IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC-B" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

ITA No.574/Bang/2017
Assessment year : 2008-09

Shri. Rajendra Kumar, No. 37, M. M. Lane, Ganigarpet, Avenue Road, Bengaluru-560002. **PAN : AHYPK4750G**	Vs.	The Income Tax Officer, Ward-5(2)(2), Bengaluru,
APPELLANT		RESPONDENT

Assessee by	:	Shri. Sudheendra, FCA
Revenue by	:	Smt. Swapna Das, JCIT

Date of hearing	:	16.05.2017
Date of Pronouncement	:	19.05.2017

O R D E R

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of CIT(A), interalia, on the following grounds:

1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The impugned orders being bad in law, void ab-initio are required to be quashed.

2.1 In any case, the conditions precedent for the issue of notice u/s. 148 of the Act being absent, the re-opening of assessment becomes bad in law and consequently the order as passed/confirmed being also bad in law is required to be quashed.

2.2 In any case, the impugned order passed without complying the legal formalities required u/s 147 of the Act, become bad in law and is required to be quashed.

3.1 In any case the order passed in gross violation of the principles of natural justice and fair play, especially in the absence of the cross examinations of the persons whose averments are sought to be relied upon by the Assessing Officer while passing the order, make the order totally bad in law and liable to be cancelled.

3.2 The learned Commissioner of Income tax (Appeals) has instead of quashing the impugned order on the above grounds, has just confirmed the order of Assessing Officer without properly considering the fact and circumstances of the case, arguments of the appellant and the law applicable.
3.3. In any case and without prejudice, the orders passed by the authorities below being contrary to binding dictum of the jurisdictional High Court are bad in law and are liable to be quashed.

4. The assessing officer had in any case, erred in treating a sum of Rs. 9,75,066/-as Short term capital gain (ignoring loss and STT) earned on sale of shares and taxing the same under the head 'Income from other sources' and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The action of authorities below has no support in law; is contrary to facts and evidence available. Such a treatment deserves to be rejected totally.

5.1 In any case and without further prejudice, the authorities below have erred in:
a) taxing/confirming an adhoc figure as Short term capital gain earned on sale of shares as income under the head other sources.
b) Not considering the fact that the appellant had earned Short Term Capital Gain on sale of shares and same was offered to taxation
c) Holding without basis that the transactions in shares are fraudulent.
d) Alleging without any basis that the appellant has obtained accommodation entries and appellant's own money come back in the guise of capital gains.

The conclusions / observations of authorities below being totally erroneous and without basis both on facts and law is to be disregarded.

5.2 In any case and without prejudice, the addition as made/sustained is erroneous and excessive.

5.3 The several observations made and various conclusions drawn by the lower authorities in the course of order are without basis and evidence and are made/drawn on surmises, probabilities and conjectures. Such observations and conclusions by quasi-judicial authorities have no support in law and deserve to be rejected in toto.

6. The appellant had actually sold shares through demat account and had earned Capital Gain thereon and same needs to be accepted as such.

7. The appellant denies the liability to pay interest. The interest having been levied erroneously is to be deleted.

8. In view of the above and other grounds to be adduced at the time of hearing it is requested that the impugned order be quashed or atleast the income from Short Term Capital Gain as returned be accepted, the assessment of adhoc figure as Income from Other Sources be deleted and the interest levied be also deleted.

2. Through ground Nos. 1 and 2, the assessee has assailed the validity of the reopening of the assessment on the ground that reopening was done after 4 years from the end of the relevant assessment year without recording his satisfaction in the reasons for reopening that income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment on the part of the assessee. The learned counsel for the assessee further invited our attention to the fact that assessment year involved in 2008-09 and the reopening was done by issuing the notice

under section 148 of the Act on 03.10.2013. The time of 4 years for reopening the assessment was available upto 31.03.2013. Therefore, the reopening was done after 4 years. He further invited our attention to the reasons recorded for reopening the assessment which are available at page No. 125 of the compilation of the assessee. In the reasons recorded for reopening the assessment, there was no averment with regard the satisfaction of the AO that income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year. Therefore, the reopening is bad in law. In support of his contentions, he has invited our attention to judgments of jurisdictional High Court in the case of CIT Vs. Mysore Cements Ltd, 355 ITR 136 in which it has been held that if conditions stipulated in part II of the proviso do not exist, then, when the assessment order passed under sub-Section 3 of Section 143, no action can be taken under section 147 of the Act after the expiry of 4 years from the end of relevant assessment year. The learned counsel for the assessee further contended that for making verification or enquiry, the assessment cannot be reopened. In support of his contention, he placed

reliance upon the judgment of jurisdictional High Court in the case of Shri. C. M. Mahadeva Vs. CIT in ITA No. 79/2009 dated 24.08.2015.

3. The learned DR on the other hand has placed the reliance upon the order of the CIT(A) with the submission that the assessment was reopened on the basis of the statement recorded during the course of search upon Choksi Group in which it has been reposed that they were engaged in providing accommodation and the assessee is also one of the beneficiary. Therefore, the reopening is valid.

4. Having carefully examined the orders of the authorities below and the documents on record, in the light of rival submissions, I find that undisputedly, the assessment year involved is 2008-09 and the 4 years for reopening of the assessment without recording a satisfaction that income chargeable to tax has escaped assessment on account of failure on the part of the assessee to disclose truly and fully the material facts for the assessment was available only upto 31.03.2013. Thereafter if the AO intent to reopen the assessment, he is required to record satisfaction in the reasons that income chargeable to tax has escaped assessment by reasons of the failure on the part of the assessee

to disclose fully and truly all material facts necessary for the assessment for that assessment year. Undisputedly, the reopening was done after 4 years from the end of the relevant assessment year and the AO is required to record his satisfaction that the income chargeable to tax has escaped the assessment on account of the failure on the part of the assessee to disclose fully and truly all material necessary for the assessment. For the sake of reference, we extract section 147 and its first proviso as under:

> *"147. 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 proceedings under this section, or recomputed 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):*

5. We have carefully perused the reasons recorded by the AO for reopening the assessment but in the entire reasons there is no averment with regard to escapement of income chargeable to tax by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. For

the sake of reference we also extract the reasons recorded by the AO for reopening the assessment:

> *"On verification of the records it is noticed that the assessee had purchased and sold shares amounting to Rs.1,18,850/- and Rs.8,90,720/- respectively and earned profit of Rs.7,71,870/- during the accounting year relevant to A. Y. 2008-09. Verification of correct capital gains and the correctness of cost of shares and sale of shares consequent on search operation in Mahasagar Group of cases is required. During the course of search one Mr. Mukesh Chokshi Director of M/s. Mahasagar Securities Ltd., has interalia stated that his business activities is to provide accommodative entries for Short-term Capital Gains, Long-term Capital Gains, purchase and sales, Share application money etc. and consequently profit would be accommodated to the beneficiaries and he has further stated that the Bills given are not genuine which are issued without any actual transaction. The list of beneficiaries have been provided and assessee is also one such beneficiary."*

6. The controversy in this regard has been set at rest through various jurisdictional pronouncements including the judgment of jurisdictional High Court in the case of CIT V. Mysore Cements Ltd (supra) in which it has been categorically held that if conditions stipulated in part II of the proviso do not exist, then, when the assessment order passed under sub-Section 3 of Section 143, no action can be taken under section 147 of the Act after the expiry of 4 years from the end of relevant assessment year.

7. In the instant case, admittedly, the assessment was reopened after 4 years without recording any averment that income chargeable to tax has escaped the assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the impugned assessment year. Therefore, the reopening in the instant case is not valid. Since reopening is not valid, the assessment framed consequent thereto is not sustainable in the eyes of law. I accordingly knock down the assessment framed consequent to the bad reopening and delete the additions made therein. Since I have knocked down the reopening of the assessment, I find no justification to deal with other issues on merit.

8. In the result, the appeal of the assessee stands allowed.

Pronounced in the open court on 19th May, 2017.

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.
Dated: 19th May, 2017.
/NShylu/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.