merely Rs.20,56,145 and it was on this basis that the Additional Commissioner and the Commissioner granted their approval for reopening the assessment. Even though the assessee highlighted this fundamental error at the initiation of the case by stating that his income was mentioned as Rs.20,56,145 instead of Rs.69,71,191, this was summarily rejected stating that it was a clerical mistake and that the latter figure would be treated as his income. If the correct income i.e. Rs.69,71,191 was put before the Commissioner at the time of seeking his approval, he might have taken a different view. There was nothing on record to show that the clerical mistake of substituting Rs.20,56,145 for Rs.69,71,191 was ever brought to the notice of the Commissioner either before or after approval or sanction under section 151(1) of the Act. The initiation of the case for reopening of the assessment was erroneous and without application of mind especially since the Assessing Officer had not examined the return filed, which would have revealed that the assessee had filed regular returns, had sufficient opening balance

in his account and the withdrawals therefrom substantiated the donation made. Therefore, the reopening of the assessment was unsustainable in law and the notice issued under section 147 of the Act was to be quashed.”

6.5. *The Hon’ble Bombay High Court in the case of Siemens Information Systems Ltd., vs., ACIT & Others [2007] 293 ITR 548 (Bom.) held as under :*

“The petitioner had several EOU/STP units engaged in the business of export of software. In response to the notice for reopening the assessment for the assessment year 1999-2000, the petitioner, objecting to the issuance of the notice, stated that the reasons furnished by the authority had quoted the provisions of section 10A as amended by the Finance Act, 2000, with effect from the assessment year 2001-02 and as such could not have been made applicable to the assessment year 1999-2000 and the notice had been issued under the mistaken belief about the correct position of law. However, opportunity to show cause was given to the petitioner as to why the loss claimed should not be disallowed to be carried forward. On a writ petition :

Held, allowing the petition, (i) that it would be clear from the reasons given that the authority proceeded on the presumption that the law applicable was the law after the amendment and not the law in respect of which the petitioner had filed the return for the year 1999-2000. This by itself clearly demonstrated that there was total non-application of mind on the part of the authority and consequently, the notice based on that reason would amount to non-application of mind.

(ii) That the income derived by the assessee from an industrial undertaking to which section 10A applies could not be included in the total income of the assessee. Therefore, the petitioner was right in filing the return by excluding the income in terms of section 10A.”

6.6. *In the case of Pr. CIT vs., RMG Polyvinyl (I) Ltd., 396 ITR 5 (Del.) the Hon’ble Delhi High Court held as under:*

"In the present case too, the information received from the Inv. Wing cannot be said to be tangible material per se without a further enquiry being undertaken by the learned assessing officer"

6.7. *In the case of Pr. CIT vs., Meenakshi Overseas (P) Ltd., 395 ITR 677 (Del.), the Hon’ble Delhi High Court held as under :*

"Reassessment notice condition precedent recording of reasons to believe that income has escaped assessment mere reproduction of investigation report in reasons recorded absence of link between tangible material and formation of ceding illegal Income Tax Act, 1961, Sec.147, 148"

6.8. In the case of *Pr. CIT vs., G And G Pharma India Ltd., [2016] 384 ITR 147 (Del.)*, the Hon'ble Delhi High Court held as under :

"Reassessment condition precedent application of mind by assessing officer to materials prior to forming reason to believe income has escaped assessment - No independent application of mind to information received from Directorate of Investigation and no prima facie opinion formed-reassessment order invalid".

6.9. In the case of *Sarthak Securities Co. (P) Ltd., 329 ITR 110 (Del.)*, the Hon'ble Delhi High Court held as under :

"No independent application of mind by the Assessing officer but acting under information from Inv. Wing - Notice U/s. 147 to be quashed".

6.10. *The crux of the above Judgments had been that in case incorrect, wrong and non-existing reasons are recorded by the A.O. for reopening of the assessment and A.O. failed to verify the information received due to non application of mind to information, reopening of the assessment would be unjustified and is liable to be quashed. Considering the totality of the facts and circumstances of the case and in the light of material on record, we are of the view that reopening of the assessment is illegal and bad in Law and is liable to be quashed. We, accordingly, set aside the Orders of the authorities below and quash the reopening of the assessment. Resultantly, all additions stand deleted. In view of the above, there is no need to decide other issues raised in the present appeal which are left with academic discussion only. Accordingly, appeal of the Assessee is allowed.*

7. *In the result, appeal of the Assessee allowed.
Order pronounced in the open Court."*

9. Considering the totality of the facts and circumstances from the case and in the light of the material on record, I am of the view that reopening of the assessment is illegal, bad in law

and is liable to be quashed. I, accordingly, set aside the orders of the authorities below and quash the reopening of the assessment.

9.1 It may also be noted here that the AO without any justification and without bringing any material on record as to which broker assessee has given margin money for trading has made addition of Rs. 11,49,060/-. When the AO does not know as to who is the broker to whom alleged amount is given, AO was not justified in making estimate based on general information that assessee has given the impugned amount to the broker for transaction in MCX. Since, it is an admitted case that assessee suffered loss in MCX transactions, therefore, there was no justification to make estimated addition of Rs. 11,49,060/-.

10. In view of the above, I set aside the orders of the authorities below and delete the addition of Rs. 11,49,060/-.

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

Order pronounced in the open Court on 01.02.2021.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 01.02.2021

*Kavita Arora

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches : Delhi.