

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

**BEFORE SHRI ANIKESH BANERJEE, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 4062/Mum/2023
(Assessment Year: 2013-14)**

Ravi Gopal Trivedy 402, Sheetal, A Wing, Lokhandwala Complex, Andheri (West), Mumbai-400053 PAN : ABCPT1927A	Vs.	National e-Assessment Centre, Delhi
Appellant)	:	Respondent)

Appellant/Assessee by : Dr. K. Shivaram a/w Mr. Shashi
Bekal, CA

Revenue/Respondent by : Shri R.R. Makwana, JCIT

Date of Hearing : 23.04.2024

Date of Pronouncement : 24.04.2024

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax (Appeals)/National Faceless Appeal Centre, Delhi [for short 'the CIT(A)] dated 16.10.2023 for the AY 2013-14. The assessee raised the following revised grounds:

“1. Reassessment is bad in law

That on the facts and circumstances of the case and in law the Ld. National Faceless Appeal Centre (NFAC) has erred in confirming the issue of the reassessment and order passed by the National Faceless Assessment Centre.

1.1. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in confirming the notice under section 148 of the Act based on incorrect information and without application of mind and without providing copies of the information received.

1.2. That on the facts and circumstances of the case and in law the Ld. NFAC has failed to appreciate that the recorded reasons stated that the assessee has made a fictitious profit, whereas the assessee has the recorded reasons suggests a loss, and the addition is made on capital gains, hence the issue of reassessment notice and assessment order is bad in law.

1.3. The Ld. NFAC failed to appreciate that the case laws relied on the NFAC do not apply to the facts of the appellant and the case laws are relied on without giving an opportunity to the appellant to respond, hence the order is bad in law.

2. Impugned addition of Rs. 9,09,787/- a short term capital gain is bad in law.

That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 9,09,787/- as short term capital gain.

2.1. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 9,09,787/- as short term capital gain without providing the details of the said amount arrived by the National Faceless Assessment Centre.

2.2. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 9,09,787/- as short term capital gain without any evidence that suggests the transactions is fictitious.

2.3. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 9,09,787/- without considering the submissions and documents presented by the Assessee in the course of assessment and appeal proceedings.

2.4. The National Faceless Assessment Centre erred in making wrong facts and observations stating that the assessee has made a loss of Rs. 9,09,787/-, which shows the non-application of mind, whereas the Ld. NFAC erred in observing that it was a typographical error and hence confirmed it.

3. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.

2. The assessee is an individual and filed the return of income for AY 2013-14 on 29.07.2013 declaring a total income of Rs.39,69,500/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (the Act). Subsequently the Assessing Officer (AO) reopened the assessment for the reason that the assessee has entered into fictitious share transactions through M/s Anand Rathi Commodities Ltd. wherein the assessee has purchased shares of the said company for Rs.18,02,025/- and has sold the same for Rs.8,92,238/- thereby booking a fictitious loss of Rs.9,09,787/-. The assessee filed the return of income in response to notice under section 148 of the Act declaring the same income as in the original return. The assessee filed its objections in response to the reason recorded for reopening submitting that the assessee is not able to match the values as mentioned in the recorded reasons with his books of accounts. The assessee further submitted that from the sale value as mentioned in the reasons recorded matches with one transaction out of which the assessee has declared a profit of Rs.17,273/- and had paid tax on the same. The assessee therefore, requested the AO to provide the source of information from where the alleged fictitious purchase of shares for Rs.18,02,025/- was obtained so that the assessee could file the reply appropriately. The AO vide letter dated 25.03.2022 disposed of the objections of the assessee and concluded the assessment by making an addition of Rs.9,09,787/- as Short Term Capital Gain (STCG). The CIT(A) confirmed the additions. The assessee is in appeal before the Tribunal.

3. The ld. AR submitted that the assessee was not provided with the complete information based on which the case of the assessee was reopened under section 148 of the Act. The ld. AR further submitted that the assessee has not entered into the alleged transactions mentioned in the recorded reasons and therefore, requested the AO to provide details of the same. The ld. AR also submitted that since the assessee was never provided with the details of the transactions as mentioned in the reasons recorded, the assessee could not submit any details to counter the allegations made in the reasons recorded. The ld AR therefore argued that the reassessment done without providing proper information to the assessee is not valid. The ld. AR in this regard relied on the following decisions:

- (i) Mohan Thakur Vs. ACIT, ITA No. 1434-37/Mum/2018 dated 01.03.2021.
- (ii) Kishin Chand Chellaram Vs. CIT (1980) 125 ITR 713 (SC).

4. The ld. AR submitted that the reasons recorded are on the basis of incorrect information and without application of mind. In this regard the ld. AR drew our attention to the submission made before the AO/CIT(A) wherein the assessee has made a suo-moto declaration matching the alleged sale value with one of the transactions entered into by the assessee to submit that the said transaction resulted in profit and not loss. The ld. AR further submitted that the lower authorities failed to consider the facts submitted by the assessee and proceeded to make the addition based on incorrect information that the assessee has made a loss from the alleged transactions. The ld. AR therefore, submitted the re-opening based on incorrect information is not valid and in this regard relied on the decision of the co-ordinate bench in assessee's own case for AY 2014-15 (ITA No. 358/Mum/2023 dated 16.05.2023). The ld. AR also placed reliance on various other judicial pronouncements to submit that the reopening based on the reasons recorded which

is prima facie incorrect is done without application mind and therefore not valid. On merits, the ld. AR submitted that the AO has not brought any document on record to show the existence of a non-genuine transaction nor any document that the modifications have been done at the behest of the assessee. Therefore, the ld. AR submitted that the entire assessment has been done by the AO based on mere conjecture and surmises. With regard to the case laws relied on by the CIT(A), the ld. AR submitted that the facts of assessee's case are distinguishable and therefore, not applicable.

5. The ld. DR on the other hand submitted that the re-opening is done based on the information received by the AO and therefore, the AO had reasons to believe that the income has escaped assessment. The ld. DR further submitted that the mere fact that the amount mentioned in the reasons recorded not matching with any transactions of the assessee cannot be the reason for questioning the validity of the re-opening under section 148 of the Act. The ld. DR also submitted that M/s. Anand Rathi Commodities Ltd. have admitted the fact that fictitious transactions have been entered into by them and therefore the AO has correctly made the addition based on the information.

6. We have heard the parties and perused the material on record. The AO based on the information that the assessee has entered into high volume fictitious commodity trading by Client Code Modification of NSEL. The reasons recorded for reopening of the assessment is extracted below:

ANNEXURE**Reasons for REOPENING OF THE assessment U/S 147 OF THE Income TAX Act, 1961**

1. In this case, the information has been uploaded that the assessee is found to have done the high volume/value transactions i.e. Fictitious Profits in Commodity Trading by CLIENT CODE MODIFICATION on NSEL.
2. The taxpayer is found to have entered into the fictitious profits in commodity trading amounting to Rs. 18,02,025 (bought value) 8,92,238 (sell value).
3. It is found from the details provided that the assessee has resorted to a suspicious mode of obtaining the gains and not offering the income to tax by not showing the details of income or claiming non allowable deduction. Thus, the income related to the above mentioned transactions remains undisclosed and the same are required to be considered in computing total income of the assessee.
4. As a outcome of enquiry / perusal and analysis of details available on records, it is noticed that the genuineness of the said transactions is not conclusively proved. Hence, I have reasons to believe that income chargeable to tax more than Rs.1,00,000/- has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year i.e. for the subject A.Y. within the meaning of section 147 of the Income-tax Act, 1961.

Yours faithfully,
SHASHIKANT SINGH
CIRCLE 24(1), MUMBAI

7. The assessee filed objections before the AO requesting to give details of figures mentioned in the alleged fictitious transactions with M/s Anand Rathi Commodities Ltd. The assessee had stated that the figures mentioned in the reasons recorded are not matching with any transaction entered into with M/s Anand Rathi Commodities Ltd. and therefore, unable to counter the allegations mentioned in the reasons recorded. It is also noticed that the assessee has found the sale transaction mentioned in the reasons recorded to be matching with one of the transactions entered into with M/s Anand Rathi Commodities Ltd. from which the assessee has made a profit to the tune of Rs. 17,273/-. However, the AO did not accept the

submissions of the assessee and proceeded to complete the assessment by making an addition of Rs. 9,09,787/- from the alleged fictitious transactions as STCG in the hands of the assessee. The relevant findings of the AO in this regard are extracted below:

“3. Therefore the assessment is completed u/s.143(3) r.w.s 147 on the basis of material available on record. The assessee has entered into fictitious share transaction within the name of Anand Rathi commodities where in assessee has purchased shares of said company of Rs. 18,02,025/- and the sale value shown Rs.8,92,238/- thereby assessee has claimed loss of Rs.9,09,787/-[Difference of bought value of Rs. 18,02,025/- minus sell value of Rs.8,92,238/-]. The assessee could not prove that the share transactions in the name of Anand Rathi commodities is real one and shares have been purchased through its demat account and the assessee has incurred as such Loss. It is apparent from the record that the assessee has the escaped income of Rs.9,09,787/- which is difference of bought value of Rs. 18,02,025/-and sell value of Rs.8,92,238/-. As the assessee has failed to give any details why the escaped income should not be added back to the total income, I am left with no other alternative but to add back Rs9,09,787/- to the income of the assessee. I therefore added the amount of the Rs.9,09,787 /- as income on short term capital gain of the assessee.

4. Assessment is completed by making an addition on short term capital gain of Rs.9,09,787/- as under:-

<i>Returned income</i>	<i>: Rs.39,69,500/-</i>
<i>Add: Additions discussed in para 3</i>	<i>: Rs.9,09,787/-</i>
<i>Revised Assessed income</i>	<i>: Rs.48,79,287/-</i>

5. A show cause notice was issued to assessee on 27/3/2022. Assessee filed reply on 28/3/2022. Assessee's reply vide letter dated 28/3/2022 perused. Assessee's contention in reply dated 28/3/2022 as purchase value details not given, full response filed etc. is not correct. In the Assessment order, it is clearly mentioned that the transactions were made to whom etc. It is pertinent to note that the dispute is not mainly w.r.t the existence of transactions. The issue is with regard to the genuiness of transactions. The transacting party with the assessee has admitted that the transactions are not genuine.

The argument of the assessee is not tenable because the very basis of reopening is the bogus nature of purchase in the name of Anand Rathi commodities and claiming capital loss and thereby evasion of tax. The assessee could not prove that the share transactions

in the name of Anand Rathi commodities is real one and shares have been purchased through its demat account and the assessee has incurred as such Loss. Since the assessee has failed to convincingly prove that loss is real loss the assessment is completed by making an addition of Rs. 9,09,787/-.

8. Before the CIT(A) also the assessee made similar submissions and requested for the details of alleged transactions as mentioned in the reasons recorded. However, the CIT(A) did not consider the submissions of the assessee and confirmed the addition made by the AO. The main contention of the assessee is that the complete information with regard to the alleged fictitious transactions are not provided to the assessee and that the reopening is based on the incorrect information that the assessee has made loss from the alleged transactions. For the purpose of considering the legal contentions of the assessee we will first look at the relevant provisions of section 147 of the Act as applicable to the year under consideration –

*If the Assessing Officer has **reason to believe that any income chargeable to tax has escaped assessment** for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

9. From the plain reading of the above provisions it is clear that the fundamental requirement 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. Therefore for the purpose of reopening there should be 'reasons' and 'belief'. "Reasons" refer to the source like document, statement, third party confirmation etc and "belief" refers to the conclusion. The basis of the belief should be discernible from the material on record, which was available with the Assessing Officer, when he recorded reason i.e. he has tangible material to form the belief that the income had escaped assessment. Further there should be a link or close nexus between material obtained and formation of belief that the income has escaped assessment in the case of the assessee. In this regard it is relevant to quote the following observations of the coordinate bench in the case of V. K. Nanavaty Share and Stock Brokers Pvt. Ltd vs ITO (I.T.A. No.2614/Mum/2023 dated 12.04.2024) –

4. ***** 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).

10. In the back drop of the above legal position, now we will look at the assessee's case for the year under consideration. From the perusal of the reasons recorded which is extracted in the earlier part of this order, we notice that "reasons to believe" in the given case is based on some information uploaded that the assessee has entered into some fictitious transactions i.e. Rs.18,02,025 (bought value) and Rs.8,92,238 (sell value). The contention of the assessee is that there is nothing mentioned in the reasons recorded about how the transactions are linked to the assessee and the source / material from where the alleged transactions are obtained. We notice in this regard that in the objections filed, the assessee has submitted that the alleged transaction of purchases to the tune of Rs.18,02,025 is not found in his records and sought the statement of Anand Rathi Commodities Ltd in this regard. We further notice that the AO while dismissing objections has merely stated that the figures with the department do not match and that the assessee has purchased shares of the said company which not genuine / real. We also notice from the perusal of AO's finding in the order assessment (refer relevant extraction in the earlier part of this order) that the AO has made the addition for the reason that the assessee could not prove the genuineness of actually entering into the transaction without considering the fact the claim of the assessee that no such transaction has been entered into by the assessee. In our considered view, once the assessee has denied having entered into the alleged transaction the onus is on the AO to prove that the assessee has entered into the alleged transaction. The AO has not brought any material on record to substantiate that the assessee has indeed entered into the alleged transaction of purchase of shares of Anand Rathi Commodities Ltd neither in the AO reasons recorded nor while rejecting the objections of the assessee. Further the AO's claim that the assessee has claimed the fictitious loss of Rs.9,09,787 is also not substantiated based on any records.

Therefore, we see merit in the contention of the Ld.AR that the Assessing Officer while recording the reasons, has not applied his mind and has not brought out any factual finding with regard to the impugned addition. It is also noticed that the assessee's request with regard to the details of the impugned purchase transactions was not shared with him by the lower authorities. In view of these discussions and considering the facts of the case, it is evident that the reopening under section 147 has been done without recording any specific reasons pertaining to the assessee and without linking the impugned transactions to the assessee. We, therefore hold that the reopening u/s.147 is not valid and accordingly, the addition made stands deleted.

11. In the result, the appeal is allowed.

Order pronounced in the open court on 24-04-2024.

Sd/-
(ANIKESH BANERJEE)
Judicial Member
**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

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

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai