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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No.135/DEL/2019
Assessment Year 2010-11

Viswanathan Securities Pvt. Ltd., A-10/2, A-Block, Vasant Vihar, New Delhi.	Vs.	The Assistant Commissioner of Income Tax, Circle-26(2), New Delhi.
TAN/PAN: AAACV3600N		
(Appellant)		(Respondent)

Appellant by:	Shri R.K. Mehra, CA		
Respondent by:	Shri N.K. Bansal, Sr.DR		
Date of hearing:	24	11	2022
Date of pronouncement:	21	02	2023

O R D E R

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-IX, New Delhi ['CIT(A)' in short], dated 15.10.2018 arising from assessment order by the Assessing Officer dated 16.10.2019 passed u/s 143(3) r.w. Section 147 of the Income Tax Act, 1961 ("the Act") concerning Assessment Year 2010-11.

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

"1. That on facts and in the circumstances of the petitioner company's case, the learned Commissioner of Income tax (Appeals)-9, New Delhi erred in law and on facts in upholding the order of the learned assessing officer in initiating the reassessment proceedings under section 147 by issuing notice under section 148 of the Income tax Act, 1961, without there being any application of mind by the learned assessing officer and further his such action was based just on suspicion, surmises and conjectures.

2. That on facts and in the circumstances of the petitioner company's case, the learned Commissioner of Income tax (Appeals)-9, New Delhi erred in law and on facts in upholding the order of the learned assessing officer firstly for issuing undated reasons for reopening of assessment and then issuing corrigendum on a subsequent date rectifying some fundamental issue mentioned in the original reasons to believe for reopening assessment. He has further erred in law in wrongly applying the provisions contained in section 292B of the Income tax Act, 1961 and thus such action of the learned assessing officer lacks jurisdiction and bad in law.

3. That on facts and in the circumstances of the petitioner company's case, the learned Commissioner of Income tax (Appeals)-9, New Delhi erred in law and on facts in upholding the order of the learned assessing officer in not passing a speaking order against the objections raised by the petitioner company as required in law and the speaking order stated to have been passed on 13-11-2017 against the objections filed, remains unsubstantiated and unverified.

4. That on facts and in the circumstances of the petitioner company's case, the learned Commissioner of Income tax (Appeals)-9, New Delhi erred in law and on facts in upholding the order of the learned assessing officer in sustaining the addition of Rs. 21,31,154, allegedly on the ground that the petitioner company has shifted out its profits through client code modification, without bringing on record any material evidence whatsoever and also completing the assessment based on suspicion, surmises and conjectures alone."

3. As per the grounds of appeal noted above, the assessee has *inter alia* challenged the jurisdiction of the Assessing Officer assumed under Section 147/148 of the Act and has assailed the order passed by the Assessing Officer under Section 143(3) r.w. Section 147 dated 28.12.2017 as bad in law. Since, the assessee has challenged the legality of reopening of assessment which has jurisdictional issue and goes to the root of the matter, it will be appropriate to adjudicate this aspect to begin with.

4. The relevant facts germane to the adjudication of jurisdictional issue are as follows:

4.1 The assessee-company is engaged in the business of dealing in shares and securities in its own name and also acting as sub-brokers. The assessee company filed its return of income on 30.09.2010 declaring income at

Rs.28,95,180/- for Assessment Year 2010-11 in question. Subsequently, certain information were statedly received by the AO from the office of Principal Director of Income Tax (Inv.) Ahmedabad vide letter dated 08.03.2016 that assessee has under-reported its taxable income to the extent of Rs.21,31,154/- for Assessment Year 2010-11 by misusing the 'client code modification' (CCM) facility available for correction of punching mistakes. Consequently, the case was reopened under Section 147 after recording of reasons and obtaining necessary approval from the superior authority. A notice under Section 147 was issued on 27.03.2017 and duly served on the assessee in this regard. The Assessing Officer subsequently issued corrigendum on 14th December, 2017 to rectify certain mistakes occurred in the reasons originally recorded.

4.2 The reasons for issuance of notice under Section 148(1) for reopening of assessment under Section 147 of the Act for Assessment Year 2010-11 as recorded under Section 148(2) of the Act is reproduced hereunder:

> *"The assessee is a company filed its return of income on 30.09.2010 declaring income of Rs.28,95,190/-. The details of the directors of the assessee company obtained from records are hereunder:*
>
> *2. Thereafter, the return was processed under 143(1) of the I.T. Act. Subsequent to the processing completed U/s 143(1), information through email was received on 14/03/2016 from Asstt. Director of Income Tax [Investigation], Unit 1(3), Ahmedabad by which a Survey Report was disseminated in cases of beneficiary clients who have taken contrived losses & shifted out profits using Client Code Modification.*
>
> *3. It is a detailed report of 589 pages. 1 have gone through the report and gathered that Client Code is a unique code which is assigned by a broker to its clients, A broker can issue just one code to a client. Client Code Modification means modification / change of the client codes after execution of trades. Vide Circular no. SMD/POL1CY/Cir-/03 dated February 6, 2003 SEBI mandated that the stock exchanges shall not normally permit changes in the client code except to correct for genuine mistakes. The client code modifications permit brokers to rectify human errors when a client inadvertently provides a wrong code or when a wrong code is punched in by the broker while executing the trade. The broker is allowed to change it*

between 3.30 pm and 4 pm to rectify a genuine error that may have occurred while entering the code. The facility ensures smooth functioning of the system and is to be used as an exception rather than routine. Client code modification means modification of client code after the execution of trade.

Over a period of time, some persons, in connivance with brokers started using Client Code Modifications for purposes other than genuine errors. Contrary to its motive, CCM facility was being misused and brokers transferred gains or losses from one person to another by changing the code, in the garb of correcting an error. These gain or loss-book entries were then used to evade taxes.

4. Non genuine CCM were carried out to book contrived losses. In some cases, this facility was used by brokers to transfer gains or losses from one party to another by modifying client codes in the guise of rectifying an error. It became a practice to book artificial profits or losses in March to impact tax liabilities. It is generally done by buying or selling stocks intra-day so as to say consciously incur a loss and use that as a tax offset

Client code modification (CCM) especially in the Futures and Options Segment (F&O) was being used a device to evade taxes wherein the client codes were modified for booking artificialrofits or losses at the far end (Jan to March) of the Financial year when the book profits/losses of various clients have crystallized. This is done with an intention to impact the'tax liabilities of the pair of clients whose codes are modified.

1 have examined the 1TR and the record of the assessee in respect of F Y 2009-10 relevant to A.Y. 2010-11 and the following facts are noted:

a) The return of the assessee shows that during the year it has undertaken transactions in sale/purchase of shares, and its turnover could have included the transactions contrived by way of COM. In the relevant period, the assessee Uasnotclaimed any current year losses. During the period 01.04.2009 to 31.03.2010, it has undertaken transactions through M/s. SS Corporate Securities Limited.

b) The transactions which involved CCM, as per information received under the report of the Investigation Wing are as under:

Name of the Beneficiary Client	*Address of Beneficiary*	*Name of Broker*	*When OC (Ascertained profit shifted out)*	*When MC (Ascertained Losses Shifted In)*	*Net reduction in Income due to CCM*
M/s Vishwanathan Securities Pvt. Ltd.	*A-10/2, Vasant Vihar, New Delhi-110057*	*M/s. S.S. Corporate Securities Limited*	*(-)1578004.95*	*0*	*(-)1578004.95*

c) Thus, the assessee has shifted in ascertained loss of (-)1578004.95 through a transaction involving CCM.

5. Thus, a careful scrutiny of information received from the investigation wing and analysis of report, data of transactions and verification of ITR/Assessment Record lead to an irresistible conclusion that Client Code Modification had been carried out in the case of assessee to shift in ascertained losses of (-) Rs.1578004.95. By shifting in the above losses and shifting out the profit through contrived transactions by means of CCM, the assessee has artificially depressed its profits. By withholding these facts surrounding the transaction during the regular assessment proceedings, the assessee has failed to disclose fully and truly all the material facts necessary for its assessment.

6. Considering the above referred credible information and analysis subsequent to the information, I have reason to believe that an amount at least of Rs.1578004.95 has escaped assessment in the case of M/s Vishwanathan Securities Pvt. Ltd., for the A.Y. 2010-11 within the meaning of Section 147/148 of Income Tax Act, 1961. The case is squarely covered under provisions of section 147 of Income Tax Act, 1961.

7. Since more than 4 years from the end of the relevant assessment year have elapsed, approval of Pr. Commissioner of Income Tax, Delhi-9, New Delhi, is solicited in terms of the provisions of Section 151(1) of the Act."

4.3 The Corrigendum regarding reasons for issue of notice under Section 148 for reopening of assessment under Section 147 of the IT Act, 1961 for the Assessment Year 2010-11 is also reproduced hereunder:

To
The Principal Officer,
Vishwanathan Securities Pvt. Ltd.
A-10/2, Vasant Vihar,
New Delhi-110057

Sir/ Madam,

Sub:- Corrigendum regarding reasons for issue of notice u/s 148 for reopening of assessment u/s. 147 of I.T. Act, 1961 for the A.Y. 2010-11 in case of M/s. Vishwanathan Securities Pvt. Ltd.-reg

Please refer to the above mentioned subject and notice issued u/s 148 of the I.T. Act, 1961 dated 27.03.2017 in the above mentioned case.

In this regard, it is stated that information was received in this office through e-mail on 14/03/2016 from Asstt. Director of Income Tax (Investigation), Unit 1(3), Ahmedabad by which a Survey Report was disseminated in case of beneficiary clients who have taken contrived losses & shifted out profits using Client Code Modification. While

recording the reasons for reopening of above mentioned case, except the name and address of the Beneficiary Client all other data got copy paste from the next column of the excel sheet In this regard, the correct data for the above mentioned case is as mentioned below:

Name of the Beneficiary Client	*Address of the beneficiary*	*Name of the Broker*	*When OC (Ascertained profit shifted out)*	*When MC (Ascertained Loss shifted in)*	*Net reduction in Income due to CCM*
M/s Vishwanathan Securities Pvt. Ltd.	*A-10/2, Vasant Vihar, New Delhi-110057*	*M/s A to Z Stock Trade Pvt. Ltd.*	*20,81,710.4*	*(-)49,443.75*	*(-)21,31,154.15*

In view of the above, assessee has shifted in ascertained loss of (-) 21,31,154.15 through a transaction involving CCM.
This corrigendum is in accordance with section 292B of the Income Tax Act, 1961, which states as "No return of Income, assessment, notice, summon or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act".

4.4 The proceedings under Section 147 were accordingly initiated and the assessment was completed by the Assessing Officer under Section 143(3) r.w. Section 147 of the Act wherein addition of Rs.21,31,154/- was made alleging profit shifting by the assessee in a clandestine manner by conniving in client code modification.

5. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) did not find any merit on both counts, i.e.,

(i) Wrongful assumption of jurisdiction under Section 147 as alleged.

(ii) Incorrect additions by AO alleging shifting of profit by using client code modification.

6. Aggrieved by the denial of any relief by the CIT(A), the assessee preferred appeal before the Tribunal.

7. We have heard the rival submissions and perused the first appellate order and the assessment order. We have also perused the material referred to and relied upon in the course of hearing. It is the case of the asessee that jurisdiction assumed by the Assessing Officer under Section 147 r.w. Section 148 of the Act is void *ab initio* and illegal and consequently the notice issued under Section 148 and the assessment order framed under Section 143(3) r.w. Section 147 of the Act requires to be quashed on the grounds of;

(i) Impermissibility of substantive modification of Reasons recorded by issuing of corrigendum, subsequent to issuance of notice and assumption of jurisdiction which corrigendum has the effect of improving the basis of issuance of Notice under Section 148 of the Act.

(ii) Inapplicability of Section 292B to change the basis of reopening a case.

(iii) Non application of mind by the Assessing Officer while recording reasons.

7.1 As pointed out on behalf of the assessee, the reasons furnished to the assessee-company do not bear any date. Furthermore, name of the broker mentioned in the reasons originally recorded under Section 148(2) is 'S.S. Corporate Securities Ltd.' Also, the alleged profit shifted out and allegedly escaped assessment was stated in such reasons to be Rs.15,78,004.95. Based on such reason recorded in writing, the proceedings under Section 147 were initiated and set in motion. In the course of the re-assessment proceedings, the Assessing Officer however issued a corrigendum dated 14.12.2017 quoted in para 4.3 above to modify the very basis of so called believe formed earlier towards escapement of assessment. The Corrigendum was also issued beyond the limitation period provided under Section 149 to enable the reopening of the assessment. By the Corrigendum, two important changes have been carried out; firstly, the name of broker was amended from 'S.S. Corporate Services

Ltd.' to broker namely 'A to Z Stock Trade Pvt. Ltd.'; secondly, the amount of alleged escapement was modified from Rs.15,78,004.95 to Rs.21,31,154/-.

7.2 At the first blush, we find the action of the Assessing Officer to be wholly untenable in law. By issue of corrigendum, the Assessing Officer has attempted to rectify the very fulcrum of believe derived qua the broker, i.e., S.S. Corporate Securities Ltd. The name of the broker was substituted in the corrigendum which has changed the tone of the entire basis for assumption of jurisdiction under Section 147 of the Act. The amount earlier computed and determined precisely at Rs.15,78,004.95 was also substituted by improved figure of Rs.21,31,154/- in the corrigendum. The whole basis for deriving the belief from the information is thus substantially changed.

7.3 Needless to say 'reason to believe' is the bedrock for usurping jurisdiction under erstwhile provisions of Section 147 for reopening the assessment. The expression 'reason' is objective in nature and denotes the material or any substantive information possessed at the command of the Assessing Officer. The belief of the Assessing Officer on such material/information has the element of somewhat subjectivity and thus belief which can be formed reasonably by a person instructed in law. It is axiomatic to say that the Assessing Officer can exercise the drastic power under Section 147 of the Act only after due care and application of mind on the material/information so collected and which triggers belief towards escapement of income. As a corollary, the formation of reason to believe is an objective exercise based on material available on record. The Assessing Officer, in the instant case, has formed the belief *qua* the material attributable to transactions with S.S. Corporate Securities Ltd., if it is to be assumed that the action was taken with application of mind. The assessee however pointed out in the course of the assessment that no transactions have been carried out in the capital market segment or in the currency derivative segment through

the said broker. Thus, at the stage of recording reason, the Assessing Officer was not privy to the exact nature of information at all for alleged formation of believe or in the alternative he has casually and perfunctorily exercised power of reopening *dehors* the material supplied to him. Both the situations dis-empowers the Assessing Officer to exercise the drastic powers conferred under Section 147 of the Act.

7.4 This apart, it is trite that the reasons recorded by the Assessing Officer cannot be supplemented by issue of corrigendum or by filing the affidavit or by making oral submissions etc. as viewed in the judicial precedents such as Hindustan Lever vs. R.B. Wadkar (2004) 268 ITR 332 (Bom); NDTV System vs. ITO (2013) 255 CTR 113 (Bom) etc. When a statutory functionary makes order on certain grounds, it cannot be supplemented by fresh reason as observed Kakrala Krishna Murthy & Another vs. CIT 216 ITR 206 (AP). Thus, 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. While the Revenue is entitled to elaborate on briefly recorded reasons, the Revenue cannot give new ground for reopening, genesis of which is not traceable to such recorded reasons. Hence, the supplementation made by the AO by way of corrigendum is totally contrary to the plethora of judicial pronouncement holding the field in this regard.

7.3 We now advert to the plea of the Assessee with reference to Section 292B of the Act. Section 292B of the Act takes care of certain situations and enables the income tax authorities to cure defects in orders, notices, etc. The jurisdiction to reopen flows from reason recorded in writing under Section 148(2) on the strength of ‘reason to believe’ towards escapement of charitable

income. Thus, such reasons confers assumption of jurisdiction of substantive nature. Fundamental defect in the basis for holding 'reason to believe' cannot be seen as a mere irregularity and thus cannot be cured with the aid of Section 292B of the Act. There is a marked distinction between want of basic or inherent jurisdiction and irregular exercise of jurisdiction. Defect on irregular exercise of jurisdiction alone can possibly be cured under Section 292B of the Act. The Assessing Officer, in the instant case, has drawn belief based on the transactions carried out through broker namely 'S.S. Corporate Securities Ltd.' which reason was later found to be totally non-existent. Such defect in the reasons cannot be ascribed as a mere technical irregularity and consequently defect cannot be cured by applying Section 292B of the Act. The instant case is the case of the jurisdictional defect which cannot be rectified by invoking the provisions of Section 292B of the Act. Thus, on a nuanced analysis of fact situation, we find traction in the plea of the assessee. The reasons cited for forming belief in the instant case are wholly incongruent and at odds with actual facts. The Assessing Officer apparently has not applied his mind. The corrigendum issued with the aid of Section 292B is thus also not sustainable in law for the reasons noted above. Thus, the action of the Assessing Officer suffers from multifaceted defects of cardinal nature in serious transgression of statutory requirements. The reasons were not recorded qua the transactions in relation to broker M/s. A to Z Stock Trade Pvt. Ltd. Such fundamental infirmity of substantive nature while usurping jurisdiction cannot be called a mere technical defect or procedural irregularity. Such vital infirmity, in our considered view cannot be cured or obliterated by taking shelter of Section 292B of the Act.

8. In the light of aforesaid discussion, we hold that impugned notice issued under Section 148 suffers from inherent fundamental defects and does not meet the requirement contemplated under Section 147 of the Act. The notice issued under Section 148 is thus null and void and as a sequel thereto, re-

assessment proceedings carried out in the instant case is without jurisdiction. Hence, in our considered opinion, the Assessing Officer has misdirected himself in law in initiating the re-assessment proceedings without any legal foundation.

9. In this view of the matter, impugned assessment made by the Assessing Officer under Section 143(3) r.w. Section 147 of the Act is liable to be set aside and cancelled. We do so accordingly.

10. As we have held that notice under Section 148 and re-assessment order under Section 147 is not sustainable in law. All other grounds raised by the assessee in the present appeal are rendered infructuous and academic and therefore does not call for adjudication thereon.

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

Order pronounced in the open Court on 21/02/2023.

Sd/-	Sd/-
[CHALLA NAGENDRA PRASAD] **JUDICIAL MEMBER**	**[PRADIP KUMAR KEDIA]** **ACCOUNTANT MEMBER**

DATED: **/02/2023**

Prabhat