

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER

I.T.A. No. 4348 & 4347/Mum/2023
Assessment Year: 2011-12 & 2012-13

Mansukh Arjanbhai Sureja 401-402, Sunder Dham Ram Baug Lane S.V. Road, Borivali (West) Mumbai -400092 [PAN: AABPS6775P]	Vs	DCIT, Circle-42(1)(1), Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Hariom Tulsian, A/R
Revenue by :	Smt. Sanyogita Nagpal & Smt. Mahita Nair, Sr. D/R

सुनवाई की तारीख/**Date of Hearing** : 21/08/2024

घोषणा की तारीख/**Date of Pronouncement** : 23/08/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM :

I.T.A. No. 4348 & 4347/Mum/2023, are two separate appeals by the assessee preferred against two separate orders of NFAC, Delhi, dated 19/10/2023 & 20/10/2023 pertaining to AYs 2011-12 and 2012-13.

2. Since common grievance is involved in both the appeals they were heard together and disposed of by this common order for the sake of brevity.

3. For the sake of our convenience, and as per the concession of the rival representatives, we consider the facts of AY 2011-12 *qua* grounds of appeal, which read as under:-

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred by confirming the legality of the reassessment proceedings by ignoring crucial facts of the case and the manner in which the proceedings were

initiated. The reassessment proceedings are bad in law; illegal and void-ab-initio for the reasons stated hereunder:

A. *Even though a specific request was made to furnish a copy of the standard form used for obtaining the approval by the assessment officer from the PCIT-32 for initiating the reassessment proceedings, the learned A.O. did not provide it and pointed out that the same has been issued in the ITBA system online.*

B. *That during the inspection granted to the assessee 12.11.2018 of the approval granted by PCIT-32, it was observed that the approval was undated and no reasons were cited by him for his satisfaction in granting the said approval. Merely the words "I am satisfied that this is a fit case for 148" were written in the said letter which shows non-application of mind and mechanical manner in which the approval was granted.*

C. *That the Ld. Assessing officer merely acted mechanically and made fishing and roving inquires on the information supplied by the investigation wing about an alleged penny stock without applying his own mind which is evident from the fact that she relied on incorrect data for reopening the assessment alleging that the shares were quoted at Rs. 2050/- on 05/01/2011 whereas the shares were actually quoted between Rs. 201 to Rs. 207 per share on the said date.*

D. *The assessing officer failed to establish a live link between the materials relied upon for reopening the assessment and escapement of income in the hands of the assessee which is evident from the fact that the Ld. A.O. incorrectly stated in the reasons for reopening the assessment that the assessee has not claimed any exemption in the return of income which was not the case at all.*

E. *The assessing officer initiated the reassessment proceedings in relation to a company that was non-existent at that point of time by the name of Nivayah Infrastructure & Telecom services Ltd. whereas in fact the shares sold by the assessee were of S.V.Electricals Ltd.*

F. *That the assessee was never provided with an opportunity to cross-examine the so called entry operators whose statements were relied upon by him to re-open the assessment even after a specific request was made in this regard by the assessee, thereby violating the mandatory principles of natural justice.*

2. *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the additions made by the learned assessing officer. Following are the additions made:*

A. *The total sale price of Rs. 11,80,95,269 - being the sale proceeds of 6,38,000 shares on the alleged ground that the capital gains bonafidely earned by the appellant on the said 6,38,000 shares were fictitious, even though the assessee had submitted documents like Letter of Allotment, Bank Statement highlighting payment, Contract Notes, etc. to prove the genuineness of the transaction.*

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B. The assessing officer overlooked the plethora of documentary evidences submitted by the assessee establishing genuineness of the transaction and the fact that the transactions made by the assessee was through the Stock Exchange and the payments for such transactions are made through proper banking channels and there was no failure on the part of the assessee to disclose fully and truly all material facts for the purpose of assessment.

C. Under section 69C of Rs. 11,80,952/- i.e namely 1% of the sale value of the shares of Rs. 11,80,95,269 /- as commission on the basis of assumption and presumption and without an iota of evidence.

3. On the facts and circumstances of the case and in law, the learned CIT(A) erred in relying on the decision of Hon'ble Calcutta High Court in the case of PCIT vs. Swati Bajaj while simultaneously ignoring the decisions of the Hon'ble Jurisdictional High Court and Hon'ble Jurisdictional Tribunal which are squarely applicable to the case of the appellant and which are binding on him. Some of these decisions are listed as under:

- i. CIT vs. Shyam Pawar reported in 229 taxman 256 (Bombay HC)
- ii. CIT vs. Mukesh Marolia in ITA No. 456 of 2007 (Bombay HC)
- iii. South Yarra Holdings vs. Income Tax Officer, reported in 256 taxman 594 (Bombay HC)
- iv. Vijayrattan Balkrishan Mittal vs. DCIT in ITA No. 3427/MUM/2019 (Mumbai Tribunal)"

4. The entire quarrel revolves around the reopening of the assessment. The bone of contention are the reasons recorded for reopening the assessment and same read as under:-

"An information has been received from D.D.I.T., Investigation, Unit 8(3), Mumbai vide letter No. DDIT(Inv)/Unit-8(3)/TEP/Diss./Action/2018-19 dated 20.02.2019 that M/s Nivayah Infrastructure & Telecom Services Ltd is a penny stock scrip listed on BSE with Scrip Code (517534) and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain or short term capital loss in their books of accounts. It was also noticed that the share price of M/s Nivayah Infrastructure & Telecom Services Ltd rose from Rs.39 on 21st July, 2009 to Rs.2,050/- on 5th January, 2011 and dipped to Rs.47.20 on 18th July, 2012, whereas the financials of the company for the relevant period do not show any substantial change so as to support such huge share price movement. The trade data of M/s Nivayah Infrastructure & Telecom Services Ltd was called for from BSE and on analysis of the data, it is observed that the assessee is one of the beneficiaries, who have traded in the scrip during F.Y. 2010-11 relevant to A.Y. 2011-12 and the trade value involved is Rs. 11,80,95,269.50ps.

3. The information has been analyzed with the return of income filed by the assessee. It is found that the assessee has claimed exempt income on sale of shares amounting to Rs. 3,94,00,099/-. However, the income declared by the assessee in its return of income is not in consonance with the transactions carried on by the assessee according to the above information.

4. It is evident from the above facts that the assessee had not truly and fully disclosed material facts in the return of income for the year under consideration thereby necessitating reopening u/s 147 of the Act.

5. It is pertinent to mention here that in this case, the assessee has filed return of income for the year under consideration, but no assessment as stipulated u/s 2(40) of the Act was made and the return of income was only processed u/s 143(1) of the Act. In view of the above, provisions of clause(b) of explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case, where income chargeable to tax has escaped assessment."

5. Having heard the rival contentions, we have carefully perused the orders of the authorities below and the relevant documentary evidences brought to our notice, in the light of Rule 18(6) of the ITAT Rules, 1963.

6. The facts mentioned at clause 3 of the reasons are factually incorrect if we consider them with the documentary evidences. Page 7 of the paper book is part of the return of income filed by the assessee and under schedule EI - Details of Exempt Income, the assessee has categorically mentioned - Long-term capital gains from transactions on which Securities Transaction Tax is paid - Rs.13,11,67,379/- and the total income claimed to be exempt has been shown at Rs.13,12,67,807/- and most importantly, the Hon'ble Jurisdictional High Court of Bombay in the case of *South Yarra Holdings vs. ITO in W.P. No. 3998 of 2018*, had the occasion to consider similar reasons for re-opening the assessment which read as under:-

"Reasons for reopening [u/s 148](#) for A.Y.2-011-12 is provided as under :

1. The information has been received from DDIT (Inv) Unit 8 (3) Scindia House, Mumbai-38 vide their letter dated 23-3-2018 which is received in this office on 28-03-2018.

2) The DDIT (Inv) Mumbai has received information that M/s Nivayah Infrastructure & Telecom Services Ltd is a penny stock listed do in BSE with scrip code (517634) and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain

or short term capital loss in their books of accounts. It was noticed that share price of M/s Nivayah Infrastructure & Telecom Services Ltd rose from Rs.39 in 21st July 2009 to Rs.2050 on January 2011 and dipped to Rs.47.20 on 18 th July 2012. However, the financials of the company for the relevant period do not show any substantial change so as to support such huge share price movement. The company does not have business worth while to justify the sharp rise in market price of shares. The sharp rise in market price of this entity is not supported by the fundamentals of the company. Both purchase and sale of the shares are concentrated within few person/entities.

2.2. The DDIT (Inv) has traded in the above scrip namely M/s Nivayah Infrastructure & Telecom Services Ltd during the F.Y. 2010-11 to the tune of Rs.3504000000000000000.

2.3. The DDIT (Inv) Unit - 8 (3) Mumbai has given a finding that enquiries have been conducted in the penny scrip namely M/s Nivayah Infrastructure & Telecom Services Ltd vis-a-vis facilitating introduction of unaccounted income of members of beneficiaries in the form of exempt Capital gain or Short term Capital Loss in their books of account. These transactions are mostly in view of cash of equal amount and commission is charged over and above at certain fixed percentage for providing such accommodation entry. These accommodation entries were taken from various beneficiaries for introducing their unaccounted cash into their books of accounts without paying the due taxes. 2.4 The detailed investigation report containing the modus operandi of tax evasion through penny stock and discussion in entry operators from brokers and scrips has been provided along with the letter of DDIT (Inv) Mumbai. 2.5. Our assessee is one of the beneficiary who have availed accommodation entries by way of traded in shares to the tune of Rs.3504000,0000000000005 in M/s Nivayah Infrastructure & Telecom Services Ltd with a view to ultimately reduce tax liability and or to bring capital in the form of equity or debt or tax exempt income or a combination of the above transaction, therefore, it is necessary to verify the actual amount of bogus LTCG analyzing the D-mat statement and bank account statement. 3. In this case return of income as fixed for the year under consideration and regular assessment [u/s 143 \(3\)](#) was made on 27.11.2013. Since 4 years from the end of the relevant year has expired in this case the requirements to initiate proceedings [u/s 147](#) of the IT Act are reasons to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded in paragraph 2 above.

4. In this case more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue the notice [u/s148](#) has been obtained separately from the Pr.Commissioner of Income Tax as per the provisions of [section 151](#) of the Act.

5. Notice [u/s 148](#) was issued with prior approval of Pr.Commissioner of Income Tax-6 Mumbai."

6.1. It can be seen from the above that the Hon'ble Bombay High Court was seized with identical facts relating to identical company M/s Nivyah Infrastructure & Telecom Services with scrip code 517634 and under similar circumstances, the Hon'ble High Court held as under:-

"7. It is a settled position in law that re-opening of an assessment has to be done by an Assessing Officer on his own satisfaction. It is not open to an Assessing Officer issue a reopening notice at the dictate and/or satisfaction of some other authority. Therefore, on receipt of any information which suggests escapement of income, the Assessing Officer must examine the information in the context of the facts of the case and only on satisfaction leading to a reasonable belief that income chargeable to tax has escaped assessment, that re-opening notice is to be issued.

8. From the reasons, it is evident that the impugned notice has been issued on the basis of information received from the Deputy Collector Income Tax (Investigation) alleging that M/s Nivyah Infrastructure & Telecom Services Ltd is a penny stock listed on the Bombay Stock Exchange and that the petitioner had dealt with the same leading to escapement of income. On receipt of information, the least that is expected of the Assessing Officer is to examine the same in the context of the facts of this case and satisfy himself whether the information received does prima facie lead to a reasonable belief that income chargeable to tax has escaped assessment. In this case, the reasons indicate that the Assessing Officer has not carried out such exercise and accepted the report of the Deputy Collector of Income Tax (Investigation) Mumbai to conclude that the petitioner had dealt with Nivyah Infrastructure and Telecom Services Ltd during the previous year relevant to the assessment year 2011-12. Admittedly, there was no company by name "M/s Nivyah Infrastructure & Telecom Services Ltd" in existence during that year for consideration. This clearly shows that the Assessing Officer acted on the satisfaction of the Deputy Collector of Income Tax (Investigation) that income chargeable to tax has escaped assessment."

6.2. And, finally concluded by holding that the impugned notice is bad in law as it has not been issued by the AO on his satisfaction that there is reason to believe that income chargeable to tax has escaped assessment.

7. Finding the facts and the issues *mutatis mutandis*, the same with the facts considered by the Hon'ble Bombay High Court (*supra*), we have no hesitation in setting aside the impugned notice u/s 148 of the

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Act thereby quashing the resultant assessment orders. Since we have quashed the assessment orders we do not find it necessary to delve into the merits of the case.

8. In the result, appeals of the assessee are allowed.

Order pronounced in the Court on 23rd August, 2024 at Mumbai.

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 23/08/2024

Sd/-

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai