

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'SMC', KOLKATA

[Before Dr. Manish Borad, Accountant Member &
Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 2187/Kol/2019
Assessment Year : 2011-12

Rajesh Kumar Damani	Vs	ITO, Ward-50(4), Kolkata
PAN: ADOPD 0035 H	.	
Appellant		Respondent

Date of Hearing	13.04.2023
Date of Pronouncement	04.05.2023
For the Assessee	Shri Miraj D. Shah, AR
For the Revenue	Shri Vijay Kumar, Addl. CIT

ORDER

Per Sonjoy Sarma, JM:

The instant appeal has been filed by the assessee against the order of Id. CIT(A)-15, Kolkata dated 18.07.2019 relevant to assessment year 2011-12. The assessee has raised the following grounds of appeal:

"1. For that in the facts and circumstances of the case the appellate order passed was in Violation of principals of natural justice hence is bad in law and be quashed.

2. For that in the facts and circumstances the Learned Commissioner of Income Tax Appeals erred in upholding the addition of Rs.7,75,467/- made u/s 68 of the income tax Act, 1961 as unexplained cash credit on account of bogus long term capital gains on sale of listed equity shares. The addition is not called for and hence the same be deleted.

3. For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in upholding the addition of Rs.93,974/- made u/s 69C of the Income Tax Act, 1961 on account of disallowance of various expenses. The addition is not called for and hence the same be deleted.

4. For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in not allowing the exemption u/s 10(38) of the IT Act 1961. The exemption be allowed as per law.

5. For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in not allowing the capital gains from the sale of listed shares to be exempted income. The exemption should be allowed as per law.

6. For that in the facts and circumstance of this case the material based on which the Ld. Assessment Officer passed the assessment order are collected behind the back of the assessee and which were not provided during the course of assessment proceeding, thus material should be excluded/ignored for the purpose of this case.

7. For that in the facts and circumstances of the case the statement of third parties on which the Ld Assessment officer relied during the course of assessment proceeding were not subjected to cross examination for the assessee, thus the third party statement relied upon should be excluded/ignored for the purpose of this case.

8. For that the learned CIT (Appeals) erred in upholding the reopening of the assessment u/s 148 of the I.T. Act 1961 by the Ld assessing officer. The reopening was bad in law and thus the reopening of the assessment be held bad in law and hence the assessment be quashed.

9. For that the learned CIT (Appeals) erred in upholding the reasons recorded before reopening of assessment u/s 148 of the IT Act 1961 did not meet the test of law laid down by various courts and hence the reopening be declared to be bad in law and the reassessment order be quashed.

10. For that the learned CIT(Appeals) erred in upholding the reopening of assessment u/s 148 of the IT Act 1961 was on borrowed satisfaction and not on any independent application of mind by the assessing officer and hence the reopening be declared to be bad in law and the reassessment order be quashed.

11. For that the learned CIT (Appeals) erred in upholding the reopening of assessment u/s 148 of the IT Act 1961 was without any relevant material having link to escapement of income and hence the reopening be declared to be bad in law and the reassessment order be quashed.

12. For that the learned CIT (Appeals) erred in upholding that the sanction u/s 151 of the IT Act 1961 before the reopening of assessment u/s 148 of the IT Act 1961 was mechanical and without application of proper mind and the sanction was bad in law and hence the reopening be held to be bad in law.

13. For that the learned CIT (Appeals) erred in upholding that the assessment order was passed without service of notice as per law and hence the order was bad in law and the same be quashed.

14. For that the learned CIT (Appeals) erred in upholding that the assessment order was passed by an assessing officer not having jurisdiction over the assessee as per law and hence the order was bad in law and the same be quashed.

15. For that the learned CIT (Appeals) erred in upholding that the Learned Assessing Officer erred in using survey report u/s 133A of the IT Act 1961 in case of third parties against the assessee

16. For that the learned CIT (Appeals) erred in upholding that statement given in survey proceedings is not evidence under the provision of the Income Tax act 1961 and hence the same be ignored.

17. For that the learned CIT (Appeals) erred in confirming the interest charged u/s 234 A/B/C the same was unjustified and hence the same be recalculated as per the applicable law.

18. The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963.

19. The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.”

2. At the outset, ld. counsel for the assessee drew our attention regarding legal issue that has been raised by the assessee as ground no. 8 of the assessee where the assessee has challenged the reopening of assessment u/s 147/148 of the Act by the ld. AO, therefore, we are inclined to adjudicate this issue raised before us as because there is merit on the legal issue then it goes to the root of the reassessment order framed pursuant to the reopening itself.

3. Brief facts of the case for adjudication of the legal issue are that assessee filed its return of income for the AY 2011-12. Thereafter, the ld. AO on 26.03.2018 issued a notice u/s 148 of

the Act for reopening of the assessment, which proposes action of the AO was objected by the assessee on 25.06.2018. However, same was turned down by the AO and the reassessment order was passed on 29.12.2018. Since the legal challenge as stated above, therefore, we would proceed to dispose of the said legal ground.

4. At the time of hearing, the ld. AR assailed the decision of the AO to reopen the assessment based on letter from the DIT (Inv.). According to the ld. counsel, the AO without application of his mind proceeded to reopen the assessment only on the basis of general report DIT (Inv.) regarding certain bogus LTCG claim. Further, he contended that before the ld. AO decided to reopen the assessment, he has to specify the condition precedent to assume jurisdiction and for that he took our attention to the expression used in section 147 of the Act which uses the expression that the ld. AO should have “reason to believe” escapement of the income. According to him, the expression “reason to believe” postulates a foundation based on information and believe based on reasoning. Further, he submitted that even after there is a foundation based on information is there, still there must be some reasons warranted holding a believe that income chargeable to tax has escaped and in the present case of assessee such requirement as contemplated by law as not been made any reasons recorded by the AO before venturing to reopen the assessment which vitiate the assumption of jurisdiction by the AO to reopen the assessment itself. Further, the ld. counsel

submitted that even if the information given by DIT (Inv.) is adverse against the assessee then also AO has to make reasonable enquiry and collect material which would make him believe that there is in fact an escapement of income.

5. The ld. counsel for the assessee submitted that similar reasons were recorded by the AO for reopening of the assessment in the case of Shri Udit Kumar Dugar and the issue raised by the assessee in the said case challenging the validity of assessment made by the AO u/s 147/143(3) of the Act on the ground that the reopening of the assessee itself was invalid was decided by the Tribunal in favour of the assessee vide its order dated 03.05.2019 passed in ITA No. 799/Kol/2018. He has also placed on record a copy of the said order, perusal of which shows that assessment made by the ld. AO in the case u/s 147/143(3) was held to be invalid by the Tribunal as the reopening of the assessment for the similar reason as recorded in the present case itself was found to be bad in law for the following reasons given in paragraph no. 17 and 18 of its order.

“17. From the aforesaid understanding of law governing the issue at hand, we have to examine the reasons already set out above and test whether the condition precedent necessary to usurp the re-opening jurisdiction can be discerned from perusal of the reasons recorded by the AO in the instant case (supra). From the gist of the reasons recorded by the AO, we understand that the AO received information from DIT (Inv.), Kolkata dated 21.09.2015 that the investigation carried out by the Directorate revealed that a very large number of persons had taken entries of huge bogus long term capital gain in an organized manner through share transactions of penny stock companies listed with Calcutta Stock Exchange with the involvement of the promoters of the penny stock companies, unscrupulous broker and entry operators. In the reasons recorded it was also stated that the aforesaid letter was accompanied by CD which contains

Investigation Report, details of transaction and other related information. In the reasons recorded, the AO noticed that the investigation by the DIT(Inv.) focused on nine penny stock companies which were listed with the Calcutta Stock Exchange and then after narrating the general modus operandi of these unscrupulous people the AO notes that the investigation carried out by the DIT(Inv.) revealed that the share price of M/s. Bakra Pratisthan Ltd. (hereinafter "BPL") is one of the penny stock companies listed with the Calcutta Stock Exchange which was also artificially rigged to provide entry of bogus LTCG and as per the information of DIT, the assessee had transacted in shares of M/s. BPL during AY 2012-13 and accordingly the assessee is one of the beneficiary. According to investigation by the DIT the AO notes that there was a total sale of shares of M/s. BPL by the assessee involving trade value of Rs.2,38,54,750/- and according to AO, this information suggests long term capital gain by the assessee for this amount. After taking note of the information from DIT (Inv.), the AO in the reasons recorded opines his suspicion in his own words states "moreover, the transactions cannot be considered genuine merely for the reason that they were carried out on the Exchange Platform with the involvement of registered broker through banking channel in a known sequence with no apparent aberrations." Thereafter, in the reasons recorded he refers to Hon'ble Apex Court decision in CIT Vs. Durga Prasad More (1971) 82 ITR 540 (SC) and express his opinion the taxing authorities are entitled to look into the surrounding circumstances to find out the reality (which means the AO has not formed the belief that there is reason to believe escapement of income, however needs further probe) and thereafter the AO observes that the matter is to be considered by applying the test of human probabilities. Thereafter referring to the Hon'ble Supreme Court decision in the case of Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC) and in the case of CIT Vs. P. Mohankala 291 ITR 278, he concludes that in view of the above facts and after analysing the information available on record, the AO says that he has reason to believe that the assessee has suppressed his income by using LTCG treating it as exempt to the tune of Rs.2,38,54,750/- which is/are reported as bogus by the Directorate. (which means that as per the report of directorate LTCG claim of assessee is bogus) And thereafter, he concludes that he has reason to believe that income to the extent of Rs.2.38 cr. has escaped assessment. Thus, from a reading of the reasons recorded by AO to justify re-opening of assessment, clearly show that the AO has taken note of the information from the DIT(Inv.) and taken the contents of the information given by DIT (inv) as gospel of truth against the assessee [without any verification or enquiry] to form a conclusion about escapement of income without independent application of mind by himself is nothing but an action taken by AO based on the strength of borrowed belief of DIT (inv) and not that of AO, which

vitiates the very assumption of jurisdiction by AO to re-open the assessment, which finding of us will be clear when we analyze the reasons recorded in detail infra.

18. From the aforesaid reasons recorded by AO it is evident that other than the general information given by DIT (inv) there is no other material the AO collected himself after preliminary enquiry which could have enabled him at the time of recording reasons to come to a conscious independent conclusion that "income of the assessee has escaped assessment". According to us, the information given by DIT(Inv) can only be a basis to ignite/trigger and be the starting point to enquire; and at that stage the information of DIT (Inv.) can be termed as a foundation only to form "reason to suspect" and not reason to believe escapement of income which is the jurisdictional fact & law required to enable the AO to successfully assume jurisdiction to reopen as envisaged u/s. 147 of the Act. And the reason to suspect cannot be the basis for usurping jurisdiction to reopen u/s. 147 of the Act, for conducting roving/further examination to be resorted by him in order to strengthen the suspicion to an extent which can later transform the suspicion to create the belief in his mind that income chargeable to tax has escaped assessment. Merely on an allegations levelled by DIT (Inv.), as in this case explaining the general modus operandi carried out by un-scrupulous persons in suspected transactions to earn bogus LTCG, can only raise suspicion in the mind of the AO (which fact we have pointed out earlier) which is not sufficient/requirement of law for reopening of assessment. It has to be kept in mind that the 'reasons to believe' is not synonymous to 'reason to suspect'. 'Reason to suspect' based on an information can trigger an enquiry so that it can be found out whether there is any substance or material to substantiate that there is merit in the information adduced by the DIT(Inv.) and after post enquiry the AO has to take an independent decision whether to re-open the assessment or not. And at the cost of repetition we say that the AO should not act on dictate of any other authority like in this case from DIT (Inv.) because then it would be borrowed satisfaction of the jurisdictional fact & law which is not permitted by law and consequently vitiate the assumption of jurisdiction by AO to reopen u/s. 147 of the Act. In this case, as discussed above, we note that the AO after referring to the investigation report concludes that the information given by the DIT (Inv.) need to be looked into from the surrounding circumstances to find out the reality from the angle of human probability. Thereafter, the AO says that he has reason to believe that the assessee had suppressed its income by using LTCG treating it as exempted to the tune of Rs.2,38,54,450/-; which is/are reported as bogus by the directorate. So it is clear from the aforesaid averments that AO based on directorate's report (DIT Investigation's Report) has taken a view that LTCG claim of assessee is bogus, and

not as per his independent view after a preliminary enquiry. Because the AO himself records in the reasons to re-open that the claim of assessee (LTCG) need to be looked into from the surrounding circumstances to find out the reality, which admission of AO goes on to show that "AO had reason to suspect" only and not reason to believe. This statement of AO clearly shows that the information given by DIT(Inv.) need further probe to find out the reality. So the AO admits that the information given by DIT(Inv.) has not rendered him to make up his mind to believe that income chargeable to tax has escaped assessment. At the cost of repetition we say that an adverse information against an assessee may trigger "reason to suspect", as in this case was, and it was incumbent on his part pursuant to the information reaching his hand (AO), to make reasonable enquiry and collect material which could make him believe, that there is in fact an escapement of income, which exercise AO admittedly did not do and has blindly copied the contents of the DIT(Inv) report and proceeded to reopen the assessment/ intimation passed u/s. 143(1) which action of AO cannot be countenanced. In other words, when the AO was in receipt of the information from the DIT(Inv.) he ought to have made reasonable enquiry and collect materials which would make him believe, that there is escapement of income. As stated earlier, it has to be remembered that information is not synonymous to truth. At the cost of repetitions, we note that AO simply on the basis of the investigation report of DIT (Inv.) has jumped into conclusion that there is an escapement of income which is erroneous since it does not satisfy the jurisdictional fact and law for reopening as envisaged u/s. 147 of the Act. The AO simply taking note of the DIT(Inv.) letter has borrowed the satisfaction without independent application of mind to form reason warrant holding a belief that income chargeable to tax has escaped assessment. Just because a letter has been received from the DIT(Inv.) the AO cannot reopen the assessment even if original assessment was u/s. 143(1) of the Act. In the light of the above, the AO based on the reasons recorded as set out above could not have initiated a fishing enquiry to find out the veracity of the information given by the DIT(Inv.). The reasons recorded by AO does not stand the test as laid by plethora of judicial precedence as discussed above which is sine qua non to assume jurisdiction u/s 147 of the Act, therefore, in the light of the aforesaid facts and circumstances of the case as discussed, we find that the reasons recorded by the AO to justify reopening the assessment u/s. 147 fails and, therefore, the very assumption of jurisdiction to reassess the assessee falls. Since the AO failed to validly assume jurisdiction u/s. 147 of the Act, the assumption of jurisdiction by him to re-open the assessment itself is *qorum non judice* and, therefore, all subsequent action is null in the eyes of law and therefore, we quash the reopening and consequent reassessment order framed by him."

6. As rightly contended by the learned counsel for the assessee, the legal issue raised by the assessee in this case thus is squarely covered in favour of the assessee by the decision of the Division Bench of this Tribunal in the case of Udit Kumar Dugar (supra) and even the ld. DR has not been able to rebut or controvert this position. We, therefore, respectfully follow the said decision of the Tribunal and quash the assessment made by the AO in the present case u/s 147/143(3) of the Act by holding that same as invalid as reopening of the said assessment itself was not in accordance with law. Accordingly, legal ground raised by the assessee is allowed.

7. Keeping in view the decision rendered above on the legal issue quashing the assessment order made by the AO u/s 147/143(3), the other issues raised by the assessee in this appeal have become infructuous or academic in nature, therefore, we do not consider it necessary or expedient to adjudicate upon the same.

8. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on 04.05.2023.

Sd/-

Sd/-

(Manish Borad)
Accountant Member

(Sonjoy Sarma)
Judicial Member

Dated: 04.05.2023
Biswajit, Sr. PS

Copy of the order forwarded to:

1. Appellant- Rajesh Kumar Damani, Room No. 605, 6th Floor, 58-D, Ganesh Market, Netaji Subhash Road, Dalhousie, Kolkata-700001.
2. Respondent – ITO, Ward-50(4), Kolkata.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata