

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.2264/M/2019
Assessment Year: 2014-15**

Income Tax Officer- 29(2)2), Room No.203, C-10, 2 nd Floor, Pratyaksh Kar Bhavan, Bandra (East), Mumbai - 4000251	Vs.	M/s. Mukesh B. Pichholiya (HUF), 703, 7 th Floor, Siddhesh Apartment, 2 nd Katar Galli, Thakur Dwar Road, Mumbai - 400 002 PAN: AACHM 9921J
(Appellant)		(Respondent)

**CO No.53/M/2019
(Arising out of ITA No.2264/M/2019)
Assessment Year: 2014-15**

M/s. Mukesh B. Pichholiya (HUF), 703, 7 th Floor, Siddhesh Apartment, 2 nd Katar Galli, Thakur Dwar Road, Mumbai - 400 002 PAN: AACHM 9921J	Vs.	Income Tax Officer- 29(2)2), Room No.203, C-10, 2 nd Floor, Pratyaksh Kar Bhavan, Bandra (East), Mumbai - 4000251
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vimal Punamiya, A.R.
Revenue by : Shri Bharat Andhade, D.R.

Date of Hearing : 14.01.2021

Date of Pronouncement : 06.04.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeal by the Revenue and the cross objection by the assessee have been preferred against the order dated 21.01.2019 of the Commissioner of Income Tax (Appeals)

[hereinafter referred to as the CIT(A)] relevant to assessment year 2014-15.

2. The Revenue has challenged the deletion of addition of on money of Rs.1,72,33,650/- as made by the AO towards on money paid by the assessee to builders M/s. Runwal Green Projects. Whereas the assessee has challenged by virtue of cross objection the validity of assessment framed under section 143(3) read with section 147 of the Act on the ground that no additions were made for which the reasons were recorded under section 148(2) of the Act and therefore the assessment made is invalid and void ab-initio.

3. We would like to take up first the cross objection of the assessee in which the assessee has raised legal issues which are reproduced as under:

“1. On the facts and circumstances of the case and law the Ld. CIT(A) erred in confirming that the assessment made in pursuance of notice u/s 148 of the act is not void and illegal.

2. On the facts and circumstances of the case and law the Ld. CIT(A) has not appreciated facts that there was no escapement of income found by the learned Assessing Officer in relation to the reasons recorded as no addition/ disallowance is made in the assessment order based upon the reasons recorded.

3. On the facts and circumstances of the case and law, the learned CIT(A) has erred in not considering the fact that the learned Assessing Officer has erred in law and on facts in framing impugned assessment order without assuming jurisdiction as per law.

4. On the facts and circumstances of the case and law the Ld. CIT(A) has not appreciated facts that assessment made u/s 148 is bad in law.”

4. We would like to first adjudicate the ground No.2 of the cross objection.

5. The facts in brief are that the assessee filed the return of income on 26.07.2014 declaring an income of Rs.86,620/-. The case of the assessee was reopened under section 147 of the Act

after the AO received information from Directorate of Investigation that assessee has generated bogus capital gain on penny stocks which was claimed as exempt under section 10(38) of the Act amounting to Rs.1,12,91,467/-. Accordingly, the notice under section 148 of the Act was issued on 12.09.2016. The reasons recorded are reproduced as under:

“Reasons for reopening :-

In this case, return of Income for AY 2014-15 was filed on 26/07/2014 income of Rs.86,620/- for the assessment year under consideration.

2. Information has been received from the Directorate of Investigation that an organized racket of generating bogus entries of LTCG in penny stocks have been unearthed as a result of investigation carried out throughout the country. As a result of this investigation, Mukesh B. Pichholiya (HUF) beneficiaries who have taken bogus entries of LTCG amounting to Rs. 1, 22,76,731 /- have been identified. M/s. Mukesh Bhawanilal Pichholiya (HUF) having PAN AACHM992U who is assessed in this circle/ward has also availed of such an entry. The same is reflected in the return of income for AY 2014-15 by way of claim of exemption amounting to Rs. 1, 12,91, 467/- under section 10(38) of the Income Tax Act, 1961.

3. The Directorate of Investigation has made available various confessional statements of entities involved in the transactions for generating such bogus claims of LTCG. I have examined these statements and trio detailed report of the investigation. I have also examined these evidence vis-a-vis the return of income of the assessee. After appraisal of these material on record, there is enough reason to believe that not only the claim of exemption under section 10(38) by the assessee is prime facie bogus but by making such bogus claim, the assessee has clearly failed to disclose all material facts for determination of income. In fact in this case the assessee seems to have fabricated evidence in order to mislead the revenue to believe the apparent as real."

6. The assessee has challenged this issue before the Ld. CIT(A) who has dismissed the appeal of the assessee on this issue, however, candidly recorded a finding that reasons were recorded in respect of bogus long term capital gain under section 148(2) of the Act whereas the assessment framed was in respect of some other issue, however, dismissed the appeal of the assessee by holding that AO has received information from the office of DDIT(Inv.), Unit 4(1), Mumbai regarding seized

material from M/s. Runwal Homes Pvt. Ltd. and thus justified the reopening of assessment.

7. After hearing both the parties and perusing the material on record, we find that undisputedly the assessment has been framed under section 143(3) read with section 147 of the Act dated 27.12.2017 wherein the addition has been made by the AO of Rs.1,72,33,620/- as unexplained investment under section 69 qua the cash paid by the assessee to M/s. Runwal Homes Pvt. Ltd. for purchase of flat, the evidences whereof were found during the course of search on the said builder. Thus we note that no addition was made in respect of the bogus long term capital gain of Rs.1,12,91,467/- which was stated to be claimed as exempt under section 10(38) of the Act by the assessee in the reasons recorded under section 148(2) of the Act. In our opinion, the order of Id. CIT(A) upholding the assessment order can not be sustained. Our finding is supported by the following decisions:

1. CIT vs. Jet Airways India Ltd. (2011) 331 ITR 236 (Bom.)
2. CIT Mumbai vs. ICICI Bank Ltd. (2013) 31 taxmann.com 53

In the case of CIT vs. Jet Airways (I) Ltd. (supra) the Hon'ble Bombay High Court has observed and held as under:

“16. *Explanation 3* lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended

to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

17. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147(1) and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh's case (supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147(1) as they stood after the amendment of 1-4-1989 continue to hold the field.

18. In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall, accordingly, stand answered against the revenue and in favour of the assessee. The appeal is, accordingly, dismissed. There shall be no order as to costs."

8. We, therefore, respectfully following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (I) Ltd. (supra) quash the reassessment framed by the AO. Accordingly, ground No.2 of the cross objection is allowed.

9. Since we have quashed the assessment we are not adjudicating the other issues raised by the assessee.

10. The appeal filed by the Revenue challenging the order of Ld. CIT(A) becomes infructuous as we have quashed the assessment framed by the AO (supra).

11. In the result, appeal of the Revenue is dismissed whereas cross objection of the assessee is partly allowed.

Order pronounced in the open court on 06.04.2021.

**Sd/-
(Amarjit Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 06.04.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.