

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, KOLKATA

**BEFORE SHRI RAJESH KUMAR, AM
AND
SHRI PRADIP KUMAR CHOUBEY, JM**

**ITA Nos.1630 &1631/KOL/2024
(Assessment Years:2013-14 &2014-15)**

Vivog Commercial Limited
104, Terminal 9, Nehru Road,
Near Ville Parle Police Sation,
Vile Parle (East), Mumbai-
400057

(Appellant)

PAN No.AAACV8936D

Vs. DCIT, Circle 5(1)
P-7, Chowringhee Square,
Kolkata, West Bengal-700069

(Respondent)

Assessee by : Shri Siddarth Agarwal, AR
Revenue by : Shri Kumar Ashutosh, DR

Date of hearing: 19.11.2024
Date of pronouncement : 27.11.2024

ORDER

Per Rajesh Kumar, AM:

These are the appeals preferred by the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the "Ld. CIT(A)"]even dated 19.06.2024 for AY 2013-14 & 2014-15.

02. Both the appeals are being heard together and disposed off by this common order for the sake of brevity and convenience. First of all, we shall take appeal in ITA No. 1630/KOL/2024 A.Y. 2013-14.

ITA No. 1630/KOL/2024

03. The only ground pressed by the Id. Counsel for the assessee is against the order of Id. CIT (A) upholding the reopening assessment as made

by the Id. AO u/s 147 read with section 148 of the Act despite the fact that the opening of the assessment was made on borrowed satisfaction and without non-application of mind to the facts and qua which no addition has been made to the income of the assessee in the assessment framed.

04. **At the time of hearing, the assessee has only pressed ground no. 2 of revised grounds filed before the Bench, which read as under:-**

"For that the re-assessment order dated 29.05.2023 is vitiated in law inasmuch as there was absolutely no independent application of mind and no independent enquiry on the part of the AO in respect of the purported information allegedly received by the him . . ."

05. The brief facts of the case are that the assessee filed its return of income for A.Y. 2013-14 on 30.09.2013 by declaring total income of Rs.73,68,200/-. The Id. AO after receiving information from Revenue Audit Party that during the year under consideration, M/s. Vivog Commercial Ltd. has made transactions through broker namely M/s. Pace Commodity Brokers Pvt. Ltd. via Client Code Modification during the F.Y. 2012-13. The Id. AO further noted that it is apparent from the information that Client Code was modified hundred times during the said financial year which is abnormal and thus, assessee has reduced its taxable income to the tune of Rs.93,53,400/- by client code modification. Accordingly, the case of the assessee reopened u/s 147 by issue of notice u/s 148 of the Act on 19.04.2021, after obtaining the approval from the competent authority. In the meantime, the judgement of Hon'ble Supreme Court in Civil Appeal No. 3005/2022 in the case of Ashish Agarwal & others, vide order dated 04/05/2022 was delivered, wherein the Hon'ble Supreme Court held that the impugned notices issued u/s 148 of the Act shall be deemed to have

been issued under section 148A of the Act as substituted by the Finance Act, 2021 and be treated to be show-cause notices in terms of section 148A(b). The court further directed that the Id. AO, shall issue within 30 days provide to the assessee the information and material relied upon by the Revenue so that the assessee can reply to the notices within two weeks thereafter. Accordingly, the assessee was provided information/ material(case related information details) through notices dated 29.05.2022, which was duly served upon the assessee. The order u/s 148A(d) of the Act was passed on 27.07.2022 and the notice u/s 148 of the Act was issued on 27.07.2022. The compliance was made by the assessee to the said notice vide letter dated 21.02.2023, requesting the Id. AO, the original return filed on 11.05.2021, as return filed in response to the notices u/s 148 of the Act. Finally, the additions were made of ₹93,53,400/- on account of non-genuine loss and also in respect of unexplained expenditure of ₹9,35,340/- to the income of the assessee in the assessment framed u/s 147 read with section 144B of the Act dated 25.05.2023.

06. In the appellate proceedings ,the issue raised by the assessee against the reopening of the assessment was summarily dismissed by the CIT (A) and now, aggrieved assessee is in appeal before the Tribunal.
07. The Id. AR vehemently submitted before us that the case of the assessee has been invalidly re-opened by the Id. AO without any independent application of mind and without any enquiry. The Id AR argued that the AO has acted on the borrowed satisfaction. The Id. AR referred to the notice issued u/s 148A(b) of the Act a copy of which is attached at page no.1 of the Paper Book and submitted that in Para 3, the AO has mentioned that according to information

received through insight portal the assessee has made transactions through M/s. Pace Commodity Brokers Pvt. Ltd. during A.Y. 2013-14 and the said broker has modified the client code of the assessee for several times. The AO also noted that the assessee has made transactions to the tune of Rs.4,16,60,700/- towards purchases and Rs.3,23,04,300/- on account of sales and sought reply from the assessee. Thereafter on page no.3 to 9 of the information details attached to the above notice comprised the transactions both in respect of purchases and sales. In the column "in the information type column" the Id. AO has stated the amounts of fictitious profits in the commodity trade. The Id. AR submitted that the assessee has not transacted any transaction through said stock broker .i.e. through M/s. Pace Commodity Brokers Pvt. Ltd as mentioned by the Id. AO in the notice issued u/s 148 A(b) of the Act dated 29.05.2022. The assessee also filed affidavit to this effect before the authorities below affirming on oath that assessee has not executed any transaction through M/s. Pace Commodity Brokers Pvt. Ltd. during the F.Y. 2012-13 relevant to A.Y. 2013-14 dated 11.12.2020. Thereafter the Id. AR by referring to page no. 38 to 41 of the paper book which comprised the the income tax return, audited accounts, including P & L account and submitted that the assessee has offered its entire income that that too at marginal rate of tax as the assessee has returned profit for the instant assessment year of Rs. 2,07,59,842/-. The Id. Revenue further submitted that the profit made from the Commodity tradings Ltd. as well as other income were not claimed as exempt i.e. nowhere the assessee claimed the long-term capital gain as exempt and offered the income at the highest rate so there was no escapement of income as alleged by the Id. AO. Thereafter the Id. AR referred to page no.62 of the Paper Book which a copy of the detail statement of

commodity accounts with Anand Rathis Commodities Ltd. With Profit and Loss statement for F.Y. 2012-13 relevant to A.Y. 2013-14 giving comprehensive details as to purchases, sales, profits and loss along with dates etc. and showed the aggregate profit of ₹36,43,657/- from commodity transactions with contract notes at page no.63 to 100 of the Paper Book evidencing the fact that transactions were executed through broker M/S Anand Rathis Commodities Ltd. The Id. AR finally submitted the reopening of the assessment has been made by the AO without any inquiry, verification and without any independent application of mind and therefore, the reopening is invalid and nullity and so is the order passed consequently. In defense of the argument the Id. Counsel for the assessee relied on the decision of *Excel Commodity and Derivative (P.) Ltd. Vs. Union of India**[2023] 455 ITR 341 (Cal). The Id. Counsel for the assessee submitted that in the said decision, the Hon'ble Court held that the term 'information' in Explanation 1 under section 148 of the Act cannot be lightly resorted to so as to reopen assessment and this information cannot be a ground to give unbridled power to the revenue and finally, the appeal of the assessee was allowed under similar facts. The Id. AR therefore, prayed that in view of the said decision the appeal of the assessee may kindly be allowed as the information available in the domain of the Id. AO was not enquired and verified, therefore, it amounts to reopening of amounts without application of mind and therefore, the reopening of assessment as well as the order passed by the Id. AO may kindly be quashed.

08. The Id. DR on the other hand relied on the orders of the Id. authorities below and submitted that though there is a mistake while issuing of notice u/s 148A(b) of the Act in Para 3 in mentioning the name of the broker which was stated as Pace Commodity Brokers Pvt. Ltd.,

whereas the matter of fact, the broker whom the assessee dealt with was Anand Rathis Commodities Ltd. The AO has also attached the detail of information with the said notice. The Id. DR submitted that the fictitious profit in commodity trade was adjusted in the income of the assessee, accordingly, the profit was declared. The Id AR requested the Bench to allow some time so that the correct position qua this fact could be ascertained from the AO. Accepting the request of the AO the the Id SR DR was allowed 15 days' time to file the reply from the date of conclusion of the hearing. It was also stated in the open court that if on the basis of report of the AO a fresh hearing is required , then the case would be fixed for clarification. However even the Id. DR did not file any report within 15 days. Therefore, we are passing the order accordingly on the basis of facts available and after taking into account the arguments of both the sides.

09. After hearing the rival contentions and perusing the information available on record, including the notice issued u/s 148A(b) of the Act dated 29.05.2022, we note that the Id. AO has wrongly stated in para 3 of the notice issued u/s 148A(b)that the assessee has transacted in commodity transfer through Pace Commodity Brokers Pvt. Ltd. As a matter of fact the commodities transactions were carried out through Anand Rathis Commodities Ltd. We note that the information available with the assessee, copy of which is attached from page no.3 to 9 of the Paper Book, which states that the assessee has made a fictitious profit in trade. We note that the assessee replied the said notices vide letter dated 11.06.2022, wherein the assessee specifically stated that it is not transacted any transaction through broker Pace Commodity Brokers Pvt. Ltd. and will be filed an affidavit duly signed by Director. However, the Id. AO without considering these information's passed the order u/s 148A(d) dated 27.07.2022 and also issued notices u/s

148 of the Act on 27.07.2022 by justifying that the income amounting to ₹93,53,400/- is chargeable to tax which is escaped assessments and accordingly, in his opinion it is fit case to issue notice u/s 148 of the Act. Having considered these facts and the transactions carried out by the assessee through Anand Rathis Commodities Ltd. the details whereof are available in the paper book at page no.62., we note that the assessee has fully disclosed the income in the profit and loss account and the profit of the assessee during the year was ₹2,07,59,841/- from all sources including profit on commodity transactions which were offered to tax at maximum marginal rate tax. Under these circumstances, we are unable to understand as to how the income has been held to have escaped the assessment. In our opinion it is classical case of non-application of mind by the Id. AO to the information available with the Id. Assessing Officer. We note that despite the assessee being filing reply denying the information as condoned in notice issued u/s 148A(b) of the Act on 29.05.2022, the Id. AO simply ignoring the facts, proceeded to pass the order u/s 148A(d) of the Act dated 27.07.2022 and accordingly, issued notice u/s 148 of the Act on the same date. In our opinion there was blantant non application of mind by the AO to the information available before him as he has not conducted any independent enquiry on the veracity of the information despite the assessee caregorical denial of absolutely not having done any transactions in commodity through the alleged broker .i.e. M/S Pace Brokers Pvt Ltd. Therefore in our opinion the re-opening of assessment without any independent application of mind and independent enquiry is bad in law. The case of the assessee is squarely covered by the decision of the Calcutta High Court in the case of *Excel Commodity and Derivative (P.) Ltd. (supra)*, wherein Hon'ble court held as under:-

3. We have elaborately heard Mr. Subash Agarwal, learned counsel for the appellant and Mr. Tilak Mitra, learned standing counsel appearing for the respondent/revenue. So far as the first portion of the order passed by the learned Single Bench is concerned, the appellant/assessee has no quarrel as the order impugned in the writ petition has been quashed. The assessee is only aggrieved by the direction issued by the learned Single Bench remanding the matter back to the assessing officer. The issue is whether in the facts and circumstances of the case, such an order of remand was justified and called for.

4. The appellant/assessee was issued notice under section 148A(b) of the Act dated 22nd March, 2022. The sum and substance of the allegation in the notice was that the appellant/assessee has done fictitious derivative transactions with M/s. BlueviewTradecom Pvt. Ltd. The assessee submitted their detailed reply to the said notice enclosing all relevant documents in support of their claim to justify that they have not indulged in any fictitious derivative transaction. The procedure contemplated under section 148A requires the assessing officer to consider the reply and thereafter pass a reasoned order, if in opinion of the assessing officer, the information furnished by the assessee in their reply is satisfactory, then nothing more requires to be done. On the other hand, if the assessing officer is of the view that the reply furnished by the assessee is not acceptable, then he is to pass a speaking order in terms of clause (d) of Section 148A of the Act. In the instant case, the assessing officer has passed the order under section 148A(d) dated 7th April, 2022. On a reading of the said order, we find that the assessing officer has indirectly accepted the explanation given by the appellant/assessee that they have not indulged in fictitious derivative transaction. We say so because in the order dated 7th April, 2022 in paragraph 4 therein, the assessing officer alleges that prima facie the appellant/assessee has taken accommodation entry by way of fund transfer from M/s. Brightmoon Suppliers Pvt. Ltd. which is a different company. Thus, the order passed under clause (d) of Section 148A of the Act is not based on the reason for which notice dated 22nd March, 2022 was issued under section 148A(b) of the Act. Therefore, the order dated 7th April, 2022 is illegal and has to be held to be wholly unsustainable. In such factual position, the necessity to remand the matter back to the assessing officer does not arise.

5. Further, we take note of the Circular issued by the Central Board of Direct Taxes (CBDT) dated 22nd August, 2022 giving instruction to the departmental officers with regard to the uploading of data on functionality/portal of the

Income-tax Department. This circular emphasises the earlier circular dated 1st August, 2022 and in paragraph 3 therein, it has been stated as follows:

"(3). Further, it is re-emphasized that -

(i) Before initiating proceedings under section 148/147 of the Act, any information available on data-base/portal of the Income-tax Department shall be verified before drawing any adverse inference against the taxpayers. It is not out of place to mention here that the information made available/data uploaded by the reporting entities may not be fully accurate due to inter alia, error of human nature technical nature, etc. Therefore, due verification may be carried out and opportunity of being heard be given to the taxpayer before initiating proceedings under section 148/147 of the Act.

(ii) The supervisory authorities are hereby advised to keep an effective supervision so as to ensure that all extant Instructions/Guidelines/Circulars/SOPs are duly followed by the Assessing Officers in their charge."

6. From the above it is clear that it has come to the notice of CBDT that in several cases information made available/data uploaded by the reporting entries are not fully accurate due to error of human nature, technical nature etc. Therefore, the department was advised to effect due verification and opportunity of being heard given to the tax payers before initiating proceedings under section 148/147 of the Act. Thus, in the preceding paragraph we have pointed out the factual position in the case on hand and it appears that proper verification was not done on the information which was available with the assessing officer at the time of issuance of notice under section 148A(b) of the Act which has led to an erroneous order dated 7th April, 2022 being passed.

7. In *Divya Capital One (P.) Ltd. v. Asstt. CIT [2022] 139 taxmann.com 461/445 ITR 436 (Delhi)*, the Court had considered the new re-assessment claim and held as follows:

"7. This Court is of the view that the new re-assessment scheme (vide amended sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business. In fact, the legislature brought in safeguards in the amended re-assessment scheme in accordance with the judgment of the Supreme Court in *GKN Driveshafts (India)*

Ltd. v. ITO [2002] 125 Taxman 963/[2003] 259 ITR 19 before any exercise of jurisdiction to initiate re-assessment proceedings under section 148 of the Act.

8. This Court is further of the view that under the amended provisions, the term "information" in Explanation 1 to section 148 cannot be lightly resorted to so as to re-open assessment. This information cannot be a ground to give unbridled powers to the Revenue. Whether it is "information to suggest" under amended law or "reason to believe" under erstwhile law the benchmark of "escapement of income chargeable to tax" still remains the primary condition to be satisfied before invoking powers under section 147 of the Act. Merely because the Revenue-respondent classifies a fact already on record as "information" may vest it with the power to issue a notice of re-assessment under section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under section 148 post an order under section 148A(d)."

8. As pointed out in the aforesaid mentioned decision, the term "information" in Explanation-1 under section 148 cannot be lightly resorted to so as to reopen assessment and this information cannot be a ground to give unbridled power to the revenue. In fact, in the case on hand, the information has been lightly used which resulted in issuance of notice. As pointed out earlier, the assessee had submitted the explanation to the notice along with documents in support of their claim. The assessing officer has given up the said allegation which formed the basis of the notice and proceeded on a fresh ground for alleging that the transaction with some other company was an accommodation entry. Therefore, on that score also the order dated 7th April, 2022 is liable to be set aside in its entirety without giving any opportunity to reopen the matter on a different issue.

9. For the above reasons, the appeal filed by the assessee (APOT/132/2022) is allowed and the order dated 7th April, 2022 under section 148A of the Act is set aside and the direction issued by the learned Single Bench remanding the matter to the assessing officer is also set aside. Consequently, no further action can be taken by the department against the appellant/assessee on the subject issue.

10. In the result, the connected application for stay (IA No. GA/1/2022) also stands disposed of."

010. The facts of the instant case are materially same and therefore respectfully following the above decision and considering the facts and circumstances, we quash the re-opening of assessment. The appeal of the assessee in ITA No. 1630/KOL/2024 for A.Y. 2013-14 is allowed on technical and legal ground.

011. As far as appeal in ITA no. 1631/KOL/2024 for A.Y. 2014-15 is concerned, since the issue raised and facts are *verbatim*, except the change in figures and this fact being not controverted by the learned Departmental Representative, we apply our decision of ITA No. 1630/KOL/2024 *mutatis mutandis* in ITA no. 1631/KOL/2024 for A.Y. 2014-15 and allow the appeal of the assessee by quashing the re-opening of assessment.

012. In the result, the appeals of the assessee are allowed on legal issue.

Order pronounced in the open court on 27.11.2024.

Sd/-
(PRADIP KUMAR CHOUBEY)
(JUDICIAL MEMBER)

Sd/-
(RAJESH KUMAR)
(ACCOUNTANT MEMBER)

Kolkata, Dated: 27.11.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Kolkata