

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI GAGAN GOYAL, AM**

आयकरअपीलसं./ I.T.A. No.3257/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2009-10)

Niti Rastogi Mumbai 301, CITI Apartment, Flat NO.21, Sector-16, Koparkhianane, Navi Mumbai- 400709	बनाम/ Vs.	ITO-WARD 28(2)(3) Tower 6, Vashi Station Complex, Vashi Navi Mumbai- 400705
स्थायीलेखासं./जीआइआरसं./PAN No ADYPR5589E		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

आयकरअपीलसं./ I.T.A. No.3258/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2010-11)

Niti Rastogi Mumbai 301, CITI Apartment, Flat NO.21, Sector-16, Koparkhianane, Navi Mumbai- 400709	बनाम/ Vs.	ITO-WARD 28(2)(3) Tower 6, Vashi Station Complex, Vashi Navi Mumbai- 400705
स्थायीलेखासं./जीआइआरसं./PAN No ADYPR5589E		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri. Prakash Pandit, Adv
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri. Chetan M. Kach, Sr.AR.
सुनवाईकीतारीख/ Date of Hearing	:	16.03.2023
घोषणाकीतारीख / Date of Pronouncement	:	23.03.2023

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeals have been filed by the Assessee against separate impugned order of even date, 22.11.2022, passed by NFAC Delhi for the quantum of assessment passed u/s 143(3) r.w.s 147. Since facts and issues involved are common, therefore same we have heard together and being disposed of by the Assessing Officer consolidated order.

2. In both the years here Assessee has challenged the validity of re-opening u/s 147 and the 'reasons recorded' u/s 148, on the ground that same were based on incorrect facts which were contrary to the evidence in material on record. Besides this, Assessee has also challenged addition of; i) Rs. 10,07,950/- on account shares treating it to be a bogus transaction; ii) Rs. 19,25,000/- as gift received from HUF in which assessee is a member; iii) Rs 17,56,906/- on account of unexpected investment; and iv) Rs. 46,821 /- on account of expenses in the Assessment Year 2009-10. In the Assessment Year 2010-11 the assessee has challenged the addition of; i) Rs.38,25,617/- on account of sale of shares treating it to be a bogus transaction; ii) Rs 15 lacs on

account of gift received from actual; iii) Rs.17,56,906/- on account of unexpected investment; iv) disallowance of Rs. 2,67,219/-on account of commission of paid; and lastly, v) Rs.46,821/-on account of expenses.

3. We will take up the appeal for the Assessment Year 2009-10 and our finding given in this appeal will apply *mutatis mutandis* in the appeal for the Assessment Year 2010-11 as similar facts are permeating and the finding given by the Ld.CIT(A) are same accept for variation in figure.

4. Brief facts qua the issue of validity of re-opening u/s 147-148 are that, assessee is an individual and derives income from commission on sale of industrial safety items and interest. She filed her return of income for the Assessment Year 2009-10 on 16.04.2009, disclosing total income of Rs. 1,93,210/- which comprised of income under the head income from business at Rs.2,93,290/-. The said return was processed u/s 143(1). Thereafter, assessee's case was re-opened u/s 147 and notice u/s 148 was issued on 11.02.2014. The reasons recorded by the Assessing Officer for the Assessment Year 2009-10 are as under:

“1. The assessee is an individual and involved in the profession of consultancy. No return of income for the A.Y. 2009-10 was filed by the assessee as per records.

2. As search action was conducted on the M/s. Mahasagar Group of cases on 25.11.2009. In a sworn statement recorded, Shri. Mukesh Chowksi, the key person of M/s. Mahasagar Group, admitted that he and his group were engaged in fraudulent billing activities and in giving accommodation entries in order to enable their clients to declare Speculation profit / loss, LTCG / STCG, profit loss on account of commodity trading, introduce Share Application Money or introduce in the form of Gifts.

3. Shri. Mukesh Chowksi also provided a list of all the beneficiaries of such accommodation entries which contained the name and addresses of the beneficiaries. It was seen that the name and PAN of the assessee appears in the said list. The information on records shows that the assessee had taken accommodation entries amounting to Rs.6,84,239/- during the year shown as bogus bills for purchase of shares and Rs.323711/- being accommodation entries for sale of shares.

This amount has escaped assessment since no return of income for the A.Y. 2009-10 has been filed by the assessee. Therefore, there is failure on the part of the assessee to disclose all material facts necessary for making assessment in his case for the A.Y. 2009-10.

4. In view of the above facts, I have reason to believe that income chargeable to tax amounting to Rs. 10,07,950/- (Rs.6,84,239/- Rs.323711/-) has escaped assessment for the A.Y. 2009-10 within the meaning of the section 147 of the Act. The case is therefore reopened u/s. 147 for the A.Y. 2009-10 and notice u/s. 148 of the Income Tax Act, 1961 is hereby issued.

Date: 11.02.2014

Sd/-11.02.14

(Manoj Kumar)
Income Tax Officer 22(3)(3) Mumbai.”

5. After filing the return of income in response to the notice u/s 148 by stating that return filed on 16.04.2009 should be treated as return file in response to u/s 148, the assessee filed objections before the Assessing Officer against the re-opening and the reasons recorded and also filed reply in response to the notice sent by the Assessing Officer on the issue raised in reason recorded. One of the

main contentions which were raised by the assessee was that, she has not entered into any such transaction with the said party which has been mentioned in the reasons recorded, i.e. she has not purchased any shares through **M/s. Mahasagar Group presented by Mr. Mukesh Chowksi**. The relevant replied filed by the Assessee dated, 09.02.2015 reads as under:

“To

*The Income Tax Officer
Ward 28(2)(3) Mumbai
Tower No.6, 3rd floor, Vashi Railway Station Complex,
Vashi, Navi Mumbai.*

*Sub. Your show cause notice dated 03.02.2015, incase of Niti Rastogi for A.Y.200910
PAN. ADYPR 5589 E
Respected Sir,*

With reference to your above notice, we submit as below:

A. Sir, as mentioned by Your Honour in notice which states that the Assessee has entered into transaction of sale and purchase of shares of M/s. Zen Shaving Limited through M/s.Alliance Intermediaries & Network Private Limited, M/s Mahasagar Group, represented by Mr.Mukesh Chowksi, for Rs.6,84,239 and Rs.3,23,711.

B. We request Your Honour to please give a copy of the statement recorded in case of Mr. Mukesh Chowksi, on the basis of which said assessment is reopened.

C. Further, the Assessee would like to cross examine the said party, who has alleged that he has entered into transaction with the Assessee.

D. The Assessee further confirms that she has not entered into any transaction with the said party. The same can be confirmed from her bank accounts which are enclosed with this letter (Annexure A)

E. Similarly, the Dmat Account, which the Assessee was holding during the financial year 2008- 09, do not show any entry for any such transaction entered into by the Assessee.

F. The above will prove beyond doubt that the Assessee has not entered into any transaction of any sale or purchase with the said party and hence there is no question of any unexplained investment done by the Assessee.

Your Honour is requested to accept the above facts on record and oblige.

6. Along with that, assessee also filed an affidavit before the Assessing Officer, the content of which reads as under:

1. Mrs. Nisi Rishi Rastogi, wife of Rishi Rastogi, residing at A 1901, Bhoomi Paradise, Sector-11, Sanpada, Navi Mumbai declares on solemn affirmation as under:

I, say that I have led my return of income for FY 2008-09 and FY 2009-10 on 16.04.2009 and 12:04.2010 respectively vide acknowledgement number 223300083 and 2233000051.

That during both these years, I had no other income except income from commission and bank interest.

That I have only one Dmat Account with Union Bank of India having ID 1302590001345451 and further confirm that! do not possess any other Dmat Account in my name.

That I have not entered into any transaction of sale or purchases of shares since the opening of above account till its closure on 15.01.2014.

That my bank statements for financial year 2008-09 and 2009-10 also do not show any payment or receipt for purchase or sale of shares.

I say that I am making this affidavit to produce the same before Income Tax Officer 28(2) () Mumbai confirming that I have not entered into any transaction of purchase or sale of shares during the financial year 2008-09 or FY 2009-10.

I say that whatever I have disclosed hereinabove is true to the best of my knowledge and belief and nothing material is concealed therein.

Along with, said affidavit and letter assessee had filed demat account as well as bank account to show that no such credit entry on sale of shares was ever credited in the bank account or in the

demat account and no where it is also reflected in the books of account or capital account of the assessee.

7. However, the Ld. AO despite noting these facts in the assessment orders has solely gone on the statement of Shri. Mukesh Chowksi and the inquiry and investigation carried out in his case and held that assessee has entered onto bogus transaction and therefore, the quantum of sale value of shares made through M/s. Alliance intermediaries and network P.Ltd are bogus transaction to be added u/s 68, i.e., income from undisclosed sources. Thereafter, he has proceeded to make various other additions and thereby assessing the total income at Rs. 32,19,800/-

8. The Ld. CIT(A), too after noting downs the facts and the submissions of the assessee, has confirmed all the addition made by the Assessing Officer and also dismissed the assessee's legal objections on the validity of re-opening u/s 147 and the reasons recorded.

9. We have heard both the parties and perused the relevant finding given in the impugned order as well as material referred to before us. From the bare perusal of the reasons recorded, it is seen

that, **firstly**, Assessing Officer has noted that assessee has not filed the return of income for Assessment Year 2009-10, which fact itself was contrary to the record and also goes to show that assessing officer and not perused the record before recording the 'reasons' and there is no independent application in the mind. **Secondly**, he has noted that during the course of search action in M/s Mahasagar group of cases on 25.11.2009, it came to surface that Mukesh Chowksi, one the key person was involved in providing various accommodation entries and assessee was one such beneficiary. According to the information assessee had taken accommodation entries for sums amounting to Rs. 6,84,239/- during the year shown as bogus bills and purchase of shares of Rs. 3,23,711/- being accommodation entry on sale of shares. He again reiterates that assessee has not filed the return of income and therefore there is a failure on part of the Assessee to disclose all material facts for making the assessment. Accordingly, he has reason to believe that income chargeable to tax has escaped assessment which was quantified at Rs. 10,07,950/-.

10. Now, as per the record and submissions made before the Assessing Officer and CIT (A) as noted above, there is no rebuttal of the fact that assessee has never purchased any such shares of M/s. Zen Shaving Limited through M/s. Alliance Intermediaries & Network Private Limited or M/s Mahasagar Group, represented by Mr. Mukesh Chowksi, for Rs.6,84,239 and Rs.3,23,711. This reply was given by the Assessee in response to the notice sent by the Assessing Officer on 03.02.2015. Apart from that, Assessee has also placed her bank statement, demat account before the Assessing Officer along with the affidavit that no such credit entry of any sale proceeds of shares have been credited in the bank account nor in the capital account of the assessee. It's very surprising to note that, despite assessee had stated these facts along with all the evidences, the Assessing Officer instead of verifying this fact has simply gone on the basis of so called alleged information which on the face of the record turned out to be false or incorrect information. This shows complete lack of application of mind by the Assessing Officer, at the time of recording the reasons and also in the course of the assessing proceedings when assessee has brought these facts to his knowledge. Once the basis of information and the facts which are

recorded in the reasons are found to be factual incorrect then entire basis and edifice for entertaining reason to believe gets demolished.

11. It is well settled law that 'reasons recorded' and 'reason to believe' are jurisdictional fact and there has to be some tangent material having live-link-nexus with the income escaping assessment. If, the material itself is based on incorrect information, ostensibly the entire foundation to reopen gets vitiated and accordingly, the assumption of jurisdiction also fails. Both the authorities have failed to even examine this issue and has blindly gone on the so called information received by the Assessing Officer. Not only that, in the reasons recorded there is no mention as to what was the name of the script and in which account the amount has been credited. Thus, we hold that the entire 'reasons recorded' by the Assessing Officer is based on incorrect assumption of facts and has no co-relation with the income escaping assessment and accordingly, such reasons recorded are quashed and consequently the entire proceedings u/s 148 is held to be invalid.

12. Now coming to the other additions which has been made by the Assessing Officer, now it is well settled that once the entire

reasons recorded are held to be invalid and the addition proposed in the reasons itself has been found to be untenable, then the other additions cannot be roped in such reassessment, because, jurisdiction itself is *void-ab-initio*. This issue now stands covered by the various decisions of the Hon'ble Bombay High Court starting from decision of **CIT vs. Jet Air Ways (India Ltd) reported in 331 ITR 336**. This judgment has been followed in the case of **Yashoda Shivappa Nagangoudar in Writ petition no. 3640 of 2019, judgment and order dated 5th Jan 2022**. The relevant extract of the judgment of the Hon'ble Bombay High Court reads as under:

“1. Petitioner received a notice dated 16th March, 2019 under Section 148 of the Income Tax Act, 1961 (the Act) for AY 2012-13. According to respondents they had reasons to believe that petitioner's income chargeable to tax for A.Y 2012-13 has escaped assessment. The reasons for re-opening is annexed to the petition. The reasons indicate that respondents have information that petitioner has deposited Rs. 13,40,000/- in cash during FY 2011-12 Notwithstanding that petitioner has not filed return of income for A.Y. 2012-13. Therefore, the income chargeable to tax amounting to Rs.13,40,000/- has escaped assessment due to failure on the part of the petitioner to disclose fully and truly all material facts for his assessment.

2. Petitioner filed objections dated 10th October, 2019 to the re-opening of assessment. In that petitioner has explained as under:

"However, the bank, viz; Dena bank in which I hold an account, made a factual mistake in reporting the above transactions. I had deposited total cash of only Rs. 18,000/- on two occasions during the relevant year which were out of gifts received by me/out of my past savings. Whereas, the figure of Rs.13,40,000/- reported by the bank as cash deposited, was in fact the exact amount of cash withdrawn by me, which was erroneously reported as Cash deposit in the AIR/CIB. In support of this, I have attached a copy of the bank statement for FY 2011- 12. Refer Annexure-1.

I have already written to Dena bank pointing out their mistake and have asked them to rectify the same and issue a clarificatory letter to me. I attach a copy of the letter submitted to them. Refer Annexure-2

Thus, this proves that the re-opening of my case u/s 147 of the Income-tax act, 1961 was made on the basis of incorrect material facts and the same should hence be dropped".

3. We have also considered bank statement which does not show any cash deposit of Rs.13,40,000/- It only shows cash deposits of Rs 18,000/-. In the order dated 6 November, 2019 disposing the objections respondents admit and accept that there were cash deposits of only Rs.18,000/- and not Rs 13,40,000/- as alleged in the reasons for re-opening. But according to respondents there were deposits/credits to petitioner account other than in the form

of cash, i.e., total credits of Rs.18,81,092/- (cash and non cash) and therefore as no return of income was filed to show such credits it remained unexplained.

4. To confer jurisdiction under Section 147 of the Act, the Assessing Officer must have reasons to believe that income chargeable to tax has escaped assessment. In this case, the Assessing Officer felt that there were reasons to believe that income had escaped assessment on incorrect facts and that is even accepted in the order disposing the objections which is impugned in the petition. Therefore, the entire basis on which jurisdiction is assumed under Section 147 of the Act fails. On this ground alone, the notice dated 16th March, 2019 and consequential order on objections dated 6th November, 2019 has to be quashed and set aside.

5. Mr. Walve submitted that as per explanation 3 to Section 147 of the Act, the Assessing Officer may assess or re-assess the income in respect of any issue which has escaped assessment even if such issue comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under Sub Section 2 of the Section 148 of the Act.

6. Though, there cannot be any dispute on this statement of Mr. Walve, explanation 3 presupposes that the notice which has been issued was a valid notice. As per explanation 3 it empowers the Assessing Officer to assess or re-assess the income in respect of

any issue that comes to his notice subsequently in the course of the proceedings under Section 147 of the Act but if the proceedings under Section 148 of the Act itself has been initiated wrongly, the question of any new issue that would come to his notice subsequently during the course of proceedings under Section 147 of the Act would not arise. The assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of which comes to his notice subsequently during the course of the any other income proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. We find support for this view in **Commissioner of Income Tax vs. Jet Airways (1) Ltd.** where paragraph nos.6,14,15 & 22 reads as under:
.....”

13. The aforesaid judgment of the Jurisdiction High Court clearly clinches the issue in favour of the assessee. Thus, when entire re-assessment proceedings u/s 147 and 148 is held to be invalid then no addition can be made and consequently whole proceedings and assessment order is quashed and all the additions are held to be made without jurisdiction.

14. Similarly, in the case appeal of the Assessee in the Assessment Year 2010-11, following reasons have been recorded.

“1. The assessee is an individual and involved in the profession of consultancy As per records, the ROI for the A.Y 2010-11 was filed on 12.04.2010 thereby declaring total income of Rs.2,12,467/- The ROI was processed u/s. 143(1) of the Act.

2. As search action was conducted on the M/s. Mahasagar Group of cases on 25.11.2009. In a sworn statement recorded, Shri. Mukesh Chowksi, the key person of M/s. Mahasagar Group, admitted that he and his group were engaged in fraudulent billing activities and in giving accommodation entries in order to enable their clients to declare Speculation profit / loss, LTCG / STCG, profit/ loss on account of commodity trading, introduce Share Application Money or introduce in the form of Gifts.

3. Shri. Mukesh Chowksi also provided a list of all the beneficiaries of such accommodation entries which contained the

name and addresses of the beneficiaries. It was seen that the name and PAN of the assessee appears in the said list. The information on records shows that the assessee had taken accommodation entries amounting to Rs.38,25,617/- during the year being bogus bills for sale of shares. This amount has escaped assessment since in the return of income of the assessee for the A.Y. 2010-11, the assessee has not offered this amount for taxation. Therefore, there is failure on the part of the assessee to disclose all material facts necessary for making assessment in his case for the A.Y. 2010-11.”

15. In this year also exactly facts are permeating except that AO mentions assessee had filed the return of income. But on the allegation made in the reasons were found to be incorrect which is evident from the similar reply filed stating that assessee has not entered into any such transaction and same was duly supported by copy of bank of bank statement, Demat account and other evidences which has not been rebutted. Therefore, our finding given for the Assessment Year 2009-10 will apply *mutatis mutandis* for this year also, and accordingly the impugned assessment order is quashed as *void ab initio*.

16. In the result, both the appeal of the Assesses is allowed.

Orders pronounced in the open court on 23rd March, 2023.

Sd/-

(Gagan Goyal)
Accountant Member

Sd/-

(Amit Shukla)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 23.03.2023

Mrs. Urmila

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai