

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |

IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, KOLKATA

BEFORE SHRI RAJPAL YADAV, HON'BLE VICE PRESIDENT

&

DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 408/Kol/2022

Assessment Year: 2010-11

M/s. Osian Stock Pvt. Ltd. C/o S M Surana Advocate Unit No. 1501 15 <sup>th</sup> Floor Diamond Heritage 16, Strand Road Kolkata - 700001 [PAN : AAACO3479N]	Vs	Income Tax Officer, Ward-6(1), Kolkata
---	----	---

अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
------------------------	--	--------------------------

Assessee by :	Shri Sunil Surana, FCA
Revenue by :	Shri Ranu Biswas, Addl. CIT, D/R

सुनवाई की तारीख/Date of Hearing : 30/01/2023

घोषणा की तारीख /Date of Pronouncement: 28/02/2023

**आदेश/ORDER**

**PER DR. MANISH BORAD, ACCOUNTANT MEMBER :**

This is the appeal preferred by the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the Ld. CIT(A)"), passed u/s 250 of the Income-tax Act, 1961 (hereinafter the 'Act'), dated 13/06/2022 for the Assessment Year 2010-11.

2. The assessee has assailed the order of Ld. CIT(A) on legal issue as well as on merit as raised in the concise grounds of appeal filed by the assessee which are reproduced below:

*"1. For that the Ld CIT(A) erred in not properly appreciating the facts and disposing the grounds of appeal taken by the assessee.*

*2. For that the Ld CIT(A) erred in holding that the AO has taken into consideration all legal steps before initiating action u/s 147 when the reopening of assessment was not in accordance with law.*

3. For that the Ld CIT(A) erred in not disposing the additional ground of appeal in relation to the sanction u/s 151 having been granted in a mechanical manner and as such the proceeding was invalidly reopened.

4. For that the Ld CIT(A) erred in holding that the assessee failed to discharge its primary onus when the assessee duly submitted that the money was received on account of sale of investments held by it which sale was not disputed by the AO and as such the addition was not valid.

5. For that the Ld CIT(A) erred in confirming the action of the AO in making the addition of Rs 54 lakhs due to the reason that the assessee failed to produce the directors of the purchaser companies when the sale was proved and the purchasers were in existence.

6. For that the Ld CIT(A) erred in confirming the disallowance u/s 14A when there was no exempt income as well as no expense was incurred to earn any exempt income."

3. First of all, we would like to decide the issues raised in Ground Nos. 2 & 3 as stated above. Ground No. 2, is against the reopening of assessment on borrowed satisfaction without recording reason to believe by the Assessing Officer on his own and also in view of the several error and mistakes being crept in the reasons recorded which showed complete non-application of mind by the Assessing Officer as well as by the approving authority. Vide Ground No. 3, the assessee has prayed before the Bench to quash the reassessment proceedings and consequent assessment order on the ground of invalid approval u/s 151 of the Act.

4. Facts in brief are that the assessee is a private limited company and filed its return of income on 25/09/2010 declaring total income at Rs.9,552/- The assessment was reopened u/s 147 of the Act on receipt of two separate information from DDIT (Inv) regarding receipt of money by the assessee to the tune of Rs.20,00,000/- without disclosing the source and Rs.34,00,000/- from Vriddhi Raj Trading Company Private Limited, which required further

scrutiny. The case was reopened by the AO recording the reasons that he has reason to believe that income to the tune of Rs 54 lakhs (20+34) has escaped assessment on the basis of above two information. The Ld AO issued notices which were complied with by the assessee. But the ld. Assessing Officer on the ground that the assessee failed to establish the identity, creditworthiness of the creditors and genuineness of the transactions, added the amount of Rs.54,00,000/- as unexplained credit u/s 68 of the Act. Further disallowance was made u/s 14A r.w.r 8D on account of expenditure for earning exempt income of Rs.1,59,482/-. Finally assessment u/s 143(3)/147 of the Act was framed determining total income of assessee at Rs.55,69,030/-

5. The Ld. CIT(A) simply dismissed the appeal of the assessee by holding that AO, after due application of mind to the information available as per FIU-IND regarding suspicious transactions, has come to the conclusion that income of the assessee has escaped assessment and accordingly dismissed all the legal issues raised by the assessee. The Ld. CIT(A) observed that it is not the case that the AO has received a vague and unclear information on the basis of which case of the assessee was reopened. The Ld. CIT(A) observed that the specific information was received and case was accordingly reopened and thus justified the reopening of assessment.

6. The Ld. A.R vehemently submitted before us that there is a complete non-application of mind to the information received by the AO. The Ld. A.R. took us through the copy of reasons recorded by the AO, which is filed at page 4 to 6 of PB and contended that a careful perusal of the reasons recorded by the AO u/s 148(2) of the Act revealed that there was complete

non-application of mind by the AO and also that reasons were recorded in a mechanical and most casual manner as there were several factual mistakes committed by the AO in the reasons recorded. The Ld. A.R submitted that since the reasons were recorded in a very casual and vague manner and therefore the reassessment proceedings as well as the assessment framed are invalid as the AO cannot be allowed to unsettle the already finalized assessment in a casual and mechanical manner. The Ld. A.R. also argued that since the case of the assessee was reopened after a period of four year from the end of relevant assessment year, the approval was obtained from ACIT, Circle, Range-6, Kolkata. The ld AR referred to column no. 11 of the approval granted wherein it was stated that “*Yes, I am satisfied*”. The Ld. A.R submitted that this showed that the Ld. ACT has not satisfied himself with the reasons as proposed by the AO and has not even perused the reasons placed before him and simply accorded the approval without application of mind. Had the Ld. ACIT applied his mind to the reasons recorded, the factual mistakes as appearing in the reasons recorded would have been highlighted and corrected but in absence of any application of mind by Ld. ACIT also the reasons as placed before him by the AO were approved which showed blatant non-application of mind on the part of the Ld. ACIT too which is against the spirit of the provisions of the Act. The Ld. A.R. argued that the safeguards of obtaining approval from Ld. ACIT is provided in the Act so that the AO does not reopen the assessment on wrong information or without application of mind but the whole scheme as envisaged under the Act was proved unfruitful when the ld. ACIT also accords approval in casual manner resulting into the case of the assessee being reopened in a manner which is not permissible under the Act. In defense of his arguments the Ld. A.R. relied on the following decisions:

- i) Decision of Hon'ble Calcutta High Court in the case of *Harish Gangji Dedhiya vs. Union of India & Ors. In Writ Petition NO. 1065 of 2022 dated 29.03.2022*
- ii) Decision of Hon'ble Delhi High Court in the case of *PCIT vs. M/s N.C. Cable Ltd. in ITA 335/1015 dated 11.01.2017*
- iii) Decision of Co-ordinate Bench of Gauhati in the case of *M/s Royal Heritage Tripura Castle vs. ITO in ITA Nos. 470 & 471/Gau/2019 for AY 2014-15 & 2015-16 dated 15.12.2021.*

The Ld. A.R finally prayed that in view of the above, the reassessment proceedings as well as reassessment order passed u/s 147 may kindly be quashed in view of the ratio laid down in the aforesaid decisions as the reasons recorded were containing apparent mistakes which showed a complete non-application of mind by the AO as well as by the Ld. PCIT. The Ld. A.R. argued that that AO has made merely acted on the borrowed satisfaction as there was no live link between the information received / material before the AO and the reasons recorded.

7. The ld. A.R also argued that the case of the assessee was reopened after a period of four year from the end of relevant assessment year. The ld AR argued that in order to reopen the case u/s 147 of the Act after a period of four year where assessment has been framed u/s 143(3) of the Act, the AO has to satisfy the conditions as envisaged in first proviso to Section 147 of the Act. The proviso to Section 147 of the Act provides that reopening after a period of four years from the end of relevant assessment year where assessment has been framed u/s 143(3) can only be made , if escapement of income has taken place because of failure on

the part of the assessee to disclose any material fact in the return of income or during the assessment proceedings but since this is not the case before us therefore on this account also the Ld. A.R prayed that reassessment may kindly be quashed . In defense of the arguments the Ld. Counsel relied on the decisions of various judicial forums, namely, i) *New Delhi Television Ltd. vs DCIT (116 taxmann.com 151) (SC)*, ii) *CIT vs Multiplex Trading & Industries Company Ltd. (63 taxmann.com 170) (Delhi HC)*, iii) *Hubtown Ltd. vs DCIT (74 taxmann.com 18) (Bom HC)*, iv) *Dr. RajivrajRanbirsinghChoudhary vs ACIT (79 taxmann.com 152) (Guj HC)*, v) *Haldia Petrochemicals Ltd. vs. ACIT in ITA no. 2455/Kol/2019 for AY 2008-09 dated 24.03.2021*. The Ld. A.R. prayed that in view of the facts of the assessee and the ratio laid down in the decisions as placed before the bench the assessment proceedings as well as consequent assessment may kindly be quashed.

8. Per contra, the Ld. D.R while controverting the arguments of the Ld. A.R submitted that infirmities as pointed out by the Ld. A.R in the reasons recorded are just clerical mistakes and are not fatal to the proceedings initiated on the basis of valid and correct information received from DDIT (Inv.). The Ld DR stated that the similarly the approval granted by the PCIT was also given after due application of mind. The Ld. D.R argued that it is sufficient if it is mentioned by ACIT that approval is granted by stating "Yes, I am satisfied". The Ld. D.R. submitted that such approval showed the satisfaction arrived at by the Ld. PCIT before according the permission to re-open the assessment and only thereafter the said approval was granted. Therefore there is no merit in the contentions of Ld. A.R that the Ld. PCIT has not applied his mind and recorded satisfaction before granting approval

of the case for re-opening. On the plea of the assessee, the Ld. D.R submitted that it has been stated by the AO in the reasons recorded that the income has escaped because of failure on the part of assessee to disclose fully and truly all material facts necessary for its assessment which satisfied the conditions as envisaged by proviso to Section 147 of the Act.

9. We have heard rival contentions and perused the records placed before us including the reasons recorded by the AO u/s 148 of the Act and approval granted by the Ld. ACIT to such reopening. We observe that there are several mistakes/ infirmities /contradictions in the reasons recorded. The above reasons are placed at page no. 6 of the PB. We note that the Ld. ACIT while giving the approval for reopening the assessment has either not perused these reasons and merely given a mechanical approval by stating in Item no. 11 of the approval granted dated 28.03.2017 that “Yes, I am satisfied”. In our opinion such a casual approach on the part of the authorities cannot be appreciated and encouraged because by reopening the assessment, the settled assessment are being unsettled and authorities are supposed to exercise utmost care and caution while recording the reasons and also while granting the approval. On this count itself, the reassessment proceeding as well as reassessment framed cannot be sustained. The case of the assessee find supports from the decision of Hon’ble Calcutta High Court in the case of *Harish Gangji Dedhiya (supra)* wherein the relevant portion held as under:

“7. In the reasons recorded, a copy whereof is at Exhibit B to the petition, the proposed re-opening is set out to be for A.Y.2014-15. The information based on which respondent no.2 has formed an opinion that there is reason to believe escapement of income, in the reasons it is stated, relates to A.Y.2015-16. In the conclusion given in the reasons recorded for re-opening, respondent no.2 states ...I have reason to believe that the amount exceeding Rs. One Lakh chargeable to tax has escaped assessment for the assessment year 2016-17 within the meaning of Section 147 of the I. T. Act, 1961... Therefore, respondent no.2

himself is not clear for which year or based on information for which year that he proposed to re-open, as he had reasons to believe that income had escaped assessment. In the Affidavit-in-Reply respondent no.2 casually states that it was a typographical error. In our view, respondent no.2 owed an obligation to explain as to how a typographical error crept in, in more than one place and before affixing his signature did he read the reasons that he had recorded. Therefore, we are not satisfied with the casual excuse of typographical error.

8. Moreover, if only the Additional Commissioner, who has recommended the proposal of respondent no.2 to respondent no.3 or respondent no.3 himself, while expressing satisfaction that the case was fit for issue of notice under Section 148, had bothered to read the reasons recorded, certainly they would have found the errors and they would have directed respondent no.2 to correct the reasons or refused to grant approval on reasons fraught with errors. This also indicates non-application of mind by the recommending authority, who, Mr.Sharma says, must be an Additional Commissioner of Income Tax and respondent no.3. On this ground alone, the notice issued under Section 148 gets vitiated.

9. Paragraph 2 of the reasons recorded reads as under :

“2. The A.O. has information that the assessee has entered into certain financial transaction/activities during the financial year 2013-14 relevant to the A.Y.2015-16. On going through the information, it is noticed that the assessee has involved in the share trading activity during the year and it involved an amount of Rs.2,46,07,261/-. It came to noticed that during the year assessee has made of shares/derivatives amounting to Rs. 2,46,07,261/- and made huge profit from these transactions. However, it has not been accounted in books of account. Further, it is observed that the assessee had earned long term profit from trading on shares/derivative, which found to be fictitious and claimed as exempted profit as long term capital gain on share trading. Thus, it is crystal clear that the assessee has routed his unaccounted income as long term capital gain and accounted in books of account. Accordingly, given colour of genuine transaction. Thus, I am at the opinion that assessee has escaped assessment exceeding Rs. One Lakh.”

10. Reading this, nobody can make out or atleast we are unable to make out any demonstrable link between the information and the formation of belief. This paragraph does not even indicate what was the trading activity during the year that the petitioner was involved in or from what shares or derivatives the petitioner is alleged to have made huge profit. How can someone be expected to respond to such vague charges ?

11. In Income Tax Office, I Ward, District VI Calcutta and Others vs. LakhmaniMewal Das, it is held as under :

As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the

*material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income- tax Officer on the point as to whether action should be initiated for reopening 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, remote and far- fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in Section 34 of the Act of 1922 at one time before its amendment in 1948 are not there in Section 147 of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, far- fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.*

*(emphasis supplied)*

12. *Therefore, there must be live link or close nexus between the material before the ITO in the case at hand and the belief which he was to form recording the escapement of income. It is also no doubt true that Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for re-opening assessment but at the same time, it is not any and every material, however vague and indefinite or distant, remote and far-fetched which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. It is also settled law that the reasons for re-opening assessment has to be tested / examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to re-open the assessment. These reasons cannot be improved upon and/or supplemented much less substituted by an Affidavit and/or oral submissions (**First Source Solutions Limited vs. The Assistant Commissioner of Income Tax - 12(2)(1) and Another**).*

*Therefore, the submission of Mr.Sharma that respondent no.2 has explained in the order on objections what was the report and information and details on which he formed a reason to believe, will be of no assistance to respondents.*

13. *In the circumstances, we hereby allow the petition in terms of Prayer Clause (a) which reads as under :*

*"That this Honble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ under Article 226 of the Constitution of India, calling for records pertaining to the impugned reopening notice dated 31.03.2021 issued by the Respondent No.2 (being Exhibit A hereto) and after going into the validity and legality thereof to quash and set aside the same."*

14. *Petition disposed.*

10. Similarly in the case of *N.C. Cables Ltd. (supra)* Hon'ble Court has held that the competent authority while authorizing the reassessment notice has

to apply his mind and form an opinion and mere appending of the expression 'approved' says nothing. The operative part is reproduced as under:

*"11. Section 151 of the Act clearly stipulates that the Ld. CIT(A), who is the competent authority to authorize the reassessment notice, has to apply his mind and form an opinion. The mere appending of the expression 'approved' says nothing. It is not as if the Ld. CIT(A) has to record elaborate reasons for agreeing with the noting put up. At the same time, satisfaction has to be recorded of the given case which can be reflected in the briefest possible manner. In the present case, the exercise appears to have been ritualistic and formal rather than meaningful, which is the rationale for the safeguard of an approval by a higher ranking officer. For these reasons, the court is satisfied that the findings by the ITAT cannot be disturbed.*

*12. The substantial questions of law framed are answered in favour of the assessee and against the Revenue. The appeal is dismissed."*

11. Similarly the Co-ordinate bench of Gauhati in the case of *Royal Heritage Tripura Castle (supra)* has held that ritualistic approval granted in mechanical manner without application of mind is invalid and the notice issued by the AO is without jurisdiction. The operative part is reproduced as under:

*"6. Having heard both the parties and perused the records. It is an admitted position that the AO had put up a note before Addl. CIT wherein he has put up a note along with the information as well as reason for forming his belief to re-open the assessment of the assessee for A.Y. 2014-15 on 28.11.2017 which action of AO required the approval of Addl./Joint CIT u/s 151 for issuance of notice u/s 148 of the Act. It is noted that the AO had put up the note for approval for reopening on 28.11.2017 and on the same day approval has been written by hand by the Addl. CIT and on the same date notice has been issued u/s 148 by the AO. Even though the Ld. DR stated that he has got online approval wherein the Ld. Addl. CIT has written "I am satisfied with the reason so approval granted" still according to me the action of the Addl. CIT cannot satisfy the requirement of law which is expected from an authority while exercising approval before issuance of notice for reopening. It should be kept in mind that approval u/s 151 of the Act is a power given to the higher officer (Addl. CIT / Joint CIT) in certain cases like that of the assessee in this cases is for granting approval to re-open the assessment of the assessee which is a valuable safeguard to check against any arbitrary exercise of power by ITO/AO. This safeguard given by the Parliament to the higher officer cannot be granted mechanically or in a ritualistic manner. Merely by scribbling "approved" or for argument sake even if the Ld. Addl. CIT has written "I am satisfied with the reason so approval given". This standard of approval cannot*

*satisfy the test as to whether the Addl. CIT has applied his mind or not before approval was granted. It is noted that even this kind of approvals given by the higher authorities as contended by the Ld DR has been found not to satisfy the test as to whether the approving authority has applied its mind to the information received by the AO and to the reason recorded by the AO justifying the re-opening as held by the Hon'ble Delhi High Court and Madhya Pradesh High Court in the cases cited by the Ld. AR (supra). Therefore, in my opinion, approval granted by the Addl. CIT, Sillong Range has been done in a ritualistic manner mechanically without application of mind. Therefore, the approval granted by the Addl. CIT is bad in law for non-application of mind. Therefore, the issuance of notice u/s 148 of the Act by the AO without getting proper approval from the Addl. CIT as per section 151 of the Act being invalid, the action of the AO issuing notice u/s 148 of the Act is without jurisdiction and, therefore, consequently framing of assessment order dated 07.08.2018 is bad in law and accordingly quashed. "*

12. In view of the facts of the case and in the light of the ratio laid down in the decisions as discussed above, the reassessment proceedings as well as reassessment framed u/s 147 are liable to be quashed.

13. Accordingly considering the facts and circumstances of the case and various judicial pronouncements as discussed above, we are inclined to set aside the order of Id CIT(A) and quash the proceeding u/s 147 of the Act and also the consequent assessment order. Consequently the ground no. 3 are allowed. As the assessment order is quashed, the adjudication of other grounds of appeal, would only be an academic exercise and hence we do not adjudicate the same.

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

**Order pronounced in the Court on 28<sup>th</sup> February, 2023 at Kolkata.**

Sd/-

**(RAJPAL YADAV)  
VICE-PRESIDENT**

Sd/-

**(DR. MANISH BORAD)  
ACCOUNTANT MEMBER**

Kolkata, Dated 28/02/2023

*\*SC Sp/2*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,  
TRUE COPY

Assistant Registrar  
आयकर अपीलीय अधिकरण  
ITAT, Kolkata