

IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2339/Mum./2021
(Assessment Year : 2011-12)

ITA No.2338/Mum./2021
(Assessment Year : 2012-13)

Income Tax Officer
Ward-24(2), Mumbai

..... Appellant

v/s

Kailash Chandra Gupta (HUF)
501-B, Legend Building, New building
New Link Road, Off. Lokhandwala Complex
Andheri (West), Mumbai 400 053
PAN - AAAHK4439D

.....Respondent

Assessee by : Shri Rajesh Sanghvi
Revenue by : Shri Tejinder Pal Singh

Date of Hearing - 17/08/2022

Date of Order - 10/11/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the Revenue challenging the separate impugned orders of even date 17/10/2021, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [*'learned CIT(A)'*], for the assessment years 2011-12 and 2012-13.

2. Since both the appeals pertain to the same assessee and the issue involved is also common, therefore, as a matter of convenience, these appeals

were heard together and are being disposed off by way of this consolidated order. With the consent of the parties, the Revenue's appeal for the assessment year 2011-12 is taken up as a lead case and the decision rendered therein would apply *mutatis mutandis* to the other appeal filed by the Revenue for the assessment year 2012-13.

ITA No. 2339/Mum/2021
Revenue's appeal – A.Y. 2011-12

3. In this appeal, the Revenue has raised the following grounds:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A), NFAC was correct in holding that notice issued u/s 148 of the Income Tax Act, 1961 for Assessment Year 2011-12 is bad in law without appreciating the fact that reopening of assessment was based on new material and evidences available with the assessing officer to arrive at the reason indicating escapement of income".

2 "On the facts and in the circumstances of the case and in law, the Ld. CIT(A), NFAC was correct in quashing the assessment order without going into the merit of the case by treating the notice issued u/s 148 as 'bad in law ignoring the fact that the Assessing Officer has issued the notice u/s 148 after properly applying the provisions of section 147 of the Income Tax Act, 1961.

3. This appeal is filed consequent to CBDT Circular No.3 of 2019 dated 06.09.2019.

4. The appellant prays that the order of Ld. CIT(A), NFAC on the above ground be reversed and that of the Assessing Officer be restored.

5. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

4. The only grievance of the Revenue is against quashing of reassessment proceedings under section 147 of the Act by the learned CIT(A).

5. The brief facts of the case pertaining to this issue are: The assessee is a HUF. For the year under consideration, the assessee filed its return of income

on 28/06/2011 declaring a total income of Rs.12,21,449. Based on the information received from the Directorate of Investigation, Kolkata, reassessment proceedings in the case of the assessee were initiated and notice under section 148 of the Act was issued on 13/09/2016, after recording the reasons. In reply, the assessee filed a letter requesting that the return of income originally filed be treated as a return filed in response to notice issued under section 148 of the Act. The assessee also sought the reasons recorded while reopening the assessment. The assessee filed its objections challenging the initiation of reassessment proceedings under section 147 of the Act. The said objections filed by the assessee were rejected. Pursuant thereto, statutory notices under sections 143(2) and 142(1) of the Act were issued and the assessee filed its reply to the information/details sought. Vide assessment order passed under section 143 (3) r/w section 147 of the Act, the Assessing Officer ('AO') noted that the assessee had purchased 5000 shares of Splash Media on 13/05/2009 at the rate of Rs 47.22 and paid Rs. 2,36,116 along with the brokerage and other charges. Later on, bonus shares in the ratio of 3:1 were received to the assessee, and the shareholding of the assessee was increased to 20,000 shares. Out of these 20,000 shares, 2000 shares were sold on 08/06/2010 at the sale value of Rs. 14,91,647.90 during the financial year 2010-11 and the long-term capital gain arose on the sale of shares was claimed as exempt under section 10(38) of the Act. The AO analysed the information received from the Investigation Wing Kolkata regarding the price manipulation of the shares of Splash Media. The AO also referred to the statement of various persons recorded by the DGIT (Investigation), Kolkata.

During the assessment proceedings, notices under section 133(6) of the Act were issued to the 5 entities, which have purchased the shares of Splash Media from the assessee. In this regard, a copy of the return of income with profit and loss account, balance sheet, capital account, audit report, DEMAT account details from the time of purchase of shares of Splash Media till its sale, period of holding of these shares and copy of bank statement was sought by the AO. As noted in the assessment order, reply from only 2 parties was received but complete details were not provided as required by the AO. After a detailed discussion on the mode of acquisition of shares and its sale by the assessee, the AO vide assessment order disallowed the long-term capital gain of Rs. 13,93,293, claimed as exempt under section 10(38) of the Act and made the addition of Rs. 14,91,647, under section 68 of the Act being the sale proceeds received by the assessee on sale of shares. The AO also disallowed commission at the rate of 3%, charged for providing arranged long-term capital gain, under section 69C of the Act.

6. In its appeal before the learned CIT(A), the assessee raised grounds challenging the invocation of jurisdiction under section 147 of the Act as well as the addition made by the AO under section 68 of the Act. Vide impugned order dated 17/10/2021, learned CIT(A) allowed the appeal filed by the assessee on jurisdiction issue and held that the conclusion of the AO that income has escaped assessment in the case of the assessee by trading in the bogus penny stocks of Splash Media was based entirely on the satisfaction of the Directorate of Investigation, Kolkata, and there was no independent

application of mind on the part of the AO. The relevant observations of learned CIT(A), in this regard, are as under:

"In view of the above, the notice issued by the AO to the Appellant under Section 148 of the Act on the basis of aforesaid "reasons to believe" which reflect the "borrowed satisfaction" is bad in law. And further, since the foundation of the impugned assessment order framed thereafter under Section 147 of the Act lies in such a notice, the impugned assessment order itself is bad in law, and, hence, the impugned assessment order is, hereby, quashed. As a result, the addition of Rs. 15,33,446/- [Rs. 14,91,647/- plus Rs. 41,799/-] made by the AO on this account is, hereby, deleted.

7. As regards the issues raised on the merits of addition made by the AO under section 68 of the Act, the learned CIT(A) left the same open as relief was granted to the assessee on the jurisdictional issue itself. Being aggrieved, the Revenue is in appeal before us.

8. During the hearing, the learned Departmental Representative ('learned DR') submitted that the information received from the Directorate of Investigation, Kolkata is tangible material based on which the AO formulated its belief that income chargeable to tax, for the year under consideration, has escaped assessment in the case of the assessee. The learned DR further submitted that the reasons recorded by the AO for reopening the assessment in the present case cannot be said to be based on the borrowed satisfaction as the investigation by the Investigation Wing, Kolkata is only by another arm of the Revenue.

9. On the other hand, the learned Authorised Representative ('learned AR') submitted that the AO completely relied upon the investigation report and did not carry out any independent inquiry of its own, after receipt of the

information, if the amount is reflected in the return of income or whether long term capital gain is claimed. Learned AR further submitted that the AO has not verified the facts and mere receipt of information from any source cannot tantamount to tangible material for the formation of reason to believe. The learned AR also placed reliance upon various decisions in support of its submission.

10. We have considered the rival submissions and perused the material available on record. As is evident from the record, in the present case return of income filed by the assessee was not selected for scrutiny. The AO based on the information received from the Directorate of Investigation, Kolkata initiated the reassessment proceedings. The reasons recorded by the AO, while reopening the assessment, are as under:

**"REASONS RECORDED FOR REOPENING OF ASSESSMENT
U/S 147 OF THE I.T. ACT, 1961**

The assessee has filed the return of income for A.Y.2011-12 on 28.06.2011. declaring total income at Rs. 1221449/-.

As per the report/information available with this office that the Directorate of Investigation, Kolkata, has undertaken the accommodation entry of Long Term Capital Gain(LTCG) investigation and as a result, they have been able to identify a very large number of beneficiaries who have taken a huge amount bogus entries of LTCG/STCL through listed penny stock. The investigation reveals that the trading in the penny stock was a manipulated affair to generate entries of bogus Long term Capital Gains/Short Term Capital Loss facilitating tax evasion by a large number of persons.

As per the said information, the assessee has earned Long Term Capital Gains through trading in the following penny stock.

F.Y.	Scrip Name	Buy or Sell	Qty	Qty (Normalized)	Trade Count	Trade Value
2010-11	Splash Media	SELL	20000	2000	5	1491646.90

The above mentioned script/share is one of the penny stocks of which price was rigged to gain huge profit/Loss through manipulated affairs. The said

manipulations are corroborated by the sworn statements of various persons recorded during the course of the said investigation.

Thus, it is clear that the assessee is one such person who has availed accommodation entry of bogus Long Term capital gains and claimed exemptions u/s 10(38) of the IT Act, 1961 amounting to Rs. 1491646.90. This is resulted in under-assessment of Rs. 1491646.90 for the A.Yr. 2012-13.

In view of the above facts, have reason to believe that income chargeable to tax of Rs.1491646.90 has escaped assessment within the meaning of Section 147 of the IT Act, 1961 for the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for the previous year relevant to A.Yr. 2012-13. Hence it is a fit case for initiation of proceedings u/s 147 of the Income Tax Act, 1961 by issuing notice u/s 148 of the Income Tax Act 1961.”

11. From the perusal of aforesaid reasons recorded by the AO, it is evident that the Directorate of Investigation, Kolkata found that various entities have indulged in providing bogus entries of long-term capital gain/short-term capital gain through listed penny stocks. The Investigation Wing further found that there are various beneficiaries of such bogus entries of long-term capital gain/short-term capital gain. As per the said information, the assessee has earned long-term capital gain through trading in the penny stocks of Splash Media. The AO based on said information received from the Directorate of Investigation, Kolkata concluded that income to an extent of Rs. 14,91,646.90 has been under-assessed due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

12. It is the plea of the learned AR that the reassessment proceedings have been initiated entirely based on the satisfaction borrowed from the Investigation Wing and no independent inquiry was conducted by the assessee to come to the aforesaid conclusion. In support of its plea, reliance has been placed upon various decisions. Before dealing with each decision, relied upon

by the learned AR, it is relevant to note that such decisions have been rendered in their facts based on reasons recorded for initiating the reassessment proceedings, and thus no decision can be treated as direct precedent unless similar circumstances exist as in the present case. In Perfect Capital Services Ltd vs ITO, ITA No. 387/Del./2014, we find that SMC bench of the Tribunal set aside the reassessment proceedings on the basis that the reasons recorded by the AO do not demonstrate any application of mind on the material/information received from Director (Investigation). Further, in PCIT vs G & G Pharma India Ltd, in ITA No. 545 of 2015, vide judgment dated 08/10/2015, the Hon'ble Delhi High Court set aside the reassessment proceedings by observing as under:

"12. In the present case, after setting out four entries, stated to have been received by the Assessee on a single date i.e. 10th February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated: "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has introduced its own unaccounted money in its bank account by way of above accommodation entries." The above conclusion is unhelpful in understanding whether the AO applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the Assessee, which must have been tendered along with the return, which was filed on 14th November 2004 and was processed under Section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the AO to have simply concluded: "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO must apply his mind to the materials in order to have reasons to believe that the income of the Assessee escaped assessment is missing in the present case."

13. In Piramal Enterprises Ltd vs DCIT, in WP No. 2958 of 2016, the Hon'ble jurisdictional High Court vide judgment dated 15/02/2017 observed as under:

"5.Mere receipt of information from any source would not by itself tantamount to reason to believe that income chargeable to tax has escaped assessment. In the present case the Assessing Officer prima facie has not done the bare necessary/rudimentary enquiry into the material received before he concludes that income chargeable to tax has escaped assessment. The evidence of the same is the absence in the reason of any amount being determined by the Assessing officer as having escaped assessment. This prima facie determination of income escaping assessment would indicate application of mind to arrive at the reason to believe that income chargeable to tax has escaped assessment."

14. Further, from the perusal of the decision in PCIT vs Shodiman Investment Private Limited, in ITA No. 1297 of 2015, we find that the Hon'ble jurisdictional High Court vide judgment dated 16/04/2018, set aside the reassessment proceedings as the assessing officer failed to establish the vital link between the material and the reason to conclude that income has escaped assessment.

15. Further in Shri Udit Kumar Dagar vs ITO, 2019 (5) TMI 430, the coordinate bench of the Tribunal set aside the reassessment proceedings as the same was initiated merely based on DIT (Investigation) report.

16. In the present case, it is pertinent to note that no scrutiny assessment was conducted in the case of the assessee and therefore the only data available with the AO was the data provided along with the income tax return and the report/information received subsequently from the office of Directorate of Investigation, Kolkata. The said information constitutes new and tangible material for initiating the reassessment proceedings in the case of the assessee.

17. It is also to be noted that the AO in the reasons recorded has categorically mentioned that the assessee has entered into 5 trades where 2000 shares of Splash Media were sold by the assessee having sales value of Rs. 14,91,646.90 during the financial year. Though this information was received from Investigation Wing, Kolkata but the AO applying his mind extracted the relevant details pertaining to the assessee. In the first paragraph of the reasons, information of penny stock was noted. Based on this in second paragraph, relevant details about the alleged bogus transaction of the assessee were identified. In the third paragraph, the AO has clearly identified the escapement of income and in the last paragraph, the satisfaction of the AO is recorded. Thus, there was a 'tangible material' on which the AO applied his mind independently. Hence, it is not correct to state that reopening has been made on the basis of borrowed satisfaction.

18. It is further pertinent to note that it is undisputed that the assessee has transacted in shares of Splash Media and earned Rs. 14,91,646.90 and has declared an amount of Rs. 13,93,293 as a long-term capital gain on the sale of shares in its return of income. Thus when new and tangible material in form of a report from the Directorate of Investigation, Kolkata was received, reassessment proceedings were initiated. In ACIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd, [2007] 291 ITR 500 (SC), the Hon'ble Supreme Court observed as under:

"16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer

has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co. (P.) Ltd. [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC)."

19. Therefore, if there is relevant material based on which a reasonable person can form a requisite belief that income chargeable to tax has escaped assessment, then proceedings under section 147 of the Act can be validly initiated. Further, it is also well settled that the sufficiency or correctness of the material is not a thing to be considered at the stage of recording the reasons. The existence of a valid "reason to believe" is a *sine qua non* to exercise the jurisdiction under Section 147 of the Act. The expression 'reason to believe' imports the cumulative presence of the following four elements viz. some tangible material or materials to establish that income has escaped assessment; nexus between such material and the belief of escapement of income from assessment as envisaged under Section 147; application of mind by the Assessing Officer to such material; and an inference, based on reason, drawn tentatively by the officer that income has escaped assessment. The application of mind by the AO to the new and tangible material has to be discerned from the reasons recorded in each case and from the perusal of the

reasons recorded for reopening the assessment in the present case, we are of the considered view that all the aforesaid conditions are fulfilled and the AO has rightly initiated the reassessment proceedings under section 147 of the Act. Various decisions relied upon by the learned AR are factually distinguishable. Therefore, in view of the above, the findings of the learned CIT(A) quashing the reassessment proceedings are set aside. As a result, the grounds raised by the Revenue are allowed.

20. Insofar as the merits of the case are concerned, as noted above, the learned CIT(A) did not adjudicate the grounds raised by the assessee challenging the additions made by the AO. Therefore, the learned CIT(A) is directed to adjudicate the said grounds.

21. In the result, the appeal by the Revenue for the assessment year 2011-12 is allowed for statistical purposes.

ITA No. 2338/Mum/2021
Revenue's Appeal- A.Y.2012-13

22. Since similar issue is arising in this appeal and undisputedly the facts are also similar except with variance in figures, therefore, our findings/conclusions rendered in Revenue's appeal for the assessment year 2011-12 shall apply *mutatis mutandis* to this appeal as well. As a result, the grounds raised by the Revenue are allowed.

23. Insofar as the merits of the case are concerned since the grounds raised by the assessee challenging the addition made by the AO were not

adjudicated, therefore, the learned CIT(A) is directed to adjudicate the said grounds.

24. In the result, the appeal by the Revenue for the assessment year 2012–13 is allowed for statistical purposes.

25. To sum up, both the appeals by the Revenue are allowed for statistical purposes.

Order pronounced in the open Court on 10/11/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 10/11/2022

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai