आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री जी. मंजुनाथ लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

आयकर अपील सं./ **ITA No. 1628/Mum/2017**

(निर्धारण वर्ष / Assessment Year 2010-11)

Income Tax Officer, Ward 6(1)(2), Mumbai R.No. 563, 5th Floor, Aayakar bhavan, M.K. road, Churchgate, Mumbai-20	Vs.	Ample Holdings Pvt. Ltd 40B, Ridge Road, Malabar Hill, Mumbai-400 006
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./**PAN No. AABCV7726L**		

अपीलार्थी की ओर से / **Appellant by**	:	Shri Anadi Verma, DR
प्रत्यर्थी की ओर से **/ Respondent by**	:	S/Shri Vijay Mehta & Anuj Kisnadwala, ARs'

सुनवाई की तारीख **/ Date of hearing:**	04-04-2019
घोषणा की तारीख **/ Date of pronouncement :**	04-04-2019

आदेश / O R D E R

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

This appeal filed by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-12, Mumbai [in short CIT(A)], Appeal No. CIT(A)-12/ITO-6(1)(2)/193/15-16 vide order dated 02.12.2016. The Assessment was framed by the Income Tax Officer, Ward-6(1)(2), Mumbai (in short 'ITO/ AO') for the A.Y. 2010-11 vide order dated

29.03.2016 under section 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of Revenue is against the order of CIT(A) quashing the reassessment order framed by AO after reopening the same under section 147 of the Act read with section 148 of the Act. For this Revenue has raised the following two grounds: -

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate the fact that assessee company had received a sum of Rs. 17,42,40,000/- on account of share premium during the F. Y. 2009-10 relevant to A. Y. 2010-11 and as there was no assessment done for this period earlier, the A.0. had reasonable cause to believe that the sum so introduced by of credit in the books of accounts of the assessee are not explained and hence income chargeable to tax had escaped 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) has erred in deleting the addition made without discussing the same on merit."*

3. Briefly stated facts are that the assessee company is engaged in the business of investment in shares and securities and consultancy services. The assessee filed its return of income for the relevant AY 2010-11 on 24.09.2010 under section 139(1) of the Act. Subsequently,

the AO issued notice under section 148 of the Act dated 23.03.2015. In response to the notices under section 148 of the Act, the assessee filed a letter before AO dated 21.04.2015 stating that the return filed under section 139(1) of the Act may be treated as return filed in response to notice under section 148 of the Act and also requested to provide copy of reasons recorded for initiating the reassessment proceedings under section 147 of the Act. Subsequently, vide letter dated 14.10.2015 again a request was made to supply the copy of reasons recorded for initiating the reassessment proceedings under section 148 of the Act. Finally, the AO issued notice under section 142(1) of the Act dated 29.10.2015 and along with questionnaire the reasons supplied reads as under: -

> *"The reasons for reopening your assessment is as under:*
>
> *From the records, it is seen that the assessee is in receipt of huge share premium amounting to ₹ 17,42,40,000/- during the FY 2009-10 relevant to AY 2010-11. As there was no scrutiny assessment done for this year, the so-called share premium having been received by the assessee was not examined. In view of the ratio of the decision of Rajest Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 500 (SC) no assessment u/s 143(1) has been carried out by the Assessing Officer."*

4. The assessee raised the objection against the reasons vide letter dated 09.11.2015 stating that the source has not been specified in the reasons recorded and the reopening without disclosing the source of

information would not be tangible in the eyes of law. Even, it was contended that there is total non-application of mind by the AO and reopening is based on incorrect understanding of law that income to the extent of amount of share premium charged over the intrinsic value of shares escaped the assessment. According to assessee, it was not specified under which the provisions of Act the same is taxable. It was stated that even the provisions of section 56(2)(viib) of the Act which bring to tax such capital receipt, which was brought into first time is effective only from 01.04.2013 and thus not applicable to the transactions under reference in AY 2010-11. It was claimed that the said section was not in existence when shares were issued by the assessee in FY 2009-10 relevant to AY 2010-11. It was also argued that no escaped income has been identified and only mentioned that income to the extent of amount of share premium charged over the intrinsic value of shares has escaped assessment. It was stated in the objections that the escapement of income or evidence of escaped income has not been identified and therefore reopening is bad and i.e. based on presumptions and conjuncture. Even no tangible material has been brought on record by the AO while recording the reasons rather the same is based on the documents filed along with return of income i.e. audited accounts which clearly states that the assessee is in the receipt of share premium during FY 2009-10 relevant to AY 2010-11. The main premise of the AO i.e. there was no scrutiny assessment done over this year and the share premium received by assessee was not examined. It was stated that reopening cannot be initiated for verification of further facts or to cause further enquiry in case the assessment proceedings are completed. But the AO while framing the assessment under section 143(3) read with section 147 of the Act has not considered the objection properly and merely rejected the objection only on one premise that the nature of

share application money received i.e. the intrinsic value of share in comparison with to excess premium received, is not substantiated by any cogent evidence. Hence, the whole basis of formation of belief by the AO that income to the extent not justified that escaped assessment in term of the provisions of section 147 of the Act the newly introduced sub section (viib) of section 56(2) of the Act. The relevant disposal of objection vide letter dated 17.11.2015 and the relevant Paras 3.1 to 3.5 reads as under: -

> *"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 cast, the assessing officer has found that the assessee is in receipt of huge share premium amounting to Rs. 17,42,40,000/ during the financial year 2009- 10 relevant to assessment year 2010-11. 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.*

3.2 From the record and details filed, it is evident that the assessee is an unlisted company and the nature of the share application money received (the intrinsic value of share in comparison to excess premium received) is not substantiated by any cogent evidence, hence, it is the basis of formation of belief by the assessing officer that income to the extent not justified has escaped assessment in terms of provision of section 117 of the I. T. Act.

3.3 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:

((viii,) where a company. not being a company in which the public are substantially interested receives in any previous year, from an person being a resident, any consideration for issue of shares that exceeds the face value of such shores, the aggregate consideration received/or 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 though applicable front 13 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.

3.4 It may also be noted that it has been held by Hon'ble Supreme Court in the case of I.T.O. us. Lakhmani Mewat Das 119761 reported in 103 ITR 437 (SC) that the assessee cannot challenge the sufficiency of belief by A.O. It is also a matter of fact that the assessee has received huge share premium and therefore, the veracity of the same can be doubted and as such forms the basis for belief of the Assessing Officer. It must be noted that the expression 'reason to believe' cannot be read to mean that the A.O. should have finally ascertained the fact by legal evidence or conclusion. The function of the A.O. is to administer the statute with solicitude for the public exchequer with an in-built idea of fairness to taxpayers as has been held by Hon'ble Apex Court in the case of C.I.T. vs. Rajesh Jhaucri Stock Brokers (P.) Ltd. 120077 reported in 161 Taxman 319 (SC).

3.5 Insertion of Section 56(2)(viib) w.e.f 01/04/2013 does not imply that addition, on account of excessive share premium u/s 68 cannot be made for years prior to the amendment. The Bombay High Court in the case of Major Metals Ltd v/s Union of India 207

taxman 185 (Born) has upheld the stand of the department."

5. Accordingly, the AO completed the assessment. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) quashed the reopening of assessment vide Para 6.3 as under: -

"6.3 I have carefully perused the assessment order and the submission of the appellant. On perusal of the reason recorded, it is seen that the AO has not demonstrated as to how he has formed the belief that income has escaped to tax. A.O. has only mentioned that the appellant has received huge share premium and that the share premium has not been examined as no assessment u/s 143(3) has been carried out. This clearly indicates that the AO, at the time of reopening the assessment wants to reopen the assessment to verify the genuineness of the share premium. However, it is seen that the reason recorded does not reflect the "reason to believe" for reopening the assessment.

It is seen that the AO, has rejected the objection raised by the appellant. On carefully perusal of the said rejection letter to the objection raised by the appellant, it is seen that the AO has only noted that " the assessee is an unlisted company and the nature of the share application money received (the intrinsic value of share in

comparison to excess premium received) is not substantiated by any cogent evidence, hence, it is the basis of 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 Act."

It is clearly seen that the formation of belief is only on account of huge share premium. The share premium is a capital receipt but it Cal) be treated as unexplained cash credit u/s 68 only if the appellant has not satisfactorily proved the genuineness of the three limbs, i.e identity, creditworthiness and genuineness of the transaction. But, in the instant case, the AO has not found any cogent reason to disallow the appellant's claim that three limbs are satisfied. If all the three criteria is fulfilled, then section 68 cannot be invoked only on the basis of high value of share premium. In the instant case here, the A.O. has no information that the investors are not genuine; or have no creditworthiness or it was an accommodation entry taken in the garb of share premium. I hence, in absence of any information, it can be very well be concluded that it is mere suspicion on the part of the AO that the high value share premium is bogus. If A.O. wants to verity it, he can do so but this is not sufficient and enough

reason for formation of belief. Even ii) the assessment proceeding the AO has not stated that the investors are not genuine, or have no creditworthiness and therefore, the reopening is done only on guess work and mere suspicion. 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 143 held as under: - "The reasons recorded for the ITOs 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 (or assessment. and (2) the assessee was believed to have received a Sum of Rs. 22 lakhs from Oberois and this stint 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 air

suspicion, gossip or rumour. The ITO would be acting without acting without jursidiction if rite reason for his belief (Fiat the conditions are satisfied does not exist or is not material or relevant to the belief required by the section The count 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 stared in the reasons for starting proceedings in the instant case on winch any belief could he founded of the nature contemplated by section 34(1A). The so-called reasons were staled to be beliefs thus lending 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, appeal was allowed."

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 facts of the case here.

Further, the Hon. 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. In view of the above facts and discussion, I find force in the submission of the appellant. Therefore, ground no 1 of the appeal is allowed.*

Aggrieved, Revenue is in appeal before us.

6. Before us, the learned Sr. Departmental Representative argued that the reassessment proceeding is valid because no scrutiny assessment was carried out originally and return was processed under section 143(1) of the Act. According to the learned Sr. Departmental Representative, the AO found that the assessee is in the receipt of huge share premium amounting to ₹ 17,42,40,000/- during the FY 2009-10 relevant to AY 2010-11 and the details and evidence relating to issue of shares premium charged per share and other details are not available on record. According to him, the belief formed by assessee is based on new subsection (viib) of section 56(2) of the Act. According to the learned Sr. Departmental Representative, the assessment is reopened on the basis that what is required is the reason to believe but the AO has established the fact of escapement of income. According to him, at this stage notice is to be issued and only question is whether there is relevant material on which a reasonable person can form a requisite belief. According to him, the AO has reopened the assessment after recording the proper reasons. For this the learned Sr. Departmental Representative relied on the decision of Hon'ble Madras High Court in the case of Tans Corporate Advisory Services (P) Ltd. vs. ACIT (2017) 77 taxmann.com 21 (Madras).

7. On the other hand, the learned Counsel for the assessee stated that the assessee has filed complete details of share capital along with reserve and surplus and also share premium receipt by assessee from Essar Telecom Holdings Overseas Private Limited. It was explained that this security premium of 17,42,40,000/- was disclosed by Essar Telecom Holdings Overseas Private Limited in their return of income and audited accounts and by way of note this was explained that out of the above 17.60 crores company has cancelled the debentures consequent to the conversion thereof into 1.76 thousand equity shares at a premium of 10 each. According to the learned Counsel this is only a conversion of debentures into share premium and in this year there is no receipt at all of any share premium. The learned Counsel of the assessee filed copy of audited accounts of Essar Telecom Holdings Overseas Private Limited. In view of the above factual position, the learned Counsel explained the comparison of reasons between the reopening supplied by the AO and now supplied by the learned CIT Departmental Representative which reads as under: -

Reasons for reopening supplied by AO	*Reasons for reopening as supplied by DR*
From the records it is seen that the assessee is in receipt of huge share premium amounting to ₹ 17,42,40,000/- during the FY 2009-10 relevant to AY 2010-11. As there was no scrutiny assessment done for this year, the so-called share premium having been received by the assessee ws examined. In view of the ratio of the decision of Rajesh Jhaveri Stock Brokers Pvt. Ltd (291 ITR 500 (SC)] no assessment u/s 143(1) of the Act has been carried out by the Assessing Officer	*The assessee, Ample Holdings Pvt. Ltd, PAN AABCV7726L is an assessee of this charge. The assessee for AY 2010-11 has file its return declaring income of ₹ 2,07,145/- which was processed u/s 143(1) of the Act on 15.04.2011.* *From the records, it is seen that the assessee is in receipt of huge share premium amounting to ₹ 17,42,40,000/- during the FY 2009-10 relevant to AY 2010-11. As there was no scrutiny assessment done for this year, the so-called share premium having been received by the assessee was no examined. In view of the ratio of the decision of Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500 (SC)] no assessment under section 143(1) of the Act has been carried out by the Assessing*

	Officer.
In view of the above,	*To ascertain the 'nature' and the 'justification' for changing share premium over and above the intrinsic value of the shares remains unexplained.* *I have reason to believe that*
Income to the extent of amount of share premium charged over the intrinsic value of the share has escaped assessment.	*Income to the extent of amount of share premium charged over and above the intrinsic value of the share premium escaped assessment. (this sentence has been repeated)* *Notice u/s 148 is therefore, issued in this case.*

8. We have heard rival contentions and gone through the facts and circumstances of the case. From the documents produced before us which were already before the lower authorities, it is noted that the security premium of ₹ 17,42,40,000/- is just conversion from debentures which is clearly discernible from the accounts of the assessee particularly notes on accounts and this is not new introduction of share capital. This security premium is out of fully convertible debentures allotted earlier and this amount is reflecting in the balance sheet of Essar Telecom Holdings Overseas Private Limited under the head unsecured loan i.e. fully convertible debentures of 1,76,000 which is for an amount of ₹ 17,55,00,000/- and this is available as on 31.03.2009 also. Out of this amount, the assessee converted the debentures into security share premium of ₹ 17,42,40,000/- and balance share capital. In the given facts, we have gone through the reasons record, either given by AO to the assessee and hence, reproduced in the assessment order and the order of CIT(A) as well, the reasons provided by the learned Sr. Departmental Representative now. In essence, whether it is a case of escapement of income in view of the above facts and the reasons recorded, we find that while recording the reasons the source of information has not been specified and even the AO has not applied his

mind to the facts of the case and the reopening is based on incorrect understanding of law that income to the extent of an amount of share premium charged over the intrinsic value of shares escaped assessment. We find that the issue of share premium is a capital transaction bearing no effect on the income of the assessee and moreover, in this year there is no new introduction of share capital rather it is change from debentures to share capital or conversion of the securities, which were already allotted in earlier year i.e. as on 31.03.2009 as is evident from the balance sheet filed before us. Further, the AO while rejecting the objections of the assessee has mainly referred to provisions of section 56(2)(viib) of the Act are enabled to tax such a capital receipt for the first time is effective only from 01.04.2013 and thus not applicable to transactions under reference for the relevant AY 2010-11. The said section was not in existence when the shares were issued by the assessee in FY 2009-10 to AY 2010-11 and thus, the transaction in question is clearly out of the ambit of the above section and does not amounts to income of the assessee. Furthermore, from the reasons it is very clear that the escapement of income or evidence of escapement income has not been identified and therefore, reopening is based on presumption in conjuncture.

9. Further, according to us, there is no tangible material provided by the AO in the reasons recorded and it is very well settled proposition that proceedings under section 147 of the Act could be initiated in case of escapement of income from assessment as per statutory mandate. A perusal of reason extracted hereinabove, would now suggest that reopening is based upon in tangible material except that the assessee is in receipt of huge share premium amounting to ₹ 17,42,40,000/- during the FY 2009-10 relevant to AY 2010-11 and there is no scrutiny

assessment done for this year. Hence, according to AO, share premium have not been received by assessee and was not examined. This issue has been addressed by Hon'ble Delhi High court in the case of CIT vs. Orient Craft Limited [2013] 354 ITR 536 (Delhi), wherein it is held that the assessment reopened by the AO on the belief that there was an escapement of income and going through the return of income filed by the assessee after he accepted the return of income under section 143(1) of the Act without scrutiny assessment. Hon'ble Delhi High Court quashed the reassessment by observing as under: -

> *"15. 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, both strongly deprecated by the Supreme Court in Kelvinator of India Ltd.(supra). 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-à-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."*

10. Even Hon'ble Bombay High Court in the case of Khubchandani Healthcare P. Ltd. v. ITO 384 ITR 322 has considered this proposition and held that even in case where no assessment was framed under section 143(3) of the Act and return was processed by issuing intimation under section 143(1) of the Act, sine qua non to issue a reopening notice was reason to believe that income chargeable to tax had escaped assessment. The Hon'ble Court held observed as under: -

> *"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. Prima-facie, we are of the view that the basis of the impugned Notice stands concluded by the decision of this Court in Vodafone India Services (P.)Ltd. v. CIT [2014] 368 ITR 1/50 taxmann.com 300/[2015] 228 Taxman 25 (Bom.), wherein it has been held that the share premium being on the capital amount cannot be subjected to tax as income."

11. In view of the above facts and circumstances and precedence decided by Hon'ble Bombay High Court and Hon'ble Delhi High court, we affirm the order of CIT(A) quashing the reassessment.

12. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 04-04-2019.

Sd/-	Sd/-
(जी. मंजुनाथ /G MANJUNATHA)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 04-04-2019.

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**