

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B': NEW DELHI**

**BEFORE,
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.7679/Del/2019
(ASSESSMENT YEAR 2010-11)**

M/s. Gulshan Investment Co. Ltd. 11, Babar Lane Bangali Market New Delhi-110 001 PAN-AACCG 0597R (Appellant)	Vs.	Income Tax Officer Ward-10(4) New Delhi (Respondent)
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Appellant by	Mr. Sashi Tulsian and Mrs.Parnashree Banerjee, Advs.
Respondent by	Ms. Maimum Alam, Sr. DR

Date of Hearing	25/04/2023
Date of Pronouncement	16 /05/2023

ORDER

PER M. BALAGANESH AM:

This appeal of the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals)-4, New Delhi, [hereinafter referred to as 'Ld. CIT(A)'] in Appeal No.CIT(A), Delhi-452/17-18/CIT(A)-4 dated 31/07/2019 against the order passed

by Income Tax Officer, Ward-10(4), New Delhi (hereinafter referred to as the 'Ld. AO') u/s 143(3) of the Income Tax Act,1961 (hereinafter referred to as 'the Act') on 31/12/2017 for the Assessment Year 2010-11.

2. We find that the assessee has challenged the validity of assumption of jurisdiction u/s 147 of the Act by the Ld. AO vide revised grounds 1 and 2 thereon before us. We deem it fit to address this preliminary ground first.

3. We have heard the rival submissions and perused the materials available on record. The assessee is a registered Non-Banking Finance Company ('NBFC') and is engaged in the business of purchase and sale of shares, securities, commodities and mutual funds, trading in derivatives, future & option and also derivative of commodities in commodity exchanges. The return of income for AY 2010-11 was filed by the assessee company on 13/10/2010 declaring loss of Rs.18,43,753/-. The Original assessment was completed u/s 143(3) of the Act determining the total income of the assessee at Rs.26,26,406/-. Before completing the assessment, the Ld. AO had issued a questionnaire together with notice u/s 142(1)

of the Act dated 08/01/2013 calling for details of income from operations during the year under consideration and also directing the assessee to explain the speculation loss as shown thereon together supporting details. In this regard, the assessee, vide reply dated 21/01/2013 submitted the details of commodity trading loss (Net) of Rs.42,47,083/- as under:

Name of Broker	Profit/Loss in Commodity
Global Commodities Pvt. Ltd.	-17,66,290.51
Smart Commodity Broker Pvt. Ltd.	93,39,115.01
R.K. Commodities Services Pvt. Ltd.	1,78,32,070.79
Shanti Vijay Investments Pvt. Ltd.	-29,65,19,78.29
Net Profit/Loss As per Balance Sheet	-4247083.00

The assessee further submitted that the above said loss from commodity trading of Rs.42,47,083/- was adjusted against speculation profit of Rs.24,03,330/- to arrive at the net loss from the speculative business of Rs.18,43,753/- which was the returned loss effectively. The Ld. AO after taking into consideration all these details and after due examination of details furnished by the assessee together with supporting documents, had framed the assessment u/s 143(3) of the Act determining total income at Rs.26,26,406/- on 26/02/2013. In the said assessment, the Ld. AO had determined this speculation loss at Rs.80,41,538/- and adjusted

the same with speculation profit of Rs.24,03,330/- and net speculation loss of Rs.56,38,208/- was arrived which was carried forward to next year. Apart from this, the Ld. AO made disallowance u/s 14A of the Act in the sum of Rs.9,91,240/- in the original assessment completed u/s 143(3) of the Act.

4. Subsequently, based on information received from the Investigation Wing, Kolkata, according to which certain entities were identified to be involved in facilitating bogus loss or profit to other real beneficiaries based on Forward Marketing Commission (FMC) report that members of National Multi Commodity Exchange (NMCE) were found to be involved in creating artificial volume and suspected evasion of Income Tax, the AO initiated reassessment proceeding u/s 147 of the Act alleging that the assessee company is one of the beneficiary of accommodation entries obtained by allegedly routing through the NMCE and has earned contrived profit of Rs.1,79,21,950/-. In the opinion of the Ld. AO, this profit is nothing but accommodation entries obtained through alleged sub-brokers namely M/s. Advent Commodities Pvt. Ltd., Anjani Textile, Shri Hemant Sarawagi, M/s Mahavir Synthetics and M/s. Proficient Commodities Pvt. Limited. The reasons recorded by the Ld. AO for

the purpose of reopening the assessment are enclosed in page 17 to 20 of the PB which reads as under:

*“To,
The Principal Officer
M/s Gulshan Investment Company Limited
11, Babar Lane, Bengali Market
New Delhi-110 001*

Subject:- Request for providing reasons recorded for initiating proceedings u/s 148 of the I.T. Act, in the case of M/s Gulshan Investment Company Limited for A.Y. 2010-11-regarding.

With reference to the notice u/s 148 of the I.T. Act, dated 31.03.2017 issued to you for A.Y.2010-11, please refer to your letter dated 20.04.2017 filed in this office on 21.04.2017. In this letter you have stated that income tax return filed vide ack.No.170172121121010 on 30.10.2010 be treated as filed in response to the notice u/s 148 of the I.T. Act.

You have further requested to provide reasons recorded for initiation of assessment proceedings u/s 147 of the I.T. Act. The reasons recorded are as under:

“The assessee filed its return of income on 13.10.2010 for the assessment year 2010-11 declaring Nil Income (rather loss of Rs.18,43,753/-). The assessment u/s 143(3) was completed by DCIT, Circle-6, Kolkata vide order dated 26.02.2013 at an income of Rs.26,26,406/- after adjusting brought forwarded losses of Rs.30,98,495/-

1. Based on the Forwards Market Commission (FMC) report that “clients/members of NMCE were found to be involved in creating artificial volume and suspected evasion of Income Tax by misuse of NMCE platform” a focused survey action u/s 133A of the IT Act was conducted by Pr. Director of Income Tax (Investigation), Ahmedabad at the premises of NMCE and backup of the NMCE trade was taken. After analysis of this data, 85 entities was identified who had looked contrived losses in excess for Rs.10 Crores and information was shared with concerned Director General of Income Tax (Inv.) Out of 85 such entities, 50 entities were in the jurisdiction of the office of DCIT(Inv.). Kolkata, the O/o Pr. DIT(Inv.), Kolkata on the basis of investigation carried out, found that most of the entities who had booked bogus loss are dummy entities who have facilitated bogus loss or profit to other real beneficiaries.

2. The modus operandi involved as informed by the operators is:-

The income/profit and loss in the form of commodity are mainly generated through the trading at approved Commodity Exchanges. For this two membership are required in one membership losses are generated and the other membership profits are generated. This is done through trading in commodities like lead, zinc etc.

The parties who require profit give us cash and we bring this cash through bank in the account of membership in which losses are to be generated and the same is given as margin to the exchange and when the trade is completed the next day exchange make payment in the account of profit taking membership and from there we give cheques or RTGS or NE FT to the parties who gave us the cash.

In the case of commodity loss the party given in the account of membership and we give them cash in return after deducting out commission which we receive from the parties who taken commodity profit. When we get parties who want loss generated and profit generated simultaneously, cash from profit taking party is routed to loss taking party and here there is no involvement of cash deposit in the bank.

The cash which is taken from parties are routed through various individual/proprietorship accounts through various sources the market.

3. On the basis of investigation carried out by the office of Pr. DIT (Inv.), it has informed that the following transactions entered into by M/s Investment Company Limited during the period relevant to AY.2010-11 are bogus fictitious transaction

NAME OF CLIENT	PAN	TOTAL BUYING	TOTAL SELLING	AMOUNT DEFFERENCE	P/L BOOKED	F. Y.	SUB BROKER(LODOGED FILE)
GULSHAN INVESTMENT COMPANY LIMITED	AACCG0597R	4973250	5/52800	179550	PROFIT	2009-2010	Advent Commodates
GULSHAN INVESTMENT COMPANY LIMITED	AACCG0597R	26466650	27317451)	850800	PROFIT	2009*2010	Anjam Textile
GULSHAN INVESTMENT COMPANY LIMITED	AACCG0S97R	186473550	193929850	7456300	PROFIT	2009-2010	Foirdeal Finance Pvt. Ltd.
GULSHAN INVESTMENT COMPANY LIMITED	AACCG0597R	157107750	163398650	6290900	PROFIT	2009-20)0	Hemant Saraosii
GULSHAN INVESTMENT COMPANY LIMITED	AACCG0597R	72836300	75743500	2907200	PROFIT	2009-2010	Mahtbir Synthetic.
GULSHAN INVESTMENT COMPANY LIMITED	AACCG0S97R	6173050	6610250	237200	PROFIT	2009-201C	Proficient

4. The Office of Pr. DIT(Inv.) Kolkata on the basis of its investigation has concluded that M/s Advent Commodities Pvt. Ltd, Anjani Textile Proprietorship concern of Shri Swapan Kumar Roy [AOBPR4855D], M/s

Fairdeal Vincom Pvt. Ltd, Shri Hemant Sarawagi [AMVPS8048K], M/s Mahbvir Synthetics Proprietorship concern of Shri Vijay Kumar [BBAPK6168F]], M/s. Proficient Commodities Pvt. Ltd.[AADCP 7843A],

Name of R.K. Commodities do not appear in the information provided by the Inv. Wing neither were they held to be a party accommodating entries for us.

are involved in providing accommodation entries to various parties in the form of profit and or loss as desired by them and the transactions entered into by the assessee company with these entities during the period relevant to A.Y.2010-11 are not genuine business transactions and are merely accommodation entries which has been routed through NMCE by colluding with the Brokers/Members of NMCE to make them appear genuine.

5. The assessee company has reportedly taken accommodation entries to the tune 1,79,21,950/-from various parties mentioned above.

6. A notice u/s 133(6) was issued to the assessee company on 28.03.2017 after taking approval of the Pr. CIT-4, New Delhi whereby the assessee was required to furnish the following information:-

1. Detailed note in respect of all sources of income during the period relevant to A.Y. 2010-11.

2. Copy of audited balance sheet including P&L account, all the schedules and audit report in Form 3CD for A. Y. 2010-11.

3. Please inform whether you have made any transactions 'National Multi Commodity Exchange 'during the period relevant to A.Y. 2010-11.

4. If yes, in response to question no. 3 above please give details of the resultant profit / loss arising through such transactions.

5. Please provide copy of account of such brokers sub brokers/ parties through/with whom transactions were made on 'National Multi Commodity Exchange' during the period relevant to A.Y. 2010-11.

7. The assessee company filed its reply vide letter, dated 29,03.2017 wherein it has informed that during the period relevant to A,Y. 2010-11 made transactions through/with 'National Multi Commodity Exchange' and has earned profit of Rs.1,78,32,070/- from trading of commodity derivatives transactions during this period. It has filed copy of account of

M/s R.K. Commodities Pvt. Ltd. through/with whom transactions were made during the A.Y. 2010-11. A perusal of the copy of accounts shows that the assessee company started transactions on 17. 09.2009 and has earned profit through 'Difference Commodities diff MTM credits

8. As per the information provided by the assessee company it appears that it has not made transactions through the companies / parties appearing in the information received from the office of DDIT(Inv) Unit-3(1),Kolkala vide letter dated 17.03.2017. In view of the information available in this office I have reason to believe that profit / income to the tune of the Rs. 1,79,21,950/- taken from the parties mentioned above has escaped assessment within the meaning of provisions contained in section 147 of the Act as the-assessee company has not declared its affairs correctly in the return filed by it.

9. In view of the material placed on record in the form of information received from DIT (Investigation), Kolkata and facts mentioned above, I have reason to believe that assessee has taken accommodation entries resulting into profit of Rs.1,79,21.950/- which has escaped assessment. Accordingly, in order to bring to tax the income amounting to Rs.1,79,21,950/- assessment for the A.Y.2010-11 is proposed to be reopened u/s 147 of the I.T. Act.

10. The case pertains to a period beyond four years from the end of relevant assessment years at the time of issue of notice, necessary sanction is solicited from Pr. Commissioner of Income Tax-4, New Delhi, in view of the amended provisions of section 151 w.e.f.01.06.2015.

*(Anil Gandhi)
Deputy Commissioner of Income-tax
Circle-10(2), New Delhi”*

5. Notice u/s 148 of the Act was issued on 31.03.2017 to the assessee. The copy of the reasons were also communicated to the assessee, pursuant to which the assessee filed objections vide letter dated 19/05/2017, stating that the reasons recorded was nothing but a case of change of opinion in the absence of any new information or material which has come into the possession of the

Ld. AO to form a reasonable belief that income of the assessee had escaped assessment within the meaning of section 147 of the Act. The Ld. AO disposed of this objection vide independent order dated 30/08/2017 dismissing the objections. Thereafter, the reassessment proceedings were proceeded with by issuing notices u/s 143(2) and 142(1) of the Act. The Ld. AO dismissing the entire submissions of the assessee proceeded to make addition u/s 68 of the Act in respect of profit derived from derivative transactions in the sum of Rs.1,79,21,950/- by treating it as accommodation entries. This action of the Ld. AO was upheld by the Ld. CIT(A).

6. It would be pertinent to understand the chronology of events that had occurred before the initiation of reassessment proceedings in this case. After obtaining the information from the Kolkata Investigation Wing, the Ld. AO issued notice u/s 133(6) of the Act dated 28/03/2017 calling for the following details, enclosed in page 13 of the Paper Book, which is reproduced as under:

“

1. *Detailed note in respect of all sources of income during the period relevant to A.Y.2010-11.*
2. *Copy of audited balance sheet including P&L account, all the schedules and audit report in Form 3CD for A.Y.2010-11.*

3. Please inform whether you have made any transactions through/with 'National Multi Commodity Exchange' during the period the period relevant to A.Y.2010-11.
4. If yes, in response to question no.3 above please give details of the resultant profit/loss arising through such transactions.
5. Please provide copy of account of all such brokers/sub brokers/parties through/with whom transactions were made on 'National Multi Commodity Exchange' during the period relevant to A.Y.2010-11. ”

7. The assessee had responded to this notice u/s 133(6) of the Act vide its letter dated 29/03/2017 by furnishing the entire requisite details and also enclosing the copy of the account of the broker through whom the transactions were made by the assessee on National Multi Commodity Exchange (NMCE). The reply given by the assessee in this regard as under:

To,
The Deputy Commissioner of Income Tax,
Circle-10(2), C.R. Building,
New Delhi

Ref: Information U/s 133 (6) of the I.T, Act. 1961 for the Assessment Year 2010-2011

Sub: Submission

"Dear Sir,

With regard to the information U/s 133(6) of the Act, as desired by your good self, we are submitting herewith the following documents and submission for your kind perusal, reference and consideration:-

1. The Detailed note in respect of all sources of Income for the Asst. Year 2010 -2011 is enclosed herewith.
2. The Copy of audited Balance Sheet including P&L account, all schedules along with audit report and copy of 3CD for the A. Y. 2010-2011 are enclosed.

3. Yes, we have made transactions in National Multi Commodity Exchange during the F. Y. 2009-2010.
4. The Profit of Rs. 17832070.79 arose from those transactions.
5. The copy of account of the broker to whom transaction were made on the National Multi Commodity Exchange is Enclosed.
6. Apart from the National Multi Commodity Exchange we have also traded in other commodity Exchange i.e. Multi Commodity Exchange (MCX) and National commodity Exchange of India (NCDEX), This being the business of the company we also traded in National Stock Exchange of India (NSE) and Bombay Stock Exchange (BSE).
7. We also wish to inform that we have assessed U/s 143(3) of the Act for the Asst. Year 2010-11 and the details has been submitted on the time of assessment.
8. The copy of the Assessment order passed U/s 143(3) of the Act is enclosed herewith for your kind Perusal reference and consideration.

We hope your good self shall find above in order and we shall glad to furnish any further information & elucidation as desired.

Thanking You.

Yours Faithfully
For Gulshan Investment Company Ltd.
(Director/Authorised Signatory)

8. Thereafter, a notice u/s 148 of the Act dated 31/03/2017 has been issued by the AO. We find that the assessee had categorically stated before the Ld. AO that its broker is M/s. R.K. Commodities Pvt. Ltd. through whom the entire transactions of derivatives were carried out by the assessee. It had categorically stated in the objections to the reasons recorded also that the assessee had not transacted with any of the Sub-brokers mentioned in the reasons. It was also categorically stated that even the assessee's broker i.e., M/s R.K. Commodities Pvt. Ltd. had not made any transaction with those Sub-brokers mentioned in the reasons. The assessee had also

stated that the transactions carried by it in derivatives through its broker M/s R.K. Commodities Pvt. Ltd., the assessee had earned a profit of Rs.1,78,32,070.79 during the year and the same had duly been reflected in Income Tax Return already filed by it. Hence, there was no additional profit earned by the assessee in the sum of Rs.1,79,21,950/- from derivatives as alleged by the Ld. AO in the reasons and that both are one and the same, as the figure reflected by the assessee is exclusive of service tax and brokerage and the figure mentioned in the reasons is inclusive of service tax and brokerage. In our considered opinion, (i) when the factual and legal objections were filed by the assessee, even though the Ld. AO obtains certain information from the Investigation Wing mentioning the name of the assessee as one of the beneficiaries by way of earning contrived profit of Rs.1,79,21,950/-, it is bounden duty of the Ld. AO to atleast verify the transactions from the return filed by the assessee as to whether the said sum has already been disclosed by the assessee in the return. This preliminary verification of the facts from the Income Tax Return of the assessee would have enabled the Ld. AO to accept the contentions of the assessee that income is already offered to tax. In the instant case, this

preliminary verification also was not even carried out by the Ld. AO. Even though as stated earlier, the information received from the Investigation Wing would constitute fresh material in the hands of the Ld.AO, the same would only become 'reason to suspect' not 'reason to believe' that income of the assessee has escaped assessment. The Ld. AO is duty bound to examine the return of the assessee, details filed during original assessment proceedings and its supporting documents of the assessee which are part of the assessment folder to examine as to whether this figure was disclosed in the return thereon. We find that the Ld.AO in the instant case was carried away by the information received from the Investigation Wing and considered the same as sacrosanct. Hence in our considered opinion, the Ld. AO did not have any information which had a live link to form a belief that income of the assessee escaped assessment warranting reopening within the meaning of section 147 of the Act. Instead the Ld. AO had only reason to suspect. His suspicion could have been solved by making preliminary verification of the return of the assessee which was not done. Ultimately, in the reassessment proceedings the very same sum has been made in the hands of the assessee which leads to

double addition of the very same transactions in the hands of the assessee. This fact goes clearly to prove that the Ld. AO had not applied his own mind at all while framing his mind while recording the reasons that income of the assessee has escaped assessment.

9. From the bare perusal of the reasons recorded by the Ld. AO, we find that the Ld. AO had recorded the reply given by the assessee in response to notice u/s 133(6) of the Act on 29.03.2017 wherein it had furnished the entire details of transactions in derivatives carried out through its broker M/s R.K. Commodities Pvt. Ltd. The ld. AO only concludes that the assessee had denied having any transactions in derivatives with the sub-brokers and directly without any live link and without any cogent reason, the Ld. AO concludes that based on the information from investigation wing, he has reason to believe that income of the assessee has escaped assessment. This is a classic case for initiating reassessment proceedings based on vague information received from Investigation Wing, Kolkata without making even the preliminary examination on the content of the information.

10. In the instant case, we find that assessment originally has been completed for AY 2010-11 u/s 143(3) of the Act on 26.02.2013. The notice u/s 148 of the Act is issued on 31.03.2017. Hence, the notice u/s 148 of the Act is issued beyond four years from the end of the relevant assessment year. Hence, the proviso u/s 147 of the Act would come into operation. We find that the ld. AO in the reasons has made a very general observation in para-8 that assessee company had not declared its affairs correctly in the return filed by it. When the assessee had denied having any transactions with the Sub-brokers listed in the reasons and in view of the fact that assessee had already disclosed that profit earned from derivatives transactions carried out through M/s R.K. Commodities Pvt. Ltd. in the original return filed and assessed already u/s 143(3) of the Act, how can thereby any failure on the part of the assessee to disclose fully and truly all material facts that are relevant for the purposes of framing the assessment. How can the assessee be expected to prove the negative ? The assessee could be expected to give explanation for the transactions carried out by it. It could not be expected to give explanation for the transactions

not carried out by it, merely because some information had already been received by the Ld. AO from the Investigation Wing, Kolkata.

11. We also find that the Ld. AO in the original scrutiny assessment proceedings had examined the entire transactions of commodity / derivatives trading during the course of original assessment proceedings itself which is evident from notice u/s 142(1) dated 08/01/2013 enclosed in page 5 of the PB vide question No.10 which read as under:

“(10) Please explain how you would show this speculation loss of Rs.18.43 lacs in your accounts with all supporting documents.”

11.1 The assessee had furnished a reply before the Ld. AO vide letter dated 08.01.2013 by furnishing the complete details of income from operations together with script wise details of shares & securities, trader details along with ledger copies of derivatives and speculation profit. The assessee has also submitted that it had calculated the commodity trading loss (Net) of Rs.42,47,083/- and had adjusted the same with the speculation profit of Rs.24,03,330/- in the return of income and had arrived the net loss of Rs.18,43,753/-. Moreover, in the scrutiny assessment order

framed u/s 143(3) of the Act dated 26/02/2013, the Ld. AO had devoted specific paragraphs vide para 4 to 4.5 in his order by discussing the entire issue of transactions carried out by the assessee in derivatives. In fact, part of the transactions were also treated by the Ld. AO as speculative transactions and the Ld. AO had arrived at the net speculation loss of Rs.56,38,208/- and allowed the same to be carry forward to the next year. These facts which are staring, goes to prove that sufficient enquiries were already made by the Ld. AO on the impugned transactions mentioned in the reasons. Hence, it also tantamount to change of opinion on the part of the Ld. AO for initiating the reassessment proceedings u/s 147 of the Act.

12. To sum up, (a) the reassessment proceedings are initiated based on vague information received from Investigation Wing, Kolkata which only gives reasons to suspect and not reason to believe;

(b) the profit from commodity transactions in the sum of Rs.1,79,21,950/- had already been offered by the assessee in the original return itself;

(c) the assessee had carried out transactions through its broker M/s R.K. Commodities Pvt. Ltd. only and had not carried any transactions with the Sub-brokers mentioned in the reasons recorded. No contrary evidences have been brought on record by the Revenue in this regard either in the reasons recorded, or during the course of assessment proceedings or during the course of arguments before us ;

(d) the reassessment, if sustained, would only lead to double addition in the hands of the assessee.

12.1. Hence, there cannot be reassessment of income warranting reopening u/s 147 of the Act.

13. In view of the aforesaid factual observations, we have no hesitation to quash the reassessment proceedings initiated u/s 147 of the Act, both on law as well as on merits. Accordingly, the reassessment is hereby quashed and grounds raised by the assessee are allowed.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 16th May, 2023.

Sd/-

(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Dated: 16.05.2023

Pk/sps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI