

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

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM**

आयकर अपील सं/ I.T.A. No.3814/Mum/2023

(निर्धारण वर्ष / Assessment Years: 2015-16)

Priyasha Meven Finance Ltd R 404 Rotunda Building, Bombay Samachar Marg, Fort-400001.	<b>बनाम/</b> Vs.	ACIT, Circle-4(2)(1) Room No. 642/669, Aayakar Bhawan, M. K. Road, Mumbai-400020.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCP2042F</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Mani Jain	
Revenue by:	Shri H. M. Bhatt (Sr. DR)	

सुनवाई की तारीख / Date of Hearing: 05/03/2024

घोषणा की तारीख /Date of Pronouncement: 21/03/2024

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi, dated 28.08.2023 for AY. 2015-16.

2. The assessee has challenged the validity of the reopening by AO (jurisdiction) u/s 147 of the Income Tax Act, 1961 (hereinafter "the Act"). So the legal issue is taken up first. According to the Ld. AR, the assessee had not taken this legal issue before the Ld. CIT(A). However, according to him, since it is a legal issue, it can be raised for the first time before this Tribunal and for such a proposition relied upon the decision of the Hon'ble Supreme Court in the case of NTPC Vs. CIT (229 ITR 383) (SC). Per Contra, the Ld. DR objects to raising of this legal issue before this Tribunal for the first time. According to him, the assessee had not taken up this issue before the Ld. CIT(A), therefore, the same should be remanded back to the file of the Ld.



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CIT(A) for his adjudication. However, after considering the rival submission on admission of this ground of appeal, we find that it is a legal issue. And even though it is being raised for the first time before this Tribunal, we are inclined to admit the same as held by the Hon'ble Supreme Court in the case of NTPC Vs. CIT (supra), and therefore, we are proceeding to hear the appeal on the legal issue.

3. Brief facts related to the legal issue are that the assessee company had filed its return of income on 29.09.2015 declaring total income of Rs.57,65,270/- which was processed u/s 143(1) of the Act and the returned income was accepted. However, thereafter, the case of the assessee has been re-opened by issuance of notice u/s 148 of the Act dated 29/30.03.2017 which action of the AO has been challenged before us.

4. Assailing the action of the AO to have re-opened the assessment, the Ld. AR drew our attention to Para No.1 of the "Reasons recorded" (Infra) and pointed out that the only material on the basis of which the AO has resorted to re-opening of the assessment is seen as an *ex-parte ad interim order* passed by the SEBI dated 20.08.2015. Thereafter, the Ld. AR, drew our attention to the copy of the ex-parte order passed by the SEBI, which is found placed at page no. 1 to 37 of PB-2 and especially to page no. 35 & 36 of the ibid SEBI order, wherein the names of fifty nine (59) entities/persons have been given in a chart format and that SEBI had restrained those persons/entities from trading in the security market till further orders. Further, according to the Ld. AR, a perusal of the fifty nine (59) names



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restrained by SEBI would reveal that assessee's name (M/s. Priyasha Meven Finance Ltd) is not figuring in it. But he fairly accepted the fact that at item No. 26, the name of the director of the assessee company Shri Nikhil Jalan is figuring in the list of fifty four (54) names. However, the main contention of assessee is that without even the name of assessee company figuring in the fifty four names who all are restrained by the ex-parte interim order of SEBI, Ld. AR wondered as to how the AO based on such a SEBI order dated 20.08.2015 could have issued notice u/s 148 of the Act conveying his desire to re-open the assessment of the assessee company. According to the Ld. AR, it is settled position of law that *adverse information* against an assessee (*in the present case as noted in the ex-parte interim SEBI order against the director of assessee company*) at best could have triggered "*Reason to Suspect*" and not the essential condition precedent *viz* "*Reasons to believe, escapement of income*". According to the Ld. AR, when the AO got information (*in this case ex-parte SEBI interim order*) against director of the assessee company, it could have triggered the AO to suspect escapement of income either in the hands of the director of the assessee company Shri Nikhil Jalan or the assessee company. In such an event, according to Ld AR, the AO before resorting to re-opening/recording the reason to re-open the assessment, ought to have conducted preliminary enquiry and collected relevant material and satisfied at least in whose case he should re-open the assessment i.e. whether the assessment of director of assessee company or the assessee company should be re-opened. Having not done such an exercise, AO could not have proceeded to re-open the assessment of



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assessee company. In order to buttress his submission, he also drew our attention to Para one (1) and Para (IV) of the “*reasons recorded*” wherein the AO has alleged escapement of income to the tune of Rs.12.50 cr. According to the Ld. AR, the assessee while objecting to the re-opening of assessment, contested the figure of Rs.12.50 cr escaping assessment and asked the AO how he computed escapement of income of Rs.12.50 cr. In this regard, the Ld. AR pointed out that AO kept silent on this issue, i.e, while disposing/rejecting the objections raised by assessee. In this regard, it was pointed out by the Ld. AR that AO in the re-assessment order has disallowed only Rs.6 cr and not Rs.12.50 cr, which difference in escapement of income according to Ld. AR itself goes on to show that AO ought to have conducted preliminary enquiry and not resorted to re-opening in the case. Further, according to the Ld. AR, the Hon’ble Bombay High Court decision in the case of Hindustan Lever Ltd (268 ITR 332) has held that while examining the validity of the re-opening of the assessment, the Appellate Authorities ought to consider the reasons recorded on standalone basis. According to him, nothing can be added nor anything be deleted from the reasons so recorded by the AO. The Hon’ble High Court observed that “*No inference can be allowed to be drawn on the basis of reasons not recorded by him and the AO has to speak through the reasons so recorded by him*”. Moreover, the Ld. AR submitted that in this case, the adverse material which was before the AO was “*ex-parte interim order of the SEBI dated 20.08.2015*” (which was challenged by assessee before the SAT Authorities) and it can only trigger “*Reasons to Suspect*” and not “*Reasons to believe, escapement*



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*of income*”. And the AO has alleged in the reason to reopen that there is escapement of income of Rs.12.50 cr whereas from the re-assessment order it can be seen that the AO has made an addition of only Rs. 6 cr, which fact itself shows that AO failed to meet in the “*Reasons recorded*” the essential condition precedents to re-open the assessment i.e. “*Reasons to believe, escapement of income*”. Further according to Ld. AR a perusal of “*Reasons recorded*” would show that AO re-opened the assessment on the basis of borrowed satisfaction of SEBI (*interim ex-parte order*) and therefore it is bad in law; and recorded reasons suffers from non-application of mind of AO while he recorded the *reasons for re-opening* the assessment, which vitiates the reopening of assessment. For the foregoing reasons, the impugned action of the AO to re-open the assessment is bad in law and therefore the notice issued u/s 148 of the Act is *ab initio void* and therefore urged that it may be quashed.

5. Per contra, the Ld. DR submitted that SEBI had restrained fifty four (54) persons/entities including the director of the assessee company Shri Nikhil Jalan from trading in security market/stock exchange which fact is discernable from the SEBI order dated 20.08.2015. Since there was such a material in the hands of the AO, he has rightly re-opened the assessment because the SEBI by passing such an order has stated that those persons/entities have misused the stock exchange system to generate fictitious profits/losses for the purpose of tax evasion/facilitating tax evasion. Therefore, the Ld. DR does not want us to interfere with the action of the AO to re-open the assessment.



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6. We have heard both the parties and perused the records. Since the assessee has challenged the jurisdiction of AO to have reopened the assessment, the “*reasons recorded*” by AO need to be examined to see whether he had satisfied the conditions precedent necessary for reopening the assessment u/s Section 147 of the Act i.e. Firstly whether AO has recorded the reasons before reopening the assessment. And if so, whether the reasons recorded fulfil the requirement of law or not. The fundamental requirement of law as stipulated u/s 147 of the Act is that before reopening an assessment, the AO has to record the reasons wherein he has to spell out the “*Reasons to believe, escapement of income*”. It is well settled that “*Reasons to believe*” postulate foundation based on information and belief based on reason. After a foundation based on information is made, there still must be some reason, which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In addition, one should bear in mind the fine distinction between “*Reason to Suspect*” and “*Reason to believe*”. Information adverse may trigger “*Reason to Suspect*” which is not sufficient to reopen an assessment because as per section 147 of the Act, AO should have “*Reasons to believe*”, *escapement of income*” and not Reasons to suspect escapement of income. Therefore, when AO receives adverse information against an assessee, he should make preliminary inquiry and collect material, which would make him form a belief that there is in fact an escapement of income. Then only AO should record the “*reason to believe escapement of income*” and thereafter only, should issue the notice u/s 148 of the Act. Once the AO satisfies the aforesaid requirement of law, then only invocation of



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jurisdiction of reopening an assessment be held to be valid in the eyes of law. Further, we have to bear in mind that, when the validity of reopening of an assessment is tested, the reasons recorded by AO for reopening the assessment needs to be tested on a *standalone basis*. Nothing can be added nor anything be deleted from the reasons so recorded by AO. No inference can be allowed to be drawn on the basis of reasons not recorded by him. AO has to speak through the reasons so recorded by him. The reasons recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide the link between conclusion and evidence. So the reasons recorded by the AO before re-opening as it is, it should be examined to see whether AO had met in the “*reasons recorded*”, the essential condition precedent to do so i.e. “*Reason to believe, escapement of income*” (Refer decision of Hon’ble Bombay High Court in the case of *Hindustan Lever Ltd. (268 ITR 332)*). So in this backdrop let us look at the reasons recorded in this case by AO to re-open the assessee’s assessment for AY 2008-09, which is reproduced as under [*and please note that since no paragraph numbers were given by AO, for convenience Para number (I) to (v) are given*] :-

**Reasons for Re-opening u/s 147.**

(I). The assessee had filed its original return of income for A.Y. 2015-16 on 29.09.2015 declaring total income of Rs 57,65,270/. The return was processed u/s 143(1) of the IT Acts 1961, Information was received from ‘the investigation wing of Mumbai that SEBI passed an interim ex-parte order dated 20/08/2015 (WTM/RKA/ISD/106/2015) (Annexure A) restraining certain entities from buying, selling or dealing in securities and accessing the securities markets, either directly or indirectly, in any manner whatsoever, till further directions in the matters of Illiquid stock options. Further, SEBI observed that the suspected entities have misused the stock exchange system to generate fictitious profits/losses for the purpose of tax evasion/facilitating tax evasion. On perusal of the information, it is observed that the assessee company is also one of the suspected entities indulged in availing fictitious profit/loss amounting to Rs.12,50,00,000/- by executing reversal trades in illiquid stock options on the BSE for the purpose of facilitating tax evasion.



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(II). The following observations were made by SEBI in its order:

a) The loss-making entities were trading mainly in options on individual stocks which were thinly traded. The trades by these loss-making entities, in many cases, contributed to 70% to 100% of total traded volume for the contracts on those days.

b) On majority of occasions, the quantity of stock options bought and sold by the loss making entities for a contract was identical, however, there was a significant difference in the sell value and buy value of the transactions resulting into significant loss to the loss making entities.

c) Substantial number of transactions were squared up and a major percentage of transactions thereof were trade reversals i.e. if the stock options were sold first to an entity, they would be bought back in exact quantity from the same entity or vice. versa.

d) As the first leg of these reversal trades, these loss-making entities were mainly seen selling stock options without any corresponding offsetting position in the underlying scrip. In many cases, these options were sold at unreasonably low prices, even below the intrinsic value of the option, Theoretically, the price of an option is a combination of its intrinsic value and time value. The former is a function of difference between option strike price and the underlying price and the latter being a function of time remaining till expiry of the option contract. It is well understood that in normal conditions, the minimum price which the option seller would demand to take the risk of writing the option would be equivalent to the intrinsic value of the option, but here the loss-making entities were selling options much below their intrinsic value.

e) In the second leg of the reversal trades, the options once sold by an entity at unreasonably low prices were subsequently bought back on the same day or on the next trading day at substantially higher prices when compared to the first leg sell price.

(f) in certain instances, variations to the above pattern were seen which inter-alia included loss-making entities incurring loss by buying the options first instead of selling them.

g) Further, during the period when stock options@ position was kept open, there was no significant change in the price of the underlying scrip to justify the difference between the prices of the two legs of the reversal trade.

h) The trading done by loss-making entities in stock options in the above manner. accounted for significant proportion of their overall trading on that segment.

i) The loss-making entities as well as the profit-making entities were seen trading repeatedly in deep in-the-money options and deep out-of-the-money options on individual stocks, which were thinly traded.

(III). The SEBI has concluded that the loss-making entities and the profit-making entities show a scheme, plan, device and artifice on their part for some ulterior motive. These entities have, prima-facie, used and employed a pre meditated manipulative device or contrivance while



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dealing into securities market and indulged into non-genuine and deceptive transactions. The non-genuine and deceptive transactions of these entities are, prima facie, covered under the definition of 'fraud' and their dealings as discussed herein above were, fraudulent' as defined under regulation 2(1)(c) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations") and prohibited under the provisions of section 12A(a), (b) and (c) of the SEBI Act, 1992 and regulations 3(a), (b), (c) and (d) and 4(1) and 4(2)(a) thereof.

(IV). In view of the findings, as highlighted by SEBI in its order cited above, and the claim of non-genuine profit/loss, and after perusing the details available on record and duly applying my mind, have reason to believe that the assessee has failed to disclose fully and truly all material facts necessary for assessment for relevant AY. Hence, I have reasons to believe that the income chargeable to tax of the assessee company M/S. Priyasha Meven Finance Ltd, PAN: AADCP2042F for A.Y. 2015-16 has escaped assessment. Thus, in view of Section 147 of the Income Tax Act, 1961 income of Rs.(-)12,50,00,000/- escaping assessment is required to be re-assessed.

(V). Issue notice u/s 148 of the Income Tax Act, 1961 after seeking prior approval of Jt. Commissioner of Income Tax-4(2), Mumbai vide her letter No. JCIT-4(2)/Approval as required u/s. 151 of the Income Tax Act, 1961."

**7.** Keeping the aforesaid principle of law in mind noted at para 6 supra, we note from the "*Reasons recorded*" by the AO (supra), for reopening the assessment, we note that the AO in the first (1<sup>st</sup>) paragraph notes that he received information from the Investigation Wing that SEBI has passed an *ex-parte interim order* dated 20.08.2015 restraining certain entities from buying, selling or dealing in securities and in the matter of illiquid stock options till further orders. The AO also noted that the SEBI has observed that *suspected* entities have misused the stock exchange system to generate fictitious profits/losses for the purpose of tax evasion/facilitating tax evasion. According to the AO, as per this information, the assessee company also is one of the suspected entity which indulged in availing fictitious profit/loss amounting to Rs.12,50,00,000/- by executing reversal trades in illiquid stock options on the BSE for the purpose of facilitating tax evasion.



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And thereafter, at Para II, the AO has taken note of the general observations of SEBI made in the ex-parte interim order dated 20.08.2015. Then, at Para no III, AO took note of the SEBI's conclusion that entities named in the SEBI order have prima-facie, used and employed a pre-meditated manipulative device or contrivance while dealing into securities market and indulged into non-genuine and deceptive transactions which amounts to fraudulent activity prohibited under the provisions of the SEBI Act. And thereafter, at para no. IV, AO held that assessee failed to disclose fully and truly all material facts necessary for assessment for relevant assessment year. And hence according to AO he has reasons to believe that income chargeable to tax of the assessee company to the tune of Rs.12.50 cr has escaped assessment. And thereafter, he says at Para no V about him issuing notice u/s 148 of the Act, after getting approval of JCIT u/s 151 of the Act for re-opening the assessment of the assessee for AY. 2015-16.

**8.** Thus, we find that the material on the basis of which the AO formed the "*Reasons to believe, escapement of income*". was the information forwarded by the Investigation Wing of Mumbai that SEBI had passed an *interim ex-parte order* dated 20.08.2015 which [*copy of SEBI order*] is found placed at page no. 1 to 37 of PB. From a perusal of the *ibid ex-parte interim order* of SEBI, it is found that assessee company's name (*M/s. Priyasha Meven Finance Ltd.*) is not figuring in the fifty nine (59) persons/entities named therein at page no. 35 & 36 of the said SEBI order. However, we note that at item no.



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twenty six (26) the name of Shri Nikhil Jalal is there, who is one of the *director of the assessee company*, who was also restrained from accessing the security market until further orders. The main thrust of contention of Assessee Company is that this interim ex-parte order (*which has been challenged by Shri Nikhil Jalan before the SAT*) could not have been foundational/relevant material on the basis of which AO could have formed the belief that income has escaped assessment in the hands of assessee company for various reasons stated infra. Firstly, because assessee-company's name doesn't figure in the list of 59 persons/entities prohibited as it is by SEBI order; and secondly, merely because name of Shri Nikhil Jalan (*director in assessee*) was seen figuring in the list, could not have been the basis to reopen the assessment of assessee-company; and thirdly, Shri Nikhil Jalan is an independent person and files return in his individual capacity; and Fourthly, assessee company is a separate legal entity and assessed separately; and Fifthly, the SEBI order was only an interim ex-parte order, which was challenged by Shri Nikhil Jalan (*at the time of re-opening*); and sixthly, AO has borrowed the satisfaction made by SEBI, without forming his own belief regarding escapement of income in the hands of assessee-company; and seventhly, the AO has alleged Rs 12.5 cr to have escaped assessment, whereas, escapement after reassessment pegged down to Rs 6 cr, which itself shows non-application of mind, while recording reason to reopen the assessment. We find substance in the contention of Ld AR. And as rightly pointed out by the Ld. AR, the *interim ex-parte order* of the SEBI named Shri Nikhil Jalan, which could have triggered "*Reasons to Suspect*" and not



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“Reasons to believe escapement of income” which doesn’t satisfy the requirement of law to successfully usurp the jurisdiction to re-open the assessment of the assessee-company, which is a separate legal entity. Therefore, having carefully perused the material on the basis of which AO re-opened the assessment i.e, SEBI ex-parte interim order, we are of the considered opinion that at best it is an adverse information against director of assessee company [Shri Nikil Jalan]; and AO after receiving the same, ought to have conducted preliminary enquiry [since at that stage there was only “Reason to suspect” escapement of income in his hands]; and collected material; and if it was found that it is not the director of assessee company who has misused the stock exchange, instead it was the assessee company which actually misused the stock exchange, in such an event, the AO should have recorded his own reason warrant holding the belief that income chargeable to tax has escaped assessment, which essential requirement of law has not been met in the “reasons recorded” by AO in the instant case to successfully re-open the assessment of assessee company. In the light of the discussion (supra), we find that “Reasons to believe, escapement of income’ as recorded by the AO (supra) to reopen the assessment in the hands of the assessee company for AY 2015-16, have not met the essential requirement of law [ refer M/s Ganga Saran & sons (P) Ltd vs ITO (130 ITR 1)(SC)]. Therefore, we are inclined to quash the notice issued u/s 148 of the Act dated 29/30.03.2017 and consequently the re-assessment framed dated 30.12.2017 is null in the eyes of law.

**9.** Since the assessee succeeded on legal issue, the other grounds of appeal are not decided, which are academic.



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

Order pronounced in the open court on this 21/03/2024.

Sd/-  
(S RIFAUR RAHMAN)  
ACCOUNTANT MEMBER

Sd/-  
(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 21/03/2024.  
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai