IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA no.6008/Mum/2016
(Assessment Year :2008-09)

ITO-6(3)(4),
R.No 522, 5th Floor,
Aayakar Bhavan, ……. Appellant
M.K. Marg,
Mumbai 400 020

v/s

M/s. KRR Investment Consultancy Private Limited,
303, Jogani Industrial Estate, 541, Senapati Bapat Marg, ……. Respondent
Mumbai-400028
PAN:-AACCK4930E

Assessee by : Shri Neelkanth Khandelwal
Revenue by : Shri Ram Tiwari

Date of Hearing-02.04.2018	Date of Order –09.05.2018

O R D E R

PER: SANDEEP GOSAIN, JUDICIAL MEMBER.

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A), Mumbai, dated 04/07/2016 and pertains to AY 2008-09. The grounds of appeal read as under:-

"On the facts and in the circumstances of the case and in law, the Ld.

CJT(A) has failed to appreciate the facts that assessee company had received a sum of Rs. 1,49,79,000/- (including premium of Rs.99,80,0001-) on account of share application money/share capital and share premium during the F. Y.2007-08 relevant to A. Y. 2008-09 and as there was no assessment done for this period earlier, the A.0. has reasonable cause to believe that the sum so introduced by way of credit in the books of accounts of the assessee are not explained and hence income chargeable to tax had escape assessment and considered it fit to reopen the assessment u/s 147 of the I. T. Act.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) while disallowing the claim of the assessee in ground no. 2 that notice issued u/s. 148 of the Act was wit hout jurisdiction and not served on the assessee in the prescribed time limit, has erred in allowing the claim of the assessee that there was no tangible material with the A. 0. which is essential requirement for reopening and thus, has failed to appreciate that the A.O. had no occasion to examine the transaction related to share application that the A.O. had no occasion to examine the transaction related to share application/Capital/ Premium money of Rs. 1,49,79,0001- hence, earlier, no opinion had been formed on this issue and the basic presumption that data furnished by the assessee being arbitrary and bereft of any merit gives rise to sufficient ground to believe that income assessable to tax has escaped assessment."

2. Brief facts of the case are that the assessee has filed return of income for A.Y. 2008-09 on 18/09/2008 declaring total income at Rs. (-)8,66,372/-). The same was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter 'the Act'). Subsequently, the assessment was reopened after recording the reasons and after seeking reply of the assessee, order u/s 143(3) r.w.s 147 of the Act was passed on 29/03/2016, thereby making additions u/s 68 of the I.T. Act.

3. Aggrieved by the order of assessment, assessee preferred appeal before the Ld. CIT(A) and Ld. CIT(A) after considering the facts of the case and hearing both the parties, partly allowed the appeal thereby holding that the order of reopening was bad in law.

4. Aggrieved by the order of Ld. CIT(A), the Revenue has preferred the present appeal before us on the grounds mentioned herein above.

Since the Revenue has raised total four grounds of appeal before us, out of which grounds number 3 & 4 are general in nature and therefore needs no specific adjudication in view of our finding on merits on other grounds.

Ground No. 1 & 2 are inter-related and inter-connected and relates to challenging the order of the Ld. CIT(A) in holding that notice issued u/s 148 of the Act was without jurisdiction and by further holding that no 'tangible material' was with the Assessing Officer which is an essential requirement for reopening the assessment. Therefore, we thought it fit to decide both the grounds through the present common order.

5. We have heard the counsels of both parties and we have also perused the material placed on record. Before we decide the

merits of the case, it is necessary to evaluate the orders passed by the Ld. CIT(A) on these grounds. The Ld. CIT(A) has dealt with above grounds in para num 7.1 to 7.3 of its order and the same are reproduced hereunder:-

> *"7.1. I have carefully perused the assessment order and the submission of the appellant. The appellant is contesting the reopening on two issues, firstly, the appellant stated that the notice was issued on 7.4.2015 and hence it is time barred. The appellant relied by tracking of speed post. On perusal of the same it is seen that Indian Postal Authorities booked it on 7.4.20015. From the perusal of the envelope through which the notice was sent, it is seen that it is booked on 31.03.2015 at receipt Sr. No 344. Hence, there is no merit in the AR's argument that the notice was issued on 7.4.2015. The fact that it has been sent on 31.03.2015 now stands vindicated.*
>
> *7.2 The second argument put forth by the appellant is that, there is no tangible material on the basis of which the AO forms the belief that income chargeable to tax has escaped assessment. I have carefully considered the reason for reopening recorded by the AO before issuance of notice u/s 148 of the Act. On perusal of the reason recorded, it is seen that the AO has reopened the assessment to verify the share application / share premium received. The AO has not mentioned on which basis or as to how he formed the belief that income chargeable to tax has escaped assessment. The basic requirement for reopening the assessment is "reason to believe". But at the time of recording the reason for reopening, the AO has not recorded as to how he has a reason to believe that income chargeable to tax has escaped assessment. The*

reason recorded merely indicate that the AO wants to verify the share application / Share premium money received and nothing more. Hence, I find force in the argument of the appellant. The words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds but not on mere suspicion, gossip or rumour. The Hon'ble Supreme Court in the case of Sheo Nath Singh reported in 82 ITR 147 held as under :-

"The reasons recorded for the ITO's belief were (1) the assessee who was at the relevant time a managing director in about a dozen limited companies along with 'Oberois' was believed to have made some secret profits which were not offered for assessment, and (2) the assessee was believed to have received a sum of Rs. 22 lakhs from 'Oberois' and this sum or at least part of which represented income which had escaped assessment. It was abundantly clear that the two reasons which had been given for the belief which was formed by the ITO hopelessly failed to satisfy the requirements of the statute. The words reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and the ITO may Act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The ITO would be acting without acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot he investigated by the court.

There was no material or fact which had been stated in the reasons for starting proceedings in the instant case on which any belief could be founded of the nature contemplated by section 34(1A). The so-called reasons were stated to be beliefs thus leading to an obvious self-contradiction. Hence, the requirements of section 34(1A) were not satisfied and, therefore, the notices which had been issued were wholly illegal and

invalid.
In the result, the appeal was allowed."

7.3 Reliance is placed by the undersigned on the above mentioned Hon'ble Supreme Court order to allow this ground of appeal since it is identical to the case here.

Further, the Jurisdictional High Court in the case of Khuchandndani Healthparks (P) Ltd reported in 68 taxmann.com 91 held that in the absence of reason to believe that income had escaped assessment even in the case where assessment has been completed earlier by intimation u/s 143(1), the assessment in not valid. Hence, ground no 2 of the appeal is allowed on the basis of discussion above."

6. After having gone through the facts of the case and orders passed by the revenue authorities and hearing both the parties and also perusing the judgements cited before us, we find that Assessing Officer had reopened the assessment only to verify the genuineness of share application/share premium received by the assessee and while doing so, the Assessing Officer has nowhere mentioned as to how and on which basis, he formed the belief that income chargeable to tax had 'escaped assessment'.

We have also gone through the provisions of reopening as well as the judgments cited by both the parties as mentioned

and reproduced in the orders passed by the Ld. CIT(A). After having gone through the same, we are of the considered view, that the basic requirement for initiating the reopening proceedings by the AO is to form "reasons to believe" that the income has escaped assessment. However as per the facts of the present case, at the time of recording reason for reopening, the Assessing Officer has not recorded as to how he has a 'reason to believe' that income chargeable to tax has escaped assessment.

The only reason recorded by the AO indicates that the AO wanted to examine the share application/share premium money received by the assessee and nothing more. Therefore, the Ld. CIT(A) while relying upon the legal provisions as laid down in various judgments, has rightly concluded that the word "reason to believe" suggest that the belief must be that of an 'honest and reasonable person' based upon 'reasonable grounds' but not on 'mere suspicion, gossip or rumour'. The Ld. CIT(A) apart from other judgments have also relied the judgment of Hon'ble Supreme Court in the case of **Sheo Nath**

Singh reported in 82 ITR 147, wherein it was held as under:-

> *"The reasons recorded for the ITO's belief were (1) the assessee who was at the relevant time a managing director in about a dozen limited companies along with 'Oberois' was believed to have made some secret profits which were not offered for assessment, and (2) the assessee was believed to have received a sum of Rs. 22 lakhs from 'Oberois' and this sum or at least part of which represented income which had escaped assessment. it was abundantly clear that the two reasons which had been given for the belief which was formed by the ITO hopelessly failed to satisfy the requirements of the statute. The words reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and the ITO may Act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour, The ITO would be acting without acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court.*

There was no material or fact which had been stated in the reasons for starting proceedings in the instant case on which any belief could be founded of the nature contemplated by section 34(1A). The so-called reasons were stated to be beliefs thus leading to an obvious self-contradiction. Hence, the requirements of section 34(1A) were not satisfied and, therefore, the notices which had been issued were wholly illegal and invalid.

In the result, the appeal was allowed."

Ld. CIT(A) had also rightly relied upon the judgment of jurisdictional High Court in the case of **Khuchandndani Healthpart (P) Ltd report in 68 taxmann.com 91**, wherein it was held that in the absence of the 'reasons to believe' that income had escaped assessment even in the case where assessment has been completed earlier by intimation u/s 143(1), the assessment in not valid.

The Hon'ble Delhi High Court in the case of **PCIT Vrs. Tupperware India Pvt. Ltd. (2016) 65 taxman.com 17 (Del),** has categorically held that requirements of section 147 cannot be dispensed with, when an assessment made u/s 143(1) is sought to be reopened. It was further held that in the

absence of any tangible material available with the AO to form requisite belief regarding escapement of income, reopening of assessment u/s 143(1) was bad in law.

Further the Hon'ble Delhi High Court in the case of CIT vrs. Orient Craft Ltd. (2013) 29 taxmann.com 392 (Delhi) has held as under:-

> *Section-147, read with section 143, of the Income-tax Act, 1961 – Income escaping assessment - General - Section 143(1) v. section 147 - Assessment year 2002-03 - Return was filed by assessee claiming deduction under sections 8OHHC and l0B- Assessing Officer issued intimation accepting return under section 143(1) - Later, he sought to reopen proceedings on ground that there was escapement of income - He reached this belief merely, on going through return of income' and nothing more - However, there was no whisper in reasons recorded of any tangible material which came to possession of Assessing Officer subsequent to issue of intimation - Whether this was a case of an arbitrary exercise of power conferred under section 147 and, hence, reassessment proceeding was not validly initiated - Held, yes [Para 14] [In favour of assessee.*

After analyzing the aforementioned order, we notice that Hon'ble Delhi High Court has also consider many other judgments passed by respective courts and also based its finding on the judgment passed by Hon'ble Supreme Court in the case of **CIT vrs. Kelvinator of India Ltd (2010) 187 Taxman 312/320 ITR 561 (SC),** wherein it was held that in the absence of any tangible material, there will be a review in guise of reopening and held as under:-

> *An assessee in whose case the return was processed under section 143(1) cannot be placed in a more vulnerable position than an assessee in whose case there was a flit/-fledged scrutiny assessment made under section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression 'reason to believe ' in cases where*

assessments were framed earlier under section 143(3) and cases where mere intimations were issued earlier under section 143(1) may well lead to such an unintended mischief It would be discriminatory too. An interpretation that leads to absurb results or mischief is to be eschewed.

In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income 'on going through the return of income filed by the assessee after he accepted the return under section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer. The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words 'reason to believe' vis-a-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the Assessing Officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147.

We have also considered the other judgments cited by the respective parties, wherein it was unanimously held as under:-

> *It is while expounding the words 'reason to believe' that the Supreme Court in the later judgment in CIT vrs Kelvinator of India Ltd (supra) held that there should be 'tangible material' to come to the conclusion that income had escaped assessment. Thus, in my humble understanding of both the judgments, while resorting to section 147 even in a case where only an intimation had been issued under section 143(1)(a), it is essential that the Assessing Officer should have before him tangible material justifying his reason to believe that income had escaped assessment.*

We have also gone the orders passed by the Coordinate Bench of Hon'ble ITAT in ITA No. 4059/Mum/2012 in case titled **'Tarang Textile Pvt. Ltd. Vrs. ITO'** wherein it was held as under:-

> *We have gone through the judgment cited above and we find that it is a settled law that reopening of assessment completed u/s 143 (1) of the Act within four years is impermissible in the absence of tangible/fresh material.*
>
> *From the facts and circumstances of the present case no fresh/tangible material was found by the AO before*

initiating the reopening of assessment proceedings. Even the Hon'ble High Court of Delhi in the case of ***Jay Bharat Maruti Ltd versus Commissioner of income tax (2009)223 CTR (Delhi) 269*** *held as "No reasonable person could have come to a conclusion that there was relevant material available with the AO to have reason to believe that assessee's income chargeable to tax had escaped assessment only by virtue of the fact that the assessee had charged to its P&L a/c the credit balance available in its modvat account hence, reopening of assessment was such a tenuous ground was bad in law".*

From the co- joint reading of all the judgments cited above as well as taking into consideration the facts of the case and the reasons recorded by the AO while initiating proceedings for reopening of the assessment, we find that the AO had no tangible fresh material at the time of initiating the proceedings for reopening of the assessment. Therefore while relying upon the judgment and reasons cited above, we hold that the proceedings of reopening of assessment are ***bad in law and invalid****.*

We have also gone through the order passed by Hon'ble Jurisdictional Bombay High Court in the case of **Piramal**

Enterprised Ltd Vrs. DCIT in Writ Petition No. 2958 of 2016, wherein it was held as under :-

> *It is a settled position that even where and assessment has been only processed under Section 143(1) of the Act, the reopening notice must satisfy the test of having reason to believe that the income chargeable to tax has escaped assessment (see Asst. CIT v/s. Rajesh Jhaveri Stock Brokers (P)Ltd. 291 ITR 500). The reason to believe has to arrived at after applying one's mind to the material available and to reach prima facie view that income chargeable to tax has escaped assessment. Mere receipt of information from any source would not by itself tantamount to reason to believe that income chargeable to tax has escaped assessment. In the present case the Assessing Officer prima facie has not done the bare necessary/rudimentary enquiry into the material received before he concludes that income chargeable to tax has escaped assessment.*

From the co- joint reading of all the judgments cited above as well as taking into consideration the facts of the case and the reasons recorded by the AO while initiating proceedings for reopening of the assessment, we find that the

AO had no tangible material at the time of initiating proceedings for reopening of the assessment.

We have also considered the judgment of Hon'ble Gujarat High Court in the case of **Inductotherm (India) (Pvt) Ltd Vrs. M. Gopalan, DCIT (2013) 36 taxmann.com 401 (Gujarat),** wherein it has been categorically held that for mere verification of the claim, power for reopening of assessment could not be exercised. The AO in guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were as scrutiny assessment.

From the facts and circumstances of the present case, no fresh /tangible material was found by the AO before initiating the reopening of assessment proceedings. Even the Hon'ble High Court of Delhi in the case of **Jay Bharat Maruti Ltd. Vrs. CIT (2009) 223 CTR (Delhi) 269** and also in the case of **CIT vrs. Orient Craft Ltd. (2013) 29 taxman.com 392 (Del)** have taken views in favour of assessee by holding that when AO had no tangible fresh material at the time of initiating the proceedings for reopening of the assessment, then in that

eventuality, the proceedings of reopening of assessment were held to be bad in law and invalid.

We are in agreement with the contention of the counsel for the assessee that for mere verification of the claim, power for reopening of assessment could not be exercised. The AO in the guise of power to reopen an assessment cannot seek to undertake a fishing and roving inquiry and seek to verify the claim as if it were a scrutiny assessment.

7. Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the revenue stands **dismissed**.

8. In the result, the appeal filed by the Revenue is **dismissed**.

Order pronounced in the Open Court on 09.05.2018.

Sd/-	**Sd/-**
B.R. BASKARAN	**SANDEEP GOSAIN**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 09.05.2018

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Dhananjay
Sr. Private Secretary

(Dy./Asstt.Registrar)
ITAT, Mumbai