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

BEFORE SHRI M.BALAGANESH, AM
&
SHRI AMARJIT SINGH , JM

ITA No.4710/Mum/2017
(**Assessment Year 2008-09:**)

DCIT, CIR. 6(3)(2) R.No.522, 5th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Khyati Realtors Pvt.Ltd 301/68, Manek Bhuvan 1st Hindu Colony Dadar (E), Mumbai – 400 014
PAN/GIR No.AACCK4422B		
(**Appellant**)	..	(**Respondent**)

Revenue by	Shri. B. Yadagiri
Assessee by	Shri Vijay Mehta & Shri Anuj Kisnadwala
Date of Hearing	**17/06/2019**
Date of Pronouncement	**17/07/2019**

आदेश / O R D E R

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

This appeal in ITA No.4710/Mum/2017 for A.Y.2008-09 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-12, Mumbai in appeal No.CIT(A)-12/DCIT-6(3)(2)/408/15-16 dated 12/04/2017 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 16/03/2016 by the ld. Dy. Commissioner of Income Tax-6(3)(2), Mumbai (hereinafter referred to as ld. AO).

2. The preliminary issue raised by the revenue is with regard to the action of the ld. CIT(A) in quashing the re-assessment order passed by the ld. AO.

3. The brief facts of this appeal are that the assessee company is engaged in the business of real estate, trading in Transferable Development Rights (TDR) and finance business. The assessee company filed its return of income on 29/09/2008 for the A.Y.2008-09 declaring total income of Rs.34,26,260/-. The said return was processed u/s.143(1) of the Act on 31/10/2009. The original scrutiny assessment was completed u/s.143(3) of the Act on 29/12/2010 determining total income of Rs.43,97,620/-.

3.1. Later, the assessment was sought to be reopened by the ld. AO by issue of notice u/s.148 of the Act on 30/03/2015 after recording the following reasons:-

4

REASON FOR REOPENING

M/s.Khyati Realtors Pvt. Ltd. (PAN : AACCK4422B)

A.Y.2008 - 09

In this case, the assessee filed its return of income for A.Y.2008-09 on 29.09.2008 declaring total income at Rs.34,26,260/-. The said return was processed u/s.143(1) on 31.10.2009. I have perused the Return of Income filed by the assessee in this case. It is seen that the case for above A.Y.2008-09 was not subject to assessment u/s.143(3) earlier and was processed u/s.143(1).

Table showing the financial result of 7 years as under :

A.Y.	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-1
Turnover	8,17,27,284	NIL	8,61,120	NIL	NIL	NIL	NIL	[illegible]
Gross Profit	1,03,03,291	33,86,776	1,07,93,033	3,70,03,041	14,35,68,423	6,11,78,444	4,31,37,725	5,47,89,(
Net Profit	1,03,30,274	23,78,641	94,36,720	3,68,73,511	13,39,92,776	5,14,61,876	3,77,74,902	4,31,15,!

2. From the records, it is seen that the assessee is in receipt of huge share premium amounting to Rs.49,06,36,080/- during the F.Y.2007-08 relevant to **A.Y.2008-09**. 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 nature of the share application received (the intrinsic value of the share in comparison to the excess premium received) is not substantiated.

3. As there was no assessment done, the Assessing Officer had no occasion to examine the said transaction. On perusal of the information and the evidences stated in support thereof, I am satisfied that income chargeable to tax has escaped assessment on this count. This issue was not examined by the A.O. in original scrutiny assessment proceedings and hence no opinion has been formed on this issue.

4. As noted above, the basic presumption and data is arbitrary and bereft of any genuine basis and gives rise to sufficient ground to believe that income assessable to tax has escaped in this case.

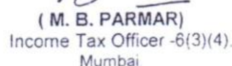
5. The Hon'ble Supreme Court in the case of **Rajesh Jhaveri Stock Brokers Pvt. Ltd.** has held that Section 147 authorizes and permits the Assessing Officer to assess or re-assess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word 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 judgment was rendered by the Hon'ble Supreme Court in the above case in view of the fact that only 143(1) had taken place and no scrutiny was done u/s.143(3) and the reopening was held to be valid.

6. The Hon'ble Bombay High Court in the case of E.C.G.C. v/s. Addl. C.I.T. 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 where 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 also placed on the judgment in the case of **M/s.Usha International, 348 ITR 485 (Delhi High Court).**

7. The introduction of a sum of Rs.50,55,920/- at a premium of Rs.49,06,36,080/- is a 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 to such extent has escaped assessment. I am, therefore, satisfied that income chargeable to tax to the extent of Rs.49,06,36,080/- has escaped assessment in the subject case and consider it fit to reopen the assessment u/s.147 of the Act.

8. Therefore, I have reason to believe that income chargeable to tax has escaped assessment due to failure on part of the assessee to disclose truly all material facts necessary for assessment. Therefore, the case is put up for reopen by issuing notice u/s.148 of the I.T. Act, 1961.



(M. B. PARMAR)
Income Tax Officer -6(3)(4),
Mumbai

3.2. In the re-assessment proceedings, the ld. AO made an addition u/s.68 to the tune of Rs.3,21,75,000/- towards receipt of share capital and share premium during the relevant year under consideration and determined the total income of assessee at Rs.3,63,72,620/- and passed an order u/s.143(3) r.w.s.147 of the IT Act on 16/03/2016.

3.3. The assessee challenged before the ld. CIT(A) both on jurisdiction for reopening the assessment as well as on merits. The ld. CIT(A) quashed the re-assessment proceedings by holding that the reopening was not done in accordance with law. The ld. CIT(A) however, did not adjudicate the issue on merits.

4. Aggrieved, the revenue is in appeal before us.

5. We have heard rival submissions. On perusal of the reasons, we find that the ld. AO starts his reasons with the premise that no assessment was originally framed for the A.Y.2008-09 which is totally contrary to the facts available on record, in view of the fact that there was scrutiny assessment framed for A.Y.2008-09 u/s.143(3) on 29/12/2010. We find that even the turnover figures, gross profit and net profit figures mentioned in the reasons for reopening were not matching with the accounts of the assessee. More importantly, the ld. AO had proceeded to record the reasons on the premise that the reopening is done in the instant case within a period of four years from the end of the relevant assessment year, which is also factually incorrect. In the instant case, notice u/s.148 was issued on 30/03/2015 which is beyond four years. Hence, the applicability of the proviso to Section 147 would come into play wherein it is mandated on the part of the ld. AO to record in the reasons itself, the failure on the part of the assessee to furnish true and full disclosure of facts in the return or in the original assessment. This fact is conspicuously absent in the reasons recorded reproduced hereinabove. Hence, the reopening deserves to be quashed on this ground itself. We find that the ld. CIT(A) had quashed the re-assessment proceedings by observing as under:-

> ***"2. The following** grounds of appeal are taken by the appellant.*
>
> *"I. Reopening of assessment u/s. 148*
> *i. On the facts and circumstances of the case and in law, the Ld. A.O. erred in reopening the assessment for the reasons recorded which is a fallacy since even though assessment was completed u/s. 143(3) on 29.12.2010 in the appellant's case, it has been stated in the reasons recorded that no assessment has been done and wrongly stated that appellant had received share premium amount of Rs. 49,06,36,080/- during the year instead of Rs.3,21,75,000/-.*
> ***ii. On the facts** and circumstances of the case and in law the Ld. A.O. erred in reopening **the** assessment beyond four years and failed to point out as to how the appellant has failed to disclose fully and truly all material facts necessary for its assessment. Thus, reopening of assessment beyond four years, without application of mind on the facts, is bad in law and needs to be quashed.*

2. On the facts and circumstances of the case and in law, the Ld. A.O. erred in making addition on account of unexplained cash credit u/s. 68 of Rs. 3,21,75,000/- by merely holding that the appellant had not discharged satisfactorily the primary onus cast upon it and could not justify the premium as well as valuation of the shares. Addition made, without considering the submission about the capacity of the investor and justification of premium of share, is bad in law and needs to be deleted.

3.The appellant company craves leave to add, to amend, alter/delete and/or modify the above ground of appeal on or before the final date of hearing".

3. Shri P. Sheth, C.A & A.R. of the appellant filed written submissions and it is carefully perused and kept on file.

4. The facts as mentioned by the appellant in the statement of facts are kept on record.

5. Considering the facts and circumstances of the case, the appeal is disposed off
as under: -

6. Ground no. 1
I have carefully perused the assessment order and the appellant's written submissions. It is seen that the A.O. has erred in reopening the assessment for the reasons recorded that no assessment has been done in this case. It is seen that assessment has been completed on 29.12.2010 u/s. 143(3) in the appellant's case. It is also seen that the A.O. has erred in stating that the appellant has received share premium of Rs. 49,06,36,0807- during the year when the actual amount is Rs. 3,21,75,0007-. It is also seen that the A.O. has erred in reopening the assessment beyond four years and having failed to point out as to how the appellant had not disclosed fully and truly all material facts.

6.1 As per records, it was found by the A.O. that the appellant had received a huge amount in the form of Share Capital/Share Application money/Share Premium of Rs.49,06,36,080/-. Notice u/s. 148 was issued on 30.03.2015. Vide letter dt 28.04.2015 the appellant requested the A.O. to provide the reasons for reopening and also requested the A.O. to treat the return of income filed on 29.09.2008 in response to ***notice*** *issued u/s 148.Notice u/s 143(2) dated 22.09.2015 was issued and served on the appellant and the reasons for reopening were provided to the appellant vide letter dated 26.11.2015. The appellant's case was reopened to examine the receipt of share premium of Rs. 49,06,36,080/- as there was no scrutiny assessment done for this year as per the reasons recorded for reopening by the A.O.*

6.2 On receipt of the reasons recorded for reopening the assessment the appellant raised objection vide its letter dated 21.12.2015 which is as follows:

"i. Company was selected for scrutiny u/s. 143(3) and Assessment order u/s. 143(3) for A.Y. 2008-09 was passed vide order dated 29.12.20.10 showing- Total income of RS.43,97,620/- after duly verified all aspects by Assessing Officer, However you stated in reason for reopening that "case for A.Y. 2008-09 was not subject matter to assessment u/s. 143(3) earlier and was processed u/s, 143(1)," The said statement is wrong.

ii. Issue of Share premium has been duly disclosed in the Balance sheet of both • Investor and Investee companies. Copies of statement of income, balance sheet, P & L accounts have been duly disclosed, in the return of income filed by us. There is no new fact or materials emerging out which can lead to belief that income has escaped assessment.
iii. Accumulated profits and turnover or past performance has been consistently and appropriately, disclosed in the ITRs and Balancesheet year after year. Your suspicion that income has escaped assessment does not form a reason to believe that income has escaped assessment. Kindly appreciate that mandate u/s. 148 requires a reason to believe that income has escaped assessment. Reason to suspect does not tantamount to reason to believe. There are various pronouncements in support of our above Contention.

iv. Shares are issued to its existing shareholder/ group company i.e. M/s. Lakshdeep Investment and Finance Private Limited and issue price per share is fixed as per mutual understanding between issuer and investor, v. In view of the above we submit that your action of reopening the assessment is based on mere suspicion without any fresh tangible material coming on record and hence is bad in law."
The above objections raised by the appellant were disposed off by the AO vide A-Os letter dt 22.01.2016 for the following reasons:

- *In the reasons recorded, it is clearly mentioned that the share premium received is more than intrinsic value of shares. On verification of accounts it was found that share premium received is very high as compared to its intrinsic value. Appellant's inability to declare undue premium received on shares as income for the year resulted in non-disclosure of true and correct income for AY 08-09.*

- *The material was available on record showing that the premium on share is received above intrinsic value of shares and it is held in the case of ACIT vs Kanga & Co. (2010 TIOL 464 ITAT Mum) that tangible material need not be from outside the return of income.*

- *Appellant failed to declare full and complete, taxable income during the year.*

6.3 On going through the reasons recorded for reopening the assessment, it is seen that correct facts are not stated.

It is rightly stated by the A.O. that the return was processed u/s. 143(1). However, return was also selected for scrutiny and subjected to assessment u/s. 143(3). Queries were raised by the AO regarding increase in share capital during the original . assessment. After application of mind, order was passed u/s. 143(3) on 29.12.2010. This shows that the AO while recording the reasons for reopening the assessment has failed to verify his own records.

i) The appellant also stated that the A.O. has given a wrong picture of the financial result of the appellant.

A.O. held as under:

ii)"Table showing the financial result of 7 Years as under;

A.Y.	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Turnover	8,17,27,284	NIL	5,61,120	NIL	NIL	NIL	NIL	NIL
Gross Profit	1,03,03,291	J3,S6,776	1,07,93,033	3,70,03,041	14,35,68,423	5,11,78,444	1,31,37,725	5,47,89,662
Net Profit	1,03,30,274	23,78,641	34,36,720	3,68,73,511	13,39,92,776	6,14,61,876	3,77,74,902	4,31,15,554

ii) In the above table, the AO has considered figures from the Profit & Loss A/c, Amount reflecting as "Profit before taxation" is considered as Gross Profit figure and "Profit after taxation" as Net Profit. Further turnover is stated as NIL. Although turnover is NIL in the above years but appellant has earned interest income which is also its business income and which should be considered as gross receipts. Thus, even the above table does not give true picture of the financial result of appellant.

A.O. held as under ---..-

iii."2. From the records, it is seen that the assessee is in receipt of huge share premium amounting to Rs. 49,06,36,080 during the F.Y. 2007-08 relevant to A.Y. 2008-09.........
7. Tlie introduction of a sum of Rs. 50,55,920/- at a premium of Rs. 49,06,36,080/- is a 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 to such extent has escaped assessment. I am, therefore, satisfied that income chargeable to tax to the extent of Rs. 49,06,36,080/- has escaped assessment in the subject case and consider it fit to reopen the assessment u/s. 147 of the Act". .

6.4 It is seen that the facts stated in above para is incorrect. During the year shares were issued as under;-

S. N	Name of the Person	No of share	face Value	Issue Price	Premium per share	Money Received towards		
						Share Application Money	Share Premium	Total
1.	M/s Lakshadeep							
	Investment & Finance Private Limited	32,500	0	1000	990	3,25,000	3,21,75,000	3,25,00,000

During AY 2008-09 the appellant had received share premium of Rs. 3,21,75,000/-only and Rs. 49,06,36,080/- pertains to total share premium received upto AY 2008-09 and not during the AY 2008-09. Further during the year the appellant had issued 32,500 shares and received Rs. 3,25,000/- only towards share capital and Rs. 3/21,75,000/-

*towards share premium. The AO has referred to a sum of Rs. 50,55,920/- which is total share capital upto AY 2008-09 and not the only share capital received during the AY 2008-09. This fact is clearly reflected in the balance sheet of the appellant company for AY 2008-09. Extract of Balance **sheet** is given hereunder:-*

	As at 31st March, 2008	*As at 31st March, 2007*
SCHEDULE "A" : SHARE CAPITAL		
Authorised:		
10,00,000 (Previous Year 10,00,000) Equity shares of Rs. 10/- each	*1,00,00,000*	*1,00,00,000*
	1,00,00,000	*1,00,00,000*
Issued, Subscribed and Paid-up:		
505,592 (Previous Year 473,092) Equity Shares of Rs. 10/- each fully paid up (All the above shares are held by Holding Company-Lakshdeep Inv & Fin. Pvt Ltd)	*50,55,920*	*47,30,920*
SCHEDULE "B" : RESERVES AND SURPLUS		
Capital Reserve	-	-
Share Premium		
As per last Balance sheet	*45,84,61,080*	*36,82,80,000*
Addition during the year	*3,21,75,000*	*9,01,81,080*
	49,06,36,080	*45,84,61,080*
Profit & Loss Account	*1,47,52,602*	*1,23,73,961*
	50,53,88,682	*47,08,35,041*

As seen from above, Rs. 50,55,920/- is total share capital as on 31.03.2008 and Rs. 49,06,36,080/- is total share premium as on 31.03.2008. These facts are reflected in the balance sheet of the appellant itself which is already placed on record. The AO had picked the wrong figures and considered total share capital of Rs. 50,55,920/- as share capital received during the year and Rs. 49,06,36,080/- as share premium received during the year. Further, it is stated mat income chargeable to tax to the extent of Rs. 49,06,36,080/- has escaped assessment. It is seen that amount of Rs. 49,06,36,080/- pertains to share premium and

share premium is a capital receipt and not a revenue receipt. Therefore/ share premium cannot be taxed as revenue receipt and due to this fact also it can be stated that there is no escapment of any income.

A.O. held as under :

iv) "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 AO once again stated that no scrutiny assessment was done in appellant's case. The case is reopened since according to AO the share premium was not examined as no scrutiny is done. Thus, the AO is reopening the assessment merely to examine the issue the share application/share premium. But it is seen that assessment u/s. 143(3) has been done in this case.

A.O. held as under:

v) "The assessee is an unlisted company and the nature of the share application received (the intrinsic value of share in comparison to excess premium received) is not substantiated."
From the above, it is not clear whether nature of share application or amount of share premium is doubted. Further, it is alleged that premium is in excess as compared to intrinsic value. However, it is not stated as to which intrinsic value is AO referring . During the reassessment proceeding, the appellant had submitted the working of valuation of shares as per Net Asset Value Method and value of share is arrived at Rs. 1005/- and appellant had issued shares at issue price of Rs. 1,000/-. If the AO would have gone through the balance sheet of the appellant company which was already on record than he could have noticed that the issue price of shares is not in excess. A.O. held as under:

vi) "3. As there was no assessment done, the Assessing Officer had no occasion to examine the said transaction. On perusal of the information and the evidences stated in support thereof, 1 am satisfied that income chargeable to tax has escaped assessment on this count. This issue was not examined by the A.O. in original scrutiny assessment proceedings and hence no opinion has been formed on this issue.'

The AO without verifying his own records has simply stated that no assessment was done in appellant's case. Also no information or evidences are mentioned relying on which the AO has stated that he is satisfied that income chargeable to tax has escaped assessment. Further, repeatedly AO states that issue was not examined as no assessment was done however, assessment was already done as explained above. 8 A.O. held as under:-

vii) "4. As noted above, the basic presumption and data is arbitrary and bereft of any genuine basis and gives rise to sufficient ground to believe that income assessable to tax has escaped in this case."

The basic presumption and data referred to are itself based on wrong facts and without verifying the data available on the record. Thus the formation of belief that income assessable to tax has escaped is without verifying the records and there is lack of application of mind.

6.5 Further, in the reasons recorded for reopening the assessment the AO had relied on two case laws. They are discussed as under:-
1 ACIT vs Rajesh Jhaveri Stock Brokers (P.) Ltd [2007] 161 Taxman 316 (SC)

In the above case, the phrase "reason to believe" is explained. In the reasons recorded it has been also stated that "This -judgment was rendered by the Hon'ble Supreme Court in the above case in view of the fact that only 143(1) had taken place and no scrutiny was done u/s. 143(3) and the reopening was held to be valid." However, the appellant's case is already scrutinized u/s. 143(3) and thus reliance placed on above decision does not support the reopening of the scrutinized assessment.

2 ECGC vs Addl CIT (2013) 30 taxmann.com 211 (Bombay)

In the above case, the reopening of assessment took place within a period of four years whereas in the appellant's case reopening is beyond a period of four years. Thus, in the above case formation of belief was only required to reopen the assessment. However, the appellant's case falls within the ambit uf the proviso to s. 147 as explained hereunder. Further in the above case, no query was raised by the AO during the original assessment whereas in the appellant's case queries were duly raised by the AO during the assessment proceeding regarding increase in share capital. Thus, the decision of the above case cannot be applied to the facts of the appellant's case.

Thus, it is seen that the facts of the two case laws relied by AO and the facts of the appellant's case are totally different and therefore the above decisions do not apply to appellant's case.

6,6 The AO has reopened the case of appellant on basis of wrong facts and merely to examine the issue of receipt of share premium.

It is pertinent to note that notice u/s. 148 was issued on 31,03.2015 i.e. after expiry of four years from the end of the assessment year. The first proviso to section 147 of the Act says:-

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

In the appellant's case, original assessment u/s. 143(3) was completed on 29.12.2010 wherein queries were raised regarding issue of increase in share capital. The following queries were raised during the original assessment

i. Furnish details of the expenses incurred towards increase in share capital and state why the same should not be capitalized.

ii. Furnish share holding pattern of the company along with the name of share holder and the percent of the share held by said share holder.

iii. Furnish the share holding pattern of M/s.Lakshdeep Investment & Finance Pvt Ltd and the applicability of the section 2(22)(e) of the Income Tax Act.

Also the balance sheet itself discloses all the facts regarding share capital issued and premium received. Further in the reasons recorded for reopening it is not explained how there is failure on part of appellant to disclose fully and truly all material facts. In fact repeatedly it has been stated by the AO that since no original assessment was carried on in
the appellant's case, the said issue was not examined. However, in reality the original assessment was completed in the appellant's case. AO has gone through all the facts, raised queries and only after applying his mind had passed the assessment order.All the material facts are fully and truly disclosed during the assessment proceeding.

6.7 Reliance is placed on following Hon'ble judgements in allowing this Ground of Appeal:-
1. In case of Nirmal Bang Securities (P.) Ltd vs ACIT [2016] 67 taxmann.com 57 (Bombay) it was held that:-

"In view of the well settled legal position and there admittedly being not even an allegation in the reasons recorded that there was any failure on the part of the assessee to disclose truly and fully any material fact necessary for assessment, let alone the details thereof, the impugned notice and the impugned order are liable to be quashed and set aside on this ground alone. [Para 24].

In the facts of the present case, even otherwise from the record it is visible that the assessee had disclosed fully and truly all material facts relating to the dividend income received by it, Tins is clear firstly from the return of income filed by the assessee where in the computation annexed to the return, the assessee had stated that it had earned dividend income which was fully exempt from tax under section 10(33). Secondly, in the profit and loss account, the assessee had disclosed that it had earned dividend income of the aforesaid amount. Thus there being a full and true disclosure of all material facts relating to earning of dividend income from units of mutual funds and the claim for exemption under section 10(33), the impugned notice is without jurisdiction as it fails to satisfy the criteria as set out in the first proviso to section 147. [Para 25]"

In the appellant's case, AO has merely stated that there is failure on part of assessee to disclose truly all material facts necessary for assessment. However, AO has not stated how there is failure on appellant's part since the appellant had already submitted all details during assessment proceeding. Further during the original assessment proceeding, the appellant had submitted balance sheet as on 31.03.2008 wherein it is clearly reflected that shares have been issued to the existing shareholder i.e. M/s. Lakshdeep Investment & Finance Pvt Ltd and in the Schedule of "Reserves & Surplus" addition to share premium during the year is shown as Rs. 3,21,75,000/-. Queries were also raised regarding share capital. Thus, a full and true disclosure of all material facts relating to share issue is made during the original proceeding and therefore notice u/s. 147 is without jurisdiction as it fails to satisfy the criteria as set out in the first proviso to s. 147.

2. In case of Khubchandani Healthparks (P.) Ltd v ITO[2016] 384 ITR 322 (Bombay) it was 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 arid 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.
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 Each case has to be decided on its own merits and so far as reopening is concerned, the same has to be viewed on the touchstone of reason to believe as recorded while issuing the notice."

In the appellant's case not only return was processed u/s. 143(1) but the assessment was completed u/s. 143(3) wherein the specific query were raised regarding increase in share capital. Further, reference has also been made to the decision of Hon'ble Mumbai High Court in case of Vodafone wherein it is held that the share premium being capital receipt cannot be subjected to tax as income.

3. In case of Purity Techtextile (P.) Ltd v. ACIT [2010J 189 Taxman 21 (Bombay) it was held that:
Section 147 of the Income Tax Act 1961, Income escaping assessment – Non-disclosure of primary facts - Assessment year 2003-04 and 2004-05 - Whether reasons, which are recorded by Assessing Officer for reopening assessment, are crucial and it is on basis of those reasons alone that validity of an order reopening an assessment has to be decided - Held, yes - On 29-12-1999, assessee had taken certain land and building on lease for a period of ten years - Thereafter, it purchased plant and machinery and set up an industrial undertaking on property - It was allowed deduction under section 80-IB from assessment year 2001-02 to assessment year 2006-07 - On 24-3-2009 and 31-3-2009, Assessing Officer reopened assessments for assessment years 2003-04 and 2004-05 on ground that during course of subsequent proceedings, a copy of license was filed by assessee, which stated that plan for factory was approved by Sarpanch on 12-9-1988 and, consequently, there was valid reason to believe that income had escaped assessment inasmuch as information showed that industrial undertaking was in existence prior to date of lodging of claim for deduction under section 80-IB for assessment year 2001-02 - Facts revealed that Assessing Officer had granted assessee deduction under section 80-IB after being appraised of all relevant details, including those in Form 10CCB which showed that plans had been approved in 1988 - Whether, on facts, Assessing Officer was justified in invoking powers under section 148 beyond expiry of a period of four years from end of assessment year 2003-04 - Held, no - Whether for assessment year 2004-05, though reopening of assessment had taken place within a period of four years from expiry of that assessment year, yet it was apparent that Assessing Officer did not have before him any additional material at all to form a belief that income had escaped assessment and, therefore, reopening of assessment was not justified for that assessment year also - Held, yes
***6.8** It is pertinent to note that, in the appellant's case, shares have been issued at premium during the year to the existing shareholder only i.e. holding company of the appellant and said facts are duly reflected in the balance sheet of the appellant which was submitted during the assessment proceeding.*
Since the AO has duly applied his mind in original assessment, the assessment cannot be reopened for the same issue for which AO has applied his mind. No new material or facts are brought on record which shows that there is any escapement of income. From the same set of facts or materials, the AO has now drawn different conclusion as compared

to conclusion drawn during assessment proceedings. Thus it is nothing but a mere change of opinion.
6.9 Reliance is also placed on following decisions of Hon'ble Supreme Court and Hon'ble Mumbai High Court wherein reopening based on mere change of opinion was held as invalid;-

1 CIT v. Kelvinator of India Ltd (2010) 187 Taxman 312(SC)
2

"However, one needs to give a schematic interpretation to the words 'reason to believe', failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of mere change of opinion', which cannot be per se reason to reopen. One must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess, but the reassessment has to be based on fulfilment of certain pre-conditions and if the concept of 'change of opinion' is removed as contended on behalf of the department, then in the garb of reopening 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 1-4-1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment. Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However, on receipt of representations from the companies against omission of the words 'reason to believe', the Parliament re-introduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer.

2. Asteroids Trading and Investments (P.) Ltd v. DCIT [2009] 308 ITR 190 (BOM.)

Where petitioner had made full disclosure necessary for claiming deduction under section 80M and Assessing Officer, after applying his mind to relevant records/ had made a specific order allowing deduction, subsequent issue of notice on ground that deduction under section 80M was wrongly allowed, being based on change of opinion, was invalid.
6.10 Further on perusal of the reasons recorded it can be seen that appellant's case is
reopened merely because the issue was not examined in the original assessment proceeding. Thus, it can be said that the case is reopened to examine the issue.In the case of NAVI TRADING LIMITED vs. UNION OF INDIA (2015) 278 CTR 0219 (Bom) : (2015) 375 ITR 0308 (Bom), juris dictional High Court has held that/ more details are sought or some verification is proposed that cannot be a substitute for the reasons and which led the Assessing Officer to believe that an income chargeable to tax has escaped assessment, "*
So here, in the appellant's case, assessment was carried out u/s. 143(3); all the facts were placed on record during original assessment; case was reopened beyond a period of four years without showing how the appellant failed to disclose all material facts fully and
truly.
In view of the above facts and explanation, reopening of the assessment is quashed as it is based on wrong facts; it's a mere change of opinion and is merely to examine the case of appellant.
Thus ground of appeal no. 1 is allowed.
7. Ground no. 2

Since ground no. 1 is allowed, Ground no. 2 becomes infructous and is not adjudicated upon.
8. In the result, the appeal of the appellant is allowed."

5.1. We also find that the Hon'ble Jurisdictional High Court in the case of Asian Paints Ltd. vs. DCIT reported in 308 ITR 195(Bom) had held as under:-

"7. We have heard the learned Counsel appearing for both sides. We have also gone through the judgments on which reliance was placed by the learned Counsel appearing for both sides.

8. In the order rejecting the objection filed by the petitioner to the notice under Section 148, respondent No. 1 has observed 'verification of assessment record reveals that the said details were called for but inadvertently the same were not taken into account while framing the assessment and, therefore, it cannot be said that there is a change of opinion.' According to respondent No. 1, thus, the relevant material was available on record, but he failed to apply his mind to that material in making the assessment order. The question is, can respondent No. 1 take recourse to the provision of Section 147 for his own failure to apply his mind to the material which, according to him, is relevant and which was available on record. We find that this situation has been considered by the Full Bench of the Delhi High Court in its judgment in the case of CIT v. Kelvinator of India Ltd. [2002] 256 ITR 1 and the Full Bench has observed thus (page 19):

The said submission is fallacious. An order of assessment can be passed either in terms of Sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said Sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of Clause (e) of Section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.

9. It is clear from the observations made above that the Full Bench of the Delhi High Court has taken a view that in a situation where according to the Assessing Officer he failed to apply his mind to the relevant material in making the assessment order, he cannot take advantage of his own wrong and reopen the assessment by taking recourse to the provisions of Section

147. We find, ourself, in respectful agreement with the view taken by the Full Bench of the Delhi High Court.

10. It is further to be seen that the Legislature has not conferred power on the Assessing Officer to review its own order. Therefore, the power under Section 147 cannot be used to review the order. In the present case, though the Assessing Officer has used the phrase 'reason to believe', admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the Assessing Officer, nothing new has happened, therefore, no new material has come on record, no new information has been received, it is merely a fresh application of mind by the same Assessing Officer to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator [2002] 256 ITR 1 referred to above, has taken a clear view that reopening of assessment under Section 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under Section 148.

11. In the result, therefore, petition succeeds and is allowed. Rule is made absolute in terms of prayer Clause (a) with no order as to costs."

5.2. We find in the instant case, the reopening was sought to be made by the ld. AR only for making verification which is not permissible in the eyes of law. In view of the aforesaid elaborate findings given by the ld. CIT(A) and respectfully following the judicial precedents hereinabove, we do not find any infirmity in the order of ld. CIT(A) quashing the re-assessment proceedings. Accordingly, the ground No.1 raised by the revenue is dismissed.

5.3. Since the re-assessment is quashed, the addition made towards share capital in the sum of Rs.3,21,75,000/- which is the subject matter of ground No.2 raised by the revenue need not be adjudicated as it becomes academic in nature.

6. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on this 17/07/2019

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

Mumbai; Dated 17/07/2019
Karuna Sr.PS

<u>Copy of the Order forwarded to</u> :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai