

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.1646/Mum/2019
 (निर्धारण वर्ष / Assessment Year: 2009-10)

Azizur Rahman Faizur Rahman City House, Ground Floor, 55 Maruti Lane, D. N. Road, Fort, Mumbai-400 001	बनाम/ Vs.	ITO- 17(1)(3) 116, Aaykar Bhavan M. K. Road Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AESPR-6467-C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Pramod Kumar Parida– Ld AR
Revenue by	:	Shri Brajendra Kumar- Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	14/09/2021
घोषणा की तारीख / Date of Pronouncement	:	28/10/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2009-10 arises out of the order of learned Commissioner of Income-Tax (Appeals)-28, Mumbai [CIT(A)], dated 17/01/2019 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) r.w.s 147 of the Act on 27/12/2016 on certain grounds. In ground no.1, the assessee has challenged the reassessment jurisdiction of Ld. AO and the ground read as under: -

1.issue of Notice u/s. 148 with infirmities and against invalid reasons to believe - Impugned Order may be quashed on the ground of jurisdictional defect

The Id. CIT erred in not appreciating that when the reopening notice u/s. 148 is beset with legal infirmities as outlined herein below, the same may be treated as void-ab-initio and consequently, the order impugned may be quashed on the following factors:

- (i) that the Report of the ADIT(Inv) is not a valid formation of belief by the Assessing Officer out of his own satisfaction; hence, the reason to believe on borrowed facts about the possible escapement becomes improper affecting proper jurisdiction;
- (ii) that the notice is issued beyond period of limitation (served on 30.03.2016) by virtue of first proviso to Section 147 as there was furnishing of entire particulars on the relevant issue during original scrutiny assessment proceedings; therefore, on mere change of opinion, no reassessment notice could be issued which further affects the jurisdiction test and
- (iii) that the notice u/s. 143(2) dated 16.12.2016 was issued beyond limitation period (due date 30.09.2016) as the same was served on 19.12.2016, further affecting jurisdictional tests.

2. The Ld. Counsel for assessee (AR), drawing our attention to the reasons recorded by Ld. AO to reopen the case of the assessee, submitted that there was no independent formation of belief that the income had escaped assessment. For the same, Ld. AR relied on the decision of Hon'ble High Court of Bombay in the case of **Pr. CIT V/s M/s Shodiman Investments Pvt. Ltd. (ITA No.1297 of 2015 dated 16/04/2018)** rendered under similar factual matrix. The Ld. Sr. DR, on the other hand, supported the assessment framed by Ld. AO. Having heard rival submissions, our adjudication would be as under.

3. The material facts are that the assessee was originally assessed u/s 143(3) on 29/12/2011. However, the case was reopened and notice was issued u/s 148 on 23/03/2016. Though the assessee opposed reopening, however, the same was rejected and addition of Rs.4.70 Lacs was made in the hands of the assessee on the allegation that the loss from F&O transactions was fictitious loss obtained through Client Code Modification.

4. During appellate proceedings, the assessee assailed the reassessment proceedings, inter-alia, on the ground that the case was reopened merely upon receipt of information from investigation wing about entering into suspicious transactions. However, there was no independent application of mind by Ld. AO as to formation of belief that the income had escaped assessment. The reopening was done merely on borrowed satisfaction. However, the legal grounds were rejected on the ground that there was clear cut information that the assessee's broker had shifted losses through client code modification. The Ld. AO used the information received from investigation wing to arrive at conscious decision that the assessee had obtained fictitious losses. The additions, on merits, were also confirmed after considering the factual matrix. Aggrieved, the assessee is in further appeal before us.

5. For the purpose of adjudication, it would be imperative to extract the reasons leading to reopening of the case of the assessee as follows:-

The return of income was filed on 18-02-2009 declaring the returned income at Rs.29,79,840/-. Information was received from the office of the ADIT(Inv.) Unit -1(3), Ahmedabad vide letter No. ADIT(Inv.)1(3)/ADH/CCM/Dissemination/e-mail/15-16 dated 11-03-2016 regarding tax evasion through client code modification during the F.Y. 2008-09. As per the survey report prepared by the ADIT(Inv.) Unit 1(3), Ahmedabad on the basis of the data received from NSE, it has stated that CCM has been used as a tool for tax evasion. The survey report comprises the list of beneficiaries of CCM, wherein the assessee have taken losses of Rs.1,00,000/- and above and have shifted out profits of Rs.1,00,000/- and above.

It was intimated that the above assessee is one of the beneficiaries of tax evasion through client code modification and has done transaction of Rs.1,00,000/- and above.

In view of the above, I have reason to believe that income to the extent of Rs.1,00,000/- and above has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Upon perusal of the recorded reasons, it could be gathered that the reasons have been recorded in a mechanical manner without ascertaining as to how the assessee has obtained fictitious losses

through client code modification. The reasons are mere repetition of the information received from investigation wing without establishing the linkage of the assessee with the broker who manipulated the transactions. The details / nature of transactions which would, prima-facie, lead to reasonable belief of escapement of income has not been specified in the recorded reasons.

The Hon'ble High Court of Bombay in the case of **Pr. CIT V/s M/s Shodiman Investments Pvt. Ltd. (ITA No.1297 of 2015 dated 16/04/2018)** held as under:-

12. The re-opening of an Assessment is an exercise of extraordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. Therefore, the reasons to believe have to be necessarily recorded in terms of Section 148 of the Act, before re-opening notice, is issued. These reasons, must indicate the material (whatever reasons) which form the basis of re-opening Assessment and its reasons which would evidence the linkage/ nexus to the conclusion that income chargeable to tax has escaped Assessment. This is a settled position as observed by the Supreme Court in **S. Narayanappa v/s. CIT 63 ITR 219**, that it is open to examine whether the reason to believe has rational connection with the formation of the belief. To the same effect, the Apex Court in **ITO v/s. Lakhmani Merwal Das 103 ITR 437** had laid down that the reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income. If the aforesaid requirement are not met, the Assessee is entitled to challenge the very act of re-opening of Assessment and assuming jurisdiction on the part of the Assessing Officer.

13 In this case, the reasons as made available to the Respondent-Assessee as produced before the Tribunal merely indicates information received from the DIT (Investigation) about a particular entity, entering into suspicious transactions. However, that material is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped Assessment. It is for this reason that the recorded reasons even does not indicate the amount which according to the Assessing Officer, has escaped Assessment. This is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment.

14 Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a re-opening notice on the basis of intimation regarding re-opening notice from the DDIT (Inv.) This is clearly in breach of the settled position in law that reopening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction.

15 Therefore, in the above facts, the view taken by the impugned order of the Tribunal cannot be found fault with. This view of the Tribunal is in accordance with the settled position in law.

16. Therefore, the question as framed does not give rise to any substantial question of law. Thus, not entertained.

17. Accordingly, Appeal dismissed. No order as to costs.

We find that the ratio of aforesaid decision squarely applies to the facts of the case under consideration. No linkage of the assessee has been established with the information received from investigation wing and the reopening is based merely on borrowed satisfaction. The reasons were mere reasons to suspect and not the reasons to believe that the income had escaped assessment. This being the case, the reopening could not be held to be valid in the eyes of law since the jurisdictional requirements were not fulfilled. We order so. The assessment framed by Ld. AO is bad in law and accordingly, quashed.

6. In view of the foregoing, the other arguments / grounds raised before us have been rendered academic in nature and therefore, not dealt with.

7. The appeal stand allowed in terms of our above order.

Order pronounced on 28th October, 2021.

Sd/-
(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-
(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 28/10/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

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