

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA
BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos.750 & 751/Kol/2023
Assessment Years: 2011-12 & 2012-13**

Hem Lata Jhunjhunwala 9, Pretoria Street, Kolkata-700071 (PAN: ACIPJ0434H)	Vs.	Assistant Commissioner of Income Tax, Circle-11(2), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Manoj Kataruka, Advocate
Respondent by : Shri Prabhakar Prakash Ranjan, Addl. CIT

Date of Hearing : 11.01.2024
Date of Pronouncement : 01.04.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these appeals filed by the assessee are against the separate orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order Nos. ITBA/NFAC/S/250/2023-24/1053561277(1) & ITBA/NFAC/S/250/2023-24/1053561488(1), both dated 06.06.2023 passed against the separate assessment orders by ACIT, Circle-11(2), Kolkata dated 05.12.2018 and 30.11.2018 u/s. 143(3)/147 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 05.12.2018 and 30.11.2018 for AYs 2011-12 and 2012-13. Since grounds are common and facts are identical, we dispose of both these appeals by this consolidated order for the sake of convenience.

2. Common issues are involved in both the appeals by the assessee whereby assessee has raised jurisdictional issue on passing of reassessment u/s. 147 by issuing a notice u/s. 148 claiming it to be illegal, arbitrary and excessive and not in accordance with the law.

Assessee has also raised a jurisdictional issue alleging that notice u/s. 143(2) was not issued. On merits of the case, assessee has challenged the addition made by the Ld. AO of Rs.10,06,270/- on account of commodity profit by treating it as unexplained cash credit u/s. 68 of the Act and also an addition of Rs.2,33,820/- on account of expenses in relation to commodity profit.

3. There is a variation only in the quantum of addition made in the second appeal for AY 2012-13, issues remaining common in both the appeals.

4. Brief facts of the case are that assessee is an individual and her sources of income are by way of director's remuneration, income from commodity profit, inter alia, dividend, capital gain etc. Return was originally filed u/s. 139(1) reporting total income of Rs.34,05,980/-. Subsequently, Ld. AO issued notice u/s. 148 dated 28.03.2018 by recording reasons to believe that information was received from DDIT (Inv.) Unit-3(1), Kolkata with regard to systematic evasion of taxes by clients/members of the National Multi Commodity Exchange (NMCE) during different financial years by misusing the platform of NMCE.

4.1. In the reasons to believe so recorded by the Ld. AO, it is noted that assessee had taken bogus profit/loss of NMCE amounting to Rs.2,99,600/- through broker Sahal Commodities Pvt. Ltd. (Sahal). In the reasons to believe recorded by the Ld. AO, he noted that assessee had taken artificial profit and loss aggregating to Rs.2,99,600/- by way of entering in the sham transaction of commodity exchange via a net work of forged company dummy directors to rout its own unaccounted money. Against these reasons to believe recorded by the AO, assessee raised an objection as to their vagueness and they being unclear without pointing out any particular wrong doing on the part of

the assessee. The reasons to believe are mere suspicion and assumptions according to the assessee.

4.2. Assessee strongly submitted that the allegation made by the Ld. AO of believing commodity profit of Rs.2,99,600/- has escaped assessment is totally wrong and has no basis since the same is without proper verification of record and application of mind on the part of the AO. Therefore, these reasons have no legs to stand. To corroborate this assertion, assessee submitted that in the P&L Account and Balance sheet as well as computation of total income placed on record, an amount of Rs.10,06,270/- had been reported as profit earned from commodity trading on the platform of NMCE during the year. The alleged profit of Rs.2,99,600/- earned by the assessee through the broker Sahil is already included in the commodity profit of Rs.10,06,270/- which has been duly accounted and reported and offered to tax in the regular return filed by the assessee.

4.3. It was also submitted that the earning of profit is duly supported by contract notes and payments have been received by the assessee through account payee cheques reflected in her bank statement. On these set of facts, which are verifiable from the documents on record, assessee strongly asserted that the reasons to believe so recorded and reopening of the case done by the AO are without verification of the return of income reported by the assessee. There is neither escapement of any income nor there was any failure on the part of the assessee to disclose true and correct income. According to the assessee, the entire allegation and the basis on which the reasons have been recorded are arbitrary, irrational and devoid of any live nexus. Assessee had placed on record in the course of reassessment proceeding, all the relevant documentary evidence to substantiate her claim which forms part of the paper book before the Bench.

4.4. Assessee had furnished the details of commodity profit which she had earned not only from Sahil but also through another broker Dignity Logistic Services Pvt. Ltd. Details of the said profit from two brokers as furnished by the assessee before the AO is tabulated as under:

Date	Name of the Broker	Amount of Profit
12.04.2010	Dignity Logistic Services (P) Ltd	127998.27
22.04.2010	Sahal Commodities (P) Ltd	149600.00 /
26.04.2010	Sahal Commodities (P) Ltd	149218.52 /
30.04.2010	Dignity Logistic Services (P) Ltd	150086.73
10.05.2010	Dignity Logistic Services (P) Ltd	158137.16
12.05.2010	Dignity Logistic Services (P) Ltd	123404.84
24.06.2010	Dignity Logistic Services (P) Ltd	95117.15
24.06.2010	Dignity Logistic Services (P) Ltd	27096.55
13.07.2010	Sahal Commodities (P) Ltd	25611.60 /
	TOTAL	1006270.82

4.5. In the P&L Account placed at page 11 of the paper book, the net profit of Rs.44,29,245/- includes commodity speculation profit of Rs.10,06,270/-. This net profit has been reported and included in the computation of total income in the year wherein total income arrive at by the assessee is at Rs.34,05,980/-. Thus, the sole assertion of the assessee on the impugned reassessment proceeding is in respect of reasons to believe recorded by the AO which are devoid of any merit, based on surmises and conjectures, without verification of return of income already on record. Despite the above submissions, Ld. AO proceeded to complete the assessment and made the addition of Rs.10,06,270/- by treating it as income from other sources. He also disallowed Rs.2,33,820/- on account of expenses in relation to commodity profit for interest on loan and processing charges.

Aggrieved, assessee went in appeal before the Ld. CIT(A), who confirmed the findings arrived at by the Ld. AO. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, Ld. Counsel for the assessee reiterated the above narrated facts and corroborated the same with the documents placed in the paper book.

6. Per contra, Ld. Sr. DR submitted that Ld. AO has made the enquiry. He has also taken note of the suspended status of the broker Sahil from the website of NMCE, and thus, submitted that Ld. AO is justified in initiating the reassessment proceedings and making the addition thereby.

7. We have heard the rival contentions and perused the material available on record. Admittedly, it is a fact on record that assessee had reported the income from commodity transactions undertaken on NMCE platform, by way of profit of Rs.10,06,270/- under the head profits and gains from business or profession in the original return filed by her. This profit included the profit and gain from commodity transactions undertaken through the broker Sahil, alleged by the Ld. AO in the reasons to believe recorded by him. Further, assessee has evidently demonstrated that she had earned commodity profit not only from Sahil but also from Dignity Logistic Services Pvt. Ltd. (DLSPL), details of which are already tabulated above and relevant corroborative documents in the form of ledger account, contract notes, bills and bank statements are placed on record.

7.1. We note that the entire amount of commodity profit reported by the assessee in her original return has been subjected to due tax and there is no escapement of income on the part of the assessee which can be attributed in respect of the commodity profit already reported

by her in the return. We note that the intention of the legislature is to reassess the income which has escaped tax, leading to the leakage in the revenue by incorporating sections 147 and 148 of the statute. In the present case before us, there is no income which has escaped assessment, evidently demonstrated by the assessee from the verifiable facts and documentary evidence in the impugned reassessment proceedings.

7.2. The Ld. AO has changed the nature of income already reported by the assessee from profits and gains from business or profession to income from other sources in the garb of reassessment proceedings undertaken by him u/s. 147 read with section 148 of the Act.

7.3. Further, in the assessment order, Ld. AO has mentioned that from the website of NMCE, the broker Sahil was expelled from the membership of the Exchange on account of fraudulent contract notes in support of which screen shots had been annexed to the impugned assessment order. However, the information from the website of NMCE does not mention about the date from which the membership of the said broker was suspended. Further, the screen shorts are dated 30.11.2018 and the transactions which have been alleged under the reassessment proceedings are for AY 2011-12 relating to FY 2010-11. There is a gap of seven and half years between the execution of the transaction and the screen shots taken, without any specific mention of when the membership of the broker was expelled by the Exchange.

7.4. Based on these observations and factual matrix of the case, the attempt of the Ld. AO is more of exercising the power to review under the garb of the power available to him to reassess u/s. 147 read with 148. We also note that before recording the purported reasons, the Ld. AO has not conducted any independent enquiry. He has not verified the correctness of the information received by him from the

Investigation Wing but has accepted it in a mechanical manner. We draw our force from the decision of Hon'ble High Court of Delhi in the case of PCIT Vs. G&G Pharma Ltd. reported in 384 ITR 147 (Del.) wherein it was held as under:

“The basic requirement of law for reopening an assessment is application of mind by the Assessing Officer, to the materials produced prior to reopening the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analyzing materials produced subsequent to the reopening will not make an inherently defective reassessment order valid.”

7.5. We also place our reliance on the decision of Hon'ble Supreme Court in the case of CIT Vs. Kelvinator India Ltd. reported in 320 ITR 561 (SC), wherein it was held as under:

“We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of “change of opinion” as an in built test to check abuse of power by the A.O. Hence, after 1st April, 1989, AO has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.”

7.6. We also take assistance from the decision of Hon'ble High Court of Bombay in the case of Hindusthan Lever Ltd. Vs. ACIT reported in 268 ITR 322 (Bom.) wherein it was held as under:

“It is settled law that the reasons recorded have to be read as it is written without there being any addition or subtraction to the same. The reasons are vague and unclear and do not point out any particular wrongdoing of the assessee. In fact it speaks of suspicion and assumptions and therefore the same is not valid. It is therefore here that the assessee is relying upon the importance of reasons recorded.”

8. Considering the factual position discussed above, corroborated by documentary evidence placed on record and supported by the above referred judicial precedents, we hold

that the impugned reassessment proceedings are bad in law. Accordingly, additions made by the Ld. AO are deleted.

8.1. In the result, grounds taken by the assessee in this respect for AY 2011-12 are allowed.

9. In respect of AY 2012-13, identical issues are involved. Furthermore, in this year the transactions of commodity profit undertaken by the assessee are only through the broker Sahil. There are no transactions with any other broker by the assessee in this assessment year. In this year, assessee had reported commodity profit of Rs.11,09,548/- though the Ld. AO has alleged escapement of commodity profit of Rs.1,58,680/- only, which in fact forms part of the above said commodity profit, already reported by the assessee in her regular return of income. Thus, this appeal is also allowed taking into consideration the above noted observations and findings in AY 2011-12.

10. In the result, both the appeals of the assessee are allowed.

Order is pronounced in the open court on 1st April, 2024.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated 1st April, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), NFAC, Delhi.
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata