

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI**

**SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.6598/MUM/2024
(Assessment Year: 2015-2016)**

Rakesh Mulchand Kothari

A-28, Kamgar Nagar, S.G.Barve Marg,
Kurla (East) Mumbai – 400024. Maharashtra.
[PAN: AADPK9088M]

..... **Appellant**
Vs

**Income Tax Officer Ward 26(2)(5),
Mumbai**

Kautilya Bhavan, Bandra Kurla Complex,
Mumbai – 400051. Maharashtra.

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Prakash Jhunjunwala
For the Respondent/Department : Smt. Mamta Nair

Date

Conclusion of hearing : 06.02.2025
Pronouncement of order : 28.02.2025

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal preferred by the Assessee is directed against the order, dated 10/12/2024, passed by the Commissioner of Income Tax (Appeals) – 51, Mumbai [hereinafter referred to as 'the **CIT(A)**'] under Section 250 of the Income Tax Act, 1961[hereinafter referred to as 'the **Act**'] whereby the Ld. CIT(A) had dismissed the appeal against the Assessment Order, dated 29/12/2017, passed under Section 143(3) read with Section 147 of the Act, for the Assessment Year 2015-2016.
2. The Assessee has raised following grounds of appeal :

"1.0 On facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the validity of notice u/s 148 issued in mechanical manner in absence of tangible

material and without having reason is believe that income chargeable to tax has escaped assessment;

- 2.0 *On facts and circumstances of the case and in Law, Ld. CIT(A) erred in confirming the validity of notice u/s 148 dated 12/09/2016, though issued before due date for filing the return of income u/s 139(4) viz. 31/03/2017, thereby the notice u/s. 148 and consequential reassessment order passed u/s.147 is bad in law;*
- 3.0 *On facts and circumstances of the case and in Law, Ld. CIT (A) erred in confirming the validity of notice u/s 148, though valid sanction u/s 151 not been obtained from correct approving authority;*
- 4.0 *On facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the addition u/s 68 of sale consideration of STT paid listed shares of M/s Surabhi Chemicals & Investments Ltd of Rs.5, 17,04,286/-;*
- 5.0 *The Ld. CIT(A), before confirming the addition of sale consideration of listed shares of Rs.5,17,04,286/-, ought to have considered the understated vital facts, being;*
 - a) *The correctness of exhaustive documentary evidences such as Contract-cum-bills, D-mat statements, bank statements, bhav copy, confirmation of stock broker, share application, letter of allotment and other documents filed on record had not been disputed by AO and CIT(A);*
 - b) *The period of holding of listed shares in the appellant's D-mat account exceeds 12 months and such shares had been sold on floor of Bombay stock exchange at prevailing market price;*
 - c) *The substantial increase in price of shares cannot be a sole reason to treat the bonafide transactions as non-genuine;*
 - d) *The appellant, in statement u/s.131, had confirmed the transactions alongwith the documentary evidences;*
 - e) *The appellant is not related to any directors/promoters and exit providers and general statements of 3rd persons recorded at back of the appellant, without allowing an opportunity of cross examination is incorrect.*

3. The relevant facts in brief are that based upon information

received from the Director General of Income Tax (investigation), Kolkata with respect to the bogus claim made by the Assessee in respect of purchase/sale of shares, reassessment proceedings were initiated in the case of the Assessee under Section 147 of the Act and notice, dated 12/09/2016, was issued under Section 148 of the Act after recording the reasons. In response to the said notice, the Assessee filed return of income on 19/09/2016 and communicated to the Assessing Officer vide letter, dated 23/09/2016, that the same be treated as a return filed in response to notice issued under Section 148 of the Act. Assessee requested for the reasons, which were communicated on 06/02/2017 and on the same date notice under Section 143(2) and 142(1) of the Act were issued. Assessee objected to the reopening by filing a letter, dated 17/02/2017, which were disposed off by way of order, dated 03/03/2017. Thereafter, once again, notice under Section 142(1) of the Act was issued on 14/09/2017 and Assessee was asked to furnish the details. The Assessing Officer found that in the return of income, the Assessee has declared Long Term Capital Gain of INR.5,17,04,286/- and had claimed exemption under Section 10(38) of the Act in respect of the same. The details asked for by the Assessing Officer were furnished by the Assessee and the Assessing Officer after considering the same framed assessment under Section 143(3) read with Section 147 of the Act on 29/12/2017 at the total income of INR.5,06,23,268/- after making an addition of the detailed discussion on the issue made an addition of INR.5,17,04,286/- under Section 68 of the Act to the returned income of INR.12,20,270/-.

4. Being aggrieved, the Assessee preferred appeal before the CIT(A). In Appellate proceedings, the Assessee challenged reopening of the assessment under Section 148 of the Act, inter alia, on the

ground that the notice under Section 148 of the Act was issued to the Assessee before the expiry of due date to file the return of income under Section 139(4) of the Act. The notice under Section 148 of the Act could not have been issued since the time limit for issuing the notice under Section 142(1) of the Act as well as the time limit for filing of the belated return was available with the Assessee. Reliance was placed by the Assessee on several judicial precedents. It was also contended that notice under Section 148 of the Act has been issued in absence of tangible material and on the basis of borrowed satisfaction. It was also claimed that when no return of income was available with the Assessing Officer at the time of recording of reasons, the averment made by the Assessing Officer in reasons recorded for reopening to the effect that the Assessee has claimed bogus exemption in the return of income was devoid of any merit and therefore, the reopening was bad in law. The CIT(A) rejected all this contention holding that Assessee has failed to file the return of income under Section 139(1) of the Act; and there was no infirmity in the reopening of the assessment. The CIT(A) further concluded that there was tangible material available with the Assessing Officer and therefore, there was no merit in the contentions raised by the Assessee challenging the validity of the re-assessment proceedings. On the merits, the CIT(A) upheld the addition made under Section 68 of the Act. Thus, CIT(A) dismissed the appeal vide order, dated 10/12/2024.

5. Being aggrieved, the Assessee had preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 2 above.
6. In the appellate proceedings before the Tribunal, the Learned Authorized Representative for the Assessee reiterated the submissions made before the CIT(A), and placed reliance upon

the reasons recorded for re-opening the assessment and the decision of the Mumbai Bench of the Tribunal in the case of Reena Rakesh Kothari vs. ITO Ward 26(2)(5), Mumbai [ITA No. 2184/MUM/2023, dated 21/03/2024]. Pressing into service Ground Nos. 1 and 3, the Learned Authorised Representative for the Assessee submitted that the reasons have been recorded on 12/09/2016, while the return of income was filed on 19/09/2016. At the time of recording of the reasons there was no return filed by the Assessee and therefore, there was no claim made by the Assessee of either exemption or non-exemption. Therefore, assertion made by the Assessing Officer in the reasons recorded that Assessee has claimed exemption is factually incorrect and shows non-application of mind at the time of recording reasons as well as at the stage of grant of approval under Section 151 of the Act. If the reasons are tested on standalone basis, it clearly demonstrates non-application of mind by the Learned Assessing Officer. In this regard reliance was placed by the CIT(A) on the judgment of the Hon'ble Bombay High Court in case of Prashant S Joshi V ITO 324 ITR 154 [BOM] and Principal Commissioner of Income tax Shodiman Investments P Ltd [422 ITR 337] which were followed in the decision of the Tribunal in the case of Reena Rakesh Kothari (supra).

7. In response, the Learned Departmental Representative supported the reasons recorded for reopening the assessment and placed reliance on the order passed by the CIT(A). It was submitted that there was tangible material for reopening the assessment in the form of report from investigation wing. The Assessee has obtained the accommodation entry with the sole object of obtaining the exemption under Section 10(38) of the Act. The reasons recorded by the Assessing Officer for re-opening the assessment were proper and did not suffer from any infirmity.

Even in the return of income filed in response to notice issued Section 148 of the Act, the Assessee had claimed exemption under Section 10(38) of the Act. There was no infirmity in the order passed by the CIT(A) in upholding the action of the Assessing Officer.

8. We have considered the rival submission; perused the material on record and have examined the position in law in view of the submissions advanced.

8.1. In the case of **Prashant S. Joshi vs. Income-tax Officer, Ward 19(2)(4): [2010] 324 ITR 154 (Bombay) [22/02/2010]**, cited on behalf of the Assessee, the Hon'ble Bombay High Court has held as under:

"9. *Section 147 provides that 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 163, 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 the section. The first proviso to section 147 has no application in the facts of this case. The basic postulate which underlines section 147 is the formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. The Assessing Officer must have reason to believe that such is the case before he proceeds to issue a notice under section 147. The reasons which are recorded by the Assessing Officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits*

not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well-settled that the question as to whether there was reason to believe, within the meaning of section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under section 148.

10. A Division Bench of this Court speaking through Mrs. Justice Sujata Manohar (as the learned Judge then was) held thus in *N.D. Bhatt, IAC v. I.B.M. World Trading Corpn.* [1995] 216 ITR 811

"It is also well-settled that the reasons for reopening are required to be recorded by the assessing authority before issuing any notice under section 148 by virtue of the provisions of section 148(2) at the relevant time. Only the reasons so recorded can be looked at for sustaining or setting aside a notice issued under section 148. In the case of Equitable Investment Co. (P.) Ltd. v. ITO [1988] 174 ITR 714, a Division Bench of the Calcutta High Court has held that where a notice issued under section 148 of the Income-tax Act, 1961, after obtaining the sanction of the Commissioner of Income-tax is challenged, the only document to be looked into for determining the validity of the notice is the report on the basis of which the sanction of the Commissioner of Income-tax has been obtained. The Income-tax Department cannot rely on any other material apart from the report."

11. The same principle was reiterated in a judgment of the Division Bench of this Court in *Hindustan Lever Ltd. v. R.B. Wadkar* [2004] 268 ITR 332 (Bom.)

"...the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons....The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be

based on evidence. The Assessing Officer, in the event of challenge to the reasons must be able to justify the same based on material available on record.... That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit of making oral submission, otherwise, the reasons which are lacking in material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced." (Emphasis Supplied)

9. Keeping in view, the above judgment of Hon'ble Bombay High Court, we proceed to examine the Reasons Recorded as communicated to the Assessee vide, letter dated 06/02/2017, which read as under:

"To

*Smt Reena Rakesh Kothari
28-1, Kamnagar Nagar,
S.G. Barve Marg, Kurla(East)
Mumbai -400 024*

Sir,

*Sub: Reasons for issuance of notice of
reassessment Assessment in your case
for A.Y. 2015-16 – regarding*

Ref: Your letter dated 23.09.2016

.....

Please refer to the above.

2. Vide your above referred letter, you had asked to furnish the "Reasons for Reassessment for issuing notice u/s 148 for A.Y.2015-16.

3. In this regard, it is submitted that perusal of EFS module of ITD computer application of the Department, it is observed that in some cases specific information is received from the Pr. Director of Income Tax (Investigation), Kolkata regarding various syndicates engaged into accommodation entries of bogus Long Term Capital Gain, Bogus Short Term Capital Gain and Bogus Short Term Capital Loss/bogus business loss through trading of shares of penny stocks. Penny stocks are those stocks which trade at very low price and whose market capitalization is very low. The Kolkata Investigation Directorate had undertaken investigation

into such 84 penny stocks and has given detailed findings indicating bogus LTCG/STCL entries claimed by various beneficiaries.

4. As per the information received you are one of the beneficiaries of such transactions classified as non-genuine shares sale/purchase transactions. The total purchases to the tune of Rs.46,80,450/- were made by you in the scrip Mahavir Advanced Remedies Limited (Scrip Code 531689) on various dates during the F.Y.2014-15 and claimed exempt income from LTCG of Rs.35,06,23,268/-.

5. The investigation conducted by the Kolkata Investigation Directorate reveals that the trading in the above mentioned penny stock was a manipulated affair to generate entries of bogus LTCG/STCG facilitating tax evasion. During the course of search action sworn statements of key persons were recorded, modus operandi was revealed and it was admitted that they were in the business of providing accommodation entries only.

6. As stated earlier, you are one of such person who has availed accommodation entries of bogus capital gain by sale of above mentioned penny stock. Therefore, the transactions claimed by you which resulted into claim of exempt income from Long Term Capital Gains, are not genuine and are merely accommodation entries executed solely to accommodate unaccounted income of Assessee in the guise of exempt income from LTCG.

7. The above fact shows that the income has escaped assessment by way of accommodation entry of bogus Long Term Capital Gain, in your case for A.Y.2015-16.

8. Since the reasons for reassessment in your case has been provided by the undersigned, hereinabove, you are requested to comply with the notice u/s.142(1) which is being sent herewith, at the scheduled time."

10. During the course of hearing the learned Authorised Representative for Assessee placed reliance in the case of **Reena Rakesh Kothari in ITA No.2184/Mum/2023, dated 21/03/2024**, wherein identical reasons recorded for reopening the assessment for the Assessment Year 2015-2016 were quashed by the Tribunal. The relevant extract of the aforesaid decision of the Tribunal read as under:

"013. On the basis of above reasons it is apparent that:

- i. *As per Para no 4 it is mentioned that Assessee has claimed exempt long term capital gain during F Y 2014-15 from LTCG of Rs 3,81,58,791/-.*
 - ii. *In Para no 6 also ld AO has claimed that transaction entered in to by the Assessee resulted in to claim of exempt income from long term capital gains which are not genuine.*
 - iii. *In Para no 7 also the LD AO has mentioned that income has escaped by way of accommodation entry of bogus long term gain for AY 2015-16.*
 - iv. *These reasons were recorded on or before 12/09/2016 being the date of issue of notice u/s 148 of the act.*
 - v. *Assessee has filed her first ROI only on 19/09/2016. It is seven days after the reason recorded. This ROI was filed u/s 139 (4) of the Act i.e. belated ROI.*
 - vi. *Prior to that no other ROI is filed by Assessee.*
 - vii. *Thus as on the date of recording of reasons of reopening, there is no ROI filed by the Assessee.*
 - viii. *Thus, as on that date it is clear that Assessee has not made any claim of exemption u/s 10 (38) of the Act.*
 - ix. *Reason recorded by the Ld. AO repeated referred to claim made by the Assessee of exemption despite the fact that there is no claim made by the Assessee as No ROI is filed.*
 - x. *In absence of any ROI filed by Assessee no claim of exemption is made by the Assessee. But the Ld AO repeatedly has mentioned that claim of the Assessee is not genuine. Thus it is clearly non application of mind by the Ld AO.*
 - xi. *Further on such reason, approval/ sanction u/s 151 of the act is accorded. Thus, such approval/ sanction are also without application of mind.*
014. *Thus no reason to believe can be formed by LD AO with respect to escapement of income prior to the dates for filing of Return of Income. Explanation 2 (a) to Section 147 of the Act also does not make any distinction between ROI filed u/s 139 (1) or u/s 139 (4) of the Act.*
015. *Thus, in absence of any ROI for the impugned assessment year, LD AO could not have formed such a belief and LD*

Approving authority also could not have approved such reason for reopening of assessment.

016. Accordingly, Ground no 2 of the appeal is allowed. As appeal of Assessee is allowed on the Ground no 2 mentioned above, all other grounds are not required to be adjudicated.

018. In the result, appeal of Assessee is allowed.”

11. We note that in the present case also the reasons recorded suffer from the same infirmity as highlighted by the Tribunal in the case of Reena Rakesh Kothari (supra). In Paragraph 4 of the Reasons Recorded for reopening assessment for the Assessment Year 2015-2016, was mentioned that Assessee has '*claimed exempt income from LTCG of INR.5,06,23,268/-*'. In Paragraph 6 of the Reasons Recorded the Learned Assessing Officer has claimed that transaction entered into by the Assessee '*which resulted into claim of exempt income from Long Term Capital Gains are not genuine*'. It is admitted position that the reasons were recorded on or before 12/09/2016 being the date of issue of notice under Section 148 of the Act. The Assessee has filed return of income under Section 139(4) of the Act as belated return on 19/09/2016 (i.e. seven days after the reason were recorded). Prior to that no return of income was on record. Thus, as on the date of recording of reasons of reopening, there is no return of income before the Assessing Officer and therefore, the question of the Assessee making claim for exemption under Section 10(38) of the Act did not arise. The Reason Recorded repeatedly referred to claim made by the Assessee of exemption despite the fact that there was no claim made by the Assessee as no return of income was filed. In the case of Reena Rakesh Kothari (supra), in identical facts and circumstances, the Tribunal has held that this amounts to non-application of mind by the Assessing Officer as well as by the sanctioning authority. No reason to believe could have been formed by Ld. Assessing Officer with respect to escapement of

income prior to the date for filing of return of income. The Learned Departmental Representative was not able to differentiate the decision of the Tribunal in the case of Reena Rakesh Kothari (supra) either on facts and or in law. Thus, taking into accounts the facts and circumstances of the present case, and respectfully following the judgment of the Hon'ble Bombay High Court in the case of Prashant S. Joshi (supra) and the decision of Tribunal in the case of Reena Rakesh Kothari (supra), we hold that the reasons recorded for reopening assessment for the Assessment Year 2015-16 do not meet the requirements of Section 147 of the Act. Therefore, the reasons recorded for reopening the assessment for the Assessment Year 2015-2016, based upon incorrect understanding of facts, communicated, vide letter dated 06/02/2017, as well as the consequent Assessment Order, dated 29/12/2017, passed under Section 147 of the Act are quashed as being bad in law. In view of the aforesaid, Ground No. 1 and 3 raised by the Assessee are allowed; and the balance grounds raised by the Assessee are dismissed as having been rendered infructuous.

12. In result, in terms of paragraph 11 above, the appeal preferred by the Assessee is allowed.

Order pronounced on 28.02.2025.

Sd/-
(Girish Agrawal)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 28.02.2025.
Karishma J. Pawar (Stenographer)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त/ The CIT
4. प्रधान आयकर आयुक्त/ Pr.CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार /(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai