

IN THE INCOME TAX APPELLATE TRIBUNAL “B-SMC” BENCH: KOLKATA
[Before Shri A. T. Varkey, JM]

I.TA No. 1934/Kol/2019
A.Y 2011-12

Ravi Choudhary (L/H of Late Sushila Choudhari) PAN: ADLPC9393E	Vs.	I.T.O. (TDS), Ward 36(2), Kolkata
Appellant		Respondent

Date of Hearing	06-02-2020
Date of Pronouncement	18.03.2020

For the Appellant	Shri Sushil Kumar Pransukha, FCA, Id.AR
For the Respondent	Shri Jayanta Khanna, JCIT, Id.Sr.DR

ORDER

This is an appeal preferred by the assessee against the order of Ld. CIT (Appeals) , 10, Kolkata dated 28-06-2019 for the assessment year 2011-12.

2. At the outset itself, learned Counsel for the assessee pointed out that impugned order of the Id. CIT(A) is bad in law since the notice u/s. 148 of the Income-tax Act, 1961 (in short, hereafter referred to the ‘Act’) was issued on a dead person. To buttress this argument, learned Counsel for the assessee drew my attention to page-1 of the P/B, which is a copy of notice issued u/s. 148 of the Act upon Smt. Sushila Choudhuri by the I.T.O., Ward 36(2), Kolkata dated 21-03-2018. It was brought to my notice by the Id. AR that Smt. Sushila Choudhury expired on 10-09-2012. It was also brought to my notice that the AO was intimated about the death of Smt. Sushila Choudhuri and to prove this fact, the Id. AR drew our attention to the correspondence made by the Income-tax Department to the assessee to the effect that Shri Ravi Choudhary is the Legal heir of Smt. Sushila Choudhari, who expired on 10-09-2012. It is noted by the department that Smt. Sushila Choudhari had demised on 10-09-2012. Further, it is also noted that Shri Ravi Choudhary informed the department that he was the legal heir of the deceased person vide correspondence dated as early as

January 09,2014. Moreover, it is noted that the despite the assessee informing the department and the department having acknowledged his request to be considered as legal heir has been approved vide letter correspondence dt. January 09,2014, still notice u/s. 148 of the Act has been issued on 21-03-2018 proposing to re-open the assessment for the AY 2011-12 in the name of Late. Sushila Choudhury. Since notice has been issued admittedly on a dead person, despite the department coming to know of this fact as early as on 09 January, 2014 according to the Id. AR, the AO's order to re-open the assessment on a dead person is bad in law.

3. Per contra, Id. DR vehemently opposed to the contentions of the Id. AR and contended that assessee as legal heir has participated in the assessment proceedings and therefore, the order cannot be faulted with the issuance of notice u/s. 148 of the Act on deceased person. According to the Id. DR, the assessee/ legal heir had fully participated in the assessment proceedings and having also responded to all other proceedings before the AO. According to the Id. DR, on this technical ground re-assessment order of the AO cannot be faulted.

4. In his rejoinder, the Id.AR referred to the case laws to the Pune Bench of Tribunal in Smt. Archana Ashok Dukre Vs. ITO, Latur, ITA No. 2237/Pun/2016 dt. 15-11-2019, wherein the Tribunal on similar case has quashed the initiation of reopening itself by referring the decision of Hon'ble Bombay High Court in Rupa Shyamsundar Dhmatkar Vs. ACIT in Writ Petition No. 404 of 2019 and Hon'ble Supreme Court's decision in PCIT Vs. Maruti Suzuki India Ltd reported in (2019) 416 ITR 613 (SC). The Id. AR also referred to the reasons recorded by the AO for reopening u/s 147 as under:-

Reasons for reopening u/s 147 of the I.T Act. 1961:

1. The assessee is an Individual who filed its return of income electronically for the relevant assessment year on 26.03.2012 declaring total income of Rs. 3,02,358/-.

2. Information was received from the Pr. DIT (Inv.), Kolkata vide his letter bearing F. No. 75A/2015-16/2733 dated 21-09-2015 that the investigation carried out by the Directorate revealed that a very large number of persons had taken entries of huge bogus Long Term Capital Gain in an organized manner through share transactions of penny stock companies listed with Calcutta Stock Exchange with the involvement of the promoters of the penny stock companies, unscrupulous brokers and entry operators. The letter is

accompanied by a CD which contains investigation report, the details of transactions and other related information.

The investigation focused on 9 penny stock companies listed with Calcutta Stock Exchange. A close view of price movement of these 9 scrips revealed that there was common pattern in the trading of all such scrips. At first their prices start from a low range, then it rises rapidly, stays there for a while then it , decreases more rapidly. The investigation revealed that various persons had subscribed to the shares of these penny stock companies for the purpose of claiming long term capital gain to bring unaccounted money into their books without payment of tax. As per the modus operandi discussed in the investigation report, those who wants to book bogus capital gain are asked to buy shares when the price is low and sell the shares at a pre-determined particular date and time to avail the bogus entry of desired capital gain. The report also reveals that these transactions are accommodated in lieu of cash of equal amount and commission charged over and above at certain fixed percentage for providing such accommodation entry.

Investigation carried out by the Directorate of Income Tax (Investigation), Kolkata revealed that the share price of "BLUEPRINT SECURITIES LTD." is one of those' penny stock companies listed with Calcutta Stock Exchange (CSE) was also artificially rigged to provide entry of bogus LTCG. A list of beneficiaries had been identified. As per the information furnished in the report, the assessee had transacted in shares of "BLUEPRINT SECURITIES LTD." and sold shares of "BLUEPRINT SECURITIES LTD." involving trade value at Rs. 3,05,800/- during A.Y. 2011-12 and the said information is also suggesting Long Term Capital Gain (LTCG) by the assessee on such sum.

3. Though, The assessee had claimed exempt income as Long Term Capital Gain (LTCG) on which STT was paid, the transactions cannot be considered genuine merely for the reason that they were carried out on the exchange platform with the involvement of registered broker through banking channel in a known sequence with no apparent aberrations. Various judgments have also held that the money came by cheque and was paid through the process of banking transactions as not by itself of any consequences. However, as discussed above the said transactions are neither verifiable from the details provided by the assessee nor it is verifiable from the return of income. The AO also had no such information before receiving the said report along with the data as mentioned above from Pr. DIT(Inv.), Kolkata.

4. On analyzing the information so received from PDIT(Investigation), Kolkata vis-a-vis return filed by the assessee on 26.03.2012, I am of the firm believe that the assessee on sale of share of "BLUEPRINT SECURITIES LTD." has plough backed his unaccounted money of Rs. 3,05,800/- into the regular books of account in the garb of Long Term Capital Gain (LTCG) on which no tax has been paid by claiming the same as exempt u/s. 10(38) of the I.T. Act 1961 through accommodation entry in lieu of cash.

5. In view of the above facts and after analyzing the information available on record, I have the reason to believe that the assessee had suppressed its

income by using the device of LTCG treating it as exempted to the tune of Rs. 3,05,800/- which is/are reported as bogus by the directorate of investigation and by doing this, the assessee is found to have failed to disclose fully and truly all material facts necessary for its assessment. Thus, income to that extent of Rs. 3,05,800/- as LTCG has escaped assessment in terms of section 147 of the Income Tax Act, 1961.

6. It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration but no assessment as stipulated u/s 2(40) of the Act was made and the return of income was only processed u/s 143(1) of the Act. In view of the above, provisions of clause (b) of explanation 2 to section 147 are applicable of facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

7. In this case, since more than four years have lapsed from the end of assessment year under consideration, a proposal is put up before L.d. Pr. C.I.T.-12, Kolkata through Add C.I.T., Range-36 Kolkata for giving necessary sanction to issue notice u/s 148 of the I.T. Act, 1961 for the A.Y. 2011-12 as per the provisions u/s 151 of the I.T. Act, 1961. “

Form ITNS-10 along with relevant enclosures is put up before the Ld. Pr. CIT-12, Kolkata for kind perusal and approval. “

5. Referring to the above reasons, the Id. AR submitted that the AO having received an information from the Id. Pr. DIT (Inv.) Kolkata vide letter dt. 21-09-2015 has recorded the reasons and issued notice dt. 21-03-2018 to Smt. Sushila Choudhari, who expired on 10-09-2012. According to the Id. AR a perusal of said reasons as recorded/mentioned hereinabove, would reveal that there was an information that a very large number of persons had taken entries of huge bogus long term capital gain (LTCG) in an organised manner through share transactions of penny stock companies listed with Calcutta Stock Exchange with the involvement of the promoters of the penny stock companies, unscrupulous brokers and entry operators. The investigation focussed on 9 penny stock companies listed with Calcutta Stock Exchange. Investigation revealed that various persons had subscribed to the shares of these penny stock companies for the purpose of claiming long term capital gain to bring unaccounted money into their books without paying of tax. According to the AO as information furnished in the report of DIT (Inv.), Kolkata, that assessee had transacted in shares of “BLUEPRINT SECURITIES LTD” and sold shares of “BLUEPRINT SECURITIES LTD” involving trade value at Rs. 3,05,800/- during AY 2011-12 and

the assessee had long term capital gain (LTCG) on such sum. After noting down general modus operandi, the AO concludes as under:-

4. On analyzing the information so received from PDIT(Investigation), Kolkata vis-a-vis return filed by the assessee on 26.03.2012, I am of the firm believe that the assessee on sale of share of "BLUEPRINT SECURITIES LTD." has plough backed his unaccounted money of Rs. 3,05,800/- into the regular books of account in the garb of Long Term Capital Gain (LTCG) on which no tax has been paid by claiming the same as exempt u/s. 10(38) of the I.T. Act 1961 through accommodation entry in lieu of cash.

5. In view of the above facts and after analyzing the information available on record, I have the reason to believe that the assessee had suppressed its income by using the device of LTCG treating it as exempted o the tune of Rs. 3,05,800/- which is/are reported as bogus by the directorate of investigation and by doing this, the assessee is found to have failed to disclose fully and truly all material facts necessary for its assessment Thus, income to that extent of Rs. 3,05,800/- as LTCG has escaped assessment in terms of section 147 of the Income Tax Act, 1961.

6. Therefore, the ld. AR contended that there is no details of the assessee transacting with these scrips other than the information that the assessee had dealt with sale of shares of M/s. Blueprint Securities Ltd. According to the ld.AR, the information received from the Investigation Wing of the Income-tax Department can only trigger the "reasons to suspect" and cannot be equated to "reasons to believe" escapement of income which is the jurisdictional condition precedent for reopening the assessment. Therefore, according to the ld.AR in any event notice issued u/s. 148 against a dead person is bad in law since the reasons recorded is vague and shows that it was recorded without application of mind. So according to ld AR the AO lacked jurisdiction to reopen the assessment of assessee. Therefore, according to ld. AR the initiation of re-opening is bad in law.

7. After hearing of both the parties and on perusal of record, I note that the AO has reopened the assessment on the deceased person, Late. Sushila Choudhari, who expired on 10-09-2012, which fact had been intimated to the department and the department had responded to Shri Ravi Choudhari addressed as Legal Heir of Late. Sushila Choudhari, thereby acknowledged that Shri Ravi Choudhari is the legal heir of late Sushila Choudhari . However, it is noted that AO issued notice dt. 21-03-2018

issued u/s. 148 of the Act in the name of Smt.Sushila Choudhari proposing to reopen the assessment for the A.Y 2011-12 and thereafter made additions of Rs. 5,12,240/- u/s. 68 and Rs. 12,806/- u/s. 69C of the Act, totalling to Rs.5,25,046/- vide order passed u/s. 143(3) r.w.s 147 of the Act dt. 11-12-2018. This action of the AO stands confirmed by the Id. CIT(A) by impugned order. Even though it is noted that the reasons recorded by the AO on 13-03-2018 for reopening of assessment shows that the AO received investigation report from the Pr. DIT vide letter dt. 21-09-2015 about the assessee having sold shares to Blueprint Securities Ltd and had obtained capital gain (long term) of Rs. 3,05,800/-, which according to the Investigation Department was a rigged transaction. Based on this information, the AO has reopened without making any preliminary enquiry and recorded the reasons to re-open. The AO before re-opening the assessment should have satisfied the condition precedent required to usurp jurisdiction under section 147 of the Act that is he has the requisite reason to believe escapement of income. It has to be kept in mind that '*reason to believe*' postulates a foundation based on information and belief based on reason. Even if there is foundation based on information, there still must be reason warrant holding a belief that income chargeable to tax has escaped income. According to me, a bare reading of the reasons recorded to reopen reveals that there was non application of mind before reopening the assessment. Based on an information/investigation report, the AO has jumped into the conclusion that the assessee is involved in the activities of penny stock rigging etc. It has to be kept in mind that information from the Investigation Wing(Income-tax Department) can only trigger *the reasons to suspect*. Then the AO to make some preliminary inquiry and collect some material which would suggest the escapement of income. However, the AO based only on investigation report has recorded his satisfaction without conducting preliminary inquiry, which is nothing but the borrowed satisfaction from the report of Investigation Wing. The condition precedent to reopen an assessment that is '*reason to believe*' should be that of the AO not that of the investigation wing, so in the absence of the condition precedent to reopen, the AO lacks jurisdiction to reopen the assessment. Moreover, even though the department was aware as on 09 Jan. 2014 itself about the demise of late Sushila Choudhari, the notice issued u/s. 148 in the name of deceased person is also bad in

law. So I find that reason recorded by AO does not satisfy the jurisdictional requirement as per the settled law on the subject and therefore AO lacks jurisdiction to reopen and thereafter notice u/s. 148 is bad in law and therefore, the same cannot be sustained in the eyes of law and therefore, the same is hereby quashed.

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

Order Pronounced in the Open Court on 18 -03-2020

Sd/-
A.T. Varkey
Judicial Member

Dated 18 -03 -2020

*PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: Ravi Choudhary (L/H of late Sushila Choudhari) C/o Tavi R. Choudhary & Co. 7th Floor, Room No. 25 Fortuna Tower, 23A, N.S Road, Kolkata-700 001.
2. Respondent/Revenue: The ITO , Ward 36(2), Aaykar Bhawan Poorva, 8th Fl., 110 Shantipally, Kolkata-107.
3. CIT,
4. CIT(A), Kolkata.
5. DR, Kolkata Benches Kolkata

**PP/SPS True Copy By By Order Assistant Registrar
ITAT Kolkata