

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI M. BALAGANESH, AM

आयकर अपील सं/ I.T.A. No.2600/Mum/2022

(निर्धारण वर्ष / Assessment Year: 2012-13)

Deepak Srichand Bathija 5-B, Elegant Apartment, 3, Sobhani Road, Cuffe Parade, Mumbai-400005.	बनाम/ Vs.	NFAC, Delhi Room No. 356 C.R. Building, New Delhi- 110002.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAPB6001A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Hari Raheja
Revenue by:	Shri Vaibhav Jain

सुनवाई की तारीख / Date of Hearing: 13/12/2022

घोषणा की तारीख /Date of Pronouncement: 22/12/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 25.08.2022 for the assessment year 2012-13.

2. The assessee has filed eleven (11) grounds, however, at the outset, the Ld. AR drew our attention to ground no. 1 wherein the assessee has challenged the validity of reopening of the assessment made by the AO u/s 147 of the Income Tax Act, 1961 (hereinafter "the Act") without satisfying the condition precedents u/s 147 of the Act. Since it is a legal issue we would like to adjudicate the same first.

3. We have heard both the parties and perused the records. Since the assessee has challenged the Ld.CIT(A)'s impugned action of up-



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

holding the re-opening of assessment, let us look into the settled position of law regarding the power of AO to re-open the assessment u/s 147 of the Act. The concept of assessment is governed by the time-barring rule; and an assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence regarding undisclosed income or AO has information in his possession showing escapement of income as stipulated u/s 147 of the Act. As per Section 147 of the Act, if the AO intends to re-open the assessment, then AO has to record the reason to reopen the assessment, wherein he should record the "*reason to believe, escapement of income*". It is settled principle of law that "*reason to believe*" postulates a foundation based on information and belief based on reason. After a foundation based on information is there, still, there must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In other words, before the AO issues notice u/s 148 of the Act, he must have recorded the *reason to believe escapement of income*. It is no doubt true that this Tribunal cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the AO on the point as to whether action should be initiated for re-opening the assessment. At the same time, we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant or remote and far-fetched, which would warrant the formation of belief relating to escapement of income. It is



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

well settled in law that reasons as recorded by AO for re-opening the assessment, are to be examined on a stand-alone basis. Neither anything can be added to the reasons so recorded, nor can anything be deleted from the reason so recorded. The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom) has inter alia observed that "*.....it is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded by him. He has to speak through the reasons*". Their Lordship added "*The reasons recorded should be self-explanatory and should not keep the assessee guessing for reason. Reason provide link between conclusion and the evidence...*". Therefore, the Ld. DR's contention before us that while examining the legal validity of the re-opening of assessment, we not only have to consider the reasons recorded by AO to re-open the assessment, but also consider the AO's action of issuing show cause notice dated 14.11.2018, wherein the new allegation of assessee's transaction and claim of LTCG of Rs.12,54,500/- on the scrip of M/s. PFL Info Tech has been raised [*which was not said/alleged in the reasons recorded for re-opening*], cannot be accepted as held by the jurisdictional High Court that while examining the jurisdiction of AO to have re-opened the assessment, we have to only consider the *reasons recorded* by the



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

AO on a stand-alone basis and adjudicate as to whether AO has satisfied in the reasons recorded, the condition precedent i.e, *reason to believe escapement of income*) to validly reopen the assessment.

4. On the touchstone of the aforesaid settled principles of law, let us see whether the AO satisfies the requirement of law for successfully re-opening the assessment by examining the recorded reasons i.e, whether AO in his reasons recorded had the requisite “*reason to believe escapement of income*”. For that let us have look at the reasons recorded by the AO to have reopened the assessment which is found placed at Page no. 22-23 of the PB which reads as under: -

“Subject: Reasons for Reopening of Assessment u/s 147 of the I. T. Act, 1961.

The reasons recorded for reopening your case for the A.Y-2012-13 is reproduced as under for necessary compliance or your part at the earliest.

“The return of income has been filed by the assessee on 28.09.2012, declaring total income at Rs.36,76,760/-

2. Information was received by this office on 13.06.2017 from the office of the DDIT (Inv.), Unit- 7(4), Mumbai vide letter No. DDIT (Inv.)/Unit 7(4)/Information/2017-18 dated 04.05.2017 that a search and seizure action u/s.132 of the Income-tax Act, 1961 was carried out in the case of Shri Vipul Vidur Bhatt and his other related entities, including one Sampada Chemicals Limited on 05.02.2016. In his statement recorded u/s.132(4) of the Act on 09.02.2016 on oath, Shri VipulVidur Bhatt had admitted that he is an entry operator and all those mentioned



*ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija*

entities / companies are bogus entities / companies, which are used by him for providing various bogus accommodation entries to various beneficiaries for commission and that he was a director in those entities / companies and all other directors are also dummy directors appointed by him and that he only controls the entire activities / affairs of as many as 347 entities / companies, which were incorporated for providing bogus accommodation entries only. During the search action, the books of accounts of all those 347 bogus entities / companies were found at an undisclosed premise at 1407, 14th floor, New Jalphalwadi, Police Colony, Tardeo, Mumbai 400034, which is neither a registered office of those bogus entities nor this premises was related to those bogus entities in any way. In his statement on oath, he further admitted that since he was engaged into the business of providing accommodation entries and that he was managing and controlling the affairs of those entities, which is admitted to be illegal work, hence he only is maintaining the books of accounts of those entities at the said premises.

2.1 In his Statement on oath, Shri VipulVidur Bhatt, admitted that he was involved in providing bogus accommodation entries in the form of bogug LTGG / STC Loss, one time entry of share capital / share premium, unsecured loan entries, turnover entries and bogus expenditure entries etc., He further admitted that the shares of a scrip, Sampada Chemicals Limited were‘ also utilized for providing bogus long term accommodation entries to the various beneficiaries, including the present assesses.

Shri DeepakSrichandBhatija (AAAPB6001A), who had availed of exemption of bogus LICG of Rs.66,01,274/- on sale of the



*ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija*

bogus scrip, Sampada Chemicals Limited in the return of income for A.Y. 2012-13.

In light of the above facts, I have reason to believe that the income of Rs.66,01,274/-has escaped assessment within the meaning of the provisions of Section 147 of the Act and as such it is a fit case for issue of notice u/s.148 of the Act.

Since the period beyond 4 years has elapsed, this is put up for kind sanction of the Pr. CIT -17, Mumbai as per the provisions of Section 151(2) of the Income-tax Act, 1961. This notice, being generated on the system, does not require to bear the signature of the designated officer and it may please be treated as notice in accordance with the provision of section 129 of the Income-Tax Act 1961.

Kavita Gokul Patil
Circle-17(1), Mumbai

5. From a perusal of the aforesaid reasons recorded, it is discerned that the AO received information from DDIT, Mumbai pursuant to a search conducted by the Department on Shri Vipul Vidur Bhatt who was an entry operator and was providing bogus accommodation entries to beneficiaries in lieu of commission. And he used to give accommodation entries through his paper companies/concerns and that one such entities was M/s. Sampada Chemicals Ltd. (hereinafter “M/s. Sampada”). The AO noted that the shares of scrip of M/s. Sampada were utilized for providing bogus long term accommodation entries to various beneficiaries including the assessee’s who had availed exemption of bogus Long Term Capital Gain (LTCG) of



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

Rs.66,01,274/- on sale of bogus shares of M/s. Sampada for the AY. 2012-13. Therefore, he had “*reason to believe escapement of income*”. The Ld. AR also brought to our notice that the AO had issued scrutiny notice dated 10.12.2018 asking the assessee to explain the LTCG of Rs.66,01,274 made on sale of shares of M/s. Sampada and why it should not be added back as unexplained cash credit u/s 68 of the Act; and drew our attention to the copy of the notice which itself we note is running to ten (10) pages. And pursuant to the notice, the assessee objected to the proposed reopening of assessment by pointing out that the assessee in the relevant AY. 2012-13 has not claimed any LTCG/capital gain in respect of the sale of scrip M/s. Sampada. Therefore, according to the assessee, foundation/information/jurisdictional fact based on which the AO has reopened the assessment itself was incorrect/on wrong assumption of facts, therefore, the entire exercise to re-open itself fails. However, the AO rejected the assessee’s objection by letter dated 16.10.2018 (29-31 of the PB). And thereafter again issued a show cause notice dated 14.12.2018 which is found placed at page no. 32 -33 of the PB wherein he changed the allegation recorded in the reasons recorded [*furnished to the assessee vide letter dated 19.06.2018 wherein the basis of reopening was the alleged claim of LTCG of Rs.66,01,274/- on sale of shares of M/s. Sampada (supra) which was the basis for issuance of re-opening notice u/s 148 of the Act dated 27.03.2018*] wherein he was stating about assessee’s LTCG claim of Rs.12,54,500/- on sale of shares of M/s. PFL Info Tech Ltd. Thereafter, the AO added the LTCG on sale of scrip of M/s. Info Tech Ltd u/s 68 of the Act of



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

Rs.12,54,500/-. This action of AO is challenged by the assessee. The main thrust of the argument of the Ld. AR is that the AO issued the statutory notice u/s 148 of the Act conveying his intention to re-open the assessment on 27.03.2018 and the factual basis for re-opening was the alleged assessee's claim of LTCG of Rs.66,01,274/- on sale of shares of M/s. Sampada Chemicals Ltd. However when assessee objected to the re-opening of assessment by pointing out that assessee had not claimed/sold any LTCG on sale of shares of M/s. Sampada Chemical Ltd in AY 2012-13, the AO rejected the assessee's objection vide letter dated 16.10.2018 and later on realizing the mistake (that assessee didn't claim LTCG of Rs.66,01,274 on sale of shares of M/s. Sampada Chemicals) on 14.12.2018 made a new allegation of assessee's claim of LTCG of Rs.12,54,500/- on sale of shares of M/s. PFL Info Tech; and thereafter made addition of Rs.12,54,500/- which action according to Ld. AR, AO could not have done because the foundational facts on the basis of which AO issued notice u/s 148 of the Act dated 27.03.2018, has changed. Therefore, the AO on the erroneous basis (that assessee claimed LTCG of Rs.66,01,274/- on sale of shares of M/s. Sampada) had issued notice u/s 148 of the Act, therefore AO's action even when this factual error was pointed out, [rejecting the objection raised by the assessee] and then on a new allegation/fact of LTCG of Rs.12,54,500/- on sale of M/s. PFL Info Tech could not have proceeded with the re-assessment. So according to him, the very issuance of notice u/s 148 of the Act dated 27.03.2018 was bad in law. We find considerable force and merit in the contention of the assessee's Ld. AR and while examining the *reasons recorded*



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

for reopening an assessment (as to whether the AO has satisfied the requisite condition precedent for doing so) we have to examine the reasons recorded *on a standalone basis*. When we do so in this case, we note that the foundational basis on which the AO had reopened the assessment was that the assessee has claimed LTCG of Rs.66,01,274/- on sale of shares of M/s. Sampada, which being accommodation entry, resulted in escapement of income. However, when the assessee brought to the notice of the AO that the assessee has not dealt with such a scrip, the AO rejected the objection. And later alleged about the assessee to have claimed LTCG on another scrip M/s. PFL Info Tech Ltd wherein the assessee has claimed LTCG of Rs.12,54,500/- which was only added to the income of the assessee (and not that of LTCG of Rs.66,01,274/- on sale of shares of M/s. Sampada). Since the foundational fact on which the AO has reopened the assessment was on wrong assumption of facts, the reasons recorded for re-opening does not satisfy the requisite condition precedent as laid down in Section 147 of the Act. According to us, when the AO received information from the Investigation Wing that the assessee has dealt with the entry provider Shri Vipul Vidur Bhatt/his concerns and assessee was a beneficiary of LTCG, then the AO ought to have made certain preliminary inquiry and then in that event could have found out that the assessee has dealt with scrip known as M/s. PFL Info Tech Ltd wherein the assessee has claimed LTCG of Rs.12,54,500/- and thereafter conducted preliminary enquires as to whether there was any link of this shares with entry-operator. And if he finds that entry-operator Shri Vipul had any nexus/connection with assessee/scrip of



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

M/s. PFL, then AO to have recorded the “*reasons to believe escapement of income*” and then reopened the assessment by issuing the notice u/s 148 of the Act, which unfortunately is not what happened in this case. However, in this case, the AO upon receiving information from the DDIT(Inv.) has wrongly assumed the fact that the assessee has dealt with the scrip of M/s. Sampada Chemical Ltd. and has claimed LTCG on sale of it and therefore AO reopened the assessment without having the adequate “*reasons to believe escapement of income*”. Therefore, the foundational fact on the basis of which the AO reopened itself is found to be on wrong assumption of fact therefore the issuance of notice u/s 148 of the Act dated 27.03.2018 itself is bad in law as held by the Hon’ble Bombay High Court in the case of Ankita A Choksey vs ITO [WP 3344 of 2018 order dated 10 January 2019. Further the re-opening is bad in law as laid down by the Hon’ble Bombay High Court in the case of Jet Airways (2011) 331 ITR 238 (Bom), wherein the Hon’ble Bombay High Court upheld the action of Tribunal which held the action of AO to be bad in law since the AO had not ventured to make any addition on the facts on which he re-opened the assessment and instead has added a new issue[which didn’t figure in the reasons recorded to re-open the assessment]. So on this count also the addition of Rs.12,54,500/- is bad in law. And therefore, the assessee succeeds on the legal issue raised by it. Therefore, we quash the issuance of notice u/s 148 of the Act. Consequently, the re-assessment framed by the AO dated 18.12.2018 is null in the eyes of law and the assessee succeeds



ITA No.2600/Mum/2022
A.Y. 2012-13
Deepak Srichand Bathija

on the legal issue. Therefore, other grounds are academic and so, not adjudicated.

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

Order pronounced in the open court on this 22/12/2022.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 22/12/2022.
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