

O-47

ITAT/42/2022
IA NO.GA/2/2022

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF
INCOME TAX CENTRAL-2, KOLKATA

-Versus-

M/S. GRD COMMODITIES LTD.

Appearance:

Mr. Smarajit Roychowdhury, Adv.
Mr. Soumen Bhattacharjee, Adv.
...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunjhunwala, Adv.
.. . for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 3rd January, 2023.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (the Tribunal) dated 14th December, 2022 in IT(SS)A No.120/Kol/2018 and cross-appeal in CO No.123/Kol/2018 for the assessment years 2009-10 and 2012-13.

The revenue has raised the following substantial questions of law for consideration:

- (i) *Whether on the facts and in the circumstances of the case and in law the learned Income Tax Appellate Tribunal erred in ignoring that transactions were beyond the realm of commercial reality and the assessee was the beneficiary of a series of false losses in all series codes, arising from synchronised transactions orchestrated by a cartel creating artificial volumes in illiquid commodities with 97% trades executed within a minute and square-off intra-day, with the solitary motive to reduce the incidence of tax ?*
- (ii) *Whether on the facts and in the circumstances of the case and in law can it be concluded that complete disclosure of facts of sham transaction in the books of accounts will constitute true disclosure of facts ?*
- (iii) *Whether on the facts and in circumstances of the case the Income Tax Appellate Tribunal erred in reviewing the adequacy and sufficiency of subjective satisfaction reached by the Assessing Officer for initiating proceedings under Section 147 of the Act, despite the fact that there were material having undeniable nexus with the alleged and spurious commodity trading losses claimed ?*

We have heard Mr. Smarajit Roychowdhury, learned standing counsel assisted by Mr. Soumen Bhattacharjee, learned

Advocate appearing for the appellant/department and Mr. J. P. Khaitan, learned senior counsel assisted by Mr. Pratyush Jhunjhunwala, learned Advocate appearing for the respondent/assessee.

Two issues fell for consideration before the learned Tribunal, first of which dealt with by the learned Tribunal was regarding the validity of the reopening of the assessment. The second was on the merits of the matter. As against the order of assessment dated 29th December, 2016, the assessee had preferred appeal before the Commissioner of Income Tax (Appeals)-21, Kolkata (CITA). Before the CITA the respondent/assessee not only raised contention regarding the merits of the matter but also contended that the reopening of assessment was bad in law as there was no reason to believe available with the assessing officer on the date when the notice for reopening was issued i.e., on 31st March, 2016. The CITA allowed the appeal on merits but rejected the contentions of the assessee regarding the validity of the reopening.

The revenue was on appeal before the Tribunal with regard to the findings of the CITA on the merits of the matter and the respondent/assessee filed cross-appeal as against the findings of the CITA upholding the validity of the reopening of the assessment.

The learned Tribunal heard both the matters together and, at the first instance, took up for consideration the

validity of the reopening proceedings and has recorded the following factual finding with regard to the assessment year 2009-10:

"19. On examination on the entries made by the AO in the order sheet [Page 63 of the paper book], it is noted that the AO had received the **appraisal report** of the search and survey cases of Commodities Traders Group of Ahmedabad only on 05-04-2016. However, the notice for reopening which is placed at Page 40 of the paper book, is dated 31-03.2016 (last date for issue of notice in respect of AY 2009-10). These events show that the AO had received the appraisal report five days after the issuance of notice on 31-03-2016. In this context, it has to be kept in mind the Hon'ble Apex Court has held in 258 ITR 317 and 253 ITR 86; the condition precedent for re-opening u/s 147 of the Act is that the AO should have 'reason to believe' escapement of income, and the 'reason to believe' postulate a foundation based on information and a belief based on reason. So we note that it is a legal necessity that a foundation based on information is a must before the AO has reason to believe escapement of income. So, here the appraisal report on which the AO builds the reason to belief was absent when he recorded the reason before invoking the reopening jurisdiction u/s. 147 by issuing notice u/s. 148 of the Act on 31.03.2016. Therefore, on these facts we discuss, we are inclined to uphold the contention of the Id. AR that the foundation on which the AO based his belief that income chargeable to tax had escaped assessment was absent at the material time when he issued notice u/s. 148 of the Act on 31-03.2016, and therefore, the basic legal requirement of reopening u/s. 148 of the Act i.e. *AO's formation of reasons to belief escapement of income prior to reopening of assessment* was absent in the given facts of the present case.

20. For the reasons set out above, we thus hold that the AO did not comply with the requirement of law set out in Section 147/148 of the Act before reopening the assessment for AY 2009-10 originally completed u/s. 153A/143(3) of the Act dated 31.03.2015, and as a consequence thereto, the order dated 29-12-2016 passed by the AO being without jurisdiction is held to be a nullity in the eyes of law. The assessee, therefore, succeeds on this legal issue. The cross objections taken by the assessee for AY 2009-10, is thus allowed."

For the assessment year 2012-13 it is seen that a more elaborate exercise was conducted by the Tribunal examining as to whether there was material available in the hands of the assessing officer when he issued notice for reopening the assessment and the Tribunal has recorded the following factual findings :

"However, we note that there was no tangible evidence or material brought on record to justify the said apprehension. Instead, we note that the report of the DDIT(Inv) rested on preponderance of probabilities and had forwarded this to the AO for further investigating the same. So, at the most this appraisal report can be termed to trigger 'reason to suspect'; and upon receipt of this appraisal report, the AO sought to have conducted preliminary enquiries and tried to collect materials to connect assessee in this orchestrated wrong doing as suggested in the appraisal report; and if he had succeeded, in this exercise, then he could have summarised his finding of facts connected the assessee to the alleged wrong doing in his 'reasons recorded' along with the modus-operandi as reported in the appraisal report to re-open, which could have exposed the live nexus and consequent cause and effect of escapement of

income, which exercise the AO unfortunately did not do in the present case. Having regard to the aforesaid facts, we find merit in the Ld. AR's contention that there was no tangible material contained in the appraisal report based on which the AO could have validly formed reason to believe that income chargeable to tax had escaped assessment which was completed u/s 153A/143(3) of the Act on 30.-03.2015. Relying the decision of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinators India Ltd. (supra) and other case laws cited (supra), we are inclined to hold that the initiation of reassessment suffered from legal infirmity since the AO in the original assessment has already taken a view after enquiry and therefore, the impugned action of AO to reopen was based upon change of opinion by the present AO without there being any tangible material or material change in the underlying facts which were already known to the AO at the time of passing of the regular assessment."

On a perusal of the above, it is clear that on the date when the notice for reopening was issued i.e. on 31st March, 2016 there was no tangible material available in the hands of the assessing officer to justify reopening the assessment. Before us this factual position, as recorded by the Tribunal, could not be assailed by the revenue. The learned Tribunal not stopping with the finding that the reopening of the assessment was bad in law has proceeded to consider the factual position in detail and affirmed the factual finding rendered by the CITA.

Thus, we are fully convinced to hold that there is no substantial question of law arising for consideration in this appeal.

Accordingly, the appeal filed by the revenue (ITAT/42/2022) fails and is dismissed.

Consequently, the application for stay (IA No.GA/2/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)