

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No. 2184/Mum/2023

(Assessment Year: 2015-16)

Reena Rakesh Kothari
28-A, Kamgar Nagar,
S.G. Barve marg,
Kurla (East),
Mumbai-400 024

(Appellant)

Vs.

Income Tax Officer
Ward 26(2)(5),
Kautilya Bhavan,
Bandra, Mumbai-400 051

(Respondent)

PAN No. AHLPK7422J

Assessee by : Shri Prakash Jhunjunwala, CA

Revenue by : Smt. Mahita Nair, DR

Date of hearing: 19.02.2024

Date of pronouncement : 21.03.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Mrs. Reena Rakesh Kothari, Mumbai (the assessee/appellant) for assessment year 2015 – 16 against the appellate order passed by the National faceless appeal Centre, Delhi (the learned CIT – A) dated 31/05/2023 wherein the appeal filed by the assessee against the assessment order dated 29/12/2017 passed under section 143 (3) read with section 147 of the income tax act, 1961 (the act) was dismissed.
02. The assessee is aggrieved and has preferred appeal raising several grounds of appeal however assessee pressed following two grounds –

"1. On facts and circumstances of the case and in law, learned CIT – A in confirming the validity of notice under section 148 dated 12/9/2016 though has been issued before expiry of the date for filing the return of income under section 139 (4) viz 31/3/2017, thereby the notice under section 148 and consequential reassessment order passed under section 147 is bad in law.

2. On the facts and circumstances of the case and in law CIT – A order in confirming the validity of notice under section 148 issued in absence of tangible material and in mechanical manner without obtaining the sanction under section 151 from the correct higher authority."

03. Facts as noted from the record shows that assessee is an individual, partner in firms and director in companies. Assessee did not file any return under section 139 (1) of the act. She filed her return of income on 19/09/2016 declaring total income of Rs 534270/-
04. Specific information was received with respect to the bogus claim of the assessee on share trading and therefore notice under section 148 of the act was issued on 12/9/2016 after recording the reasons for reopening. Same was served on the assessee.
05. In response to notice under section 148 of the Act, assessee submitted a letter on 23/9/2016 stating that



return of income filed electronically on 19/9/2016 may be treated as a return filed in response to notice under section 148 of the act. Assessee requested for the reasons, which were communicated on 6/2/2017 and on the same date notice under section 143 (2) and 142 (1) of the act were issued. Assessee objected to the reopening by filing a letter dated 16/2/2017 which was disposed of by speaking order on 3/3/2017. Therefore, once again notice under section 142 (1) was issued on 20/7/2017 and assessee was asked to furnish the details. In the return of income, it was found that the assessee has shown long-term capital gain of Rs. 38,158,791/- and claimed exemption under section 10 (38) of the act. Several details were asked for the same which were furnished by the assessee and the learned assessing officer after the detailed discussion on the issue made an addition under section 68 of the act of Rs. 39,941,823/- which resulted into framing of an assessment order under section 143 (3) read with section 147 of the act on 29/12/2017 at the total income of Rs. 4,00,76,090/-.

06. Aggrieved with the assessment order assessee preferred an appeal before the learned CIT – A. The appellate authority passed an order on 31/05/2023 dismissing the appeal of the assessee. In Appellate proceedings, Assessee challenged reopening of the assessment under section 148 of the act which was issued to the assessee



before the expiry of due date to file the return of income under section 139 (4) of the act. It is the claim before the learned CIT – A of the assessee that the learned assessing officer could not have issued the notice under section 148 of the act when the time limit for issuing the notice under section 142 (1) and the time limit for filing of the belated return was available with the assessee. Assessee pressed into service several judicial precedents. The assessee also submitted that the notice under section 148 has been issued in absence of tangible material coming into the possession of the assessee and there is a borrowed satisfaction by the learned assessing officer. It was also claim that when there is no return of income available with the assessing officer at the time of recording of reasons, the averment made by the assessing officer in reasons recorded for reopening that assessee has claimed bogus exemption in the return of income is devoid of any merit and therefore the reopening of the assessment itself is invalid. The learned CIT – A rejected all this contention and stated that assessee has failed to file the return of income under section 139 (1) of the act and belief and information is available with the learned assessing officer, there is no infirmity in the reopening of the assessment made by the learned AO. He further stated that tangible material is available and therefore there is no merit in the objection to the notice issued. Accordingly, all objections against section 148 of the act were rejected. On the



merits of the addition action of the learned AO was upheld. Accordingly, the appeal of the assessee was dismissed.

07. Before us, the learned authorized representative submitted a paper book containing 101 pages and relied upon several judicial precedents and case law compilation of 43 pages. Over and above several other judicial precedents were relied upon.
08. On Ground no 2 , It was the claim of the learned authorized representative that :-
 - i. The learned authorized representative referred to the reasons recorded placed at page number 3 of the paper book. He submits that the reasons have been recorded in 12/9/2016 wherein the assessing officer has mentioned that assessee has claimed exempt income from long-term capital gain of Rs. 38,158,791. His submission was that when at the time of recording of the reasons there was no return filed by the assessee and therefore there was no claim made by the assessee of either exemption or non exemption. Hence, nothing was available with LD AO to state whether assessee has claimed any exemption. Therefore, assertion made by the learned AO in the reasons recorded that assessee has claimed exemption is devoid of any merit and therefore the reasons recorded without looking at

the fact that till that time the assessee has not filed any return of income, is non application of mind. He further referred to paragraph number 6 of the reasons recorded wherein it has been stated that assessee is one of such person who has availed accommodation entries of bogus capital gain and therefore the transaction is claimed by the assessee which resulted into claim of exempt income from long-term capital gain are not genuine and are merely accommodation entries executed solely to accommodate unaccounted income of the assessee in the guise of exempt income from long-term capital gain. It was stated that when the assessee has not filed any return of income, the averment in the reasons recorded shows absolute non-application of mind by the learned AO. He submitted that the honourable Bombay High Court in case of Prashant Joshi 324 ITR 154 has held that only reasons, which can be considered for the formation of belief, should be seen. If the reasons are tested on standalone basis, it clearly demonstrates non-application of mind by the learned AO.

- ii. He relies up on several judicial precedents including of Honourable Bombay high court in case of Prashant S Joshi V ITO 324 ITR 154 [BOM] and

Principal Commissioner of Income tax Shodiman Investments P Ltd [422 ITR 337].

- iii. He submits that approval u/s 151 is also shows non application of mind when reasons states that assessee has claimed exemption but there is no ROI filed, hence, no claim is made.

09. The learned departmental representative submitted that

- i. There is a tangible material available with the assessing officer regarding reopening of the assessment that assessee has obtained the accommodation entry with the sole object of obtaining the exemption under section 10 (38) of the act and therefore nothing is wrong in the reasons recorded by the assessing officer.
- ii. It is not the fact that assessee has not claimed such exemption even in the return of income filed subsequently.
- iii. It has solidified the reasons recorded by the AO. The reasons recorded by the AO are perfectly based on information available and there is no infirmity in the order of the learned CIT – A in upholding the action under section 148/147 of the Act.



010. We have carefully considered rival contentions, perused orders of lower authorities, paper book and judicial precedents cited before us by the parties. Facts can be put in a narrow compass as under :-

Sr No	Particulars	Date chart for AY 2015-16
1	Due date for filing ROI u/s 139 (1) of the Act	31/07/2015
2	Last date for filing of ROI u/s 139 (4) of the Act [Belated Return]	31/03/2017
3	Due date for issue of notice u/s 143 (2) of the Act	30/09/2017
4	Notice issued u/s 148 of the Act	12/09/2016
5	Return of Income filed by assessee u/s 139 (4) of the Act	19/09/2016
6	Reiteration of ROI filed u/s 139 (4) in response to notice u/s 148 of the Act	23/09/2016
7	Communication of Reason recorded to assessee	06/02/2017
8	Notice u/s 143(2) and 142 (1) served on assessee	06/02/2017



9	Objections filed by assessee to reopening of assessment	16/02/2017
10	Disposal of Objections	03/03/2017

011. Limited issue on ground 2 raised before us is that reasons recorded by the LD AO is without application of mind.

012. Reasons Recorded for reopening of assessment as communicated to the assessee as per letter dated 6/02/2017 are as under :-

" To

*Smt Reena Rakesh Kothari
28-1, Kamnagar Nagar,
S.G. Barve Marg, Kurla (East)
Mumbai -400 024*

Sir,

*Sub: Reasons for issuance of notice of reassessment-
Assessment in your case for A.Y. 2015-16 -
regarding-*

Ref: Your letter dated 23.09.2016

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Please refer to the above.



2. *Vide your above referred letter, you had asked to furnish the "Reasons for Reassessment for issuing notice u/s 148 for A.Y.2015-16.*

3. *In this regard, it is submitted that perusal of EFS module of ITD computer application of the Department, it is observed that in some cases specific information is received from the Pr. Director of Income Tax (Investigation), Kolkata regarding various syndicates engaged into accommodation entries of bogus Long Term Capital Gain, Bogus Short Term Capital Gain and Bogus Short Term Capital Loss/bogus business loss through trading of shares of penny stocks. Penny stocks are those stocks which trade at very low price and whose market capitalization is very low. The Kolkata Investigation Directorate had undertaken investigation into such 84 penny stocks and has given detailed findings indicating bogus LTCG/STCL entries claimed by various beneficiaries.*

4. *As per the information received you are one of the beneficiaries of such transactions classified as non-genuine shares sale/purchase transactions. The total sales to the tune of Rs.3,99,41,823/- were made by you in the scrip Mahavir Advanced Remedies Limited (Scrip Code 531689) on various dates during the F.Y.2014-15 and claimed exempt income from LTCG of Rs.3,81,58,791/-*



5. The investigation conducted by the Kolkata Investigation Directorate reveals that the trading in the above mentioned penny stock was a manipulated affair to generate entries of bogus LTCG/STCG facilitating tax evasion. During the course of search action sworn statements of key persons were recorded, modus operandi was revealed and it was admitted that they were in the business of providing accommodation entries only. As stated earlier, you are one of such person who has availed accommodation entries of bogus capital gain by sale of above mentioned penny stock. Therefore, the transactions claimed by you which resulted into claim of exempt income from Long Term Capital Gains, are not genuine and are merely accommodation entries executed solely to accommodate unaccounted income of assessee in the guise of exempt income from LTCG.

7. The above fact shows that the income has escaped assessment by way of accommodation entry of bogus Long Term Capital Gain, in your case for A.Y.2015-16.

8. Since the reasons for reassessment in your case has been provided by the undersigned, hereinabove, you are requested to comply with the notice u/s.142(1) which is being sent herewith, at the scheduled time.

Yours Faithfully,



(SHUBHANGI D NAIK)

Income Tax Officer 26-(2)(5)

Mumbai"

013. On the basis of above reasons it is apparent that :-

- i. As per Para no 4 it is mentioned that assessee has claimed exempt long term capital gain during F Y 2014-15 from LTCG of Rs 3,81,58,791/-.
- ii. In Para no 6 also ld AO has claimed that transaction entered in to by the assessee resulted in to claim of exempt income from long term capital gains which are not genuine.
- iii. In Para no 7 also the LD AO has mentioned that income has escaped by way of accommodation entry of bogus long term gain for AY 2015-16.
- iv. These reasons were recorded on or before 12/09/2016 being the date of issue of notice u/s 148 of the act.
- v. Assessee has filed her first ROI only on 19/09/2016. It is seven days after the reason recorded. This ROI was filed u/s 139 (4) of the Act i.e. belated ROI.
- vi. Prior to that no other ROI is filed by assessee.
- vii. Thus as on the date of recording of reasons of reopening, there is no ROI filed by the assessee.



- viii. Thus, as on that date it is clear that assessee has not made any claim of exemption u/s 10 (38) of the Act.
- ix. Reason recorded by the LD AO repeated referred to claim made by the assessee of exemption despite the fact that there is no claim made by the assessee as No ROI is filed.
- x. In absence of any ROI filed by assessee no claim of exemption is made by the assessee. But the LD AO repeatedly has mentioned that claim of the assessee is not genuine. Thus it is clearly non application of mind by the LD AO.
- xi. Further on such reason, approval/ sanction u/s 151 of the act is accorded. Thus, such approval/ sanction are also without application of mind.
014. Thus no reason to believe can be formed by LD AO with respect to escapement of income prior to the dates for filing of Return of Income. Explanation 2 (a) to section 147 of the Act also does not make any distinction between ROI filed u/s 139 (1) or u/s 139 (4) of the Act.
015. Thus, in absence of any ROI for the impugned assessment year, LD AO could not have formed such a belief and LD Approving authority also could not have approved such reason for reopening of assessment.
016. Accordingly, Ground no 2 of the appeal is allowed.



017. As appeal of assessee is allowed on the Ground no 2 mentioned above, all other grounds are not required to be adjudicated.

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

Order pronounced in the open court on 21.03.2024.

Sd/-
(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.03.2024

Sudip Sarkar, Sr.PS/Dragon

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai