

**THE INCOME TAX APPELLATE TRIBUNAL,  
'SMC' BENCH, KOLKATA**

**Dr. Manish Borad, Accountant Member**

**I.T.A. No. 356/KOL/2024  
Assessment Year: 2011-2012**

***Alosha Marketing Pvt. Ltd.,.....Appellant  
62A, Hazra Road,  
Kolkata-700019  
[PAN:AACCA1930G]***

***-Vs.-***

***Assistant Commissioner of Income Tax,....Respondent  
Circle-4(1), Kolkata,  
Aayakar Bhawan,  
P-7, Chowringhee square,  
Kolkata-700069***

**Appearances by:**

*Shri N.S. Saini, A.R., appeared on behalf of the assessee*

*Shri Arup Chatterjee, Addl. CIT, appeared on behalf of  
the Revenue*

**Date of concluding the hearing : May 07, 2024**

**Date of pronouncing the order : July 08, 2024**

**O R D E R**

The present appeal is directed at the instance of assessee against the order of Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 29<sup>th</sup> January, 2024 passed for assessment year 2011-12.

2. Though the assessee has raised as many as eleven grounds of appeal, but the effective issues raised are of two types, firstly challenging the validity of reopening of the assessment under section 147 of the Act and secondly on merits changing the disallowance of loss of Rs.29,90,203/- incurred on account of purchase and sale of equity shares. Since the assessee has raised the legal question of assumption of jurisdiction by the ld. Assessing Officer to reopen the assessment, it would be pertinent to first deal with the aforesaid legal question as it goes to the root of the matter.

3. In the legal grounds raised by the assessee, it is stated that assessment order deserves to be quashed on account of three legal grounds-

(a) ld. Assessing Officer did not dispose of the objections raised by the assessee against the reasons recorded;

(b) no valid notice under section 143(2) of the Act was served upon the assessee;

(c) reopening has been carried out without any verification and without independent application of mind.

4. Facts in brief are that the assessee is a Private Limited Company and return of A.Y. 2011-12 furnished on 21.09.2011 declaring total income of Rs.18,530/-. In the computation of income, only income from business has been declared. Return

processed under section 143(1)(a) of the Act. Subsequently, on 28.03.2016, notice under section 148 of the Act issued and the reasons recorded for reopening mentioned in the said notice read as under:-

*The Directorate of Income Tax (Inv), Koi had conducted extensive investigation in the matter of tax evasion by some individuals/entities by showing income from LTCG, which is actually bogus, perpetrated through accommodation entry operators. In the entire scenario, it is found that the promoters of the penny stocks, the share brokers and the entry operators are involved in this business of bogus LTCG by rigging the prices.*

*The assessee is found to have enjoyed bogus LTCG of Rs.547749/- in the FY 2010-11 by transacting in the penny stock, 'JMD Telefilm'. In just reverse procedure, the assessee is learnt to have booked STCL of Rs 3531930/- from the same scrip in the same year.*

*In view of this, I have reason to believe that an income of Rs.4079679/- chargeable to tax has escaped assessment within the meaning of sec 147.*

5. In reply, the assessee filed objection against the initiation of proceeding under section 147 of the Act on 13.06.2017. In the said objection, it was submitted that the assessee has not earned any long-term capital gain as alleged in the reasons recorded; and secondly, the assessee has not booked any short-term capital loss and whatever loss has been incurred, it was claimed as business loss. It was submitted that the proceedings have been initiated under section 147 of the Act simply on the basis of information received from DIT (Investigation). It is not clear that whether the share broker through whom such shares were bought and sold had been examined and whether any deposition has been recorded from such share broker. In absence of such examination, the entire

report of DIT(Inv.) is based on assumption and presumption. It was also stated that since the reopening under section 147 has been carried out by ld. Assessing Officer merely on the basis of information without carrying out independent investigation and without satisfying as to whether there was at all escapement of income, therefore, reopening under section 147/148 is bad in law and deserves to be dropped. It is also submitted that ld. Assessing Officer has not disposed of the objections raised by the assessee. Ld. Counsel for the assessee also submitted that the reopening proceedings were challenged before the ld. CIT(Appeals) but no relief was granted. He stated that the reasons recorded are merely on the basis of information. Ld. Assessing Officer has failed to make any independent application of mind and the same is discernible from the fact that the assessee has neither earned any long-term capital gain during the year nor claimed any loss as short-term capital loss and the assessee has claimed business loss and even the amount alleged in the reasons recorded are incorrect. He thus prayed that reassessment proceeding deserves to be quashed.

6. Before me, ld. Counsel for the assessee has referred to following decisions in support of his contention that reopening is bad in law:-

*(i) Sheo Nath Singh -Vs-Appellate Assistant Commissioner of IT (Central), Calcutta and Others reported in [1971]82 ITR 147 (SC)*

*(ii) S.Narayanappa And Others -Vs- Commissioner of Income Tax, Bangalore reported in [1967]63 ITR219(SC)*

*(iii) Ganga Saran & Sons P. Ltd -Vs- Income-Tax Officer And Others reported in [1981] 130 ITR 1 (SC)*

*(iv) Commissioner of Income-tax -Vs- Spirit Global Construction (P) Ltd reported in [2023] 153 taxmann.com 641 (Delhi).*

*(v) Commissioner of Income-tax -Vs- Batra Bhatta Company reported in [2010] 321 ITR 526 (Del)-*

*(vi) Chhugamri Rajpal -Vs- S.P.Chaliha And Others reported in (1971) 79 ITR 603 (SC).*

*(vii) Bharat Jayantilal Patel Vs. Union of India And Others reported in [2015] 378 ITR 596 (Bom).*

*(viii) Aroni Commercials Ltd -Vs- Deputy Commissioner of Income Tax And Another reported in [2014] 362 ITR 403 (Bom).*

*(ix) Asian Paints Ltd -Vs- Deputy Commissioner of Income-tax And Another reported in [2008] 296 ITR 90 (Bom).*

*(x) Hewlett Packard Financial Services (India) (P) Ltd -Vs- Deputy Commissioner of Income-tax reported in [2023] 152 taxmann.com 559 (Karnataka).*

7. On the other hand, ld. D.R. vehemently argued supporting the order of ld. CIT(Appeals).

8. I have heard the rival contentions and gone through the material placed before us. Reassessment proceedings under section 147/148 are in challenge before us. The assessee-company has filed its return under section 139(1) of the Act on 21.09.2011 and processed u/s 143(1)(a) and the notice for reopening has been issued on 28.03.2016 under section 148 of the Act. Though reasons recorded have been extracted *supra* but for the sake of convenience, we are reproducing the reasons recorded:-

*The Directorate of Income Tax (Inv), Koi had conducted extensive investigation in the matter of tax evasion by some individuals/entities by showing income from LTCG, which is actually bogus, perpetrated through accommodation entry operators. In the entire scenario, it is found that the promoters of the penny stocks, the share brokers and the entry operators are involved in this business of bogus LTCG by rigging the prices.*

*The assessee is found to have enjoyed bogus LTCG of Rs.547749/- in the FY 2010-11 by transacting in the penny stock, 'JMD Telefilm'. In just reverse procedure, the assessee is learnt to have booked STCL of Rs 3531930/- from the same scrip in the same year.*

*In view of this, I have reason to believe that an income of Rs.4079679/- chargeable to tax has escaped assessment within the meaning of sec 147.*

9. Perusal of the reasons reveals that ld. Assessing Officer has referred to the information received from the Investigation Wing giving a general statement that there are certain matters of tax evasion by some individuals and entities by showing income from long-term capital gain, which is actually bogus and perpetrated through accommodation entry provider. The assessee is also alleged to have enjoyed bogus long-term capital gain of Rs.54,77,449/- by transacting in the alleged penny stock 'JMD Telefilm'. In the reasons, it is alleged that the assessee is learned to book short term capital loss of Rs.35,31,930/- from the same scrip in the same year.

10. I, however, going through the computation of income as well as the objections raised by the assessee against initiation of proceedings under section 147 of the Act observe that the assessee has not earned any long-term capital gain during the year. There is no exemption claimed under section 10(38) of

the Act at Rs.5,47,749/- in the income tax return. A copy of the said return is placed at page 43 of the paper book and computation is placed at page 28. Even in the Profit & Loss Account, net income from sale of investment is only Rs.12,500/-. As far as short-term capital loss figure of Rs.35,31,930/- is concerned, it is brought to our notice that during the year, the assessee purchased 30,000 shares of 'JMD Telefilm' for a consideration of Rs.35,36,867/- and the same was sold at Rs.5,46,663/- and hence incurred a loss of Rs.29,90,203/-. I also note that the assessee has not shown any long-term/short-term capital gain/loss and the purchases and sales of such shares are treated as stock-in-trade. Hence the loss in such scrips are claimed as business loss and not capital loss.

11. I further note that in the reasons recorded whatever is alleged is not correct. There is no separate information or material evidence available with the ld. Assessing Officer which could prove that he had reason to believe that the income had escaped assessment. The allegation, if any, escapement of income must be backed by information expressing 'reason to believe' and such belief requires to be based on some credible or relevant material. Assessment cannot be reopened on whimsical ground or in the reasons to suspect towards alleged escapement without giving reference to any relevant material, which may give rise to bonafide belief towards escapement to a reasonable person instructed in law. Whatever information is available in the reasons recorded,

either no such transaction has taken place or the nature of such transaction is different. What was expected from the Id. Assessing Officer was to first take down the information and then examine the same with reference to the financial statement and income tax return filed by the assessee and then form a belief that whether correct information was received and that whether there is a case of escapement of income, on the account of the assessee having not disclosed the material information or has furnished inaccurate particulars in the return. However, in my view, reasons appear to be a token exercise for assumption of jurisdiction and without compliances of jurisdiction parameters. Id. Assessing Officer in the instant case has proceeded on hypothesis flow from a generated information rendering the whole exercise to be arbitrary and unsustainable in law.

12. As far as the decision referred by the Id. Counsel for the assessee are concerned, we find that firstly there is absence of any order of Id. Assessing Officer disposing of the objections raised by the assessee. Neither any reference to disposing of objection is dealt in the assessment order nor Id. D.R. could file any copy of such order. Thus is an admitted fact that Id. Assessing Officer has not disposed the objection raised by the assessee against the issue of notice u/s 148 of the Act. It has been consistently held by the Hon'ble Courts that if Id. Assessing Officer does not accept the objection filed against the reasons for reopening of assessment, he shall not proceed in the matter without disposing of the objections,



failing which subsequent proceedings would be bad in law. We find support from the following decisions:-

*(i) Bharat Jayantilal Patel Vs. Union of India And Others reported in [2015] 378 ITR 596 (Bom).*

*(ii) Aroni Commercials Ltd -Vs- Deputy Commissioner of Income Tax And Another reported in [2014] 362 ITR 403 (Bom).*

*(iii) Asian Paints Ltd -Vs- Deputy Commissioner of Income-tax And Another reported in [2008] 296 ITR 90 (Bom).*

*(iv) Hewlett Packard Financial Services (India) (P) Ltd -Vs- Deputy Commissioner of Income-tax reported in [2023] 152 taxmann.com 559 (Karnataka).*

13. Further as regards the decision about holding that the reopening proceedings are bad in law if no proper reasons are recorded. I would like to take note of the decision of the Hon'ble Apex Court in the case of Sheo Nath Singh reported in (1971) 82 ITR 147, wherein Hon'ble Court observed as under:-

*"In our judgment, the law laid down by this court in the above case is fully applicable to the facts of the present case. There can be no manner of doubt that the words " reason to believe " suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstances evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court.*

*There is no material or fact which has been stated in the reasons for starting proceedings in the present case on which belief could be founded of the nature contemplated by section 34(1A). the so-called reasons are stated to be beliefs thus leading to an obvious self-contradiction. We are satisfied that the requirements of section 34(1A) were not satisfied and, therefore, the notices which had been issued were wholly illegal and invalid.*

*In the result, the appeal is allowed and the judgment of the High Court is set aside. The writ petition succeeds to the extent that the impugned notices shall stand quashed. The assesses shall be entitled to his costs.*

*Appeal allowed”.*

14. Further Hon’ble Delhi High Court in the case of *CIT -vs.- Batra Bhatta Company reported in (2010) 321 ITR 526 (Del.)*, wherein Hon’ble Court referred to the judgment of the Hon’ble Supreme Court in its order in the said order in the case of *Chhugamal Rajpal reported in (1971) 79 ITR 603* and the relevant part thereof is reproduced below:-

*“7. Having considered the arguments advanced by the counsel for the parties and after examining the matter in detail, we are of the view that the tribunal as well as the Commissioner of Income-tax (Appeals) came to the correct conclusion. A reading of the reasons recorded does not disclose that the Assessing Officer, in fact, had reasons to believe that any income had escaped assessment. It is not just the belief of the Assessing Officer that is material, but such a belief must be based on certain reasons. The first sentence of the reasons recorded is merely a statement of fact that the assessee firm sold agricultural land for Rs 57,37,500/- in March 1996 and claimed exemption under the provisions of Section 2 (14). The second sentence is merely exploratory in nature in the sense that it says that the claim of the assessee that the land is agricultural and hence not a capital asset "requires much deeper scrutiny". There is no indication as to on what information or on what material the Assessing Officer harboured the belief that the claim of the assessee required deeper scrutiny. In fact, as recorded in the order of the Commissioner of Income-tax (Appeals), no new material is on record after the filing of the return and till the issuance of the notice under Section 147. The proceedings under Section 147 are not to be invoked at the mere whim and fancy of an Assessing Officer and it has to be seen in every case as to whether the invocation is arbitrary or reasonable. The decision of the Supreme Court in Chhugamal Rajpal (supra) is clearly applicable to the facts of the present case. In the case before the Supreme Court, the purported reasons recorded for reopening the assessment were inter alia:-*

*"It appears that these persons are name-lenders and the transactions are bogus. Hence, proper investigation regarding these loans is necessary."*

8. *The Supreme Court did not find that these were sufficient reasons for reopening the assessment. With regard to the sentence "hence, proper investigation regarding these loans is necessary", the Supreme Court observed that this conclusion that there is a case for investigation as to the truth of the alleged transactions is not the same thing as saying that there are reasons to issue a notice under Section 148. The Supreme Court further observed as under:-*

*"... he must give reasons for issuing a notice under Section 148. In other words, he must have some prima facie grounds before him for taking action under Section 148. Further, his report mentions: "Hence, proper investigation regarding these loans is necessary." In other words, his conclusion is that there is a case for investigating as to the truth of the alleged transaction. That is not the same thing as saying that there are reasons to issue notice under Section 148. Before issuing a notice under Section 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under Section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of Section 147 are satisfied, the Income-tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the ITO to the CIT, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the ITO had any material before him which could satisfy the requirements of either cl.(a) or cl. (b) of s. 147. Therefore, he could not have issued a notice under s. 148."*

9. We feel that the observations of the Supreme Court in the aforesaid decision clearly apply to the case at hand. Merely because the Assessing Officer felt that the issue required „much deeper scrutiny“, is not ground enough for invoking Section 147. It is not belief per se that is a pre-condition for invoking Section 147 of the said Act but a belief founded on reasons. The expression used in Section 147 is - "If the Assessing Officer has reason to believe" and not - "If the Assessing Officer believes". There must be some basis upon which the belief can be built. It does not matter whether the belief is ultimately proved right or wrong, but, there must be some material upon which such a belief can be founded. In the present case, the Commissioner Income-tax (Appeals) as well as the Tribunal have found as a fact that there was no material upon which the Assessing Officer could have based his belief that income had escaped assessment. The decisions cited by Mr Jolly, who appeared on behalf of the revenue, namely, Income-tax Officer v. Selected Dalurband Coal Co. Pvt. Ltd.: 217 ITR 597, Raymond Woolen Mills Limited v. Income-tax Officer and Others: 236 ITR 34 and Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.: 291 ITR 500 do not say anything different. In Dalurband Coal Co. (supra), the Supreme Court observed that at the stage of issuance of notice under Section 148 of the said Act, "the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief". Again, in Raymond Woolen Mills Ltd (supra), the Supreme Court, while refusing to interfere with the re-assessment proceedings, observed that-

"We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case".

Lastly, in Rajesh Jhaveri (supra), the issue raised before the Supreme Court was whether failure to take steps under Section 143 (3) of the said Act would render the Assessing Officer powerless to initiate re-assessment proceedings in cases where intimations under Section 143 (1) had been issued. The Supreme Court held that so long as the ingredients of Section 147 are fulfilled, the Assessing Officer would be within his rights to initiate „re-assessment“ proceedings irrespective of whether steps for a regular assessment under Section 143 (3) had been taken or not. While so deciding, the Supreme Court considered the expression "reason to believe" as appearing in Section 147 in the following manner:-

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment

*year has escaped assessment. The word „reason“ in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is „reason to believe“, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief."*

*10. We have already noticed that in the present case, the Commissioner Income-tax (Appeals) as well as the Tribunal have returned the concurrent finding of fact that there was no material before the Assessing Officer on the basis of which the Assessing Officer could have maintained a belief that the agricultural land sold by the assessee was a capital asset within the meaning of Section 2 (14) of the said Act. In fact, the Assessing Officer did not even have such a belief. And, as the expression „requires much deeper scrutiny“ indicates, the Assessing Officer was embarking on mere exploration without any belief, much less a belief based on reason and materials.*

*11. Consequently, we find that there is no error in the decision of the Tribunal which is impugned before us. No substantial question of law arises for our consideration. The appeal is dismissed”.*

15. Respectfully following the ratio laid down in above decision, I find that firstly, the reopening proceedings deserve to be quashed solely on the ground that ld. Assessing Officer has not disposed of the objections raised by the assessee to the reasons recorded. Secondly, the re-opening proceedings deserve to be quashed on the ground that no proper reasons have been recorded for reopening of assessment and the reasons recorded are merely based on the information received from Investigation Wing and cannot be treated as “reasons to believe” but are merely “reasons to suspect” and mere suspicion of the ld. Assessing Officer towards

escapement of income, is not permitted under section 147 of the Act to reopen an assessment. Therefore, the reassessment notice under section 148 giving rise to jurisdiction under section 147 of the Act is quashed and consequently the reassessment order in question against appeal are also similarly quashed and set aside. Having held the reassessment order as illegal and bad in law, I do not see any reason to warrant to other grounds of appeal as dealing with the same is merely academic in nature. Since the reopening proceeding has been quashed, no additions/disallowances remain. The grounds of appeal are allowed.

**16. In the result, the appeal of the assessee is allowed.**

Order pronounced in the open Court on 08/07/2024.

Sd/-

**(Manish Borad)**  
**Accountant Member**

***Kolkata, the 8<sup>th</sup> day of July, 2024***

- Copies to :*(1) *Alosha Marketing Pvt. Ltd.,*  
*62A, Hazra Road, Kolkata-700019*
- (2) *Assistant Commissioner of Income Tax,*  
*Circle-4(1), Kolkata,*  
*Aayakar Bhawan,*  
*P-7, Chowringhee square, Kolkata-700069*
- (3) *Commissioner of Income Tax (Appeals),*  
*National Faceless Appeal Centre (NFAC), Delhi;*
- (4) *CIT- , Kolkata*

(5) *The Departmental Representative;*

(6) *Guard File*

*TRUE COPY*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***