IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.1040/Mum/2022
(**Assessment Year :2012-13**)
&
ITA No.1041/Mum/2022
(**Assessment Year :2015-16**)

M/s. Edelweiss Rural & Corporate Services Pvt. Ltd., (earlier known as M/s. Edelweiss Commodities Services Ltd.,) Edelweiss House Off CST Road Kalina, Santacruz (East) Mumbai	Vs.	ACIT Central Circle-1(2) R.No.906, 9th Floor Pratishtha Bhavan Old CGO Annexure, M.K.Road, Mumbai – 400 020
PAN/GIR No.AAKCS7311R		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Jitendra Jain
Revenue by	Shri Manoj Kumar
Date of Hearing	**01/08/2022**
Date of Pronouncement	**26/08/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

These appeals in ITA No.1040/Mum/2022 & 1041/Mum/2022 for A.Y.2012-13 & 2015-16 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-47, Mumbai in appeal No.CIT(A)-47,

Mumbai/10376/2019-20 & CIT(A)-47, Mumbai/10002/2020-21 respectively dated 15/03/2022 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 & u/s.143(3) r.w.s. 144C respectively of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 07/02/2020 & 19/03/2020 respectively by the ld. Jt. Commissioner of Income Tax, I/c Central Circle- 1(2), Mumbai (hereinafter referred to as ld. AO).

Identical issues are involved in both these appeals and hence, they are taken up together and disposed of by this common order for the sake of convenience.

ITA No.1040/Mum/2022 (A.Y.2012-13) – Assessee Appeal

2. The first ground raised by the assessee is challenging the validity of jurisdiction u/s.147 of the Act by the ld. AO for reopening the assessment.

3. We have heard rival submissions and perused the materials available on record. The primary facts as stated in the assessment order by the ld. AO are that the assessee is engaged in the business of immovable properties as owners, lessors, licensors, developers, builders and caretakers etc., The assessee is also a member /broker of various exchanges and during the previous year, company was engaged in trading, settlement and other activities of commodities exchanges for itself and its clients apart from trading in physical commodities and in derivative instruments. The assessee filed its original return of income for the A.Y.2012-13 on 29/11/2012 declaring total income of Rs.35,43,40,796/-, which was later revised on 31/03/2014 declaring total income of Rs.32,38,18,010/-. The assessment was completed u/s.143(3)

of the Act on 28/03/2016 determining total income at Rs.55,73,37,763/-. A survey action u/s.133A of the Act was carried out on the assessee along with its associated companies on 29/12/2015 by the Investigation Wing, New Delhi, pursuant to which, the case of the assessee has been centralized vide order of the Learned Principal Commissioner of Income Tax (ld. PCIT in short) u/s.127(2) of the Act dated 26/07/2016. Pursuant to the findings of the survey u/s.133A of the Act, the case of the assessee was reopened u/s. 147 of the Act after recording the following reasons:-

"Return of Income declaring total income of Rs.35,43,40,796/- was filed by the Assessee Company on 29.11.2012, which was revised on 31.03.2014 showing income at Rs.32,38,010/-. The same was duly processed u/s 143(1) of the Income Tax Act, 1961. Subsequently the case was picked up for scrutiny and assessment was finalized u/s 143(3) r.w.s. 144C(1) of the Income Tax Act, 1961, by the then Assessing Officer on 28.03.2016, assessing the income at Rs.13,82,75,577/-.

Survey Action u/s 133A of the Income Tax Act, 1961, was conducted in this case on 29.12.2015, by the Investigation Wing, New Delhi. The Investigation Wing has given its findings in the Appraisal Report, in respect of the Assessee Company under discussion, which in nutshell is as under

As per the findings of the Investigation Wing, the Edelweiss Group of Companies, comprising of M/s Edelweiss Commodities Services Limited, amongst others have indulged in large scale hoarding and manipulation of essential commodities causing unprecedented rise in the prices of pulses in the Country during 2015. The Assessee Company was one of the members of a cartel formed, which were carrying out such unscrupulous acts of hoarding. Information gathered by the Investigation Wing, revealed that some of the major commodity dealers/traders having global presence as well as in the domestic market, created a monopolistic condition by procuring and hoarding stocks of pulses, both nationally and globally. They rigged domestic market rates to an unprecedented level and thereafter offloaded their stock; which were procured at low rate. The inordinate profit earned in this manner was not offered to tax in India and was either siphoned off abroad or suppressed by introducing entry operators. The findings of the Investigation Wing regarding the Assessee Company's activities in brief as under

a) Edelweiss is a leading player in Commodity, Currency and Stock markets both in India and abroad. It has NBFCs in its group. Group owns a no. of

subsidiaries in foreign countries mostly tax havens viz. Mauritius, Dubai, Singapore, Cyprus etc.

b) Edelweiss group routed its imports through overseas subsidiaries to siphon off money abroad which was utilized for trading in overseas exchanges. It was also instrumental in manipulating prices of Chana & Castor on NCDEX. Chana prices se bench mark for other pulses in the market.

c) Aster DMCC Dubai is an Associate Concern i.e. Subsidiary of Edelweiss Commodities Services Limited, as under defined u/s 92A of the Income Tax Act, 1961, which is evident from the Audit Report u/s 92E of the Income Tax Act, 1961, in Form 3CEB.

d) Aster DMCC Dubai was used by the Assessee Company to over-invoice import of Pulses and reducing the profits in India, and thereby evading payment of Tax.

e) The aforementioned finding of the Investigation Wing gets further corroborated by the fact that Aster DMCC merely issued back to back bills to Edelweiss Commodities Services Limited India after enhancing the rates. The goods were shipped directly from port of origin to India whereas bills were routed through Dubai.

f) To this extent, Edelweiss Commodity Services Limited has not only evaded taxes but also indulged in money laundering.

g) Communications retrieved during the course of survey proceedings revealed that Aster DMCC was merely a dummy company created solely for re-invoicing/over invoicing. All imports of pulses were handled by Edelweiss Commodity Services Limited. Aster DMCC was interjected to siphoned-out a part of profit to Dubai.

h) Aster DMCC over-invoiced purchases of Edelweiss Commodity Services Limited by (875-625)/625= 40%

i) As a consequence of the above methodology adopted by Edelweiss Commodity Services Limited, the average rate of inflation of purchase of pulses is estimated to be 10.8%. The Investigation Wing, Delhi, has estimated the addition to Total Income on this account, for various financial years, from F.Y. 2011-12 to F.Y. 2015-16, which stands as under:-

FY	*Amount of purchases from Aster DMCC Dubai*	*%Inflation in purchases @10.8%*
F.Y. 11-12	*141,88,932.68*	*1,53,24,047*
F.Y 12-13	*(*)0*	*0*
F.Y. 13-14	*141,26,30,100*	*15,25,64,050.8*
F.Y.14-15	*1167,48,38,598*	*126,08,82,569*
F.Y.15-16	*298,83,25,619*	*3227,39,166.9*
TOTAL	*1608,99 83,250*	*173,77,18,191*

(*) Figures not available.

The aforementioned information was provided to the Dy.CIT and TPO 2(1)(1), Mumbai, vide letter dated 26.09.2017, before whom the proceeding u/s 92CA of the Income Tax Act, 1961, for A.Y. 2014-15 were in progress. Subsequently the TPO passed an Order u/s 92CA(3) of the Income Tax Act, 1961, on 31.10.2017. Vide this Order the TPO had made variation of Rs.19,15,43,189/-, which includes variation on account of purchase of agri commodities by the assessee company from Aster DMCC for the A.Y. 2014-15.

However, on perusal of the TPO Order passed u/s 92CA(3) of the Income Tax Act, 1961, dated 28.01.2016, for A.Y. 2012-13, it is observed that unlike TPO Order for AY. 2014-15, there is no addition on account of purchases made through Aster Commodities DMCC. During the year under consideration the Assessee Company made purchases of Rs.848,22,63,265/- from M/s Aster Commodities DMCC. Applying the bench-mark of TPO Order for A.Y. 2014-15 u/s 92CA(3) of "the Income Tax Act, 1961, wherein TPO has made variation @ 10.8% of the purchase transactions, coupled with findings of the Investigation Wing, the variation in income on account of transactions with Aster Commodities DMCC for the year under consideration works out to Rs.91.60 crores approximately. Thus it has caused escapement of income on this account to that extent.

Further, the Appraisal Report has unraveled notable surreptitious and convoluted transactions of the Assessee Company, inter-alia indicating price-rigging of pulses and agri-products by colluding Iwith other associate concerns.

The modus-operandi of such malicious scheme has been touched upon in the Appraisal Report. Broadly stated, it has been indicated that the assessee

company alongwith other players in this business have orchestrated synchronized transactions like purchase and storage of local produce. thereby causing a scarcity of pulses in the market, and simultaneously importing shipments of these agri-produce, and unloading this in the market, after the rates are inflated artificially. It has also been brought out therein that these anomalous profits have been siphoned out of the country by way of over-invoicing the import purchases and also by introducing fictitious expenses. In the backdrop of the above, the undersigned has reason to believe that the income has escaped assessment to the extent of Rs.91.60 crores, within the meaning of Section 147 of the Income Tax Act, 1961.

3.1. Accordingly, notice u/s.148 of the Act was issued on 13/12/2017 by DCIT, Central Circle-1 (1), Mumbai.

3.2. From the perusal of the aforesaid reasons, it is evident that the ld. AO had alleged escapement of income in the hands of the assessee for the A.Y.2012-13 in respect of import of pulses from Aster DMCC, Dubai which had allegedly resulted in over invoice of import of pulses thereby reducing the profits of the assessee in India. This is the main allegation levelled on the assessee in the reasons recorded by the ld. AO. But from the perusal of the final assessment order framed u/s.143(3) r.w.s. 147 of the Act dated 07/02/2020, we find that no disallowance / addition has been made on account of over pricing of import of pulses. The only disallowance made in the re-assessment proceedings was on account of loss of trading in gold jewellery amounting to Rs.30,30,72,108/-. It is not in dispute that the issue of disallowance of loss of trading in gold jewellery was not subject matter of reasons recorded. Hence, it could be safely concluded that the reasons for which the assessment was reopened, no addition was ultimately made by the ld. AO in respect of such issue. Once, no addition has been made for an issue contemplated in the reasons recorded by the ld. AO, then the entire satisfaction of the ld. AO of "reason to believe" and "formation of belief ", within the

meaning of section 147 of the Act, fails. Hence, the re-assessment proceedings deserve to be quashed on this count itself. Reliance in this regard is rightly placed by the ld. AR on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Jet Airways (I) Ltd., reported in 331 ITR 236 (Bom). The relevant operative portion is reproduced hereunder:-

> ***"15.*** *Parliament, when it enacted the Explanation (3) to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd.'s case (supra) and of the Punjab & Haryana High Court in Vipan Khanna's case (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh's case (supra), Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT v. Atlas Cycle Industries [1989] 180 ITR 319[1]. The decision in Atlas Cycle Industries' case (supra) held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries' case (supra) and of the Rajasthan High Court in Shri Ram Singh's case (supra) would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.*
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> ***16.*** *Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment*

was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."

3.3. We further find that the Hon'ble Jurisdictional High Court in the case of PCIT vs. Lark Chemicals (P) Ltd., reported in 99 taxmann.com 311(Bom) had also taken a similar view. The Special Leave Petition (SLP) preferred by the Revenue against this decision before the Hon'ble Supreme Court has been dismissed vide order dated 05/10/2018 by the Hon'ble Supreme Court reported in 259 Taxman 365 (SC). It is trite law that jurisdiction of Section 147 of the Act for the ld. AO is to be tested based on reasons recorded by the ld. AO. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of Hindustan Lever Ltd., vs. ACIT reported in 268 ITR 332 (Bom). The relevant operative portion of the said decision is as under:-

***"20.** The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is*

permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

3.4. It is also pertinent to note that the ld. Transfer Pricing Officer (ld. TPO) did not make any disallowance / addition for A.Y.2012-13 in respect of fresh reference made during re-assessment proceedings with regard to over pricing of import of pulses from the associated enterprises. This fact is evident from the order passed by the ld. TPO u/s. 92CA(3) of the Act dated 31/01/2020 which is enclosed in pages 89 & 90 of the paper book. Though it is a fact on record that for A.Y.2014-15, the ld. TPO had made certain addition on the said transaction vide his order dated 31/10/2017, still he chose not to make any addition in respect of the very same transaction of import of pulses from Aster DMCC, Dubai for A.Y.2012-13 while passing his order on 31/01/2020. These facts collectively go to prove that the entire reasons recorded by the ld. AO for A.Y.2012-13 is

without any basis and is merely decided on suspicion, surmise and conjecture not supported by any tangible material. In any case, as stated earlier, no addition has been made by the ld. AO in the re-assessment proceedings with regard to the issue for assessment has been reopened. Hence, as stated earlier, the very basic premise of the ld. AO that he had reason to believe regarding escapement of income in the hands of the assessee, miserably fails.

3.5. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, the re-assessment is hereby quashed. Since, the entire re-assessment proceedings are quashed, the ground No.2 raised by the assessee challenging the disallowance of loss on trading of jewellery, on merits, need not be adjudicated and it is left open.

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

ITA No.1041/Mum/2022 (A.Y.2015-16) Assessee Appeal:-

5. The first ground raised by the assessee is challenging the validity of jurisdiction u/s.147 of the Act by the ld. AO for reopening the assessment.

6. We have heard rival submissions and perused the materials available on record. The original return of income for the A.Y.2015-16 was filed by the assessee on 29/11/2015 declaring total income of Rs.110,09,98,710/-, which was later revised on 29/03/2017 declaring total income of Rs. 114,60,11,490/-. The assessee also returned book profit of Rs. 74,83,29,466/- u/s.115JB of the Act. Based on the survey conducted u/s.133A of the Act on 29/12/2015, notice u/s. 148 of the Act

was issued to the assessee on 30/12/2017 after recording the reasons for reopening the assessment. The reasons recorded are enclosed in pages 60-62 of the paper book filed before us which are verbatim same with that recorded for A.Y. 2012-13 by the ld. AO. Hence for the sake of brevity, the same are not reproduced again herein. The reference u/s.92CA(1) of the Act was made by the ld. AO to the ld. Transfer Pricing Officer (ld. TPO) for determining the arm's length price in respect of international transaction carried out by the assessee. The ld. TPO passed an order u/s.92CA(3) of the Act dated 31/01/2020 for A.Y.2015-16 wherein he made transfer pricing adjustment in respect of import of goods from Aster DMCC, Dubai in the sum of Rs.33,46,92,911/- by observing that assessee had earned gross profit of 2.36% on sales on the total purchases of Rs.1100,77,16,779/- made from its Associated Enterprises (AE), Aster commodities, as per the special audit report u/s.142(2A) of the Act. Based on this TPO's order, the ld. AO completed the re-assessment u/s.143(3) r.w.s. 147 of the Act on 19/03/2020 wherein the transfer pricing addition in respect of import of goods from Aster DMCC, Dubai amounting to Rs.33,46,92,911/- was made. Apart from this, further disallowances were also made by the ld. AO in the re-assessment proceedings.

6.1. We find that the assessee preferred a rectification petition u/s.154 of the Act before the ld. TPO stating that gross profit percentage on sales has been erroneously considered by the ld. TPO. The assessee submitted that actual gross profit on sales earned by the assessee is 2.58% whereas the ld. TPO had considered the gross profit at 2.36%.The assessee pleaded before the ld. TPO that if the gross profit of 2.58% is considered, then the assessee would be within the (+/-) 3% tolerance band provided in the statute and hence, there would be no requirement for making any

transfer pricing adjustment. The assessee vide its 154 application dated 07/02/2020 duly submitted the complete workings of gross profit margin earned by it on the sales made out of purchases made from Aster before the ld. TPO. The ld. TPO having accepted the revised correct gross profit of 2.58% rectified the transfer pricing adjustment figure at Rs.18,89,29,419/- vide order passed by him u/s.154 r.w.s. 92CA(5) of the Act dated 20/03/2020. It is pertinent to note that in the said rectification order, the ld. TPO did not grant the benefit of (+/-) 3% tolerance band claimed by the assessee. This order is enclosed in pages 85-87 of the paper book.

6.2. We find that assessee filed yet another 154 petition before the ld. TPO on 31/07/2021 seeking for the benefit of (+/-) 3% tolerance band. The assessee gave the complete workings to that effect before the ld. TPO. The assessee pleaded that if the benefit of (+/-) 3% tolerance band is given to it, the transfer pricing adjustment would be 'Nil'. The said plea of the assessee was duly accepted by the ld. TPO after due verification of the workings of the assessee in the rectification order passed by the ld.TPO u/s.154 r.w.s 92CA(5) of the Act dated 24/09/2021.

6.3. Now the primary basis of escapement of income as mentioned in the reasons recorded by the la.AO was on account of over pricing of import of goods from Aster DMCC Dubai. Though the addition of Rs.33.46 Crores was originally made by the ld. AO in the final re-assessment order based on order passed by the ld. TPO u/s.92CA(3) of the Act dated 31/01/2020, ultimately, the ld. TPO had brought the transfer pricing adjustment to Rs. Nil vide its order dated 24/09/2021 for the A.Y.2015-16. Hence, the issue for which reasons were recorded had ultimately not

been added by the ld. AO. Accordingly, the ld. AR argued that the reopening deserves to be quashed.

6.4. Per contra, the ld DR argued that section 154 proceedings were passed by the ld. TPO subsequent to the framing of assessment by the ld. AO and that the subsequent action of the ld. TPO cannot be taken cognizance as far as the validity of assumption of jurisdiction u/s.147 of the Act by the ld. AO.

6.5. To buttress this argument of the ld. DR, we need to address the primary issue as to what is the effect of rectification of mistake u/s.154 of the Act. It is not in dispute that there was an error in the order passed by the ld. TPO on 31/01/2020 while making the transfer pricing adjustment of Rs.33.46 Crores. The said error was ultimately rectified by the ld. TPO pursuant to application of the assessee u/s.154 of the Act wherein the TP adjustment was brought to Rs.'Nil'. The original transfer pricing adjustment made by the ld. TPO was considered by the ld. AO in the final assessment order framed by him on 19/03/2020. Pursuant to the rectification carried out by the ld. TPO by making transfer pricing adjustment of Rs. Nil, it becomes very clear that there was an error in the re-assessment order dated 19/03/2020 framed by the ld. AO. We hold that the order passed u/s.154 of the Act is only to rectify an error that is already prevailing in the previous order. Hence, the rectified order will take effect from the date of original order i.e. in this case, the re-assessment order dated 19/03/2020. Accordingly, it could be safely concluded that in the re-assessment order dated 19/03/2020, the ld. AO could not have made any transfer pricing adjustment and actually not made any transfer pricing adjustment with regard to purchase transactions from Aster DMCC Dubai. Reliance in this regard is placed on

the decision of the Hon'ble Madras High Court in the case of S. Arthanari vs. ITO reported in 83 ITR 828 wherein the Hon'ble High Court by placing reliance on yet another decision of the Hon'ble Madras High Court in the case of Vedantham Raghaviah vs. Third Additional ITO reported in 49 ITR 314 had held –

"once an order of rectification is passed, the assessment itself is modified and what remains is not the order of rectification, but only the assessment as rectified."

6.6. Similar view has also been taken by the Hon'ble Calcutta High Court in the case of Jeewanlal (1929) Ltd., vs. Additional Commissioner of Income Tax & Ors reported in 108 ITR 407 wherein it was held as under:-

> *3. The section gives the Commissioner the power to call for and examine the record of any proceeding under the Act and if he considers that any order passed by the Income-tax Officer, in so far as it is prejudicial to the interest of the revenue, he might after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary pass such order thereon as the circumstances of the case might justify. Therefore, the power that he exercises under the section is a power in respect of the order of the Income-tax Officer. He has no power to rectify the order passed by the Appellate Assistant Commissioner. In this case the question is, whether at the time when the impugned notice was issued the order under section 154 stood by itself as an order of the Income-tax Officer or not. In my opinion section 154, in so far as it rectifies the original order, has the effect of rectifying the original order and, therefore, after the order under section 154 of the Income-tax Act, 1961, was passed the order was the order as rectified by the order under section 154. In support of this proposition reliance may be placed on the observations of the Madras High Court in the case of Vedantham Raghaviah v. Third Addl. Income-tax Officer, Madras [1963] 49 ITR 314 (Mad) and the observations appearing at page 320 of the report. The same view was reiterated by the Madras High Court in the case of S. Arthanari v. First Income-tax Officer, Salem [1972] 83 ITR 828 (Mad). The application of the doctrine of merger, however, depends on the nature of the appellate or revisional order in each case and the scope of the statutory provision conferring*

> *the appellate or revisional jurisdiction. Reliance in this connection may be placed on the observations of the Supreme Court in the case of State of Madras v. Madurai Mills Co. Ltd. [1967] 1 SCR 732, 736 ; 19 STC 144 (SC) and in the case of Commissioner of Income-tax v. Amritlal Bhogilal & Co. [1958] 34 ITR 130 (SC). In the instant case whether the petitioner was a company in which the public were substantially interested or not is a point which could have been the subject-matter of appeal and decision by the Appellate Assistant Commissioner under clause (c) of section 246 of the Income-tax Act, 1961. In the aforesaid view of the matter the order of the Income-tax Officer on this aspect, namely, whether the public were substantially interested in the company, merged in the order of the Appellate Assistant Commissioner. Thereafter, the Commissioner was incompetent to revise the said order. Reliance in this connection may be placed on the observation of Chagla C.J. in the case of Commissioner of Income-tax v. Tejaji Farasram Kharawala [1953] 23 ITR 412, 420 (Bom). If the original assessment order as rectified was the effective and operative order, the same was the subject-matter of appeal before the Appellate Assistant Commissioner and the Appellate Assistant Commissioner having passed the order thereafter, that was the only effective order and the original order had merged in that order. In the premises, in the facts and circumstances of the case, in my opinion, it cannot be said that the Commissioner had jurisdiction to rectify this order. Furthermore, to give the Commissioner power to rectify the order under section 154 in the facts and circumstances of the case would be highly prejudicial to the assessee in this case. The Income-tax Officer originally had held that the assessee was a company in which the public were not substantially interested. That was one of the grounds taken in the appeal. The assessee did not press that ground because before the appeal came up for hearing the Income-tax Officer had rectified that part of the order. If that was the position now, to allow the Income-tax Officer to go back on that position would deprive the assessee of a forum of appeal before the Appellate Assistant Commissioner."*

6.7. In view of the aforesaid observations, it could be safely concluded that no addition for an issue for which assessment has been reopened has been ultimately made by the ld. AO in the re-assessment proceedings dated 19/03/2020. Hence, the basic "formation of belief " for the ld. AO that income of the assessee has escaped assessment, fails. For the elaborate reasoning given by us for A.Y.2012-13 hereinabove by placing reliance on various judgments, we quash the re-assessment proceedings

framed for the A.Y.2015-16 also. Since the entire re-assessment proceeding is quashed, the other grounds raised by the assessee on merits, need not be adjudicated and they are left open.

7. In the result, appeal of the assessee for A.Y.2015-16 is allowed.

8. In the result, both the appeals of the assessee are allowed.

Order pronounced on 26/08/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(SANDEEP SINGH KARHAIL)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 26/08/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai