

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'SMC-2': NEW DELHI
(Through Video Conferencing)**

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

**ITA No.5712/Del/2019
Assessment Year : 2011-12**

**Rajesh Gupta HUF,
C/o-Raj Kumar & Associates,
Chartered Accountants,
L-7A (LGF), South Extension
Part-II, New Delhi-110049
PAN-AAGHR9262M**

**Vs. ITO,
Ward-31(4),
R. No.1209, Civic Centre,
New Delhi-110002**

(Appellant)

(Respondent)

Appellant by : Sh. Raj Kumar, CA
Sh. Aman Gupta, CA
Respondent by : Sh. Farat Khan, Sr. DR
Date of hearing : 01.02.2021
Date of pronouncement : 19.04.2021

ORDER

PER R.K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 18.06.2019 of the learned CIT(A)-11, New Delhi, relating to Assessment year 2011-12.

2. Fact of the case, in brief, are that the assessee filed its return of income on 20.09.2011, declaring total income of Rs.10,92,630/-. The return was processed u/s 143(1) of the Act. Subsequently, the Assessing Officer reopened the assessment by recording the following reasons:-

“Reasons for re-opening of the assessment in case of Sh. Rajesh Gupta (HUF) for A.Y.2011-12 u/s 147 of the Income Tax Act, 1961.

1. As per the ITD information, Rajesh Gupta (HUF) is having PAN: AAGHR9262M address at 14, Sainik Farm, Lane C-3, Khanpur, New Delhi. Further, as per ITD database, the aforesaid assessee filed his return of income for A.Y.2011-12 on 20.09.2011 declaring an income of Rs.10,92,630/-. The return of income was processed u/s 143(1).
2. In this case, information was received from the office ADIT(Invt.) Unit-1(3), Mumbai vide office letter No. ADIT(Invt.)/Unit-1(3)/DMC EDU/2017-18/1082 dated 21/03/2018 in this office on 27/03/2018. As per the information, it is gathered that M/s DMC Education Ltd. (Script name DMC Education) is a penny stock listed on BSE with Script Code (517973) and trading in this script is highly suspicious and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain or Short Term Capital Loss in their books of accounts. The financials of the company for the relevant period do not show any substantial change so as to support such as huge share price movement. The sharp rise in the market price of this entity is not supported by financial fundamentals of the company. Both purchase and sale of the shares are concentrated within few persons/entities. The exit providers do not have creditworthiness. They are either non-filers or have filed nominal return of income. Further, during it was also examined that that this script was also indulged in self-trading.

2.1. After examining of trade data of M/s DMC Education Ltd by the Investigation Wing, Mumbai, it was analyzed that the following beneficiary has also traded in the script of M/s DMC Education Ltd during the F.Y,2010-11:

<u>S.No.</u>	<u>Name of Beneficiary</u>	<u>PAN of the beneficiary</u>	<u>Total Trade value for F.Y.2010-11</u>
<u>1.</u>	<u>Rajesh Gupta (HUF)</u>	<u>AAGGR9262M</u>	<u>Rs. 1,90,800/-</u>

3. Information received is analyzed at our end and after analyzing it is observed that the assessee Sh.Rajesh Gupta (HUF), was involved in buying the bogus inflated/deflated shares through the prearranged transactions on the Stock Exchange in the shares of M/s DMC Education Ltd and made total trade value of Rs.1,90,800/-. The trading pattern of shares of M/s DMC Education Ltd shows that the prices rose and fell sharply in a pre-arranged trading pattern. Further, the fluctuation in the share prices is not in synchronizing with the general sensex level. Also the sharp rise and fall in the price of shares of M/s DMC Education Ltd is not correlated with the fundamentals of company.

The financials of the company also do not justify the sharp rise & fall in the price of the shares for the purpose of giving bogus entry/bogus LTCG to the different beneficiaries on commission.

4. *On perusal of information received from the office of the ADIT(Inv.) Unit-1(3), Mumbai and after Verification of return of income filed by the assessee, it is observed that the assessee has not declared the transaction of Rs. 1,90,800/- in his return of income and the same remains unaccounted for being not declared by the assessee to the department and hence income of Rs.1 lakh or more has escaped assessment in A.Y.2011-12, Thus to bring the above amount to tax, re-opening the case u/s 147 is proposed.*

5. *It is pertinent to mention that in the case of CIT vs Nova Promoters & Finlease (P) Ltd. (ITA No.342 of 2011) dated 15/02/2012, the Hon'ble Delhi High Court, which is the jurisdictional High Court, Held that as long as there is a 'live link' between the material which was placed before the Assessing Officer at the time when reasons for reopening were recorded, proceedings u/s 147 would be valid. The Court also held:-*

"We are aware of the legal position that at the stage of issuing the notice u/s 148, the merits of the matter are not relevant and the Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax has escaped assessment.
“

6. *It is pertinent to mention here that in this case, the assessee has filed return of income for the year under consideration but no assessment as stipulated u/s 2(40) of the Income Tax Act was made and the return of income was processed u/s 143(1) of the income Tax Act. In view of the above, provisions of clause (b) of Explanation 2 to Sec.147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case when income chargeable to tax has escaped assessment.*

7. *In this case, more than four years have elapsed from the end of assessment year under consideration. Hence, necessary approval u/s 151(1) of the Income Tax Act may kindly be accorded for issuing Notice u/s 148 of the Act for A.Y. 2011-12.”*

3. The Assessing Officer thereafter issued notice u/s 148 of the Act on 30.03.2018 which was duly served on the assessee. The assessee in response to the same filed the return of income on 10.04.2018 declaring total income of Rs.7,50,590/- and asked for reasons which were duly

provided to the assessee. The assessee filed objections against such reopening which were disposed of by the Assessing Officer by passing a speaking order, wherein, he rejected the various objections of the assessee.

3.1. Subsequently, during the course of assessment proceedings, the Assessing Officer asked the assessee to explain as to why addition should not be made on account of accommodation entry for Long Term Capital Gain amounting to Rs.1,90,800/- u/s 68 of the Income Tax Act and the commission on account of providing such accommodation entry. Rejecting the various explanation given by the assessee and invoking the provisions of section 68 of the Act and genuineness of the claim of Long Term Capital Gain u/s 10(38) of the Act, the Assessing Officer made addition of Rs.1,90,800/- to the total income of the assessee. He further made addition of Rs.9,540/- being commission paid for arranging such accommodation entry.

4. In appeal, the learned CIT(A), sustained the addition made by the Assessing Officer. He also upheld the validity of reassessment proceedings challenged before him.

5. Aggrieved with such order of the learned CIT(A), the assessee is in appeal before the Tribunal by raising following grounds of appeal

1. *That under the facts and circumstances, proceedings U/s 147/148 are without jurisdiction, without application of mind, unwarranted, mechanical, on borrowed satisfaction and on the basis of wrongly taken facts, hence unsustainable in law as well as on merits.*

2. *That under the facts and circumstances, the approval U/s 151 is fatally defective, mechanical and without application of mind which makes the whole proceedings without jurisdiction, illegal and*

unwarranted.

3. *That the Ld. A.O., did not adjudicate the objections against initiation of re-asstt proceedings fully, as per law and as per the directions of Hon'ble SC in the case of G.K.N. Drive Shafts, hence consequential proceedings and impugned asstt. is illegal and without jurisdiction.*

4. *That under the facts and circumstances, there is no justification in law as well as on merits for addition of Rs. 1,90,800/- U/s 68 for the sale consideration amount reed on sale of share during the year which were acquired in F.Y 2005-06 and further erred in not allowing the exemption U/s 10(38) for LTCG amount of Rs. 1,30,800/-*

4.1 *That under the facts and circumstances, provisions of section 68 are not applicable on the impugned addition of Rs. 1,90,800/-.*

4.2 *That in the absence of providing and confronting alleged adverse material and in the absence of cross examination being allowed, no cognizance of such material can be taken, thus the A.O erred in law and on merits in making addition of Rs.1,90,800/- on the basis of such material.*

5. *That there is no legality and justification for addition of Rs.9,540/- as unexplained expenditure U/s 69C for alleged commission expense @5% of Rs.1,90,800/- although there is no material and evidence for the same."*

6. The learned counsel for the assessee, referring to page 3 and 4 of the paper book drew the attention of the Bench to the reasons recorded by the Assessing Officer, according to which, the assessee has not declared the transaction of Rs.1,90,800/- in his return of income and the income remained unaccounted for being not declared by the assessee before the Department. Referring to page 48 to 50 of the paper book, the learned counsel for the assessee drew the attention of the Bench to the copy of the return of income filed by the assessee, wherein, the assessee has declared Long Term Capital Gain of Rs.1,29,903/- as per Schedule E-1 of the Income Tax Return. He accordingly submitted that the Assessing Officer without verifying the return of income filed by the assessee and in a mechanical manner and under borrowed satisfaction has reopened the

assessment which is not valid in law. He submitted that when the reopening is based on wrong appreciation of facts, such reopening is held to be invalid in view of the decision of the Hon'ble Delhi High Court in the case of CIT vs Kamdhenu Steel & Alloys reported in 248 CTR 33(Del.), in the case of CIT vs Sh. Atul Jain and Vinit Jain reported in 292 ITR 383(Del.) and in the case of Pr. CIT vs Rmg Polyvinyl (I) Ltd. reported in 396 ITR 5(Del.).

7. The learned counsel for the assessee submitted that as per notice u/s 148, the case of the assessee was reopened after getting approval from the Pr.CIT-11, New Delhi. The assessee vide letters dated 02.05.2018 and 13.08.2018 requested the Assessing Officer to provide the copy of the approval taken u/s 151(1) of the Act. However, no such copy of approval was ever provided by the Assessing Officer to the assessee. Referring to various decisions, he submitted that when the approval has been given in a mechanical manner, such approval is not accordance with law and therefore, the reassessment proceedings has to be held as invalid. He submitted that the Assessing Officer in the instant case has initiated reassessment proceedings in a mechanical manner without application of mind. Referring to the following decisions, he submitted that where, the Assessing Officer has reopened the assessment on the basis of information from the Investigation Wing and without independent application of mind, such reassessment proceedings are held to be invalid being not accordance with law. For the above proposition, he relied on the following decisions:

- i. Pr. CIT vs G And G Pharma India Ltd. 384 ITR (2016)(Del.) 147

- ii. Sarthak Securities Co. (P) Ltd. 329 ITR 110(Del.)
- iii. CIT vs Kamdhenu Steel & Alloys Ltd. (2012) 248 CTR (Del.) 33
- iv. PCIT vs Meenakshi Overseas (I) Ltd. 395 ITR 677 (Del.)

8. So far as the merits of the case is concerned, the learned counsel for the assessee, submitted that the assessee had applied for 5000 shares having face value of Rs.10 each of M/s Swen Television Ltd. in A.Y. 2006-07. Thereafter, shares of M/s Swen television Ltd. were split into the face value of Rs.5/- each, Further, bonus shares in the ratio of 1:1 were allotted by the Co. Hence, in this manner, assessee held 20,000/- shares in M/s Swen Television Ltd. Thereafter, M/s Swen television Ltd. was amalgamated with M/s DMC International, and assessee was allotted 3 shares for every 4 shares held in M/s Swen television Ltd. i.e. 15000 shares of DMC allotted against 20000 shares of Swen television. In this manner, the assessee got 15000 shares in M/s DMC International. Such 15000 Shares were sold in A.Y. 2011-12. The LTCG arising on sale of shares are as under:-

M/s DMC International.	
Sale Consideration	Rs.1,90,227/-
Less: Purchase cost	Rs. 60,000/-
Less: Trf Exp	<u>Rs. 324/-</u>
LTCG	Rs.1,29,903/-

9. Referring to various pages of the paper book, the learned counsel for the assessee submitted that the assessee has duly disclosed such Long Term Capital Gain on account of sale of the shares after deducting the purchase cost (Rs.60,000/-) and the transfer expenses (Rs.324/-) from the sale consideration of Rs.1,92,227/-. Therefore, both legally and factually, the addition made by the Assessing Officer and

sustained by the learned CIT(A) is not in accordance with law. Referring to the various decisions placed in the paper book, the learned counsel for the assessee submitted that the reassessment proceedings in the instant case is not in accordance with law and therefore has to be quashed.

10. The learned DR, on the other hand, heavily relied on the order of the learned CIT(A).

11. I have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the learned CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the Assessing Officer in the instant case, on the basis of information obtained from the Investigation Wing that the assessee has traded in a penny stock namely shares of M/s DMC Education Ltd. and has not disclosed the income arising out of such transaction, reopened the assessment, the reasons of which have already been reproduced in the preceding paragraph. I find rejecting the various explanation given by the assessee, the Assessing Officer made addition of Rs.1,90,800/- u/s 68 of the Act and made further addition of Rs.7,540/- u/s 69C of the Act being the expenditure incurred for arranging such accommodation entries. I find in appeal, the learned CIT(A) upheld the reassessment proceedings as well as the addition on merit. It is the submission of the learned counsel for the assessee that the reopening has been made by the Assessing Officer in a mechanical manner and on borrowed satisfaction without independent application of mind. It is his submission that the assessee has already declared income from Long Term

Capital Gain amounting to Rs.1,29,903/- after claiming purchase cost of Rs.60,000/- and transfer expenses of Rs.324/- from the sale consideration of Rs.1,19,227/- in respect of sale of 1500 shares of M/s DMC Education Ltd. Therefore, the reopening of the assessment without verifying the return and on the basis of report of the Investigation Wing and without independent application of mind by the Assessing Officer make such reassessment proceedings a nullity.

12. I find merit in the above argument of the learned counsel for the assessee. The copy of the return filed by the assessee which is placed at page 48 to 50 of the paper book shows that the assessee has declared Long Term Capital Gain of Rs.1,29,903/- as per Schedule E-1 of the Income Tax Return and has claimed the same as exempt. From the details furnished by the assessee before the Assessing Officer as well as before the learned CIT(A) , I find the assessee has demonstrated that he had sold 15,000 shares of M/s DMC Education Ltd., during the AY 2011-12 for a consideration of Rs.1,90,227/- and after deducting the purchase cost of Rs.60,000, shares of which were acquired in AY 2006-07 (5,000 shares) and subsequent bonus shares, the assessee after deducting the purchase cost and transfer expenses had declared Long Term Capital Gain of Rs.1,29,903/-. Therefore, once, the assessee had declared such income and claimed the same as exempt, the Assessing Officer without verifying the return and without independent application of mind could not have reopened the assessment on the basis of report from the Investigation Wing, which is on account of borrowed satisfaction and not independent

application of mind. Thus, I find merit in the argument of the learned counsel for the assessee that such reopening is based on wrong appreciation of facts and on borrowed satisfaction.

12.1 It has been held in various decisions that when the reopening of the assessment is based on incorrect or wrong appreciation of facts, such reopening is not in accordance with law. It has also been held in various decisions that when the reopening is made on the basis of report of the Investigation Wing and without independent application of mind by the Assessing Officer to the return filed by the assessee, such reopening of assessment is also not in accordance with law and has to be quashed. The Hon'ble Delhi High Court in the case of Pr. CIT vs G And G Pharma India Ltd.(supra) has held that where the Assessing Officer has not applied his mind independently to the information received from the Director of the Investigation Wing and no prima facie opinion formed, such reassessment proceedings is invalid. The Hon'ble Delhi High Court in the case of Sarthak Securities Co. (P) Ltd. (supra) has held that where there is no independent application of mind by the Assessing Officer but acting under information from Investigation Wing, such notice u/s 147 has to be quashed. The Hon'ble Delhi High Court in the case of CIT vs Kamdhenu Steel & Alloys Ltd. reported in (2012) 248 CTR (Del) 33 held that where the Assessing Officer acted mechanically on the information supplied by the Directorate of Income Tax (Investigation) about the alleged bogus/accommodation entries provided by certain individuals/companies, without application of his own mind, he was not justified in invoking jurisdiction u/s 147 of the

Act. It is pertinent to mention here that SLP filed by the Revenue against the above decision of the Hon'ble Delhi High Court was dismissed by Hon'ble Supreme Court vide order dated 17.09.2012. The Hon'ble Delhi High Court in the case of PCIT vs Meenakshi Overseas (P) Ltd. reported in 395 ITR 677(Del.) has held that where reassessment was resorted on the basis of information from DIT (Investigation) that assessee had received accommodation entry but there was no independent application of mind by the Assessing Officer to tangible material and reasons failed to demonstrate live link between tangible material and formation of reason to believe that income had escaped assessment such reopening is not justified. The various other decisions relied on by the learned counsel for the assessee in paper book to the proposition that when the Assessing Officer has reopened the assessment on wrong appreciation of facts and without independent application of mind but acted mechanically on the basis of report from the Investigation Wing, such reassessment proceedings are not in accordance with law support his case. Since, in the instant case, the Assessing Officer has acted mechanically on the basis of report from the Investigation Wing and without independent application of mind and the reopening of assessment is on wrong appreciation of facts, therefore, such reopening of the assessment, in my opinion, is not in accordance with law. I, therefore, quash the reassessment proceedings initiated by the Assessing Officer u/s 147 of the Act and upheld by the learned CIT(A). The legal grounds raised by the assessee challenging the validity of reassessment proceedings are accordingly allowed.

13. Since, the assessee succeeds on the legal ground, the various other grounds challenging the addition on merit are not being adjudicated being academic in nature.

14. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 19.04.2021.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Delhi/Dated- 19.04.2021

Shekhar

Copy forwarded to: -

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

By Order

Assistant Registrar,
ITAT, Delhi