

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: A : NEW DELHI

BEFORE SHRI ANUBHAV SHARMA, JUDICIAL MEMBER
AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No.8354/Del/2019
Assessment Year: 2010-11

Anand Prakash Gupta,
A-31, Kamla Nagar,
Delhi.

Vs ACIT,
Circle-46(1),
New Delhi.

PAN: AANPG3688B

(Appellants)

(Respondents)

Assessee by	: Shri Manu Gwari, CA & Shri Madhav Gwari, Advocate
Revenue by	: Shri Ashish Tripathi, Sr. DR
Date of Hearing	: 12.02.2025
Date of Pronouncement	: 26.03.2025

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 14.08.2019 of the Commissioner of Income-tax (Appeals)-16, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No.10136/2016-17 arising out of the appeal before it against the order dated 21.03.2016 passed u/s 147 of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ACIT, Circle-46(1), Delhi (hereinafter referred to as the Ld. AO).

2. The assessee's return of income was filed on 30.09.2010 showing an income of Rs.6,12,750/-. The return was processed u/s 143(1) of the Act at Rs.36,36,170/-. Subsequently, the case was reopened u/s 147 of the Act and notice u/s 148 of the Act was issued on 27.03.2015. Thereafter, during the reassessment proceedings, certain additions were made on the allegation that by manipulating client code the assessee has benefitted and reported fictitious profits and further addition was made on account of disallowance of interest paid on personal loan as deduction u/s 37 of the Act is not available. Further, an addition on account of capital gain was made. The same were challenged before the Id.CIT(A) and addition on account of fictitious profits and disallowance were sustained while issue of capital gains was restored for recalculation. The assessee is in appeal challenging the impugned order of the Id.CIT(A) and amongst grounds on merits as stand revised the assessee has raised ground No.1(a) alleging that the notice u/s 147 of the Act was issued without application of mind.

3. The Id. representatives of both the sides were heard and Id. AR has taken us through the contents of the notice of reopening available at page No.75 of the paper book pointing out as to how there is lack of tangible material, live link and non-application of mind. The same shall be conveniently discussed later on.

4. The ld. DR, at the same time, has defended the reopening submitting that only a prima facie material has to be examined and the reopening reasons need not be elaborate containing all the facts. It was submitted that reopening reasons are self-speaking.

5. We have given a thoughtful consideration to the material before us and submissions of learned representatives of both the sides and in order to conveniently dispose of this ground the content of the reasons recorded by the learned assessing officer and the copy of which is supplied to the assessee, as made available to bench on page no. 75 of the PB, are being produced below:-

“Sub: Reasons for re-opening the case u/s 148 of the IT Act, 1961 PAN: AANPG36888 A.Y. 2010-11 – Reg.

Please refer to the above mentioned subject.

2. *In this context, the reason for reopening the case for AY 2010-11 are as under:*

As per the information received from the Office of the DIT (I&CI), Room No.1201, Earnest House, Nariman Point, Mumbai, vide letter F.No.DIT(I&CI)/CCM/2014-15/ dated 27.02.2015 it is found that the above mentioned assessee has escaped of income amounting to Rs.26,26,630/- created by sold some of the brokers misusing the client code modification facility in F&O segment on NSE during March 2010. The brokers were alleged to be indulging in transferring the fictitious losses to the above mentioned assessee.

In view of the above spot verification u/s 131 (1A) was carried out and the DIT(I&CI) Mumbai it is revealed that having misused the facility of client code modification in order to create fictitious profits. It is further revealed and admitted that having received the commission varying from 0.5 upto 2% on the amount of profit for transferring such profit to the above named assessee. The broker has submitted revised computation of income and paid taxes and paid taxes for AY 2010-11 (relevant for FY 2009-10).

Thus the undersigned is convinced that the assessee has escaped taxation in its actual income. Therefore, action u/s 147/148 is proposed to bring an amount of at least Rs.25,26,630/- apart from his returned income of Rs.36,36,170/- filed by the assessee during AY 2010-11 on 30.09.2010 under taxation.”

Sd/-.”

6. As we appreciate the aforesaid reasons we find substance in the contention of learned AR that there is merely reproduction of the information received from the investigation wing. The information is primarily that ‘some brokers’ are indulging in transferring the fictitious losses to the assessee and misusing client code modification in order to create fictitious profits. The allegation is that income has escaped assessment by these fictitious transactions.

7. Now the basic facts about identity of brokers, details of trades, client code details, extent of fictitious loss or profits are not mentioned in this information as received from the investigation wing. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. In the absence of these details as coming up from the content reproduced above, it has to be assumed that these vital facts were not even with the ld. AO at time of reopening.

8. At the same time what is material is that there is no observation of the ld. AO that on the basis of the information as received any independent enquiry was conducted to verify the information and draw a conclusion that there is any escapement of income, not reported. Infact it was during the assessment notices u/s 133(6) of the Act were issued to the concerned brokers. It is also established

that assessee had reported profits from two of the three brokers who have offered the income to taxation. Had there been any exercise of enquiry on the part of the Id. AO to examine the contents of information received from the investigation wing in context to the return of assessee then the same would have been exhibited as application of mind by the Id. AO to the information.

9. We are of the considered opinion that the reasonable belief for purpose of section 148 of the Act should be on the basis of tangible material and should be prima facie sufficient to conclude that income chargeable to tax has escaped assessment. The information from investigation wing is not gospel truth so as to on its face give presumption of escapement of income for opening the assessment. The same is not tangible material unless examined in context to the particular tax payer whose assessment is to be reopened in exercise of extraordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to, otherwise the link goes missing.

10. It is now like settled proposition of law that the information received from the Investigation Wing would constitute tangible material for re-opening

the assessment only when the AO establishes the link between tangible material and formation of belief. Reliance can be placed on the decisions in CIT v. SFIL Stock Broking Limited (2010) 325 ITR 285 (Del.), Sarthak Securities Co. Pvt. Ltd. v. ITO (2010) 329 ITR 110 (Del.), Signature Hotels Pvt Ltd v. ITO (supra), CIT v. Insecticides (India) Limited (2013) 357 ITR 330 (Del.) and Krown Agro Foods (P) Ltd v. Assistant Commissioner of Income Tax, Circle 5(1) (2015) 375 ITR 460 (Del). Reliance was also placed on the decision of this Court dated 19th November, 2015 in ITA No. 108 of 2013 (Commissioner of Income Tax-IV v. Independent Media P. Limited), Oriental Insurance Company Limited v. Commissioner of Income Tax (2015) 378 ITR 421 (Del), Rustagi Engineering Udyog (P.) Limited v. DCIT (2016) 382 ITR 443 (Del), Agya Ram v. CIT (2016) 386 ITR 545 (Del) and Rajiv Agarwal www.taxguru.in ITA 692/2016 Page 8 of 18 v. ACIT (decision dated 16th March, 2016 in Writ Petition (Civil) No. 9659 of 2015) and the most authoritative pronouncement in case of **PCIT Vs. Meenakshi Overseas Ltd. 395 ITR 677(Del.)**, where in these decisions have been considered in context to validity of reasons of reopening and following principle are laid down, which are definitely applicable to case in hand;

“24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are

considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

25. At this stage it requires to be noted that since the original assessment was processed under Section 143 (1) of the Act, and not Section 143 (3) of the Act, the proviso to Section 147 will not apply. In other words, even though the reopening in the present case was after the expiry of four years from the end of the relevant AY, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment.

26. The first part of Section 147 (1) of the Act requires the AO to have “reasons to believe” that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the precondition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment.”

11. In the case in hand though the ld. AO has mentioned that he is ‘convinced’ that assessee has escaped taxation, but this conviction of ld. AO is not on basis of application of his mind but on borrowed satisfaction out of the investigation wing report. A perusal of the reasons as recorded by the ld. AO reveals that the ld. AO has reproduced the precise information he has received from the Investigation Wing and then concluded that he is ‘convinced’. He straightaway records the conclusion without any reference to any document or statement, or examination of facts as stand reported by the assessee in

concluded assessment, except the returned income. We are of the considered belief that the Id. AO should not merely reproduce the information but takes the effort of revealing what is contained in the investigation report specific to the Assessee. Importantly he may note that the information obtained was 'fresh' and had not been offered by the Assessee till its return pursuant to the notice issued to it was filed. This is a crucial factor that goes into the formation of the belief. In **Oriental Insurance Company Limited v. Commissioner of Income Tax 378 ITR 421 (Del)** it was held that *“therefore, even if it is assumed that, in fact, the Assessee’s income has escaped assessment, the AO would have no jurisdiction to assess the same if his reasons to believe were not based on any cogent material. In absence of the jurisdictional pre-condition being met to reopen the assessment, the question of assessing or reassessing income under Section 147 of the Act would not arise”*.

12. In the light of the aforesaid discussion, we sustain the ground No.1(a) and allow the appeal of the assessee. The impugned assessment is quashed.

Order pronounced in the open court on 26.03.2025.

Sd/-

(NAVEEN CHANDRA)
ACCOUNTANT MEMBER

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 26th March, 2025.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi