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

BEFORE SHRI ABY T. VARKEY, JM AND MS PADMAVATHY S, AM

आयकर अपील सं/ I.T.A. No.2614/Mum/2023
(**निर्धारण वर्ष** / Assessment Years: 2012-13)

V. K. Nanavaty Share and Stock Brokers Pvt. Ltd R-709, Rotunda Building, Bombay Stock Exchange, M. S. Marg, Fort, Mumbai-400023.	**बनाम** / Vs.	ITO, Ward-4(2)(4) R. No. 647, 6th Floor, Aaykar Bhavan, Maharishi Karve Road, Churchgate, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACV9670N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Ravikant Pathak
Revenue by:	Dr. Yogendra T. Wakare

सुनवाई की तारीख / Date of Hearing: 20/02/2024
घोषणा की तारीख /Date of Pronouncement: 12/04/2024

आदेश / O R D E R

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 30.05.2023 for AY. 2012-13.

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.

3. Brief facts of the case are that the assessee is engaged in share broking and related services on Bombay Stock Exchange (BSE) and filed its return of income on 30.09.2012 declaring loss of Rs.47,77,007/-. Later, it filed revised computation of income declaring total loss of Rs.45,84,419/- which was scrutinized by AO and assessment u/s 143(3) of the Act was passed on 23.03.2015 assessing

total loss of Rs.45,84,419/-. The case was reopened by issue of notice u/s 148 of the Act dated 30.03.2019. The AO noted that during the year under consideration, the assessee had sold the shares of "M/s. VAS Infrastructure Ltd" (*earlier known as Vas Anima and Entertainment Ltd*) for a consideration of Rs.12,50,027/- which shares were "*Penny Stock*". And the assessee had claimed long term capital loss (LTCL) of Rs.6,46,334/- against sale of 10,000 units of the scrip and short term capital loss (STCL) of Rs.4,17,109/- on sale of 13,449 shares. According to AO, this penny stock were subjected to circular trading; and accordingly, the scrip prices were manipulated. Hence, through this process, both the quantity and rate of the scrip was increased/decreased manifold in a pre-designed manner, so as to create a profitable exit route in the guise of exempted long term capital gains or loss in the hands of investors. And since the assessee had made transactions in the above mentioned scrip, the A.O. held on the strength of the investigation wing report in the case of M/s VAS infra Ltd. that the entities purchasing the shares had merely acted as exit entry providers to the sellers from booking of exempt LTCG/STCG or losses. Therefore, the A.O. asked the assessee to explain why sale proceeds of VAS Infrastructure Ltd. of Rs.12,50,027.70 should not be added to the total income of the year under consideration. The assessee filed reply before the A.O. The A.O. concluded that short term capital loss and long term capital loss booked by assessee in its books were pre-arranged method to evade taxes and launder money. According to AO, the assessee had no logical explanation for the rise in price of the scrip of VAS INFRA. There was no evidential change in performance

of the company which would substantiate the price rise of the scrip. After considering the findings of search/survey, inquiries conducted in the case of assessee, brokers, operators and the entry providers and the nature of transaction entered into by the assessee, the sale consideration of Rs.12,49,225/- was added back to the total income of the assessee u/s 68 of the Act. The long term capital loss of Rs.6,46,334/- against sale of 10,000/- units of the scrip was disallowed. The short term capital loss of Rs.4,17,109/- on sale of 13,449/units was also disallowed and not allowed to be carry forwarded. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to dismiss the appeal of the assessee. Aggrieved by the impugned action of Ld. CIT(A), the assessee is before us and first of all raised the legal issue against the reopening of assessment.

4. 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 re-opening 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 case if an AO wants to re-open an assessment beyond period of four (4) years where the original assessment has been completed u/s 143(3) of the Act, an additional requirement of law as provided as per first Proviso to section 147 of the Act need to be fulfilled i.e. the reasons recorded has to show that escapement of income was due to failure on part of assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. And there must be a live link between the reasons recorded and formation of the belief that income chargeable to tax has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment which must not be fanciful or based on suspicion. Both the conditions must co-exist in order to confer jurisdiction on the Assessing officer. (*Refer Hon'ble Bombay High Court decision in PCIT Vs. L & T Ltd 268 Taxman 391*). The Hon'ble Supreme Court decision in the case of CIT Vs. Kelvinar of India (256 ITR 1) held that AO has power to re-open, provided he has tangible material to form the belief that the income had escaped assessment [*refer decision in (i) Balakrishna Hiralal Wani v ITO (2010) 321 ITR 519 (Bom) (HC) and (ii) Dempo Brothers Pvt. Ltd v ACIT (2018) 403 ITR 196 (Bom) (HC)*]. Another aspect one has to keep in mind is that if an AO during the earlier assessment has already queried about the issue, which the present AO wishes to re-open, he may refrain from doing so, because

AO doesn't have the power to review or it can be termed as change of opinion, unless the AO re-opening the assessment is able to show that in the first round of assessment, assessee has misguided or played fraud, on the issue during the original assessment proceedings. In the absence of such a finding by the AO who intends to re-open, the impugned issuance of the re-opening notice on the same facts which were considered earlier, clearly amounts to change of opinion and would be wholly without jurisdiction (Refer Hon'ble Bombay High Court decision in Aroni Commercial Ltd. (362 ITR 403). 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 Reason 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, he should issue the notice u/s 148 of the Act. Once the AO satisfies the aforesaid requirement of law, then only invocation of jurisdiction of reopening assessment be held to be valid in the eyes of law. Further, we have to bear in mind that, when the validity of re-opening of an assessment is tested, the reasons recorded by AO for re-opening 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, 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:-

Reasons for Reopening

The assessee is a company and filed its Return of Income for AY 2012-13 on 30.09.2012 electronically declaring loss of Rs (47,77,007). Further, the Return of Income was successfully processed. Thereafter, the case was selected under CASS. During the course of assessment proceedings, the assessee has filed the revised return declaring total loss of Rs (-) 45.84,819/-. The order u/s 143(3) of the Income-Tax Act, 1961 was passed on 23.03.2015 wherein the loss of the assessee company is accepted as per revised return of income.

2. Information has been received from Investigation Wing, Mumbai vide letter no. DDIT(Inv)6(2)/Information/VAS/2018-19 dated 13.02.2019, in respect of penny stock company wherein it was investigated that the assessee has traded into penny stock script viz. M/s VAS Infrastructure Limited and is a beneficiary having sale value of Rs 12,50,027.70/- in this script.

On analysis of such data it was found that above named assessee is one of the beneficiary who had traded in the scrip namely M/s VAS Infrastructure Limited erstwhile VAS Anima and Entertainment Ltd during F.Y. 2011-12 relevant to A.Y. 2012-13. It is to be noted that the shares of M/s VAS Infrastructure Limited was increased from Rs 60 in April, 2010 to Rs 173.40 in November, 2010. The sharp rise in the share price of this captioned scrip is not prima facie supported by financial fundamentals of the scrip. Further, the voluminous purchases and sales by companies with no financial strength clearly indicate that the transactions are only to rig the prices in the market. This clearly established that M/s VAS Infrastructure Limited is a penny script.

3. On perusal of the Return of Income filed and case record available with the Department, it is seen that the assessee had claimed Long term Capital loss of Rs (-)6,46,334/- u/s 10(38) of the Act, 1961 and Short Term Capital Loss of Rs (-) 4,17,109/- in the above mentioned penny stock script. The assessee has sold the above script having sale value of Rs 12,49,235/- and claimed the above mentioned bogus capital loss during the year under consideration. The assessee has shown income under the revised return is Rs (-) 3,25,644/- under the head business income and Capital Loss of Rs (-) 45,84,419/-. I have also examined these evidence vis-a-vis the return of the income of the assessee. After appraisal of these material on record, there is enough reason to believe that not only the claim of exemption under section 10(38) by the assessee is prima facie bogus but by making such bogus claim, the assessee has clearly failed to disclose all material facts for determination of income. In fact in this case the assessee seems to have fabricated evidence in order to mislead the revenue to believe the apparent as real.

4. In the light of the facts narrated herein above and the case of assessee is covered under explanation 2(c) of section 147 of the Act, the income of Rs. (-) 10,63,443/- for A.Y. 2012-13 liable for taxation had escaped assessment. The facts and information on record have

been looked into and I have reason to believe that the income of the assessee of Rs. (-) 10,63,443/- liable for taxation had escaped assessment in the assessment year under consideration, owing to failure on part of the assessee to disclose fully and truly all material facts necessary for its assessment.

5. Therefore, I have reason to believe that this is a fit case for issue of notice u/s. 148 of the 1.7. Act 1961 as the income of Rs. (-) 10,63,443/- has escaped assessment for the assessment year under consideration within the meaning of sec.147 of the Income Tax Act.

6. Further, in this case four years have elapsed since the end of the relevant assessment year i.e. A.Y. 2012-13, Hence, in accordance with the provisions of section 151(1) of the Income-tax Act, 1961, a notice u/s. 148 of the Income-tax Act, 1961 can be issued only if the Pr. Commissioner of Income tax-4, Mumbai is satisfied that it is a fit case for issue of such notice. Accordingly, the approval of Pr. Commissioner of Income tax-4, Mumbai is sought to issue the notice u/s. 148 of the Income-tax Act, 1961 for the A.Y. 2012-13.

(Alka R. Walawalkar)
Income Tax Officer-4(2)(2)
Mumbai.

Date: 19.03.2019.

5. The Ld. AR relying on the decision of the Hon'ble Bombay High Court in the case of M/s. Aditi Construction v DCIT and Ors (*WP. No. 783 of 2016 order dated 04th May, 2023*) wherein similar issue came up before the Hon'ble Bombay High Court [*assessee challenged the re-opening of the assessment after original assessment framed u/s 143(3) of the Act]* and contended that the present case of assessee is similar and the ratio is applicable to the case in hand and drew our attention to the Hon'ble High Court order wherein legal issue was answered in favour of assessee by holding as under: -

"3. Petitioner a partnership firm filed its return of income for AY 2008-09 on 15th September 2008. It's case was selected for scrutiny and a Notice u/s 143(2) was issued on 19th August 2009. Thereafter, by a notice u/s 142(1) dated 12th July 2010 a questionnaire seeking details regarding loans and advances of secured and unsecured loans with names /address details, interest payment, loan confirmation details of unsecured loans, details of source and capacity of creditor, complete address of creditor with PAN and bank statements were sought. All queries were answered with particulars and supporting documents. An assessment order u/s 143(3) was passed on 29th October 2010.

4. After four years, Respondent No.1 issued a notice dated 9th March 2015 under section u/s 148 of the Act, to reopen the assessment which was responded by letter dated 8th April 2015. After supplying i) the notice u/s 142(1) and ii) recorded reasons, matter was fixed for hearing on 21st August 2015. Petitioner filed its objections on 11th September 2015 and pointed out that: (a) all material facts were fully and truly disclosed in the original assessment, (b) original assessment was completed u/s 143(3), (c) no fresh or tangible material for re-opening beyond 4 years was found, (d) re-opening was based on mere change of opinion, (e) information, which was the basis for, 'reasons recorded' was not made available, (f) the case of M/s Rushabh Enterprises in Writ Petition No. 167/2015, part of the same group, with similar facts and reasons, be considered.

5…….

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7. Respondent No. 1 in its reply stated that the Petitioner has failed to 'fully and truly' disclose material facts in the original

assessment and contended that the department had to only make out a 'prima facie case' on the basis of which the Department could reopen the case and the 'sufficiency and correctness' of the material was not a thing to be considered at this stage. In support, they relied on the following cases:

i. M/s Bright Star Syntex Pvt. Ltd v ITO 9(2)(1) & Ors 1

ii. Nickunj Eximp Enterprises Pvt. Ltd vs ACIT Range 1 (2) 2

iii. Phool Chand Bajrang Lal v ITO 3

iv. Ess Ess Kay Engg. Co. (P) Ltd v CIT 4

v. Raymond Woollen Mills Ltd. v ITO 5 CONCLUSION:

8. We have heard both learned counsel and carefully perused the papers and proceedings.

9. We find that the jurisdictional conditions for invoking section 147 – 148 are not satisfied as there is no failure to disclose material facts fully and truly. It is not in dispute that by the letter dated 11th September 2015 (Exhibit H) the Petitioner have submitted all the particulars along with supporting documents to the Respondent No.1. Hence the reasons to believe and a presumption based on the statement of Shri Bhanwarlal Jain (a third party) in the course of a search, that the loans of the entities were bogus or accommodation entries was clearly dispelled. Moreover, the specific provisions of S. 153C would prevail over the general provisions of section 147 in the case of search on 3rd party.

10. In our view, once the Petitioner provided the bank statements and details of parties as sought for, the AO must necessarily carefully examine the material and then give particulars and reason/s to believe otherwise, whilst rejecting the objections, more so, when there is an assessment order u/s

143(3). This process would be in tune with the principles of 'shifting of onus' under the evidence act. The Supreme Court in Lakhmani Mewal Das has held that:

> "The expression 'reason to believe' does not mean a purely subjective satisfaction on the part of the Income-tax officer. The reason must be held in good faith. It cannot be merely a pretence.

It is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section." "It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income-tax Officer."

11. We find that the 'reasons recorded', do not state the primary fact/s that had not been disclosed as laid down in the case of Gemini Leathers v ITO 7. It is further evident that the case of Rushabh Enterprises (same group as the Petitioner) in W.P No. 167 /2015 (decided on 15th April 2015) where the reopening was quashed on the basis that there is no tangible material for reopening was also not considered.

12. The criteria for reopening of assessment after a period of four years are no longer res integra in view of the judgement of this Court in the case of Ananta Landmark P. Ltd v Dy. CIT wherein this Court held that where assessment was not sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation

of income but was a case wherein assessment was sought to be reopened on account of change of opinion of AO the reopening was not justified. It is also held that where primary facts necessary for assessment are fully and truly disclosed the AO is not entitled to reopen the assessment on a change of opinion. It is held that while considering the material on record, one view is conclusively taken by AO, it would not be open for the AO to reopen the assessment based on the very same material and take another view.

13. In the present case, a perusal of the reasons recorded by Respondent No. 1, indicate that, the Respondent No. 1 has relied upon facts and figures on the record; and the queries were answered and particulars were provided vide letter dated 11th September 2015 is also not disputed. This Court in the case of Nickunj Eximp Enterprises (P) Ltd. (supra) has considered the above aspect whilst holding that:

> "…This satisfaction has necessarily to be the subjective satisfaction of the Assessing Officer and unless it is shown by the Petitioner that such a reasonable belief as arrived at by the Assessing Officer in the facts of the cases is just not possible, the proceedings for reassessment duly initiated will not be stalled."

In our view, the Petitioner has by production of bank statements and supporting documents shown that the reasonable belief of the AO was unfounded and consequently the presumption that the Petitioner was one of the beneficiary of the accommodation entries based on the statement of the third party was disproved. Consequently, the onus would be on the AO to provide reasons to disbelieve the bank statements and supporting documents for reopening the assessment. That in our view has not been spelled

out and therefore, the reassessment sought to be initiated deserves to be stalled.

14. There is no tangible material mentioned in the recorded reasons to conclude that income had escaped assessment, so also the nature of information is also not disclosed.

15. For the aforesaid reasons, the AO has acted in excess of the limit of his jurisdiction to reopen the assessment in the exercise of powers under section 147 read with section 148 of the Act. Accordingly, the Petitioner would be entitled to succeed in this proceeding.

16. We, therefore pass the following order.

i. The impugned notice u/s 148 of the Act dated 9th March 2015, and the order dated 21st January 2016, by Respondent No. 1 for AY 2008-09 are quashed and set aside;

ii. Rule made absolute in above terms. No costs."

6. We note that the assessee is engaged in share broking and related services on Bombay Stock Exchange (BSE) and had filed its return of income on 30.03.2012 declaring total loss of Rs.47,77,007/- which was revised by assessee declaring total loss of Rs.45,84,419/-. The return of income filed by assessee had undergone scrutiny assessment u/s 143(3) of the Act dated 23.03.2015 wherein the AO acknowledged that he had verified the relevant details and documents and accepted the income/loss of the assessee as per the revised computation of income. And thus accepted the total loss of Rs.45,84,419/-. In the aforesaid assessment proceedings (original

assessment), we note that the assessee had produced before the AO [*pursuant to the notice u/s 142(1) of the Act*] brokers contract by M/s. Centrum Broking Ltd showing purchase/sale of shares of M/s. VAS Infrastructure Ltd (*refer page no. 28 to 41 of PB*); and statement of transaction for the assessment year 2012-13 (*refer page no. 42 to 61 of PB*); and thereafter, the AO framed the assessment order u/s 143(3) of the Act dated 23.03.2015 (*refer page no. 52 to 53 of PB*). Thus, it is noted that the assessee had already undergone scrutiny assessment, and the AO after inquiry regarding the loss claimed by assessee had accepted the revised computation of income declaring loss of Rs.45,84,419/-. Thereafter, the AO has issued notice u/s 148 of the Act on 30.03.2019 [*last day of expiry of six (6) years from the end of relevant assessment year*]. Therefore, the proviso to section 147 of the Act is applicable in this case i.e. AO before reopening the original assessment has to satisfy an additional condition precedent i.e. that assessee failed to disclose fully and truly or material facts necessary for re-assessment. Therefore in the present case, before the AO usurp the power to reopen the assessment, has to first of all show in the reasons recorded that he had "*reason to believe escapement of income"* and also satisfy the additional condition that *assessee had failed to disclose fully and truly or material facts necessary for his assessment*. From a reading of the reasons (supra), it is vivid that only on the basis of the Investigation Wing Report of Mumbai which states that the shares of M/s. VAS Infrastructure Ltd was a penny stock, and since the assessee has traded in such shares, and booked long term capital loss of Rs.6,46,334/- and short term capital loss of

Rs.4,17,109/-; and since assessee has sold the penny stock having sale value of Rs.12,49,225 and claimed the bogus capital loss, according to AO, the income to the tune of Rs.10,63,443/-, liable for taxation had escaped assessment. After recording the aforesaid reason, the AO reopened the original assessment dated 23.03.2015, which was based on the general investigation report of the department branding the shares of M/s VAS Infrastructure Ltd as Penny Stock. And as noted supra, an adverse information about the assessee trading in M/s. VAS Infrastructure Ltd may trigger "*Reason to suspect*" but there is no whisper in the reasons recorded that assessee had any connection with any entry operators or exit providers or the assessee's broker was discredited by SEBI or other agencies while trading in this shares. Therefore, the adverse information [report of investigation wing], is only a foundation for AO *to suspect escapement of income'.* But the jurisdictional requirement of law is '*Reason to believe, escapement of income'*. Thus, we find that *belief based on reason* is clearly missing (absent); and moreover, it is noted that assessee had already undergone scrutiny assessment wherein it had shown all the relevant documents before the AO who had taken a plausible view, therefore, without a tangible material in the hands of the present AO to show that the assessee was involved in taking accommodation entry, the AO could not have re-opened the assessment only on *suspicion*, when the fact remains that the transaction in question have taken place undisputedly in Bombay Stock Exchange through online platform and assessee is engaged in the business of share trading and is a regular investor & trader and had purchased & sold the shares in question through on-line

platform. Therefore, in the facts and circumstances discussed (supra), and relying on the decision of the Hon'ble High Court in the case of M/s. Aditi Construction v DCIT (supra), the re-opening is held to be invalid in the eyes of law; and so, the notice issued u/s 148 of the Act is held to wholly without jurisdiction and bad in law and is quashed.

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

Order pronounced in the open court on this 12/04/2024.

Sd/-	**Sd/-**
(PADMAVATHY S)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 12/04/2024.
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.
6.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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