

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM**

आयकर अपील सं/ I.T.A. No.5826/Mum/2016

(निर्धारण वर्ष / Assessment Years: 2009-10)

Shri Rajnish C. Bharti 506B, Rajendra Vihar Evershine Nagar, Malad West, Mumbai-400064.	बनाम/ Vs.	ITO-24(2)(3)/30(2)(3) BKC, Bandra, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPB6150F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri C. V. Jain	
Revenue by:	Ms. Mahita Nair (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 12/10/2022

घोषणा की तारीख /Date of Pronouncement: 22 /11/2022

आदेश / ORDER**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax-41, Mumbai dated 03.08.2016 for assessment year 2009-10.

2. The grounds of appeal raised by the assessee are as under: -

“1. On the facts, in the circumstances of the case and in law, the learned Commissioner of Income Tax Appeals Ld CIT (A)] has erred in upholding the impugned assessment order passed by the learned assessing officer (Ld. A.0) without having any lawful jurisdiction as-

a. there were no cogent reasons to believe that the Income had escaped assessment and accordingly the provisions of section 147 & 148 were not applicable to the case,



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b. the objections raised by & on behalf of the appellant were not at all considered by the ld A.O before assuming the jurisdiction u/s 147 and

c. no notices u/s 143(2) or 142(1) were issued or served on the appellant

d. The impugned assessment order has been upheld by the Ld. CIT(A) on the basis of perverse and arbitrary finding of facts

2. Without prejudice to above the learned CIT (A) has further erred in sustaining part i.e., 30% disallowance of purchases made from alleged bogus parties without considering the fact that learned A.O had made the disallowance without giving the appellant any opportunity of being heard and without bringing on record any adverse evidence. The Ld. CIT (A) has grossly erred in upholding the disallowance of Rs 4,62,66,103/- being 30% of Purchases considered to be bogus by the Ld. A.O arbitrarily, without any authority of law and without any basis.”

3. Since the ground no. 1 is a legal ground, we take up first the ground no. 1(a) which is against the action of the Ld. CIT(A) in not accepting the contention of the assessee that the AO without fulfilling the condition precedents (“*reason to believe escapement of Income*”) has resorted to reopen the assessment u/s 147 of the Income Tax Act, 1961 (hereinafter “the Act”). Therefore, according to Ld. AR, the AO did not had the requisite jurisdiction to reopen the assessment.



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4. Brief facts as noted by the AO is that the assessee had filed return of income on 28.07.2009 declaring total income of Rs.2,49,860/-. Later he received an information from the office of the DGIT(Inv.) regarding assessee's bogus claim of expenses to the tune of Rs.6,16,79,235/- from various parties. Therefore, he reopened the assessment by issuing notice u/s 148 of the Act on 27.11.2012. And then, he issued statutory notice u/s 143(3) and 142(1) of the Act. Thereafter, the AO took note of the additional information he received from the DGIT (Inv.), Mumbai dated 26.12.2013 wherein it was stated that assessee was involved in bogus claim of expenses to the tune of Rs.15,42,20,343/-. And then the AO after taking notice that the AR of the assessee attended before him on 24.03.2014, records in the assessment order that assessee/AR was furnished with the "reason for reopening" along with transaction regarding data of Hawala Purchases received from DGIT (Inv.), Mumbai, viz Copy of AIR (ITS) data; and the AO notes that he confronted the assessee with the adverse material and asked him to explain about the adverse information with supporting evidence if any. However, according to AO, the assessee failed to satisfactorily explain reply to his query/adverse material. Thereafter, the AO taking note of the fact that the assessee had purchased material from twelve (12) parties and has taken bogus purchase bills to the tune of Rs.15,42,20,343/- added the entire amount of Rs.15,42,20,343/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to sustain only 30% of the addition i.e. Rs.4,62,66,103/-; and balance Rs.10,79,54,240/- was deleted. Still not satisfied, the assessee is before us.



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5. Before the Ld. CIT(A) the assessee has raised the legal issue challenging the AO's action of reopening the assessment u/s 147 of the Act (i.e. without satisfying the essential condition precedents i.e. "reason to believe escapement of income"). For assailing the same (legal issue against re-opening/jurisdiction), the Ld. AR drew our attention to the page no. 29 of the PB wherein the reasons recorded for reopening of the assessee is found placed which reads as under: -

"Name of the Assessee : Ranjnish Chimanlal Bharti
(prop. of M/s Shreeram International)
A.Y. : 2009-10
PAN : AABPB6150F

REASONS RECORDED FOR REOPENING U/S 147

An information received from the office of the DGIT(INV) regarding bogus claim of expenses of Rs.6,16,79,235/- by the assessee from various parties. I have therefore, reason to believe that income chargeable to tax of Rs.6,16,79,235/- for the A.Y.2009-10 has escaped assessment in this assessee's case within the meaning of the provisions of section 147 of the Act dated on 27.11.2011. Notice u/s 148 issued.

VIJAY P. MARU

Income Tax Officer 24 (3)-2

Mumbai.

6. According to the Ld. AR, from a perusal of the aforesaid reasons recorded for reopening u/s 147 of the Act would reveal that the AO has not satisfied the essential condition precedent for reopening



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the assessment. According to him, based on the information from DGIT (Inv.) the AO has jumped to the conclusion that there is escapement of income i.e only based on the investigation report of the DGIT(Inv.), the AO has concluded that assessee's income has escaped assessment which is bad in law because, the essential condition precedent for re-opening i.e "reasons to believe" that there was escapement of income is absent in this case. And therefore, according to him, the AO could not have reopened the assessment u/s 147 of the Act. And therefore he pleads that the show cause notice issued itself u/s 148 of the Act on 27.11.2012 based on the aforesaid reasons recorded for re-opening be quashed.

7. Per contra, the Ld. DR of the revenue submitted that the along with reasons recorded placed at page 29 (supra), the AO had given the copy of the transaction data of Hawala Purchases received from DGIT (Inv.), Mumbai, copy of AIR (ITS). Therefore, according to Ld. DR, these additional material (data) should also be seen along with reasons recorded while examining the legal issue regarding AO's jurisdiction to re-open the assessment. According to Ld. DR, on a conjoint reading of these documents (hawala data etc) along with reasons recorded would show that the AO had necessary "reasons to believe, escapement of income". Therefore, she does not want us to interfere with the order of the Ld. CIT(A) upholding the action of AO to have reopened the assessment.



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7. We have heard both the parties and perused the records. Before we advert to the AO's reason recorded for re-opening [while we examine the jurisdiction of the AO to validly reopen the assessment], let us bear in mind certain fundamental aspects of assessment/re-assessment. The concept of assessment is governed by the time barring rule; and the assessee acquires a right as to the finality of assessment proceedings. Quietus of the completed assessment can be disturbed only when there is information or evidence regarding undisclosed income or AO had information in his possession showing escapement of income. As per section 147 of the Act, the AO is empowered to reopen the assessment if he has "*reasons to believe escapement of income*". "*Reasons to believe*" postulates foundation based on information and belief based on reason. Even if there is foundation based on information, there still must be some reason warrant holding a belief that income chargeable to tax has escaped assessment.

8. In the present case, when we have to adjudicate the legal issue as to whether the AO had satisfied the condition precedent for validly reopen the assessment, we have to examine the "reasons recorded" as such (supra). The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom) has inter alia observed that "*.....it is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded by him. He has to speak through the reasons*". Their



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Lordship added “*The reasons recorded should be self explanatory and should not keep the assessee guessing for reason. Reason provide link between conclusion and the evidence...*”. Therefore, the Ld. DR’s contention before us that while examining the legal validity of the re-opening of assessment, not only we have to consider the reasons recorded by AO to re-open the assessment, we also need to consider the AO’s action of handing over the transaction data of hawala purchases received from the DGIT(Inv.), Mumbai and copy of AIR (ITS) data, cannot be accepted and as held by the jurisdictional High Court, we have to examine the *reasons recorded* by the AO (supra) on a standalone basis to see whether AO satisfied the condition precedent (reason to believe escapement of income) in the reasons recorded to validly reopen the assessment.

9. From a perusal of the reason recorded (supra), the first line shows that the AO had received an information from the office of the DGIT(Inv.) regarding bogus claim of expenses of Rs.6,16,79,235/- which means that DGIT (Inv.) had passed on an information to the AO regarding the assessee’s claim of expenses to the tune of Rs.6,16,79,235/-purported to have been transacted with various parties which was bogus. And the AO states in the second line of the reasons recorded that he had “reason to believe that income chargeable to tax of Rs.6,16,79,235/- for AY. 2009-10 has escaped assessment”. From the aforesaid reason to re-open the assessment, we note that the AO only had foundation based on information which was not sufficient to invoke jurisdiction for re-opening the assessment. In this case, next



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essential condition is found to be absent i.e, *the believe based on reason* is absent. [At the cost of repetition it should be kept in mind that as per section 147 of the Act, the AO is empowered to reopen the assessment if he has “*reasons to believe escapement of income*”. “*Reasons to believe*” postulates foundation based on information and belief based on reason. Even if there is foundation based on information, there still must be some reason warrant holding a belief that income chargeable to tax has escaped assessment.] Further, it is settled that adverse information may trigger “*reason to suspect*”, then the AO to make reasonable inquiry and collect material which would make him believe that there is in fact escapement of income. The fine distinction between “right to suspect” and “right to believe” has to be kept in mind while examining the condition precedent for reopening an assessment as stipulated u/s 147 of the Act for the relevant year under consideration (AY. 2009-10). Here in this case, the DGIT (Inv.) had passed on an information regarding the assessee’s claim of expenses to the tune of Rs. 6,16,79,235/- to be bogus, which assessee has supposed to have incurred while purchasing goods from certain parties. Having received such an information from the DGIT(Inv.), it should have at best triggered “reason to suspect”, then AO should have made reasonable inquiry and collected material which would make him form a belief that there was in fact escapement of income; but in this case, we note that the reason recorded (supra) by the AO before re-opening the assessment does not satisfy the requisite requirement as necessary u/s 147 of the Act to validly reopen the assessment. Therefore, we are inclined to quash the reopening based on the reasons recorded by the



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AO (supra). And therefore we quash the notice u/s 148 of the Act on 27.11.2012. Therefore, further proceedings stand void in eyes of law. Therefore, the assessee succeeds on the legal issue.

10. Since the assessee has succeeded on the legal issue, other grounds raised [legal as well as on merits] are academic in nature. Therefore not adjudicated.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 22 /11/2022.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 22/11/2022.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai