आयकर अपीलीय अधिकरण, **'बी'** न्यायपीठ**,** चेन्नई। **IN THE INCOME TAX APPELLATE TRIBUNAL** **'B' BENCH: CHENNAI** **श्री एबी टी. वर्की, न्यायिक सदस्य एवं** श्री **एस. आर. रघुनाथा,** लेखा सदस्य **के समक्ष** **BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND** **SHRI S.R.RAGHUNATHA, ACCOUNTANT MEMBER**		
आयकर अपील सं./**ITA No.1652/Chny/2023** निर्धारण वर्ष**/Assessment Year: 2013-14**		
The DCIT, NCC-4(1), Chennai.	**v.**	Shri Sohan Raj Khanted Gunvanth Raj, 17, Krishna Iyer Street, Sowcarpet, Chennai-600 079.
		[**PAN: AAFPK 9519 F**]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
Department by	:	Shri A. Sasikumar, CIT
Assessee by	:	Shri D. Anand, Advocate
सुनवाईकीतारीख/Date of Hearing	:	19.06.2024
घोषणाकीतारीख /Date of Pronouncement	:	30.08.2024

आदेश **/ O R D E R**

PER ABY T. VARKEY, JM:

This is an appeal preferred by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)/NFAC, (hereinafter in short "the Ld.CIT(A)"), Delhi, dated 26.10.2023 for the Assessment Year (hereinafter in short "AY") 2013-14.

2. The Revenue is aggrieved by the action of the Ld.CIT(A) holding that re-opening of assessment is bad in law, because it was *change of opinion* on the part of the AO and therefore, he upheld the legal issue raised by the assessee as well as he decided on merits and consequently deleted the additions made by the AO.

3. The brief facts are that the assessee filed his return of income on 17.02.2014 for AY 2013-14 declaring total income of Rs.11,48,60,850/-. Later, the case of the assessee was selected under CASS and completed u/s.143(3) of the Income Tax Act, 1961 (hereinafter in short 'the Act') on 31.12.2015 accepting the retuned income. Subsequently, the original assessment was re-opened u/s.147 by issue of notice u/s.148 of the Act dated 31.03.2020 (*after expiry of four years from the end of the relevant Assessment Year*). The AO noted in the re-assessment order dated 28.09.2021 that during the course of assessment proceedings, the assessee had filed statement of computation of Short Term Capital Gains (hereinafter in short "STCG") from the sale of shares as under:

Particulars	**(in Rs.)**
Total Profit	11,71,33,910/-
Less: Interest paid	51,87,945/-
Net profit	11,19,45,965/-

4. And then, the AO noted that when he verified the records, he observed that the assessee didn't file any evidence to show that interest paid by the assessee was part of the acquisition of shares. Therefore, he

issued notice u/s.142(1) of the Act calling for the details regarding unsecured loan taken by the assessee and after perusal of the reply of the assessee noted that assessee had taken unsecured loan from M/s. Hiwide Enterprises Pvt. Ltd., and paid interest on the loan; and in order to verify the same, the AO issued notice u/s.136 of the Act to the lender company, which confirmed the loan transaction with the assessee. The AO acknowledged that the assessee had filed relevant ledger showing loan taken and interest paid to the tune of Rs.51,87,945/- to the lender company; and thereafter, AO noted that assessee had paid interest @24% which is comparatively higher rate than what would have been charged by any Financial Institution. The AO further noted that assessee had offered only STCG which is taxed u/s.111A of the Act at the beneficial rate of 15% where Securities Transaction Tax (STT) was paid and that the assessee had offered Rs.11,71,33,910/- from the sale of shares as STCG which has been taxed at the beneficial rate of 15% as is reflected in **Schedule SI** of the Income Tax Return. However, according to the AO, in addition to that the assessee is claiming the interest paid on the loan taken from investment in shares as part of the "*cost of acquisition of shares*". Hence, the AO was of the opinion that the amount of interest paid to M/s. Hiwide Enterprises Pvt. Ltd, does not form part of the cost of acquisition and only the amount paid to the broker M/s. Aishwariya & Co., to acquire the shares can only be added as cost of acquisition. According

to the AO, if the assessee was in the business of trading in shares, the amount of interest paid on this unsecured loan could have been treated as business expense and this deduction on account of amount of interest to be paid could have been allowed and it would have been taxed @30% unlike in the case of the assessee it has only been taxed @15%. The AO also noted that the assessee has earned exempt income of Rs.2,12,500/- from the shares which he purchased i.e. of Mc Dowells/United Sprits. According to the AO, the interest paid on loan has been utilized to earn dividend income from the shares of M/s.United Spirits which dividend income is exempt from taxation; and therefore, the interest paid needs to be disallowed as part of cost of acquisition. Thereafter, the AO after referring to the CBDT Circular No.6 of 2016 was of the opinion that the assessee's transaction of buying and selling of share of M/s. United Spirits by taking huge loan and paying interest @24% tantamounts to adventure in the nature of trade and needs to be taxed @30% instead of 15% as claimed by the assessee holding as under:

> In the facts and circumstances of the present case, the assessee has taken a high interest loan from M/s Hiwide Enterprises Private Ltd for a short period of 3 months. The assessee paid an interest of 24% on this unsecured loan. The assessee did not have his own capital. But he wanted to undertake the risk of investing in the shares of United Spirits. Every share trade has an element of risk. In fact, the scale of the risk can be ascertained from the fact that the assessee earned upwards Rs.11 crores from the sale proceeds. The assessee almost doubled the amount taken as loan from Hiwide Enterprises Private Ltd.
>
> Not only did the assessee repay this high value loan, it also eaned a profit of nearly Rs 11 crores on account of the same. The quantum of gain and frequency of transaction indicate that the assessee was engaging in trade

and has bought a large volume of shares of one company for a short time period.

The amount of risk undertaken becomes even more clear when the returned income of AY 2012-13 is brought into the picture. The returned income of the assessee in AY 2012-13 was Rs.36,67,881/-. As opposed to this, the returned income for AY 2013- 14 is Rs.11,48,60,850/. This astronomical jump in the returned income in a span of one year is purely on account of the risk taken by the assessee. The assessee was so confident about the price movement of United Spirits that he took a loan of nearly 8 to 9 crores from M/s Hiwide Enterprises Private Limited. The assessee did not have own capital to engage in the trade. The volume of shares purchased and the time period for which shares have been held and the frequency of transaction indicate that this transaction is more in the nature of trade than investment. The holding period of less than 12 months is also indicative of the fact the intention of the assessee was to trade and not invest. In fact, the loan was taken and repaid between July and October 2012. This indicates that the holding period was 3-4 months.

Therefore, the assessee took loan to engage in this transaction having the nature of trade.

However, the assessee has chosen to treat the same as short term capital gain and take the benefit of the beneficial taxation regime provided by Section 111A of the Income Tax Act, 1961. In addition to that the assessee also tried to take benefit of the deduction of interest expense by treating it as part of the cost of acquisition.

However, from the facts listed above- it has been established beyond doubt that what the assessee engaged in by massively investing in the single share of United Spirits over a short holding period was adventure in the nature of trade. The intention of the assessee was to trade and take benefit of the price movement of a single share. It was not to invest as has been conclusively established by the above narrated facts.

Therefore, the proceeds from this adventure/trade/share sale are be taxed as business income in the tax rate applicable to business income for the year under consideration.

In AY 2013-14, if the an individual earned income above Rs.10,00,000/- the same would have been taxed at 30%

5. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A), wherein, the assessee challenged the action of the AO re-opening the original assessment framed u/s.143(3) of the Act [*and that too after four years from the end of the relevant Assessment Year*] as well as on the merits of the addition; and the Ld.CIT(A) allowed the grounds of appeal of the assessee on both grounds (*legal as well as on merits*).

6. Aggrieved, the Revenue is in appeal before this Tribunal.

7. Regarding the legal issue of re-opening of original assessment, we note that the assessee had filed return for AY 2013-14 on 17.02.2014 declaring total income of Rs.11,48,60,850/- which was processed u/s.143(1) of the Act and later selected for scrutiny, and assessment was completed on 31.12.2015 u/s.143(3) of the Act by accepting income declared in the return. Thereafter, the AO has re-opened the assessment by issuing impugned notice u/s.148 of the Act on 31.03.2020, which was an event after the expiry of four years from the end of the relevant Assessment Year, meaning, the additional condition precedent as provided under first proviso to sec.147 of the Act also needs to be satisfied i.e, the AO has to pass one more hurdle while recording reason to re-open the assessment that assessee failed to disclose fully & truly all the material facts required for assessment of AY 2013-14, notwithstanding the first hurdle i.e. reason to believe escapement of income.

8. In this context, it should be borne in mind that the concept of assessment is governed by the time-barring rule; and an assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence regarding undisclosed income or AO has information in his possession

showing escapement of income as stipulated u/s 147 of the Act. As per Section 147 of the Act, if the AO intends to re-open the assessment, then AO has to record the reason to reopen the assessment, wherein he should record the "*reason to believe, escapement of income*". It is settled principle of law that "*reason to believe*" postulates a foundation based on information, and belief based on reason. After a foundation based on information is there, still, there must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In other words, before the AO issues notice u/s 148 of the Act, he must have recorded the reason to believe escapement of income. It is no doubt true that this Tribunal cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the AO on the point as to whether action should be initiated for re-opening the assessment. At the same time, we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant or remote and far-fetched, which would warrant the formation of belief relating to escapement of income. It is well settled in law that reasons as recorded by AO for re-opening the assessment, are to be examined on a standalone basis. Neither anything can be added to the reasons so recorded, nor can anything be deleted from the reason so recorded. The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom) has inter alia observed that "……*it is needless to*

mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded by him. He has to speak through the reasons". Their Lordship added "*The reasons recorded should be self-explanatory and should not keep the assessee guessing for reason. Reason provide link between conclusion and the evidence…*". Hence, as held by the Hon'ble High Court that while examining the jurisdiction of AO to have re-opened the assessment, we have to only consider the reasons recorded by the AO on a stand-alone basis and adjudicate as to whether AO has satisfied in the reasons recorded, the condition precedent i.e, reason to believe escapement of income to validly re-open the assessment. And for re-opening the assessment after four year from the end of the relevant assessment year, an assessment which has undergone scrutiny assessment an additional condition also need to be satisfied i.e. the assessee failed to disclose fully and truly all material facts necessary for assessee's assessment.

9. Keeping the aforesaid legal principles in mind, when we turn our attention to the facts relevant for examining the legal issue, we note that the AO in the re-assessment order itself acknowledges that assessee had filed the statement of computation of STCG from the sale of shares, wherein, assessee had disclosed about the total profit from the sale of

shares of M/s. United Spirits to the tune of Rs.11,71,33,910/- and claimed deduction of interest paid to the to the tune of Rs.Rs.51,87,945/- and offered net profit of Rs.11,19,45,965/- and claimed the same to be STCG and, offered u/s.111A of the Act tax @15% which has been accepted by the AO in the original scrutiny assessment u/s.143(3) of the Act dated 31.12.2015. Such an assessment has been re-opened by the AO after the expiry of four years from the end of the relevant Assessment Year, hence the AO had to necessarily satisfy the additional condition also as required under first provisions of Sec.147 of the Act (*in addition to the reason to believe escapement of income*) that the assessee failed to disclose fully and truly all material facts necessary for his assessment for that Assessment Year. In this regard, it is noted that the assessee had filed all the relevant documents necessary for the scrutiny of the assessment and as noted from the original Assessment Order dated 31.12.2015 u/s.143(3) of the Act, we note that the assessee had declared total income of Rs.11,48,60,850/-, out of which, assessee had duly offered Rs.11,71,33,910/- from sale of shares as STCG @ 15% which fact is revealed from perusal of Schedule SI of ITR; and it is noted that the AO during the original assessment has called upon the assessee to furnish details of the ibid STCG and after verifying the claim of the assessee that he has correctly offered STCG on the sale of shares has accepted the return of income filed by the assessee by framing the assessment

u/s.143(3) of the Act on 31.12.2015. Subsequently, the AO's impugned action to re-open the assessment on the basis of the very same material on record without satisfying the essential condition precedent as laid down u/s.147 of the Act i.e. even without spelling out what material facts assessee failed to disclose fully and truly [*on the issue for which AO is re-opening*] for assessing the assessment for AY 2013-14, cannot be countenanced; and therefore, the impugned action of the AO without satisfying the condition precedent to re-open fails, and necessarily, his action to re-open is held to be wholly without jurisdiction. Therefore, according to us, on the legal issue, the Ld.CIT(A) has rightly held that the action of the AO to re-open the assessment tantamounts to change of opinion. Further, according to us, the impugned action of the AO to re-open the assessment on the very same material which was before him (*without any other material from outside agencies in the present case*) was akin to review of his own action (*assessment order framed u/s.143(3) of the Act on 31.12.2015*), which is not permissible in law. Therefore, we are of the opinion that the Ld.CIT(A) rightly held that the AO didn't had the jurisdiction to re-open the assessment, hence, we confirm the action of the Ld.CIT(A) on legal issue.

10. Having said so, we also take note of the grounds of appeal raised by the Department, wherein, it has been stated that the Ld.CIT(A) failed to appreciate that the re-opening of assessment of the case on the basis of

factual information given by the Audit Party. It is neither the case of the Revenue that the Audit Party has brought out any new facts (on this issue), which was not disclosed by the assessee during the original assessment nor it is the case of the Audit Party that assessee has not disclosed fully and wholly all material facts necessary for assessee's assessment on the issue of sale of shares of M/s. United Spirits. In this regard, it is noted that while re-opening the assessment, the AO has asserted that the assessee didn't produce any evidence to show that interest paid was part of the cost of acquisition of shares and the details of the interest paid has not been submitted viz., no ledger account of interest as well as loan was submitted etc., which omissions if any, on the part of the AO during the original assessment, could have been interfered by the Ld.PCIT exercising his jurisdiction u/s.263 of the Act, and not the AO himself u/s.147 of the Act, which power he doesn't enjoy. Therefore, in the facts of the present case reliance by department of the Hon'ble Supreme Court decision in the case of PVS Beedies case 103 Taxman 249 (SC) does not come to the aid of Revenue, because, audit team has not brought any fact which AO has not noticed during the scrutiny assessment on 31.12.2015. Therefore, there is no merits in the grounds of appeal raised by the Revenue, so, it is dismissed and we confirm the action of the Ld.CIT(A) holding the re-assessment bad in law.

11. Coming to the merits of the addition, we note that the assessee had offered to tax @15% (STCG) on sale of shares of M/s. United Spirits, which was accepted by the AO in the scrutiny assessment u/s.143(3) of the Act on 31.12.2015 However, the AO after re-opening the assessment, while framing re-assessment order was of the opinion that the same should be taxed @30% since in the earlier year assessee had only income to the tune of Rs.33,67,881/-, whereas, for the year under consideration assessee had returned an income of Rs.11,48,60,850/-. According to the AO, assessee had taken loan of more than Rs.8 Crs. and paid 24% interest for acquiring shares of M/s. United Spirits and held the shares for less than 12 months which according to the AO indicates the intentions of the assessee to trade in the scrip/shares of M/s. United Spirits and he didn't adorn the cap of an investor. So, the assessee's claim of Short Term Capital Gain is incorrect and it ought to be business income and taxed @30%. On appeal, the Ld.CIT(A) deleted the additions made by the AO finding that the assessee has transacted in share of a single scrip, M/s. United Spirits and that share was held for a short period of time. Further, the Ld.CIT(A) noted that the AO had neither given any details of the share transaction nor reasons 'as to why' these transactions needs to be treated as "business transaction'. According to the Ld.CIT(A), the AO failed to give the analysis of the frequency of the share transactions nor has given any information about the earlier activities of

the assessee [*preceding and succeeding years*]. Therefore, he reversed the action of the AO to treat the income from STCG of Rs.11,48,60,850/- as 'business income'. We concur with the findings of the Ld.CIT(A), because, the AO didn't appreciate the relevant facts and materials in respect of the issue, which shows that the transaction of purchase and sale of single Scrip, M/s. United Spirits was in the nature of trade and hence, it can't be held that the transaction in question was an adventure in the nature of trade. It should be borne in mind that the question whether a transaction is in the nature of trade is a mixed question of fact and law; and the AO has to place on record all relevant facts and materials necessary for the purpose of determining whether transaction is in the nature of trade/adventure in the nature of trade. The AO failed to place on record the relevant/primary facts necessary for determining this mixed question of fact as well as law. In order to hold the transaction of shares as business income of the assessee, it is noted that the AO hasn't even given the essential details viz., date of purchase and sale of scrips, holding period of scrips, sales of scrips, purchase/sale price etc., and the AO has not given the details as to whether the assessee was engaged in any such kind of transaction in the earlier/subsequent assessment years. No relevant details whatsoever have been brought on record by the AO. In the light of the aforesaid facts and circumstances of the case, we uphold the impugned action of the Ld.CIT(A) who held that transaction in

question as not a trading transaction. Therefore, we concur with the action of the Ld.CIT(A) on merits as well and dismiss the appeal filed by the Revenue.

12. In the result, appeal filed by the Revenue is dismissed.

Order pronounced on the 30th day of August, 2024, in Chennai.

Sd/-	**Sd/-**
(एस. आर. रघुनाथा)	**(एबी टी. वर्की)**
(S.R.RAGHUNATHA)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 30th August, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF