

**।आयकर अपीलीय अधिकरण न्यायपीठ नागपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH : : NAGPUR**

[VIRTUAL HEARING AT PUNE]

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER**

**आयकर अपील सं. / ITA No.363/NAG/2019
निर्धारण वर्ष / Assessment Year : 2009-10**

The Assistant Commissioner of Income Tax, Chandrapur Circle, Chandrapur.	V s	M/s.Chadda Transport, Kosara Road, Padoli, Chandrapur, Maharashtra – 442401. PAN: AAAFC8556F
Appellant / Revenue		Respondent / Assessee

**Cross Objection No.01/NAG/2020
(arising out of ITA No.363/NAG/2019)**

निर्धारण वर्ष / Assessment Year : 2009-10

M/s.Chadda Transport, Kosara Road, Padoli, Chandrapur, Maharashtra – 442401. PAN: AAAFC8556F	V s	The Assistant Commissioner of Income Tax, Chandrapur Circle, Chandrapur.
Appellant / Assessee		Respondent / Revenue

Assessee by	Shri Mukesh Agrawal – AR
Revenue by	Shri Abhay Y. Mrathe – Sr.DR
Date of hearing	30/11/2023
Date of pronouncement	27/12/2023

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by the revenue against the order of ld.CIT(A)-2, Nagpur dated 28.08.2019 emanating from assessment order under section 143(3) r.w.s. 147 dated 21.09.2016 for A.Y.2009-10. The grounds of appeal raised by the Revenue are as under :

- “1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) erred in deleting the addition of Rs 2,90,22,977/- made by the AO as capital gain taxable u/s 50 of the IT Act.*
 2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeal) was right in ignoring the fact that additions made u/s 68 in the original assessment are altogether different from the addition made u/s 50 or 41(2) of the Income Tax Act in the re-assessment proceedings.*
 3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (Appeal) is right in ignoring the observation of the AO that the assessee has failed to furnish before the AO the documentary evidence relating to transfer of bank loan liability of trucks sold which were subsequently furnished before the Ld. CIT (A) during the course of appellate proceedings.*
 4. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeal) was correct in ignoring the fact that in the original appellant proceeding he could have gone into only the question raised before him without going to into other issues which necessitated action u/s 147 of the Income Tax Act.*
 5. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeal) has not appreciated the fact that he has all the powers to go beyond the remand report given by the AO and could have considered the issues raised in reassessment proceedings afresh and upheld the addition made by the AO.*
 6. *Any other ground that may be raise during the proceedings.”*
2. The assessee filed C.O.No.01/PUN/2020. The assessee has raised the ground of appeal as under :

“1. That on the facts and in the circumstances of the case the reopening of assessment u/s 147 of I T Act and consequent order passed u/s 143(3) r.w.s. 147 of the Act is bad in law and the ld CIT Appeal has erred in not deciding this issue in spite of specific ground taken by the assessee.

2. That any other cross objections can be raised during the course of hearing.”

Submission of ld.AR :

3. The ld.AR submitted that in this case original assessment order was passed under section 143(3) on 21.12.2011 for A.Y.2009-10. In the said assessment order, the Assessing Officer specifically mentioned about the sale of vehicles by the assessee to M/s.Chadda Roadlines. Assessing Officer has also mentioned that assessee had produced copies of Sale Agreements, Ledger Accounts. The ld.AR read out the relevant assessment order. The Assessing Officer made an addition of Rs.3,32,40,488/- under section 68 of the Act with reference to the said sale of vehicles. Assessee preferred an appeal. The ITAT vide its order ITA No.262/NAG/2013 for A.Y.2009-10 allowed the appeal of the assessee vide order 28.12.2015. Thereafter, the Assessing Officer issued notice under section 148 dated 23.03.2016. Assessee filed a letter to treat the original return filed on 27.09.2009 as Return in response to notice under section 148 of the Act. The assessee

also requested for copy of reasons. The Assessing Officer(AO) provided copy of reasons. Assessee filed objections before the AO. Assessee challenged the reopening on the ground that it is mere change of opinion and hence bad in law.

3.1 The ld.AR submitted that all the details were submitted during the original assessment proceedings. The ld.AR submitted that AO had applied his mind and then decided to make addition under section 68 of the Act. Therefore, issuing notice under section 148 of the Act on the same issue of “Sale of Vehicles” is nothing but change of opinion. Therefore, the notice under section 148 is bad in law and consequential assessment order is bad in law. The ld.AR invited our attention to section 148 and emphasise that beyond four years, reopening of assessment is bad in law, if AO failed to prove that assessee has suppressed information. In this case, reopening is beyond four years on the same issue which is already examined by AO.

Submission of ld.DR :

4. The ld.DR for the Revenue relied on the order of the AO.

Cross Objection Appeal No.01/NAG/2020 (Assessee) :

Findings & Analysis :

5. We have heard both the parties and perused the records.

We will first take up the assessee's Cross Objection Appeal.

5.1 In this case, original assessment order was passed on 21.12.2011. The relevant paragraph of the original assessment order is reproduced here as under:

“During the year under consideration the assessee firm had sold most of its vehicles (about 78 vehicles) to a related concern viz; M/s.Chadda Road Lines, Chandrapur for a consideration of Rs.5,50,85,000/-. In this regard, copies of sale agreement of the vehicles were called for and examined. The “Sale Agreement of Trucks” are documented on Indian Non Judicial Stamp Paper of value Rs.100 each (prepared in about 29 separate agreements as and when a bunch of vehicles are sold in that are identical format for all the agreements.”

5.2 The reasons recorded by the AO are as under :

“In this case, the assessment was completed vide order u/s 143(3) dated 21/12/2011, assessing the Total Income at Rs. 4,79,12,907/-. The assessee sold most of its trucks during the year to its sister concern, M/s Chadda Roadlines who was shown as creditor to the assessee to the extent of liability amounting to Rs. 3,32,40,488/- payable to its financier bankers towards the vehicles. The A. O. made an addition of Rs.3,32,40,488/- as unexplained credit u/s. 68 of the I. T. Act, as he was not convinced with the explanation given by the assessee for creation of liability by the assessee. During the appellate proceedings, the assessee submitted that the liability prior to the date of sale towards vehicles was taken over by the purchaser by executing a separate agreement with the bankers and the appellate authorities relying on the above submissions held that the liability shown by the assessee stands explained and deleted the addition made by the A. O.

However, on verification of the agreements, it is noticed that as per the agreement, purchase cost receivable by the seller will be adjusted against the existing liabilities which are due to be payable by the seller. Accordingly, when the purchaser took over the outstanding liability of the seller, the purchase cost for the purchaser /seller would be the liability of purchaser towards the lender, which is far more than the WDV of the vehicles. In view of the above, Capital Gains in the case of seller for the relevant A.Y. as the claimed sale of vehicles on WDV is replaced by the liability of the seller towards the financial companies (lenders), which is far more than the WDV of the vehicles. In view of the above, surplus over WDV of the trucks is taxable under the head Capital Gains under section 50 of the I.T. Act which is worked out as under:

<i>Existing liability of the seller</i>	<i>:</i>	<i>Rs. 8,83,25,488/-</i>
<i>Less: WDV of the Vehicles</i>	<i>:</i>	<i>Rs. 5,93,02,511/-</i>
<i>Capital Gains taxable u/s 50</i>	<i>:</i>	<i>Rs. 2,90,22,977/-</i>

In view of the above, I have reasons to believe that income to the tune of Rs.2,90,22,977/- has escaped assessment and it is a fit case for reopening of assessment as envisaged under the provisions of section 148 /147 of the I.T. Act, 1961.”

5.3 The AO finally held in the assessment order under section 143(3) r.w.s 147 as under :

“11.5 It is clear from the above discussion that this entire transaction to transfer the loan liability to the purchaser is merely a book entry passed in the books to avoid the payment of tax and to escape the provisions of section 50 and the provisions of section 41(2), by showing the sale consideration on sale of trucks at Rs. 5,50,85,000/- instead of Rs. 8,83,25,488/-, being the entire liability transferred to the purchaser by way of mere book entries as discussed above and by creating the purchaser as creditor in the assessee’s books to the extent of Rs.3,32,40,488/-, being excess of loans liability and sale consideration (Rs.8,83,25,488 - Rs.5,50,85,000).

11.7 In view of the above discussion, it is evident that the assessee has merely passed book entries in its books to transfer the loan liability of the trucks of Rs. 8,83,25,488/- to the purchaser as the same are not supported by the loan agreements of the purchasers, relied upon by the assessee. It is clear from the above that this entire transaction is merely a book entry passed in the books to avoid the payment of tax and to escape the

provisions of section 50 and the provisions of section 41(2) of the I.T. Act. Therefore, the entire loan liability of Rs.8,83,25,488/- transferred in the name of the purchaser by way of book entry is treated as the sales consideration towards the sale of trucks as against Rs. 5,50,85,000/- shown by the assessee. Accordingly, the surplus over WDV of the trucks is taxable under the head Capital Gains under section 50 of the I.T. Act which is worked out as under:

<i>Existing liability of the seller</i>	<i>:</i>	<i>Rs. 8,83,25,488/-</i>
<i>Less: WDV of the Vehicles</i>	<i>:</i>	<i>Rs. 5,93,02,511/-</i>
<i>Capital Gains taxable u/s 50</i>	<i>:</i>	<i>Rs. 2,90,22,977/-</i>

5.4 Thus, on perusal of the original assessment order, it is absolutely clear that during the original assessment proceedings, the AO had enquired in the issue of “Sale of Vehicles”. The assessee had filed copies of sale agreements for vehicles, copy of ledger accounts, copy of balance sheet. AO had reproduced these facts in the original assessment order. Subsequently, AO made an addition under section 68 of the Act with reference to the outstanding liability which was emanating from “Sale of Vehicles”. During the original assessment proceedings, the AO had applied mind to the issue of Sale of Vehicles, which is absolutely clear from the assessment order and details filed by the assessee during the assessment proceedings.

5.5 Thereafter, after four years without bringing any new evidence on record the AO issued notice under section 148 of

the Act. Here, in the reasons recorded, AO has not alleged that assessee failed to disclose all material facts. In the reasons recorded for reopening, the AO stated *“on verification of the agreements, it is noticed that as per the agreement, purchase cost receivable by the seller will be adjusted against the existing liabilities.....”* Therefore, AO stated that he had reason to believe that capital gain on “Sale of Vehicles” had escaped assessment. Thus, it is very much clear from the reasons that AO is referring to the same agreements which were examined by the AO during original assessment proceedings and which has been mentioned in the original assessment order. The issue of “Sale of Vehicles” is discussed in the original assessment order. In these facts, the reasons recorded are nothing but change of opinion. Therefore, we are of the opinion that AO has reopened assessment merely on the basis of change of opinion.

5.6 Proviso to section 147 of the Income Tax Act is reproduced here as under :

“Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped

assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, of that assessment year.”

5.7 Thus, as per proviso to section 147, notice under section 148 of the Act can be issued in the case of an assessee where assessment order under section 143(3) was passed only and only if assessee failed to disclose fully and truly all material facts necessary for the assessment.

5.8 In this case, the Revenue has not proved that assessee has failed to disclose fully and truly all material facts. The AO has not uttered a single word in the “reasons recorded” regarding any failure of the assessee to disclose any material facts necessary for deciding the issue. Rather, it is on record that assessee had filed copies of sale agreements for “Sale of Vehicles”. The AO had raised queries on this issue, during the original assessment proceedings. The AO had mentioned all these facts in the original assessment order. Revenue has not brought any new evidence on record. Therefore, as per proviso to section 147, there was no new material on record for issuing notice under section 148 of the Act.

5.9 The Hon'ble Bombay High Court in the case of Lokhandwala Construction Industries Pvt. Ltd., Vs. DCIT [2022] 139 taxmann.com 49 (BOM) has held that *“It would, therefore, follow that the reopening of the assessment for this reason is merely on the basis of change of opinion of the Assessing Officer. As held in Aaroni Commercials Ltd. (supra) this change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.”*

5.10 The Hon'ble Bombay High Court has held in the case of Hindustan Lever Ltd vs R B Wadkar 268 ITR 332 (Bom) as under :

Quote, “ 20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the

assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside ” Unquote.

5.11 Thus, the Hon'ble High Court (supra) has categorically held that the “Reasons” should stand on its own legs and cannot be improved subsequently.

5.12 In these facts and circumstances of the case, we have already observed that in the reasons recorded, the AO has not uttered a single word regarding assessee's failure to disclose all true facts. The Hon'ble jurisdictional High Court(supra) has already held that reasons recorded cannot be improved. Once the reasons recorded does not allege any failure of the assessee to disclose material facts, as per proviso to section

147 after four years AO does not have any jurisdiction to reopen the case. In this case, AO has not alleged any failure of the assessee to disclose all material facts. Admittedly, the reopening is after four years.

5.13 In these facts and circumstances of the case, as held by the Hon'ble Bombay High Court (supra), change of opinion does not constitute reason to believe that income chargeable to tax has escaped assessment, in the case of assessee, the reasons for reopening are merely change of opinion and hence does not constitute reason to believe that income chargeable to tax has escaped assessment.

5.14 Therefore, for all the reasons discussed above, the notice under section 148 is bad in law. Therefore, the assessment order passed under section 143(3) r.w.s. 147 is bad in law, accordingly, the Cross Objection appeal raised by the assessee is allowed.

ITA No.363/NAG/2019 (Revenue) :

6. Since we have allowed the Cross Objection Appeal i.e. C.O.No.01/NAG/2020 of the assessee, the Revenue's appeal

becomes academic in nature, hence, Revenue's appeal is dismissed.

7. To sum up, Appeal of the Assessee in C.O.No.01/NAG/2020 is allowed and Revenue's appeal in ITA No.363/NAG/2019 is dismissed.

Order pronounced in the open Court on 27th Dec, 2023.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 27th Dec, 2023/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, नागपुर बेंच, नागपुर/ DR, ITAT, Bench, Nagpur.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.