# आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

## IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

**आयकर अपील सं./ ITA No. 6953/Mum/2016**

(निर्धारण वर्ष / Assessment Year 2009-10)

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| Balbir Ispat Pvt. Ltd.<br>207, Steel Centre, Ahmedabad Street, Carnac Bunder, Masjid (E), Mumbai-400 051 | Vs. | The Income Tax Officer, Ward 6(1)(2), Room No. 508, 6th Floor, Aayakar Bhavan, Maharshi Karve Road Churchgate, Mumbai-400 020 |
| **(अपीलार्थी / Appellant)** | .. | **(प्रत्यर्थी / Respondent)** |
| स्थायी लेखा सं./**PAN No. AADCB 2038 F** | | |

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| अपीलार्थी की ओर से / **Appellant by** | : | Shri Prakash Jhunjhunwala, AR |
| प्रत्यर्थी की ओर से **/ Respondent by** | : | Shri Ashish V. Pophane, DR |

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| सुनवाई की तारीख **/ Date of hearing:** | 15-01-2019 |
| घोषणा की तारीख **/ Date of pronouncement :** | 28-01-2019 |

## आदेश / O R D E R

महावीर सिंह, न्यायिक सदस्य/
**PER MAHAVIR SINGH, JM:**

This appeal filed by the assessee is arising out of the order of Commissioner of Income Tax (Appeals)-12, Mumbai [in short CIT(A)], in Appeal No. CIT(A)-12/ITO-6(1)(2)/102/15-16 vide order dated 08.09.2016. The Assessment was framed by the Income Tax officer, Ward 6(1)(2), Mumbai (in short 'ITO'/ AO') for the A.Y. 2009-10 vide order dated

25.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in reopening of assessment. For this assessee has raised the following ground No. 1: -

> *"1. On the facts and circumstances of the case and in law Ld. commissioner of income Tax (Appeals) [hereinafter referred to as Ld. CIT(A) erred in confirming the action of the Ld. Assessing Officer (hereinafter referred to as Ld AO) of re-opening the assessment."*

3. Briefly stated facts are that the assessee filed its return of income for the relevant AY 2009-10 on 31.08.2009. The assessee is engaged in the business of manufacturing and trading of M S Structures Rounds and Bars and End Cuts. The return was processed under section 143(1) of the Act. Subsequently, the AO issued noticed under section 148 of the Act dated 20.03.2014 and reopened the assessment under section 147 of the act after recording the reasons. The assessee in response to notice under section 148 of the Act filed letter dated 22.03.2014, stating that original return of income filed on 31.08.2009 be treated as return filed in response to notice under section 148 of the Act. The AO subsequently, issued notice under section 142(1) of the Act dated 23.07.2014 and also supplied reasons recorded for reopening of assessment and the relevant reasons reads as under: -

*Reasons* of *reopening*

*The assessee, M/s Balbir Ispat Pvt. Ltd, PAN AADCB2038F is an assessee of this circle. The assessee for the AY 2009-10 has filed its return of income on 31/08/2009 declaring an income of Rs……..Zero/- which was processed under section 143(1) on 02/11/2010.*

*From the records, it is seen that the assessee is in receipt of huge share premium amounting to ₹ 4,56,00,000 during the F.Y. 2008-09 relevant to AY 2009-10. As there was no scrutiny assessment done for this year, the so-called share premium having been received by the assessee was not examined. The assessee is an unlisted company and the source of the share premium so received as well as the nature of the share application received (the intrinsic value of the share in comparison to the excess premium received) is not substantiated.*

*The Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd has held that Section 147 authorized and permits the Assessing Officer to assess or re-assess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer*

*has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing Officer should have finally ascertain the fact by legal evidence or conclusion. This judgement was rendered by the Hon'ble Supreme Court in the above cause in view of the fact that only 143(1) had taken place and no scrutiny was done under section 143(3) and the reopening was held to be valid.*

*The Hon'ble Bombay High Court in the case of E.C.G.C. v/s. Addl. CIT Writ petition No. 502 of 2012 dated 10-11 January, 2013, their Lordships have held that when the assessment is sought to be reopened within a period of four years, then what is required is 'reason to believe' but not established fact of escapement of income. At this stage of issue of notice, the only question is whether there is relevant material on which a reasonable person can form a requisite belief. When an assessment is sought to be reopened within a period of four years, the test to be applied is whether there is tangible material to do so. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored*

*relevant material in arriving at an assessment acts contrary to the law. If as a consequence of this there is escapement of income, the jurisdictional requirement of section 147 is fulfilled on the confirmation of a reason to believe that income has escapement assessment. A reason to believe is what is relevant and not an established fact of escapement of income. Reliance is placed on judgement in the case of M/s Usha International, 348 ITR 485 (Delhi High court).*

*In view of the above facts and the judicial decisions, I have reason to believe that income, in the grab of excess share application money received has escaped assessment in terms of provisions of Section 47 of the IT Act.*

4. The assessee raised objection against reopening of the assessment, which was rejected by the AO vide letter dated 21.01.2015. The assessee raised the objection that there is no income which has escaped assessment and as a matter of fact that no scrutiny assessment was done and that the share premium received by the assessee was not examined would not automatically lead to the fact that the income has escaped assessment. The assessee objected that the AO has not brought on record any tangible/ intangible or old / new material which concludes that amount received by assessee towards share premium is non-genuine or unexplained in term of section 68 of the Act or sham transaction. The assessee before AO raised the objection that share premium received by assessee is capital in nature and same cannot be

taxed unless specifically taxable under the provisions of the Act. The learned Counsel for the assessee stated that even amendment brought in section 56(2)(viib) of the Finance Act, 2012 with effect from 01-04-2013 is applicable for and from AY 2013-14. But the AO rejected the objections raised by assessee vide letter dated 21.01.2015 and the relevant paras reads as under: -

> *"3. I have considered the detailed submissions made by the assessee very carefully but I do not find any merit in the argument put forth by the assessee and therefore the objection raised is hereby rejected from the reason discussed in details in the following paragraphs.*
>
> *3.1 In determining whether commencement of reassessment proceeding is valid, it has to be seen whether there is prima-facie some material on the basis of which the department opened the case. In the present case, the assessing officer has found that the financial year 2008-09 relevant to assessment year 2009-10. Scrutiny assessment was not done in this case, hence, issue of share premium was not examined. The details and evidences related to issue of shares, premium charged per share is not available on the record. As there was no scrutiny assessment done for this year, the share premium having been received by the assessee was not examined. The reasonable belief*

*created by assessing officer before reopening of the assessment is justified and assessee's objection on this point is not tenable.*

*3.1.1 From the record and details filed, it is evident that the assessee is unlisted company and the nature of the share application money received (the intrinsic value of share in comparison to excess premium received) is not substantive by any cogent evidence, hence, it is the basis of the formation of belief by the assessing officer that income to the extent not justified has escaped assessment in terms of provision of section 147 of the I.T. Act.*

*3.1.2 To form this belief the new subsection (viib) introduced in section 56(2) vide finance act 2012 played important role:*

*This section is reproduced below for reference:*

> *(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the fact value of such share, the aggregate consideration received for such shares as exceeds the fair market value of the shares.*

*Though this insertion of section is retrospective or not is other issue but the intend of the introduction of this provision is much more important. This provision through applicable from 1.4.2013 gives clear thought that the amount shares issued at excess over fair market value is taxable in the hands of the assessee as income from other sources.*

*……..*

*3.3 Insertion of Section 56(2)(viib) w.e.f 01.04.2013 does not imply that addition on account of excessive share premium under section 68 cannot be made from years prior to the amendment. The Bombay High Court in the case of Major metals Ltd. vs. Union of India 207 Taxman 185 (Bom) has upheld the stand of the department.*

*3.4 It may also be noted that mere re-opening of the assessment by A.O. in accordance with the provisions of the I.T. Act, 1961, perse, does not inflict any financial liability on the assessee and therefore assessee cannot plead to be aggrieved by it, as long as the opportunity is given to assessee to substantiate what is claimed in its Return of Income. Re-opening under section 147 of the Act by AO is aimed at administering the statute with solicitude for the*

*public exchequer with an in-built idea of fairness to taxpayers by giving the opportunity of being heard under section 148/143(2) and 142(1) of the Act and it has been hold to be correct by the Hon'ble Apex court in the case of CIT vs. Rajesh Jhaveri Stoch Brokers (P.) Ltd. (supra).*

*3.5 The assessment is sought to be reopened, then what is required to 'reason to believe' but not established fact of escapement of income. At the stage of reasonable person can form a requisite belief. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored relevant material in arriving at an assessment acts contrary to the law. If as a consequence of this there is escapement of income, the jurisdictional requirement of section 147 is fulfilled on the confirmation of a reason to believe that income has escapement assessment. A reason believe is what is relevant and not an established fact of escapement of income. Reliance is also placed on the judgement in the case of M/s. Usha International, 348 ITR 485 (Delhi High Court).*

*3.6. In the following two cases the Hon'ble ITAT Delhi has restore the case to the file of Assessing Officer to decide the reasonableness of premium. It means, ITAT impliedly upholds*

*view that if quantum of premium is unreasonable, addition can be made. The cases are as under:*

*i) Zars Trading Pvt. Ltd. (2010) TIOL-308 ITA Del Vide order dated 25.02.2010 in ITA No. 3284/Mum/2209.*

*ii) Kushara Real Estate Pvt. Ltd. ITA No. 5247/EL 2009.*

*4. In view of the foregoing discussion and facts as mentioned in Para 3 above, it could be concluded that the assessee's argument lacks merit and therefore the objection taken by the assessee against reopening of the assessment is not acceptable and therefore rejected. I proceed with the assessment."*

Aggrieved, against the rejection of objections by AO, assessee filed appeal before CIT(A) who also confirming the reopening vide Para 6.5 as under: -

*"6.5 Further, during the assessment proceedings, the appellant has failed to establish the genuineness of the share application/ share premium money. The AO noted in the assessment order that the investor from whom share application/ share premium money was received are run by Mukesh Chokshi & other person, Shri Jayesh Krishnaraj*

*Sampat. The AO noted this on the basis of information provided by DDIT, Unit 1(4). Even during the appellant proceedings, it is seen that the appellant has not explained as to how the company had fetched such a huge share premium. The appellant's main argument that it was capital receipt is not acceptable. It is seen from various judicial rulings that the addition was confirmed on account share application share premium money bought in by the assessee in the garb of share capital. Hence, there is no merit in the submission of the appellant that whatever is shown in the books is correct and no reassessment proceedings were initiated.*

*Further, the tangible material is not something which must receive from the outside of records. Even the tangible material is something which is within the records on which no opinion is formed by the Assessing Officer. In the case here, the return is processed under section 143(1) and therefore AO has not formed any opinion with respect to the share capital shown in the return of income. When the AO has seen that there was no intrinsic value apparently on records to show that it would fetch share premium it is sufficient to form the reason to believe that income has escaped tax as the*

*normal human tendency is that it would think of the investment to grow and give benefit in future. But no such fact is seen in the case here. Therefore, AO has correctly formed the belief that income has escaped tax. Hence, I do not find any infirmity in reopening of the assessment and in rejecting the objection raised by the appellant."*

Aggrieved, now assessee is in appeal before Tribunal.

5. Before us, the learned Counsel for the assessee filed complete detail of shareholders, share allotted and share premium charged from the following 10 parties, which is subject matter of addition: -

*Name, address and PAN of the disputed shareholders where shares has been issued at ₹ 50/- (Face value of ₹ 10/- and share premium of ₹ 40/-)*

| Sr. No. | Shareholders & name | Address | PAN | No. of shares allotted | Share Capital/ premium |
|---|---|---|---|---|---|
| 1. | Ecro Artisans Pvt. Ltd. | 26.28, Nirnay Sagar, 1st Floor, Room 9/c, Satguru Kadam lane, MB Velkar Street, Kalbadevi, Mumbai-400 002 | AAACE8119M | 90,000 | 45,00,000 |
| 2. | Elderado Properties Pvt. Ltd. | 26.28, Nirnay Sagar, 1st Floor, Room 9/c, Satguru Kadam lane, MB Velkar Street, Kalbadevi, Mumbai-400 002 | AAACE1957F | 60,000 | 30,00,000 |
| 3. | Luxer | 26.28, Nirnay Sagar, | AAACL1462A | 1,90,000 | 95,00,000 |

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|---|---|---|---|---|---|
| | Properties Pvt. Ltd. | 1st Floor, Room 9/c, Satguru Kadam lane, MB Velkar Street, Kalbadevi, Mumbai-400 002 | | | |
| 4. | Suresh Rathod Consultants P. Ltd. | 26.28, Nirnay Sagar, 1st Floor, Room 9/c, Satguru Kadam lane, MB Velkar Street, Kalbadevi, Mumbai-400 002 | AAFCS5844Q | 60,000 | 30,00,000 |
| 5. | Windotech System Pvt. Ltd. | 26.28, Nirnay Sagar, 1st Floor, Room 9/c, Satguru Kadam lane, MB Velkar Street, Kalbadevi, Mumbai-400 002 | AAACW3541K | 1,50,000 | 75,00,000 |
| 6. | Alembie Securities Pvt. Ltd. | Block H, Shri Sadashiv CHS, 6th Road, Santacruz (E), Mumbai-400 055 | AAACA7087N | 60,000 | 30,00,000 |
| 7. | Alpha Chemie Trade Agencies Pvt. Ltd. | Block H, Shri Sadashiv CHS, 6th Road, Santacruz (E), Mumbai-400 055 | AADCA9890L | 80,000 | 40,00,000 |
| 8. | Buniyad Chemicals Ltd. | Block H, Shri Sadashiv CHS, 6th Road, Santacruz (E), Mumbai-400 055 | AABCB6954G | 60,000 | 30,00,000 |
| 9. | Mihir Agencies Pvt. Ltd. | Block H, Shri Sadashiv CHS, 6th Road, Santacruz (E), Mumbai-400 055 | AABCH7898H | 60,000 | 30,00,000 |
| 10. | Talent Infoway Ltd. | Block H, Shri Sadashiv CHS, 6th Road, Santacruz (E), Mumbai-400 055 | AACCT944L | 80,000 | 40,00,000 |
| Addition made in assessment | | | Total | 8,90,000 | 4,45,00,000 |

6. The learned Counsel for the assessee first of all drew our attention to the reasons recorded and stated that the AO admitted in the reasons recorded that the information is obtained from the records that the assessee has received share premium amounting to ₹ 4,56,00,000/-. According to AO as there was no scrutiny assessment done in this year, the so called share premium have been received by the assessee was not examined and accordingly, the AO formed opinion or reason to believe that the income in the guise of excess share application money received has escaped assessment in terms of the provisions of section 147 of the Act. The learned Counsel for the assessee stated that exactly on identical facts Hon'ble Bombay High court in the case of Khubchandani Healthparks Pvt. Ltd. vs. ITO (2016) 384 ITR 322 (Bom) has held that *Regular Return of income was assessed by Intimation under Section 143(1) of the Act and no scrutiny assessment was done. In the above view, to ascertain the nature and the justification for charging share premium, the Assessing Officer has reason to believe that charging of share premium over and above the intrinsic value of the share is income which has escaped assessment. The Notice itself does not indicate the approximate amount of income, which the Assessing Officer has reason to believe has escaped assessment nor does it quantify the extent to which the share premium received was in excess of intrinsic value, which has escaped assessment. It gives no reasons to indicate the basis of coming to the conclusion that share premium is excessive and, therefore, income. Moreover, the Notice also does not dispute that this is a share premium but seek justification for charging the share premium over and above intrinsic value of the share premium.* The learned Counsel for the assessee in the present case also drew our attention that exactly on identical reasons were recorded that share premium was received as well as the share application money received and intrinsic value of shares in comparison of excess premium received is taxable. The learned Counsel for the assessee particularly referred to para 9 of this judgement of Hon'ble Bombay High court, wherein it is held as under: -

*"9. The reason in support of the impugned Notice proceed on the basis that the regular Return of income was assessed by Intimation under Section 143(1) of the Act and no scrutiny assessment was done. In the above view, to ascertain the nature and the justification for charging share premium, the Assessing Officer has reason to believe that charging of share premium over and above the intrinsic value of the share is income which has escaped assessment.* ***The Notice itself does not indicate the approximate amount of income, which the Assessing Officer has reason to believe has escaped assessment nor does it quantify the extent to which the share premium received was in excess of intrinsic value, which has escaped assessment. It gives no reasons to indicate the basis of coming to the conclusion that share premium is excessive and, therefore, income.*** *Moreover, the Notice also does not dispute that this is a share premium but seek justification for charging the share premium over and above intrinsic value of the share premium. Primafacie, we are of the view that the basis of the impugned Notice stands concluded by the decision of this Court in* ***Vodafone India Services Ltd. Vs. CIT 368 ITR 01****, wherein it has been held that the share premium*

> *being on the capital amount cannot be subjected to tax as income."*

7. As far as the return processed under section 143(1) of the Act and the reasons to believe is a mandatory requirement, the learned Counsel for the assessee relied on the Hon'ble Delhi High court in the case of Madhukar Khosla vs. ACIT (2014) 367 ITR 0165 (Delhi), wherein it is categorically held that the reasons indicates specially the new material facts even though the return income was processed under section 143(1) of the Act on the basis of which reopening is initiated under section 148 of the Act. The learned Counsel for the assessee referred to para 9 and 10 as under: -

> *"9. In this case, the reasons provided under Section 148 are that in "absence of the source of the addition with documentary evidence on records, the same is required to be brought on tax net as per provisions of section 68 of the Income tax Act, 1961 as the assessee had offered no explanation about the nature and source of the said additions…" and thus, must be treated as income which escaped assessment. No details are provided as to what such information is which excited the AO's notice and attention. The reasons must indicate specifically what such objective and new material facts are, on the basis of which a reopening is initiated under Section 148. This reassessment is clearly not on the basis of new (or "tangible") information or facts that which the*

*Revenue came by. It is in effect a re-appreciation or review of the facts that were provided along with the original return filed by the assesse. The Supreme Court in Kelvinator (supra) frowned against such exercise of power:*

> *"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1stApril, 1989, Assessing Officer has*

*power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief*

*10. This Court recollects that even in case of an assessment completed under Section 143 (1), the requirement of recording "reasons to believe" are mandatory – as the text of Section 147 indicates. Rejecting an argument by the Revenue to the contrary, this Court in Orient Craft (supra) held that:*

*" The assumption of the Revenue that somehow the words "reason to believe" has to be understood in a liberal manner where the finality of intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-à-vis*

*Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-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 absurd results or mischief is to be eschewed.*

*13. Certain observations made in the decision of Rajesh Jhaveri (supra) are sought to be relied upon by the revenue to point out the difference between an "assessment" and "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where "intimation" is issued under section 143(1) there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under section 148, the proceedings cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it*

*would appear clear that the court reiterated that "so long as the ingredients of section 147 are fulfilled" an intimation issued under section 143(1) can be subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of intimation is that the assessing officer should have "reason to believe" that income chargeable to tax has escaped assessment. In our opinion, the said expression should apply to intimation in the same manner and subject to the same interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (supra) would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is*

*contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements."*

8. Similar view is also taken by the Hon'ble Delhi High court in the case of Pr. CIT vs. Tupperware India (P) Ltd. 284 CTR 68 (Delhi),

wherein it is held that the Delhi High court in the case of CIT vs. Orient Craft Ltd. held that held that expression “reason to believe” cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under Section 143(3) of the Act and another applicable where an intimation was earlier issued under Section 143(1) of the Act. It follows that it is open to the assessee to contend that notwithstanding that the argument of “change of opinion” is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under Section 148(2) of the Act on the ground that they do not meet the standards set in the various judicial pronouncements. Further, the learned Counsel for the assessee as regards to amount received on issue of share capital as premium held by Hon’ble Bombay High Court in the case PCIT vs. Apeak infotech (2017) (397 ITR 148 (Bom), wherein it is held that share application money and premium are capital receipts and cannot be considered as income. Hon’ble Bombay High court has considered the following question No. B:-

> *“B. Whether on the facts and in circumstances of the case and in law, the Tribunal as well as Commissioner of Income Tax (Appeals) was right in deleting addition made by the Assessing Officer, by holding that the share premium receipt is capital in nature?”*

And answered the same as under: -

*"(a) We find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in Vodafone India Services Pvt. Ltd. (supra) and of the Apex Court in M/s G.S. Homes and Hotel P. Ltd. (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income.*

*(b) It is further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assessee in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that this Court in Commissioner of Income Tax vs. M/s.*

*Gangadeep Infrastructure (P) ltd (Income Tax Appeal No.1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14."*

9. The learned Counsel for the assessee also referred to the CBDT instruction No. 02/2015 dated 29.01.2015, wherein the CBDT has directed the field officers and issue the instructions as under: -

*"To*
*All Principal CCsIT/DsGIT and CCsIT/DsGIT*

*Madam/Sir*

***Subject Acceptance of the Order of the Hon'ble High Court of Bombay in the case of Vodafone India Services Pvt. Ltd.-reg.***

*In reference to the above cited subject, I am directed to draw your attention to the decision of the High Court of Bombay in the case of Vodafone lndi a Services Pvt. Ltd. for AY 2009-10(WP No.871/2014), wherein the Court has held, inter-alia, that the premium on share issue was on account of o capital account transaction and does not give rise to income and, hence, not liable to transfer pricing adjustment.*

*2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs, and CsIT(Appeals).*

*3. This issues with the approval of Chairperson CBDT.*

*Sd/-*
*(Anchal Khandelwal)*
*Under Secretary to the Govt. of India"*

In view of the above, the learned Counsel for the assessee stated that, the reopening on the above reasons, in view of the precedence cited and arguments made is invalid and is to be quashed.

10. On the other hand, the learned Sr. Departmental Representative Shri Ashish V. Pophane has relied on the order of AO and that of the CIT(A) for affirming the reasons recorded and reopening of assessment.

11. We have heard rival contentions and gone through the facts and circumstances of the case. We find from the reasons recorded reproduced above that the AO failed to appreciate that the law does not permit him to reopen assessment unless he has tangible material on the basis of which he forms reason to belief that income has escaped assessment. The mere fact that the assessee has issued shares at a certain premium itself cannot be a reason to belief that income has

escaped assessment. The AO has neither mentioned by how much the shares are overvalued i.e. by what amount the premium exceeds the instinct value of the shares nor the amount, which according to him, has escaped assessment. The reasons are reproduced above but for the sake of brevity the relevant part of reasons are that, "*from the records, it is seen that the assessee is in receipt of huge share premium amounting to ₹ 4,56,00,000 during the F.Y. 2008-09 relevant to AY 2009-10. As there was no scrutiny assessment done for this year, the so-called share premium having been received by the assessee was not examined. The assessee is an unlisted company and the source of the share premium so received as well as the nature of the share application received (the intrinsic value of the share in comparison to the excess premium received) is not substantiated."* We also find from the above that the AO stated that income in the grab of share application money received in this case has escaped assessment but he could not point out on what basis / material does he belief that the share capital is not genuine. In the similar circumstances, Hon'ble Bombay High Court in the case of Khubchandani Healthparks Pvt. Ltd. (supra) held that *regular Return of income was assessed by Intimation under Section 143(1) of the Act and no scrutiny assessment was done. In the above view, to ascertain the nature and the justification for charging share premium, the Assessing Officer has reason to believe that charging of share premium over and above the intrinsic value of the share is income which has escaped assessment. The Notice itself does not indicate the approximate amount of income, which the Assessing Officer has reason to believe has escaped assessment nor does it quantify the extent to which the share premium received was in excess of intrinsic value, which has escaped assessment. It gives no reasons to indicate the basis of coming to the conclusion that share premium is excessive and, therefore, income.*

*Moreover, the Notice also does not dispute that this is a share premium but seek justification for charging the share premium over and above intrinsic value of the share premium.*

12. Similar are the facts in the present case as was before Hon'ble Bombay High Court in the case of Khubchandani Healthparks Pvt. Ltd. (supra). Respectfully following Hon'ble Bombay High Court, we are of the view that the AO has absolutely no material to even suspect, forget believe that income has escaped assessment. Hence, we quash the re-opening and accordingly, the issue of assessee's appeal on jurisdiction is allowed.

13. Since, we have already quashed the reassessment proceedings; we need not to go into the merit of the case.

14. **In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 28-01-2019.

| | |
|---|---|
| Sd/- | Sd/- |
| (राजेश कुमार / RAJESH KUMAR) | (महावीर सिंह /MAHAVIR SINGH) |
| (लेखा सदस्य / ACCOUNTANT MEMBER) | (न्यायिक सदस्य/ JUDICIAL MEMBER) |

मुंबई, दिनांक/ Mumbai, Dated: 28-01-2019.

**सुदीप सरकार, व.निजी सचिव** / *Sudip Sarkar, Sr.PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार** (Asstt. Registrar)
**आयकर अपीलीय अधिकरण,** मुंबई **/ ITAT, Mumbai**