

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)

ITA No. 2063/MUM/2023
Assessment Year: 2013-14

Asst. CIT Circle1(2)(1),
Aayakar Bhavan,
Maharishi Karve Marg,
Mumbai-400020.

PAN NO. AADCC 3053 D
Appellant

Vs.

M/s Cheryl Advisory Pvt. Ltd.,
501, Vraj Apt. 10th Road, Juhu,
Mumbai-400049.

Respondent

Assessee by : Mr. Tanzil Padvekar, Adv.
Revenue by : Mr. H.M. Bhatt, Sr. DR

Date of Hearing : 17/01/2024
Date of pronouncement : 31/01/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 28.03.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)'] for assessment year 2013-14, raising following ground:

1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified to hold the jurisdictional issue of not initiating the proceedings under section 153C of the Act and allowed the appeal without appreciating the facts that the condition precedent for issuing notice under section 153C of the Act is that the document found during the search proceedings should belong to the assessee to whom notice is issued u/s 153C of the Act.



2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs.2,77,92,524/- without appreciating the fact that the assessee has taken bogus accommodation entry amounting to Rs. 2,77,92,524 from the person which are not carrying out any genuine business activity and creditworthiness is not proved?"

3. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified to allow the assessee's appeal as reopening of the assessment is based on borrowed satisfaction without appreciating the facts of the case that the reopening was based on the information received from the Investigation Wing which is credible information?"

2. At the outset, the Ld. Departmental Representative (DR) submitted that there was a delay of 5 days in filing the present appeal. He submitted that filing of appeal got delayed due to immense work pressure with the Assessing Officer, holding of additional charge at the time of filing appeal and case records was constructed as the file could not be traced at the time of filing appeal. In view of delay of only 5 days, he submitted to condone the delay in filing the appeal. No serious objection was raised on the part of the Ld. Counsel for the assessee and therefore, in view of small period of 5 days of delay due to genuine reasons, same is condoned and appeal is admitted for adjudication.

3. Briefly stated facts of the case are that the assessee company filed its return of income for assessment year under consideration on 23.09.2013 declaring total income at Rs. Nil. The scrutiny assessment u/s 143(3) of the Income-tax, 1961 (in short 'the Act') was completed on 01.03.2016 determining total income at Rs.5,40,30,000/-. Subsequently, on receipt of information from the Dy. Director of Income-tax (Investigation), Unit-1(3), Ahmadabad



that the assessee made transactions of accommodation entries with sh Jignesh Shah and Sanjay Shah Group, the Ld. Assessing Officer recorded reasons to believe that income escaped assessment and accordingly, he issued notice u/s 148 of the Act on 27.03.2021. In response, the assessee filed return of income declaring Nil income. Subsequently, statutory notices were issued and after following due procedure of law, the Assessing Officer assessed the income at Rs.8,18,22,524/- wherein he made addition of Rs.2,77,92,524/- as u/s 69 of the Act i.e. unexplained investment.

4. On further appeal, the assessee challenged validity of the reassessment proceedings on two grounds. **Firstly**, accordingly to the assessee provisions of section 153C of the Act should have been invoked for reassessment rather than section 147 of the Act. **Secondly**, the assessee challenged reassessment proceedings u/s 147 of the Act on the ground of borrowed satisfaction. The assessee also challenged addition on merit. The Ld. CIT(A) in the impugned order allowed the grounds challenging validity of the reassessment as well as ground raised on merit. Aggrieved, the Revenue is in appeal before the Income-tax Appellate Tribunal (in short 'the Tribunal'), raising grounds as reproduced above.

5. Before us, the Ld. Counsel for the assessee filed copy of the reasons recorded along with copy of the decisions relied upon.



6. The ground No. 1 of the appeal of the Revenue relates to the issue as under which section of the Act reassessment proceedings should have been initiated, whether it should be u/s 147 of the Act or u/s 153C of the Act. We find that the Ld. CIT(A) has held that reassessment proceedings should have been initiated u/s 153C of the Act whereas according to the Ld. DR the proceedings have been validly initiated u/s 147 of the Act.

6.1 The facts in brief qua the issue in dispute are that in the course of search proceedings in the case of Sanjay Shah, Ahmadabad unexplained cash of Rs. 19.37 Crores was found along with evidences of commission earned on accommodation entries of providing bogus long term capital gain, share premium etc and transport of cash through “Angdiyas”, in tally data file with company name “ 123”. The information contained in the seized digital data indicated transactions with large number of beneficiaries. The assessee was also appearing as one of beneficiary and therefore, the investigation wing of income-tax department , Ahmadabad sent information to the Assessing Officer of assessee for considering remedial action in the hands of the assessee. On the basis of the information supplied by the investigation wing, the Assessing officer recorded reasons to believe that income escaped assessment and completed the assessment under 147 of the Act. But the Ld CIT(A) held that the reassessment should have been completed invoking section 153C of the Act and therefore, he



quashed the assessment order passed by the AO. The provisions of section 153C has undergone change with effect from 1/6/2015. Prior to amendment to the provisions of section 153C of the Act on 01.06.2015, the section 153C of the Act could be invoked if the material seized during the course of the search in the case of the searched person belonged to other person. However, after 01.06.2015 the legislature amended the condition of belongingness of material. For ready reference the amended provisions of section 153C of the Act are reproduced as under:

“153C. 1(1) [Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

a. any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to, a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person ?[for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in sub-section (1) of section 153A];*

.....”

6.1.1 Thus prior to 01.06.2015, the proceedings u/s 153C of the Act could have been initiated in case of other person if the material belongs to third person. The decisions relied upon by the



Ld. CIT(A) pertains to the period prior to 01.06.2015. In the case of the assessee search in the case of Shri Sanjay Shah and Shri Jignesh Shah has been carried on 11.09.2018 and therefore amended provisions would apply. Further, we find that the Hon'ble Supreme Court in the case of Income-tax Officer v. Vikram Sujeet Kumar (2023) 149 taxmann.com 123 (SC) has held that said amendment shall be applicable on searches conducted u/s 132 of the Act even before 01.06.2015 and therefore, now invoking of section 153C of the Act in the case of other person should be seen in the light of the amended provisions only.

6.2 Before us, the Ld. DR submitted that in the case 153C proceedings are not applicable for two reasons, *firstly*, the information has been received from the Investigation Wing and not from the Assessing Officer of the searched person and therefore, in absence of any such satisfaction by the Assessing Officer of the searched person no proceedings u/s 153C could be invoked in the case of third person. Secondly, the material in the form of computer document found during the course of the search pertain to Shri Sanjay Shah only and it did not pertain to the assessee and therefore, also proceedings u/s 153C could not have been invoked in the case of the assessee. The Ld. DR accordingly submitted that proceedings u/s 147 of the Act has been validly initiated.

6.3 On the other hand, the Ld. counsel for the assessee relied on the finding of the Ld. CIT(A) and the decisions relied upon by him.



According to him in view of the amended provisions, *firstly*, the documents found from the searched person must pertain to the other person or *secondly*, the information contained in such documents should relate to such third person. Thus, even in case of information related to third person, provisions of section 153C of the Act are applicable and thus the reassessment proceedings u/s 147 of the Act in the case of the assessee are without authority of law and accordingly should be quashed.

6.4 We have heard rival submission of the parties and perused the relevant material on record. In the case the dispute is whether the proceedings u/s 153C of the Act or proceedings u/s 147 of the Act should have been initiated in the hands of the assessee on receipt to the information by the AO, which was supplied by the investigation wing of income-tax department. Under the amended provisions, there are three steps for initiating action under section 153C of the Act. **Firstly**, the Assessing Officer of the searched person is required to record satisfaction as to whether the books of accounts or documents pertain to the other person or information contained therein relates to the other person. **Secondly**, after recording satisfaction, he shall hand over the relevant books of account or documents to the Assessing officer of other person. **Thirdly**, the Assessing Officer of the other person shall also record satisfaction to the effect that said books of accounts or documents (i.e. which pertain to the other person) have a bearing on the



determination of total income of such other person. After recording such satisfaction only, the Assessing officer of third person shall initiate proceedings u/s 153C of the Act by way of issuing notice u/s 153C read with section 153A of the Act.

6.4.1 Under the amended provisions of section 153C of the Act, the material found during the course of search of the searched person has been divided into two categories. The first category is of assets like any money, bullion, jewellery or other valuable articles. In this category of material, if same belongs to third person then only the Assessing Officer of searched person shall record satisfaction note and handover said material to the Assessing Officer of other person for taking action u/s 153C of the Act. In second category of the material i.e. books of accounts or documents, same should pertain to the third person or any information contained therein i.e. books of accounts or documents pertaining to third person, should relate to such third person, then only proceedings u/s 153C could have been initiated by the Assessing Officer of the third person on being satisfaction recorded by the AO of the searched person and after handing over of such material.

6.4.2 Thus, in terms of section 153C of the Act, the Assessing Officer of the other person can invoke provisions of section 153C of the Act only in case of handing over of the seized material by the Assessing Officer of the searched person after recording satisfaction note that said material pertains to the other person. In the case



information has been forwarded to the Assessing Officer by the Investigation Wing and therefore the required condition for invoking u/s 153C of the Act is not fulfilled and thus the Assessing Officer of the assessee was not authorised to invoke section 153C of the Act. 6.4.3 Further, in the case in hand, the condition of documents pertaining to the other person i.e. the assessee, has been disputed by the assessee. The assessee has asserted that the computer document found from the premises of Shri Sanjay Shah pertains to the assessee or the information contained therein is related to the assessee, therefore, action should have been taken invoking section 153C only. We are of opinion that though the word 'pertains' is wider than the word 'belongs to' but still there has to some connection of the document with the third person or some monetary or financial interest of the third person should reflect from the document. Since in the document seized there was reference of several persons and particular reference in the case of assessee, which has been reproduced in the reasons recorded, is of certain payments made by the assessee through banking channel and thus document can't be said to be as pertaining to the assessee and it pertains to Shri Sanjay Shah only. Since, the information contained therein 'means' information in the document pertaining to the third person but in the instant case the pertaining relationship is lacking. The document should pertain to the assessee in hand i.e. other person, because it is the Assessing officer of third person, who has to record satisfaction whether said document is having any bearing



on the determination of the income of the assessee i.e. other person. Thus the second condition of section 153C(1)(b) i.e. *any information contained therein* , also does not apply in the case of the assessee. In such circumstances provisions of section 153C of the Act cannot be invoked in the case of the assessee. Thus, the Assessing Officer has correctly invoked reassessment proceedings u/s 147 of the Act wherein on the basis of information supplied by the Investigation Wing of income-tax department, he recorded 'reason to believe' that income escaped assessment.

6.4.4 In view of above discussion, we set aside the finding of the Ld. CIT(A) on the issue in dispute and uphold the validity of reassessment u/s 147 of the Act. The ground No. 1 of the appeal of the Revenue is accordingly allowed.

7. The ground No. 3 of the appeal relates to the validity of the reassessment proceedings. The Revenue has challenged the finding of the Ld. CIT(A) holding that reopening of the assessment is based on borrowed satisfaction. In this regard finding of the Ld. CIT(A) is reproduced as under:

"6.2. The assessment order and the submissions of the appellant have been examined. In the instant case, the original return of income was filed on 24.09.2013 and thereafter scrutiny assessment u/s 143(3) was completed on 01.03.2016. Thereafter the assessment was re-opened by issue of 148 notice on 27.03.2021 based on information received from the DDIT(Inv), Unit 1(3), Ahmedabad. The AO in the re-opened assessment order mentions about the information received from the DDIT about concerns run by jignesh Shah and Sanjay Shah and how they are involved in providing accommodation entries of various kinds such as unsecured loans, share premium, bogus gains, contrived loss



etc.. and reproduce the observation of the DDIT that it was observed that the assessee (cheryl advisory pvt ltd) had taken the following bogus accommodation entries summing to Rs 2,77,92,524/- in various bank accounts.

6.3. In the alleged "reason recorded" reproduced in the assessment order, the AO elaborately discusses the modus operandi of the "Penny stock-L TCG scam" in detail: however failed to satisfy himself a reason to believe on how this modus operandi is applicable for the assessee for the relevant assessment year. He just jumps to a conclusion for justifying the re-opening by observing that "Considering all these facts as explained in above, it can be concluded that the total amount of Rs. 2.77.92.524/- is unexplained receipts u/s 69A. in the hand of assessee, which has not been offered to tax by the assessee company in its return of income during the year under consideration i.e. A.Y 2013-14. There is failure on part of the assessee to disclose truly and fully all material facts in relation to the income related to above transactions and any other income which comes to the notice of the AO subsequently has escaped assessment by reasons of failure on the part of the assessee which was required for correct assessment of the assessee for A.Y 2013-14 resulting in escapement of income to the extent of Rs. 2. 77,92,5247-.

6.4. It is well settled position of law that "reason to believe" has to be formed by the assessing officer and the same should be on the basis of his own observation and finding and not merely based on borrowed satisfaction or direction of some authority. Reliance is placed on the decision of the Hon'ble High Court of Bombay in the case of PCIT v. Shodiman Investments Pvt. Ltd. (2020) 422 ITR 337 (Bom.) (HC) wherein it was held that Where reasons as made available to assessee for reopening assessment merely indicated information received from Director (Investigation) about a particular entity, entering into suspicious transactions and, that material was not further linked by any reason to come to conclusion that assessee had indulged in any activity which could give rise to reason to believe on part of Assessing Officer that income chargeable to tax had escaped assessment, reassessment was an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax had escaped assessment. This is clearly in breach of settled position in law that reopening notice has to be issued by Assessing Officer on his own satisfaction and not on borrowed satisfaction.

6.5. In view of the above the jurisdictional judicial precedents, factual aspects of the case, I hold that the AO was not in possession of any tangible evidence or fresh material to warrant a reassessment after the period of 4 years and hence the reopening of the assessment is bad in law and ab initio void. This ground is allowed."



7.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Ld. counsel for the assessee relied on the Ld. CIT(A) and also relied on the decision of the Hon'ble Bombay High Court in the case of Mohanlal Champalal Jain v. Income-tax Officer, Ward 1(2), Thane [2019] 102 taxmann.com 293 (Bombay), Arvind Sahdeo Gupta v. Income-tax Officer [2023] 153 taxmann.com 244 (Bombay), Reynolds Shirting Ltd. v. Assistant Commissioner of Income-tax, Central Circle 6(3), Mumbai [2022] 135 taxmann.com 78 (Bombay).

7.2 On the contrary, the Ld. DR referred to the decision of the Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd. v. Income Tax Officer [1999] 236 ITR 34 (SC) and ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. [2007] 161 Taxman 316 (SC).

7.3 We have heard rival submission of the parties and perused the relevant material on record. The Ld. CIT(A) has concluded that the reopening was based merely on borrowed satisfaction. But we find that in the case of information has been received from the Investigation Wing which was gathered during the course of search proceedings in the case of Shri Jignesh Shah and Shri Sanjay Shah. Evidently, it is tangible evidence gathered during the course of the search, which is basis for reopening of the assessment. The reasons recorded by the Assessing Officer are reproduced for ready reference as under:

“REASONS:-



1. The assessee company has filed its return of income for A.Y 20123-14 on 24.09.2013 declaring total income at Rs. NIL/-. The return was processed u/s 143(1) of the IT Act, 1961. Thereafter, scrutiny assessment u/s 143(3) was completed on 0103.2016 determining total income at Rs. 5,40,30,000/-.

2. In this case information has been received from DDIT (Inv.), Unit-1(3). Ahmedabad vide letter dated 30.09.2019 as under:

"Search u/s 132 was launched on 11.09.2018 in the case of Jignesh Shah and Sanjay shah of Ahmedabad (JSSS hereinafter). The search resulted into seizure of unaccounted cash of Rs. 19.37 Cr (related to accommodation entries and commission earned thereon) alongwith incriminating digital as well as documentary evidences Clandestine record of unaccounted cash, synchronized trading, proving bogus LTCG in various BSE listed scrips and transport of such cash through angadiyas was found to be maintained in secret Tally Data file with company name "123 which was impounded during survey proceedings us 133A from business premises of Sanjay Shah. In this secret and coded file, delivery (red) and movement (through angadiya etc.) of cash is recorded against transactions of shares on BSE platform. Furthermore, the receipt of commission in form of cash is also recorded under the head "LTCG Commission".

It was found during investigation that both (Jignesh S Shah and Sanjay Shah) are managing and controlling multiple companies and concerns, which are not carrying out any genuine business activity. These concerns are involved into activity of providing accommodation entries of various kinds such as unsecured loans, share premium, bogus gains, contrived loss etc.

3. On perusal of the ledger account of the bogus entities/companies managed, controlled, and operated by Shri Jignesh Shah and Shah, it is seen that the assessee (Cheryl Advisory Pvt. Ltd.) has taken the following bogus accommodation entries:-

Bank name	Bank account No	Account Holder Name	Account Holders PAN	TRANDATE	FY	NARRATION	CR_AMT	DR_AMT	Other party bank	OTHER_ACCOUNT_NO	OT
DHANLAXMI BANK	014308300000015	A A Plus Share Brokers Pvt Ltd	AAHCA2831P	22-09-2012	2012-13	DBSSH12266001208	10000000		DBS BANK LTD	811210062295	Cr pv
DHANLAXMI BANK	014308300000015	A A Plus Share Brokers Pvt Ltd	AAHCA2831P	22-09-2012	2012-13	DBSSH12266001209	75,00,000.00		DBS BANK LTD	811210062295	Cr pv
DHANLAXMI BANK	014308300000015	Aa Plus Share Brokers Pvt Ltd	AAHCA2831P	24-09-2012	2012-13	DBSS0IN0811	26,13,178.00		DBS BANK LTD	811210062295	Cr pv
DHANLAXMI BANK	014308300000015	Aa Plus Share Brokers Pvt Ltd	AAHCA2831P	28-09-2012	2012-13	DBSSH12272000272	16,33,631.00		DBS BANK LTD	811210062295	Cr pv
Yes Bank	000784000002051	Sarvagya Builders Pvt Ltd	AAICS8701P	24-09-2012	2012-13	NEFT-000000475402-CHERYL ADVISORY PVT LTD		60,45,715.00			Cr PV



4. On perusal of information received, it is seen that during the FY 2012-13 relevant to AY 2013-14, the assessee M/s Cheryl Advisory Pvt. Ltd. has transaction of Rs. 2,77,92,524/-. As the transaction in the nature of bogus accommodation entries, hence the same is required to be added in the total income of the assessee. Further, on perusal of records, it is seen that the above mentioned transactions were not examined during the assessment proceedings u/s. 143(3) of the Income-tax Act, 1961.

4. Considering all these facts as explained in above Para's, prima facie it is concluded that the total amount of Rs. 2,77,92,524/- is unexplained receipts, in the hand of assessee, which has not been offered to tax by the assessee company in its return of income during the year under consideration i.e A.Y 2013-14. The information being new and said information was not in possession of this office earlier, and assessee being one of the beneficiary, hence it is not wrong to conclude that, in the case of the assessee, there is failure on part of the assessee to disclose truly and fully all material facts in relation to the income related to above transactions and any other income which comes to the notice of the AO subsequently has escaped assessment by reasons of failure on the part of the assessee which was required for correct assessment of the assessee for A.Y 2013-14 resulting in escapement of income to the extent of Rs. 2,77,92,524/-.

5. Thus I have reason to believe that income in excess of Rs. 1,00,000/- chargeable to tax has escaped assessment in this case. The word reason in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose the income had escaped assessment, it can be said to have reason to believe that the income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion, objectively. In the present case, since the assessee has failed to make true disclosure of its income, it leads to enough cause for forming of belief by the undersigned regarding escapement of income during the year under consideration.

6. Accordingly, subject to provisions of section 148, there is a need to assess the income of Assessee Company which has escaped assessment in AY 2013-14. The scrutiny assessment in this case has been completed u/s. 143(3) of the Income Tax Act, 1961. However, four years has expired from the end of relevant assessment year AY 2013-14. In view of the same, kind administrative sanction of the Pr. Commissioner of Income-tax-1, Mumbai is solicited in accordance with the provisions contained in sub-section of (1) of Section 151 of the Income Tax Act, 1961, for issue of notice u/s. 148 of Income Tax Act, 1961.”

7.3.1 In the case of Mohanlal Champalal Jain (supra), the Assessing Officer had proceeded on wrong premises that the petitioner had not filed return of income. Whereas, in the instant



case no such wrong premise, has been brought to the record. In the case of Arvind Sahdeo Gupta (supra), the Hon'ble High Court observed that the notice suffered from fundamental factual error and while disposing the objection also the Assessing Officer did not apply his mind and therefore, Hon'ble High Court quashed the notice u/s 148. Facts of the instant case are distinguishable from the said case and therefore, the ratio of the said decision cannot be applied over the facts of the instant case. In the case of Raynonlds Shirting Ltd. (supra), there was no mention of the reference of the petitioner in the information received from the Investigation Wing and therefore, the Hon'ble High Court has held that there was no live link of the material with the reasons recorded. The Hon'ble High Court further observed that sanctioning authority also did not apply mind while approving the reasons recorded. Accordingly, the Hon'ble High Court set aside the notice issued u/s 148 of the Act. The facts of the present case are distinguishable and therefore the ratio of the said decision is not applicable in the present case. Whereas, we find that the Hon'ble Supreme Court in the case of Rajesh Jhaveri (supra) held that for reopening there should be relevant material on the basis of which a reasonable person could make a requisite belief that income escaped assessment. Similarly in the case of Raymond Woolen Mills (supra), Hon'ble Supreme Court held that sufficiency or correctness of the material for information should not be seen at the stage of recording reasons. In the instant case there is a tangible material received from the



reliable source and which has been gathered in the course of search action ,therefore, , belief of the Assessing Officer that income escaped is reasonable. On the basis of the information of payment, the Assessing Officer inferred the said payment as liable u/s 69 of the Act. During relevant period the Assessing Officer was not authorized to carry out any inquiry from the assessee for verification the facts contended in the information. Therefore, in our opinion, the reasons have been recorded after appreciation of the information available with the Assessing Officer and it cannot be termed as based on borrowed satisfaction. Further, the assessment has been reopened beyond the period of four years from relevant assessment years and therefore, assessment could be reopened only in the case of failure on the part of the assessee in disclosing true and full material facts. Since, in the information received by the assessee, the fact of accommodation entry received by the assessee came to light for the first time and this fact was not disclosed by the assessee and therefore assessment has been reopened validly due to failure on the part of the assessee in disclosing the material facts fully and truly. Thus, we set aside the finding of the Ld. CIT(A) on the issue in dispute. The ground No. 3 of the appeal of the Revenue is accordingly allowed.

8. The ground No. 2 of the appeal of the Revenue relates to deletion of the addition on merit. We find that the Assessing Officer has made addition in respect of the entries of payment appearing in



bank statement. According to the Assessing Officer the assessee had made investment in bogus and cell companies namely AA Plus Share Broker Pvt. Ltd. and Sarvagya Builders. The Ld. CIT(A) deleted the addition observing as under:

“7.1. The appellant contend that the impugned addition under section 69A of the act to the tune of Rs 2,77,92,52/- is bad in law without appreciating that there is no iota of evidence to suggest any nexus between the assessee and shri Jignesh/Sanja shah. Further the assessee had not received any accommodation entry i.e. Bogus penny stock transaction or bogus loan or bogus share premium and section 69A is not applicable to payments made by the assessee, which is duly reflected in the books of the assessee and made through proper banking channels.

Based on the information received from the DDIT(inv), the Assessing officer reopened the assessment and found that for the relevant assessment year there are questionable investment entries of the assessee as follows:

Bank Name	Account No	Account Holders Name	Date of Transaction	Amount
Dhana Lakshmi Bank	014308300000015	AA Plus Share Brokers Pvt. Ltd.	22.09.2012	Rs.1,00,00,000/-
Dhana Lakshmi Bank	014308300000015	AA Plus Share Brokers Pvt. Ltd.	22.09.2012	Rs.75,00,000/-
Dhana Lakshmi Bank	014308300000015	AA Plus Share Brokers Pvt. Ltd.	24.09.2012	Rs.26,13,178/-
Dhana Lakshmi Bank	014308300000015	AA Plus Share Brokers Pvt. Ltd.	28.09.2012	Rs.16,33,631/-
Yes Bank	000784000002051	Sarvagya Builders	24.09.2012	60,45,715/-
Total				2,77,92,524/-

7.2. The AO concluded that the total amount of Rs.2.77,92.524/- is unexplained receipts u/s 69A in the hands of the assessee, which has not been offered to tax by the assessee company. In the computation of taxable income in page 5 of the assessment order, the same amount is added as addition u/s69 (unexplained investments). He further observes that though the assessee has objected to the proposed addition by claiming that the asseee has not made any bogus share premium or Long term capital gains, it is clear that there is corroborative evidence produced by DDIT(Inv)



that both companies (AAplus share brokers pt. Ltd and Sarvagya builders Pvt. Ltd) in which the above mentioned investments are bogus and shell companies.

7.3. I find that the Assessing Officer was in confused state of mind on how to treat this amount for taxation purpose. In one sentence in the assessment order, he observes it as unexplained receipts u/s 69A in the hands of the assessee; wherein in the conclusion part he observes the same amount as bogus investments. Further in the Assessment order the AO sketches in detail from page 2 to 4, how a bogus long term capital gain (LTCG) is availed by any person by using the concept of accommodation entry using penny stock. Further he elaborates in general, the entire scam scheme of penny stock- bogus LTCG by discussing in detail about the role played by the operators, the directors of company, the beneficiary of LTCG and the bogus paper entities and share brokers. However when coming to the assessment of the appellant, the AO; strangely remains lost and in a single sentence, he considers the total amount of Rs 2,77,92,524/- as income escaped assessment and brought it to taxation u/s 69 of the 1 T Act.

7.4. It is clear from the record that the appellant had not offered any non taxable LTCG for the relevant assessment year. What is available in the record is that the appellant had made some payments to the above mentioned companies out of the funds available in the books of account through proper banking channel. The entire scheme of bogus LTCG will culminate in assessee offering a "tax free" long term capital gain and in the instant case there is no such thing. The appellant during the scrutiny process had replied many times before the AO that the company had not bought or sold any shares during the year in question. There was no evidence found against the appellant on bogus LTCG and no evidence was pointed out by the assessing officer, and the entire addition had been made on hypothetical basis.

7.5. It is pertinent to note that, in the response to the proposed draft assessment order of the AO, the appellant had vehemently argued before the AO that the transactions are bona fide, and the assessee had not received bogus share premium or Bogus long-term capital gain or Bogus loss. Further the appellant raised objection before the AO that, no addition can be made merely based on the alleged information received from the Investigation wing without providing any evidence of the information received. The said Tally Data file with company name "123" statement of M.Jignesh Shah or Sanjay Shah were never been provided to the assessee in spite of objection raised by the appellant during the re-opened scrutiny assessment.

7.6. This allegation of the appellant is of serious concern. The AO had just made an addition behind the back of the assessee arbitrarily with surmises and conjectures, without any application of investigative mind. Further the Assessing Officer had not questioned himself, how the payment made by the assessee



company to other companies through banking channel with the funds available in the books of account of the company; is taxable u/s 69A?. The alleged addition under section 69A of the act is on payments made by the assessee through banking channels, which the appellant already produced before the assessing officer at the time of re-opened assessment. The Assessing officer without application of mind, had merely acted upon the information submitted to him by the investigation wing that there is material to suggest that the appellant had been benefited by the accommodation entries given by Jignesh Shah and Sanjay shah run companies and came to conclusion which is on the result of suspicion only. Unlike section 68, sections 69 and 69A deal with items not recorded in the books of account. If an item is recorded in the books of account, then section 69 & 69A is not applicable. The relevant cases on the above mentioned points are:

1. *Vasanthi visweswaran* 257 ITR 94 (Mad)
2. *Surendra M.Khandhar* 321 ITR 254 (Bom.)
3. *Jagjit Pal Singh Anand* 320 ITR 106 (Del.)
4. *Chuharmal* 172 ITR 250(SC)

7.7. In view of the above facts and position of law, the addition made u/s 69A/69 amounting to Rs.2,77,92,524/- by re-opening the assessment lacks justification and the impugned order stands deleted. This ground stands allowed.

7.8. As the major grounds relating to jurisdiction u/s 153C as well as the validity of reopening of the assessment is allowed, by observing that the assessment is *ab initio* void, there is no need to adjudicate other grounds: However the ground no. 3 related to addition u/s 69/69A is also adjudicated and allowed on merits assuming without conceding that the re-opening is valid. The other grounds are either consequential or academic/general in nature and hence not adjudicated.”

8.1 We have heard rival submission of the parties and perused the relevant material on record. We find that the Assessing Officer has made addition in terms of section 69 of the Act. As per the provisions of section 69 of the Act, any investment which are not recorded in the books of accounts and the assessee offers no explanation about the nature of source of the investment or the explanation offered by him is not in the opinion of the Assessing Officer is satisfactory, the value of said investment is deemed to be



income of the assessee. But, we find that in the case the Assessing Officer has nowhere stated that said investment was not recorded in books of account of the assessee. The addition u/s 69 of the Act could be made where the investments are not recorded in the books of accounts. But in the case no such finding has been given by the Assessing. The addition if any, could have been made for the bogus credit entries corresponding to the payment, subject to the conditions of section 68 of the Act, but to the extent payments are supported by the credit entries as appearing in the books of account, no addition u/s 69 of the Act could have been made. The Assessing Officer has not carried out any exercise or efforts to look into genuineness of source of payments except recording reasons to believe. Accordingly, we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground No. 2 of the appeal of the Revenue is dismissed.

9. In the result, the appeal of the Revenue is partly allowed.

Order pronounced in the open Court on 31/01/2024.

Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 31/01/2024
Rahul Sharma, Sr. P.S.



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai