

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “D”, MUMBAI**

**BEFORE AMIT SHUKLA (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

**I.T.A. No.358/Mum/2023
(Assessment year 2014-15)**

Ravi Gopal Trivedy 402, sheetal, A Wing, Lokhandwala Complex, Andheri West, Mumbai- 400 053 PAN : ABCPT1927A	vs	National-e-Assessment Centre Delhi, North Block, New Delhi
APPELLANT		RESPONDENT

Assessee represented by	Dr. K Shivram, Adv
Department represented by	Smt. Mahita Nair (Sr.Ar.CIT)

Date of hearing	11-05-2023
Date of pronouncement	16-05-2023

ORDER

PER : MS PADMAVATHY S. (AM)

This appeal is against the order of the Commissioner of Income-tax National Faceless Appeal Centre (NFAC) [hereinafter ‘Ld.CIT(A)’] dated 13/12/2022 for the assessment year 2014-15. The assessee raised the following grounds of appeal:-

“1. Reassessment is bad in law

That on the facts and circumstances of the case and in law the Ld. National Faceless Appeal Centre (NFAC) has erred in confirming the

issue of the reassessment notice and order passed by the National Faceless Assessment Centre.

1.1. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in confirming the notice under section 148 of the Act based on incorrect information and without application of mind and without providing copies of the information received and also without providing an opportunity for cross-examination.

1.2. That on the facts and circumstances of the case and in law the Ld. NFAC has failed to appreciate that the recorded reasons stated that the assessee has made a bogus loss, whereas the assessee has made a profit and offered the same to tax, as the basis of recorded reason based on wrong facts, the issue of reassessment notice and assessment order is bad in law.

1.3. That on the facts and circumstances of the case and in law the Ld. NFAC has failed to appreciate that the Ld. Assessment Centre erred in issuing a Notice under section 148 of the Act on an issue which was scrutinized during the original assessment. Therefore, no reassessment can be made based on a change of opinion.

1.4. The Ld. NFAC failed to appreciate that the case laws relied on the NFAC do not apply to the facts of the appellant and the case laws are relied on without giving an opportunity to the appellant to respond, hence the order is bad in law, ,

2. Impugned addition of Rs. 17,40,120/- under section 68 of the Act is bad in law

That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 17,40,120/- under section 68 of the Act.

2.1. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 17,40,120/- under section 68 of the Act without providing copies of information received by the Department which violates Principles of Natural Justice, Audi Alteram Partem.

2.2. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 17,40,120/- under section 68 of the Act without providing the statement of Mr. Chetan Pitamber and an opportunity for cross-examination, which violates Principles of Natural Justice, Audi Alteram Partem.

2.3. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 17,40,120/- without providing the details of the said amount arrived by the National Faceless Assessment Centre.

2.4. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 17,40,120/- by alleging that the same is a bogus loss/capital gain whereas the same is the gross value of transactions made by the assessee.

2.5. That on the facts and circumstances of the case and in law the Ld. NFAC has erred in making an addition of Rs. 17,40,120/- without considering the submissions and documents presented by the Assessee in the course of assessment and appeal proceedings.

2.6. The National Faceless Assessment Centre erred in making wrong facts and observations stating that the assessee has made a loss of Rs. 9,09,787/-, which shows the non-application of mind, whereas the Ld. NFAC erred in observing that it was a typographical error and hence confirmed it.

2.7. The Ld. NFAC erred in confirming the order passed by the National Faceless Assessment Centre without passing the speaking order hence the addition confirmed by NFAC may be deleted.”

2. The assessee is an individual and filed the original return of income for the year under consideration on 26/11/2014 returning an income of Rs.18,54,807/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. During the course of assessment, the Assessing Officer called for various details including the P&L Account of the assessee. The Assessing Officer, after considering the materials on record passed an order under section 143(3) dated 05/12/2016 accepting the capital gains offered by the assessee and by making certain disallowances under section 14A.

3. Subsequently the assessment was reopened by issue of notice under section 148 dated 31/03/2021 for the reason that certain information was received from DDIT(Inv), Mumbai in the course of investigation in National Stock Exchange Ltd with regard to the issue of Client Code Modification in the case of few brokers and based on a statement of Shri Chetan pitamber Bharkhada, President Anand Rathi Commodities Ltd(ARCL) who did the maximum client code modification was

recorded. The Assessing Officer came to the conclusion that certain losses of the assessee are speculative losses and not allowed to be set off against normal business income and that the assessee has not disclosed fully and truly all material facts in the return of income and, therefore, had a reason to believe that an income to the extent of Rs.17,40,120/- has escaped assessment. The Assessing Officer concluded the assessment stating that the share transaction done by the assessee are bogus in nature and not genuine. The Assessing Officer made the addition of Rs.17,40,120/- for this reason and also for the reason that the assessee has not furnished any details.

4. Aggrieved, the assessee preferred appeal before the CIT(A). The assessee, before the CIT(A) submitted that the Assessing Officer has relied on the information received from Investigation Cell and in spite of various requests, the copy of statement recorded of Chetan pitamber Bharkhada, President of M/s Anand Rathi Commodity Ltd and the information copy received from Investigation Cell was not furnished to the assessee. The assessee also submitted that the details on the basis of which the addition was made by the Assessing Officer were not clear. The assessee also submitted that all transactions with respect to the trading done by the assessee have been recorded and offered to tax already and that these incomes are non speculative in nature. The CIT(A) did not accept the submissions of the assessee and held that the reopening done by the Assessing Officer under section 147 is valid by relying on the decision of Bombay High Court in the case of Suresh vs Additional CIT (2017) 81 taxmann.com 346 (Bom). The CIT(A) also dismissed the grounds raised by the assessee on merits. Aggrieved, the assessee is in appeal before the Tribunal.

5. The Ld.AR submitted that the notice under section 148 where the reasons are recorded that the assessee has made bogus loss and had set it off against income is factually incorrect for the reason that the assessee has made only profit from non-speculative business. The ld AR further submitted that the assessee had not claimed any setoff of losses and has offered the entire gain from non-speculative business to tax. The Ld.AR drew our attention to the copy of the P&L Account (page 4 of the paper book) wherein the assessee has disclosed an income of Rs.73,510/- as being income from non speculative transactions. Further, the Ld.AR also drew our attention to the breakup of the non speculative gain declared by the assessee which has arisen out of the trading activities (pages 47 & 48 of paper book). The Ld.AR submitted that from this it is clear that the reasons recorded are done without any application of mind. The Ld.AR relied on the following decisions, in this regard:-

- (1) Sharvah Multitrade Co (P) Ltd vs ITO (2022) 134 taxmann.134 (Bom)(HC)
- (2) Yashoda Shivappa Nagaingoudar vs ITO (2022) 138 taxmann.com 296 (Bom)

6. The Ld.AR further submitted that the assessee has included all the transactions entered into by him in the statement of finance which were submitted by the assessee during the course of assessment under section 143(3) and that the Assessing Officer had raised specific queries with respect to the trading in commodities transactions entered into by the assessee. Therefore, it was submitted that there cannot be a re-assessment on the basis of change of opinion. The Ld.AR also submitted that the assessee has given full and true disclosure of all materials during the original assessment and there is no failure on the part of the assessee to disclose any material facts.

7. The Ld.AR, during the course of hearing also drew our attention to the reasons recorded (page 28 of paper book) where it was pointed out that there was no specific finding recorded by the Assessing Officer with respect to the impugned transaction and how the entire scam that happened in NSEL is related to the assessee. Accordingly, the Ld.AR submitted that the reopening is done without any application of mind and on the basis of misunderstood facts and therefore not valid.

8. The Ld.DR relied on the order of lower authorities.

9. We have heard the parties and perused the materials on record. The Assessing Officer has reopened the assessment of the assessee for the reason that that he had received certain information from Investigation Cell where Shri Chetan Pitamber Bharkhada, President of M/s Anand Rathi Commodity Ltd have given a statement that there were client code modifications of transactions in which there was no physical delivery of the goods on NSEL platform and that the said scam was investigated by DDIT(Inv). The copy of the reasons recorded is reproduced as below:-

*GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE ASSISTANT
COMMISSIONER OF INCOME TAX
CIRCLE 24(1), MUMBAI*

		<i>To, RAVI GOPAL TRIVEDY 402 SHEETAL A WING.LOKHANDWALA COMPLEX ANDHERI WEST MUMBAI 400053, Maharashlra India</i>	
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	PAN: ABCPT1927A		Assessment Year: 2014-15	Dated: 09/11/2021	DIN & Letter No : ITB A/AST/F/1 7/2021 -22/1 036782070(1)
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Sir/Madam/M/s

Subject: Reasons for re-opening u/s 147

1. In this case information was received from the DDJT(lnvrUnit-6(3)), Mumbai that the Serious Fraud investigation Office (SFIO) has carried out investigation National Spot Exchange Ltd, NSEL. The report has also been shared with DGIT(lnv,), Mumbai. The SFIO report has also discussed the issue of Client Code Modification in th case of few brokers. NSEL had commenced operation providing an electronic trading platform in October 2008. NSEL is an on-line exchange in an electronic commodities. The NSEL permitted trading in forward contracts and overlooked the need for physical taking of stock as required in spot trade. Paired contracts for buy and sell were used to design a scheme in which cash strapped companies would be able to raise short term capital and investors would receive a fixed and high return on Investment in the guise of a commodity exchange. Following the recommendations of the forwards markets commission (FMC) the NSEL had breached certain conditions of the exemption notification, the exchange were closed by the Ministry of Corporate Affairs.

2. The SFIO has recently prepared a detailed report on NSEL scam. In most of the cases the brokers have miss-sold the contracts offered at NSBL as investment produces giving steady and assured fixed return in the range of 12 to 14% to these traders. These brokers induced their clients by making false mis-representation suiting the greed of clients by offering funding to extent of 80 to 90% without being concerned with the income capacity of their clients. In substantial no. of cases, the brokers assured these traders that if NSEL does not pay the money then it will be paid by the broker. The brokers have also performed rampant client code modification where the dummy/ghost, client code were used to book Traders and later the client codes were modified. EOW have cited that the account of Ms. Madhu Jain (relative of director at relevant time & the promoter of .india Infoline-Nirmal Jain) in the case of India Infoline and Borosil in the cases of Anand Rathi were used as ghost accounts. In some cases, the brokers were found to be involved in unauthorized funding to clients by obtaining funds from their NBRC Subsidiaries. The member client agreement between the trader and the brokers entitled the traders' to claim money from the brokers for the trades done by them through the respective broker on NSEL Exchange platform.

3. In order to understand the modus operandi summons u/s 131 of the Income tax Act, 1961 were issued to the Broker – Anand Rathi Commodities Pvt.Ltd (ARCL) as the maximum client code modification to the tune of Rs 3,073 Rs Cr were done by; ARCL on: 11.03.2019 and statement of Shri Chetan pitamber Bharkhada, President Anand Rathi Commodities Ltd(ARCL) recorded on 12 03.2019 The broker had also stated that client code modification was indeed done. The broker had also stated that there was no physical delivery of goods at any time in all the trades earned out on the NSEL platform. After trading on NSEL was suspended. ARCL did not fulfill payment obligations against sale contracts the trades in respect of which the loss is claimed by the clients. No goods wherein the possession of clients either in his hand or in the possession of NSEL on his behalf. Therefore, a conclusion may be drawn that these losses are speculative losses which are not allowable to be set off against normal business income of the clients.

4. In view of the above and by reason of the failure on the part of the assessee to disclose fully & truly all material fact necessary thereto in his return of income, I have reason to believe that the income to the extent of Rs.17,0,120/- due to trade of client code modified transaction is chargeable to tax in the hands of the assessee being the undisclosed income of the assessee from sale of the Scrip and the gain/loss therefrom has escaped assessment within the meaning of section 147 of the Income Tax Act as per notice u/s 148 r.w.s 147 of the Act. is-being proposed to be issued to..assess such income and also any other income chargeable to tax which has escaped , -assessment, which comes^ to my notice subsequently in the course of assessment proceedings for A.Y. 2014-15.”

10. Section 147 of the Act provides that –

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 assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute 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) :

From the plain reading of the section it is clear that there should be ‘reasons’ and ‘belief’. “Reasons” refer to the source like document, statement, third party

confirmation etc and “belief” refers to the conclusion. The basis of the belief should be discernible from the material on record, which was available with the Assessing Officer, when he recorded reason and there should be a link or close nexus between material obtained and formation of belief. From the perusal of the reasons recorded by the Assessing Officer, it is noticed that the Assessing Officer though, has given a detailed description of information received from DDIT(Inv), he has not recorded any finding with respect to the alleged transactions entered into by the assessee and the basis on which the income of Rs.17,40,120/- is found to be undisclosed. In paras 1 to 3 of reasons recorded, the Assessing Officer has described the overall nature of the fraud committed but failed to record how the same to be related to the assessee.

11. Further on perusal of records, it is noticed that there is a gap in understanding of facts with regard to the speculative losses incurred by the assessee, which, according to the Assessing Officer, cannot be set off against the normal business income. A perusal of the P&L Account evidences that the assessee had only income from non speculative business and does not have any speculative loss which he has set off against any income. Therefore, we see merit in the contention of the Ld.AR that the Assessing Officer while recording the reasons, has not applied his mind and has not brought out any factual finding with regard to the impugned addition. It is also noticed that the assessee’ s request with regard to the workings of the impugned addition and the statements recorded from Shri Chetan Pitamber was not shared with him by the lower authorities. In view of these discussions and considering the facts of the case, it is evident that the reopening under section 147 has been done without recording any specific reasons pertaining to the assessee and without linking the information received from DDIT

(Inv) specifically to the assessee. We, therefore hold that the reopening u/s.147 is not valid and accordingly, the addition made stands deleted.

12. In the result, appeal is allowed.

Order pronounced in the open court on 16/05/2023.

Sd/-

sd/-

(AMIT SHUKLA)	(PADMAVATHY S)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 16th May, 2023

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai