

(2014) 02 DEL CK 0296
In the Delhi High Court
Case No : WP (C) 1452/2013

Ashok Mittal

APPELLANT

Vs

Assistant Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Income Tax Act, 1961 — Section 132, 143(3), 147, 148

Citation : (2014) 02 DEL CK 0296

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Ajay Vohra and Kavita Jha, Advocates for the Appellant; Kamal Sawhney, Sr. Standing Counsel and Judy James, Jr. Standing Counsel, Advocates for the Respondent

Judgement

Sanjeev Sachdeva, J.—The petitioner has filed the present petition impugning the notice dated 29.03.2012 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") seeking to reopen the assessment for the year 2005-06 and also the order dated 28.01.2013 dismissing the objections filed by the petitioner. The proceedings relate to the Assessment Year 2005-06.

2. The petitioner is an individual and as a sole proprietor of M/s. Ashok Mittal and Co. was engaged in the business of dealing in shares, investments, loans and finance. For the previous year relevant to the Assessment Year 2005-06, the petitioner filed return of income declaring income of Rs. 37,05,180/-. Vide order dated 28.12.2007, the assessment was framed under Section 143(3) post scrutiny at Rs. 45,01,520/-.

3. The internal audit wing of the respondents raised audit objections vide memo dated 31.03.2008. The audit objections raised pertained to incorrect valuation of closing stock of shares and also the valuation of 4,40,000 shares of M/s. MRP Limited at a cost of Rs. 20.09, instead of purchase price of Rs. 22.10.

4. The petitioner was asked and responded to the audit objections and alleged

inaccuracies resulting in underassessment. The petitioner contended that the audit objections qua valuation of shares were not valid as the petitioner had valued the shares in terms of Accounting Standard-13 (AS-13), which prescribes lower of cost or fair value as the method for valuation of shares/securities. As regards the valuation of shares of MRP Limited at below the purchase price, the petitioner contended that there was a typographical mistake wherein 4,00,000 shares had been inadvertently mentioned as 4,40,000 shares.

5. By notice dated 29.03.2012, issued under Section 148 of the Act, the Respondents sought to reassess the income of the petitioner. At the request of the petitioner, reasons recorded for issuance of notice under Section 148 were supplied to the petitioner vide letter dated 05.09.2012.

6. The reasons for reopening of assessment recorded are as under:-

"Perusal of the documents filed alongwith return it is noticed that the assessee has not been following the accounting Standards properly, as the assessee has submitted two stock valuation (first one at book value and market value and the other one at the lesser rate between book value and market value) as on 31.03.2005 for the Balance sheet of Ashok Mittal & Co., which are in the form of investment. As per AS-2, the definition of Inventory i.e. stock does not include shares held as stock-in-trade because they dealt with by another AS i.e. AS-13 (dealing with the Investments). As per accounting standards investments should, be shown separately under the head Current Investments and Fixed Investment as their valuation will differ in each category. The assessee has not submitted any document in support of such valuation. Hence, the investments should have been valued at cost which meant the value of shares has been under assessed by Rs. 9,36,589/-.

3. It has also been noticed during the perusal of records that 4,40,000 shares of MRPL held by Ashok Mittal & Co. costs Rs. 20.09 per share and their market value is Rs. 47.58 as on 31.03.2005 whereas the shares of MRPL have been shown at Rs. 22.10 per share on 31.03.2004 which means that they have been held for a period more than 12 months and accordingly, should be valued at cost. The purchase cost of shares cannot in any case come down from Rs. 22.10 per share to Rs. 20.09 per share which means that the closing stock has been undervalued by Rs. 8,84,400/-.

4. Information has been received from the Dy. Director of Income tax (Inv.) Unit 1(4) Mumbai wherein it has been stated that a search operation u/s. 132 of the IT Act was undertaken in the case of M/s. Mahasagar Securities Private Limited on 25.11.2009 on the basis of information received by him regarding suspicious transaction taking place in the bank account of this company and its related companies. Shri Mukesh M. Choikar is one of the Director of the said Company. During the course of search it was revealed that the said company and its related group of 34 companies (the prominent ones M/s. Alliance Intermediaries & Network Private Limited, M/s. Mihir Agencies Private Limited, M/s. Goldstar

Finvest Private Limited etc, all run by Mukesh Choksi) were engaged in fraudulent billing activities and in the business of providing Bogus speculation profit/loss, short term/long term capital gain/loss. Share application money commodities profit/loss on commodity trading (Through MCS) and had been continuing this business for many years. A list of such assessee has been received which reveals that Shri Ashok Mittal & Co. has taken accommodation entries from these companies to the extent of Rs. 3,13,07,210/-.

5. As per information supplied, M/s. Ashok Mittal & Co., has undertaken the transaction for taking accommodation entries from the said company has been shown at Rs. 3,13,07,210/-which is required to be investigated by issue of notice u/s. 148 read with section 147 of the Income-tax Act, 1961."

7. The reasons recorded are primarily on three grounds. Two of which were raised by the Audit Department and for which audit objections had been raised and had been replied to by the petitioner. The two objections earlier raised by way of audit objection pertained to incorrect valuation of the closing stock and incorrect rate of valuation of closing stock of shares of MRP Ltd. held by the petitioner. The third reason recorded was that the petitioner had taken accommodation entries to the tune of Rs. 3,13,07,210/- from Mukesh Choksi and companies run and controlled by Mukesh Choksi.

8. On receipt of the reasons recorded for issuance of notice under Section 148, the petitioner vide letter dated 12.09.2012 with respect to the accommodation entries received from Mukesh Choksi requested the Assessing Officer to provide details of such entries i.e. cheque number, date, amount, name of the company from whom entries were allegedly taken so that the petitioner could take further action in the matter.

9. By reply dated 20.12.2012, the Assessing Officer replied that as per the statement of Mukesh Choksi, the consideration of money had been paid in cash and represented undisclosed income launched by means of obtaining bogus accommodation bills. No further details of entries or transactions were supplied.

10. The petitioner filed objections to the issuance of notice on 15.01.2013. With regard to the objection and method of valuation of closing stock, the petitioner stated as under:-

"In this respect, it may be stated that Ashok Mittal & Co. is having "stock in trade" as its "Current Investment", as can be seen from the copy of Balance Sheet annexed herewith and also filed during original assessment proceedings. The stock in trade (shares) has been shown under the head "current assets loan & advances" and have been valued at "cost or market prices, whichever is lower" as certified by the proprietor". It may be stated that the current investment (viz. stock in trade) should be valued in accordance with AS-13. As per AS-13, the carrying amount of current investment is to be valued at lower of cost or fair value. Keeping in view the method of valuation as stated in AS-13, the assessee has valued its closing stock as on 31.03.2005, at lower of cost or market value.

It may further be noticed that the assessee has been following the same method of valuation in earlier years and the same has been accepted by the department while framing assessment of the assessee in earlier years.

Moreover while framing original assessment as per order u/s. 143(3) dated 28.12.2007, DCIT had applied his mind and also considering the method of valuation applied in earlier year(s), he accepted the method of valuation adopted by the assessee viz. "lower of cost or market value" for this year and after examination of books of accounts (Please refer to Para 1 of Page 2 of Assessment Order, copy of order is enclosed) the DCIT has accepted the trading results of the assessee for this year from dealing in shares, while framing assessment u/s. 143(3) of the Income Tax Act vide his order dated 28.12.2007.

Secondly the assessee was informed about the Audit Memo dated 31.03.2008 for the above assessment year (copy enclosed) and the assessee has already given the reply thereof vide its letter dated 14.08.2008 (copy enclosed), wherein the assessee has categorically stated that in view of the Supreme Court Judgment in the case of Investment Ltd. Vs. Commissioner of Income Tax, Calcutta, , wherein it has been held "tax payer is free to employ, for the purpose of this trade his own method of keeping accounts and for that purpose to value his stock in trade either at cost or market price". The reliance is also place on Supreme Court Judgment in the case of CIT vs. A. Krishana Sawamy Mudiliar reported in 53 (ITR) 132 wherein it has been held "if there is a system of accounting regularly employed and by appropriate adjustment by the account maintained taxable profit may properly be deducted the ITO has bound to compute the profits in accordance with the method of accounting employed."

So in view of the above facts and legal judgments, the assessee has valued its closing stock properly (viz. lower of cost of market value as per AS-13)."

11. With regard to the undervaluation of the closing stock of MRPL shares held by the petitioner, the petitioner raised the following objections:-

"In this respect, it may be stated that the closing stock of MRPL shares as on 31.03.2005 was 4,00,000 shares and not 4,40,000 shares (the quantity of 4,40,000 shares shown as on 31.03.2005 was typographical error). The assessee is enclosing herewith the full account of MRPL shares showing the opening stock, MRPL shares purchased and sold during the year; and ledger printout of stock trading account as mentioned in Comtech Software (As maintained by share brokers at that time). As per the inventory details of MRPL, as per software (on which books of accounts was maintained by the assessee) M/s. Ashok Mittal & Co. was having only 4,00,000 share of MRPL as on 31.03.2005 and the same has valued at Rs. 22.10 per share, and the amount of closing stock has been worked out at Rs. 88,40,000/-. The details furnished during assessment proceedings the amount of closing stock of MRPL shares has been shown at Rs. 88,40,000/- while the quantity was wrongly shown at 4,40,000 instead of 4,00,000 shares, (due to clerical error) hence the amount of value of closing stock was wrongly worked at

Rs. 20.01 per shares (i.e. Rs. 88,40,000/- divided by 4,40,000 (No. of shares). The amount of closing stock of MRL has been correctly shown at Rs. 88,40,000/- following the method of valuation viz. "cost price or market price whichever is lower"). The quantity of closing stock of MRPL as on 31.03.2005 can be seen from the DMAT statement, wherein quantity of MRPL has been shown as 4,00,000 shares. (Copy of DMAT statement is annexed).

From the above facts, it can be seen that the amount of closing stock of MRPL has been properly valued by the assessee and it is only due to clerical error the quantity of MRPL shares as on 31.03.2005 was wrongly shown at 4,40,000 shares instead of 4,00,000 shares, hence your proposal to reassess the income of the assessee due to the above clerical error is against law and the facts of the case."

12. With regard to the accommodation entries allegedly taken by the petitioner from companies run by Mukesh Choksi, the petitioner raised the following objections:-

"In this respect, it may be stated that as per the list of companies (as prescribed by you in Annexure "A" viz. reason for initiating proceedings u/s. 148 of Income TAX Act) the names of certain companies have been stated viz. "Mahasagar Securities Pvt. Ltd.", "Alliance Intermediaries & Network Pvt. Ltd.", "Mihar Agencies Pvt. Ltd." and "Gold Star Finevest Pvt. Ltd.". In this respect, it is to state that the assessee or M/s. Ashok Mittal & Co. of which assessee is sole proprietor, has not undertaken any share dealing transactions with any of the above mentioned companies or any other company run and controlled by Mr. Mukesh Choksi in A.Y. 2005-2006, hence the question of receiving any accommodation entry from any of the above mentioned companies or any other company managed and controlled by Mr. Mukesh Choksi, in this year is factually wrong.

Moreover during the course of original assessment proceedings all records including books of accounts, contact notes, purchase/sale invoices relating to purchase and sale of shares by Ashok Mittal & Co. were duly produced for examination and were fully considered by the DCIT while framing the original assessment order for this year.....It may be stated that in your above reply dated 20.12.2012 the details of alleged transactions to the tune of Rs. 3,13,07,210/- with Shri Mukesh Manektal Choksi's companies have not been furnished, nor the copy of the statement of Shri Mukesh Manektal Choksi has been supplied, wherein he has stated the name of "M/s. Ashok Mittal & Co." and having any accommodation transactions with it and any of its associates concerns no particulars of alleged payment received/made by Mukesh Manektal Choksi have been supplied. Moreover the nature of alleged accommodation entries have also not been stated in the reasons recorded by you viz. whether it is in the form of share application money; short term/long term capital gain/loss etc. etc.

As stated in the above paragraph the assessee is a sole proprietor of "Ashok Mittal & Co." which was dealing in shares and all the purchases and sales are properly recorded in the books of M/s. Ashok Mittal & Co. and are supported by proper share brokers contract notes; invoices/bills and these books were examined by the DCIT while framing assessment u/s. 143(3) of the Income Tax Act."

13. By the order dated 28.01.2013, the objections of the petitioner to the reopening of assessment have been rejected. The perusal of the order shows that the Assistant Commissioner of Income Tax has very cryptically dealt with the objections raised by the petitioner. The order does not deal with any of the objections raised and merely reiterates the reasons. The rationale given for rejecting the objections is that the proceedings under Section 147 to reopen the case are initiated only when the Assessing Officer has reason to believe that there is an omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

14. This reasoning per se is fallacious. When objections are raised to the notice under Section 148 seeking to reopen the assessment, the Assessing Officer has to deal with the objections on merits following the principles governing reassessment as settled by various judicial pronouncements. The Assessing Officer cannot brush aside the objections merely with a statement that proceedings are only initiated when Assessing Officer has reasons to believe that there is an escapement of income. The objections have to be objectively considered and dealt with and cannot be merely noted but not addressed. It is the very formation of an opinion that is challenged by way of objections. The challenge cannot be brushed aside cryptically. Application of mind should be apparent.

15. The second reason for rejecting the objection given is that the explanation rendered by the petitioner would be looked into during the course of the assessment proceedings. There is a difference between recording of reasons to believe and reassessment order. Reopening is permissible on foundation of prima facie belief but the fact alleged or the reason propounded must have some basis and should not be mere surmise, gossip or rumour.

16. With regard to the objections raised by the petitioner that this was a case of change of opinion based solely on audit objection, the impugned order records that it is nowhere mentioned in the reasons for reopening of the case that it is on the basis of the audit objection.

17. Comparison of the reason to believe communicated vide letter dated 05.09.2012 and the audit memo dated 31.03.2008 shows that the reasons are verbatim copy of the audit memo. The reasons to believe reproduce the audit memo. First two reasons to believe are based on the audit objections.

18. With regard to the third objection pertaining to accommodation entries taken from Mukesh Choksi and his related/controlled companies, the petitioner had

specifically objected stating that the petitioner had no transaction whatsoever with either Mukesh Choksi or any of the related/controlled companies as mentioned in the reasons to believe. The Assessing Officer has merely mentioned that in the list provided it was stated that the petitioner had taken accommodation entries from these companies. Neither any information or details were revealed to the petitioner at the time when the petitioner had sought for these details nor was any reference to the same made in the impugned order.

19. Recently in the case of M/s. SMCC Construction India Ltd. vs. Assistant Commissioner of Income Tax, W.P. (C) 2250/2012 in order dated 23.08.2013, we have held as under:-

"The words "reason to believe" indicate that the belief must be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence and not on mere suspicion, gossip or rumour. The reason to believe recorded do not refer to any material that came to the knowledge of the Assessing Officer whereby it can be inferred that the Assessing Officer could have formed a reasonable belief that the expenditure referred to had not crystallized during the relevant year. The reasons to believe recorded that income has escaped assessment are not based on any direct or circumstantial evidence and are in the realm of mere suspicion. The requirement of law is "reason to believe" and not "reason to suspect". In the present case Since the reasons to believe recorded indicate that the Assessing Officer has acted on mere surmise, without any rationale basis, the action of reopening of the Assessment is thus clearly contrary to law and unsustainable."

20. With regard to the valuation of closing stock, we notice that the reason recorded is that the assessee had submitted the valuation of stock at cost or market price, whichever is lower. The perusal of the balance sheet as on 31.03.2005 clearly shows that the petitioner has shown stock-in-trade (shares) and there is an endorsement under the entry as "valued at cost or market price, whichever is lower and certified by the proprietor". The noting in the balance sheet that the shares are valued at cost or market price whichever is lower clearly shows that the petitioner has made true and full disclosure of the manner of valuation. Since there is true and full disclosure which has been accepted by the Assessing Officer while framing the original assessment. This is also a case of change of opinion based on audit objection.

21. The relevant assessment year in the present case is 2005-06. Notice under Section 148 has been issued on 29.03.2012 i.e. after the expiry of 4 years from the end of the relevant assessment year. In terms of proviso to Section 147, the reassessment notice issued after the expiry of four years from the end of the assessment year has to satisfy the requirements of the said proviso i.e. the Assessee has failed to disclose fully and truly all material facts necessary for his assessment for that year.

22. The contention of the petitioner is that there is full and true disclosure of all

material facts and the notice seeking to reopen the assessment is barred and invalid and the reassessment proceedings have been initiated merely on the basis of change of opinion based on the audit objections.

23. The petitioner was dealing in shares and securities which were held as stock-in-trade and have been valued at cost or market price, whichever was lower. This factum is clearly disclosed in the accounts and the Assessing Officer had accepted the said position while framing the original assessment. There appears to be an intensive examination in the first instance in respect of the said issues which are now sought to be made the basis for reopening of the assessment. There has to be some material or basis existing on record for formation of belief that the shares were held as investment. Only then there would be a nexus to the formation of belief that income had escaped assessment. It is also not a case where fresh tangible material has come to the knowledge of the Assessing Officer. The Assessing Officer, at the time of original assessment, clearly formed an opinion. Thus notice under Section 148 seeking to reopen the assessment for the first reason is clearly an instance of change of opinion, which is impermissible in law. There is true and complete disclosure of the method of valuation in the balance sheet. The issue was examined in the first round. The assessing officer has merely intended to revisit the said concluded assessment and it is a clear case of change of opinion which is not permissible in law.

24. With regard to valuation of closing stock of shares of MRPL, the stand of the petitioner is that the total number of shares held by the petitioner is 4,00,000 and inadvertently, on account of a typographical clerical mistake, the number of shares has been shown as 4,40,000. The total investment is of Rs. 88,40,000. As per the petitioner the number of share held are 4,00,000 but inadvertently they have been shown as 4,40,000. For 4,00,000 the value per share is Rs. 22.10 and at 4,40,000 the value per share comes to Rs. 20.09. The total value of closing stock of Rs. 88,40,000/- remained the same. There is no purchase of 40,000 additional shares. The issue with regard to the clerical mistake had been raised by the petitioner in the objections. However, the Assessing Officer while dealing with the objections had not even adverted to this aspect and had not dealt with the issue as to how there is an escapement of income when the valuation is completely revenue neutral and the number of shares actually held by the petitioner as claimed are 4,00,000 and not 4,40,000. The record reveals that the Assessee in letters dated 14.07.2008 and 15.07.2008 in reply to the Audit Objections, had confirmed that the shares of M/s. MRPL were 4,40,000 and were valued at Rs. 20.09 per share being the lower of cost price and market price. This aspect has neither been noticed nor dealt with by the Assessing Officer while dealing with the objections raised by the Assessee.

25. With regard to the third aspect of accommodation entries allegedly taken by the petitioner from the company run by Mukesh Choksi, the petitioner has categorically taken an objection that he had no transaction whatsoever with either Mukesh Choksi or any of his companies. The Assessing Officer has not

dealt with this objection or adverted to this factum in the impugned order. Apart from relying on the statement of Mukesh Choksi, there is no other evidence or material pointed out or referred to by the Assessing Officer while rejecting the objections. But what was stated and how the petitioner was implicated is not adverted to. At this stage no detailed discussion or elucidation is required. The prima facie or tentative view must have some basis or foundation to support and justify in depth and detailed inquiry. This should be indicated and pointed out. Despite the petitioner seeking for details of the transactions, with categorical denial that there were transactions inter se, the Assessing Officer has neither referred to material/ground nor referred to any such transaction in the impugned order. When a fundamental factual dispute was raised that the petitioner had no transaction whatsoever with Mukesh Choksi or his related/controlled companies, it was in the factual matrix of the present case, necessary for the Assessing Officer to at least refer to or rely on either the statement of Mukesh Choksi specifically naming the petitioner or giving some basis for formation of the said belief or describe and hint at details of the transaction that had come to the knowledge or notice of the Assessing Officer. The material or evidence which gave reason to the Assessing Officer to believe that there is an escapement of income should be indicated. There has to be a material or evidence existing on record for the reasons to believe which should have a direct nexus to the formation of such belief.

26. The record further reveals that the Assessing Officer had received information, material and documents from the Mumbai Commissionerate. However the same is also not adverted or referred to by the Assessing Officer while disposing of the objections raised by the Assessee.

27. In the aforesaid factual position, it was necessary for the Assessing Officer to deal with the said two objections raised and return a finding. The perusal of the order shows that the Assistant Commissioner of Income Tax has very cryptically dealt with the objections raised by the petitioner. The order does not deal with any of the objections raised and merely reproduces the reasons. When objections are raised to the notice under Section 148 seeking to reopen the assessment, the Assessing Officer has to deal with the objections on merits following the principles governing reassessment as settled by various judicial pronouncements. The Assessing Officer cannot brush aside the objections merely with a statement that proceedings are only initiated when Assessing Officer has reasons to believe that there is an escapement of income. The objections have to be objectively considered and dealt with and cannot be merely noted but not addressed. Reasoned order is mandated and required. It was the very formation of an opinion that is challenged by way of objections. The challenge cannot be brushed aside cryptically. Application of mind should be apparent and has to be dealt with and answered.

28. In GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, the Supreme Court after due deliberation has prescribed procedure when an

assessee objects initiation of reassessment proceedings. The assessee is required to file objections by a speaking order. Speaking Order means a reasoned order, which deals with the contentions and the issues raised keeping in mind the law on the subject relating to notices under section 147/148 of the Act. In the present case, objections have not been disposed of as per the said mandate, as the Assessing Officer instead of dealing with the objections and rejecting or accepting them, has not dealt with them but has adopted obscurantist attitude though he was obliged to deal with the objections and not obscure them.

29. In view of the aforesaid position, we are of the considered opinion that the reassessment notice is not sustainable on the issue of valuation of closing stock. However on the issue of valuation of closing stock of M/s. MRPL Ltd. and taking of accommodation entries, we felt that since the impugned order is cryptic and does not deal with the objections raised, we are of the opinion that the same needs to be relooked by the Assessing Officer in the light of what has been held by us herein.

30. In view of the above, the writ petition is partly allowed and an order of remand is passed, remanding the matter to the Assessing Officer to re-examine the issue of reopening on the ground of valuation of closing stock of M/s. MRPL Ltd. and taking of accommodation entries. The impugned order dated 28.01.2013 is set aside and an order of remit is passed in the above terms. There shall be no order as to costs.