

**IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH
MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI M.BALAGANESH, AM**

**ITA No.6684/Mum/2017
(Assessment Year :2010-11)**

The DCIT-4(2)(2), Room No.640, 6 th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Jhawar Trade and Investment Pvt. Ltd., 285, Princess Street, C.J.House, 2 nd Floor Mumbai – 400 002
PAN/GIR No. AAACJ8175E		
(Appellant)	..	(Respondent)

**CO No.161/Mum/2019
(Arising Out of ITA No.6684/Mum/2017)
(Assessment Year :2010-11)**

M/s. Jhawar Trade and Investment Pvt. Ltd., 285, Princess Street, C.J.House, 2 nd Floor Mumbai – 400 002	Vs.	The DCIT-4(2)(2), Room No.640, 6 th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No. AAACJ8175E		
(Appellant)	..	(Respondent)

Revenue by	Shri Akhtar Ansari
Assessee by	Shri Vimal Punmiya
Date of Hearing	18/10/2019
Date of Pronouncement	25/10/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal of the revenue in ITA No.6684/Mum/2017 and Cross Objection No.161/Mum/2019 for A.Y.2010-11 of the assessee arise out of the order by the Id. Commissioner of Income Tax (Appeals)-9, Mumbai in appeal No.CIT(A)-9/DCIT-4(2)(2)/44/2016-17 dated 21/09/2017 (Id.

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 30/03/2016 by the Id. Dy. Commissioner of Income Tax – 4(2)(2), Mumbai (hereinafter referred to as Id. AO).

CO No.161/Mum/2019 (A.Y.2010-11)

2. We find that the Cross Objection preferred by the assessee is delayed by 144 days. The assessee had filed an affidavit explaining the reasons for the delay with a prayer to condone the same. We find that the assessee had affirmed that due to some renovation work carried out in their office, the relevant appeal files got dislocated as the same were erroneously kept with some old files and that relevant appeal files could be located only in the second week of May 2019 at the time of re-indexing of all the files in the office. Within two weeks of such location of the relevant files, the assessee had ultimately filed the cross objection before this Tribunal. We find in the facts and circumstances of the case, we deem it fit and proper to condone the delay of 144 days in filing the appeal before us as assessee was prevented from reasonable cause in not filing the appeal in time before this Tribunal and admit the cross objection of the assessee for adjudication.

2.1. In the Cross Objection of the assessee, the assessee had challenged the validity of reopening of assessment u/s.147 of the Act by the Id. AO.

2.2. We have heard rival submissions and perused the materials available on record. We find that the brief facts of this issue are that the assessee company is engaged in the business of investment in properties, renting on properties, investment and trading in shares and securities.

The return of income for the A.Y.2010-11 was filed by the assessee on 10/09/2010 declaring total income of Rs.2,08,34,350/- which was duly processed u/s.143(1) of the Act. Later, the assessment was sought to be reopened by issuing notice u/s.148 of the Act on 25/03/2015.

2.3. In response thereto, the assessee vide its letter dated 08/04/2015 requested the Id. AO to treat the return of income filed already on 10/09/2010 to be the return filed in response to notice u/s.148 of the Act. The assessee sought for the reasons recorded by the Id. AO for reopening the assessment. The reasons recorded by the Id. AO as reproduced in page 2 of the assessment order are as under:-

1. *“The assessee M/s. Jhawar Trade & Investment Pvt. Ltd., (PAN : AAACJ8175E) has e-filed its return of income for A.Y.2010-11 on 10-09-2010 declaring income of Rs.2,08,34,350/-, This return of income was processed u/s.143(1) on 10-12-2011.*

2. *From the records, it is seen that the assessee is in receipt of huge share premium amounting to Rs.3,70,63,750/- during the FY.2009-10 relevant to A.Y.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. 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. (emphasis supplied by us)*

3. *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 express 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 security was done u/s. 143(3) and the reopening was held to be valid.*

4. *The Hon'ble Bombay High Court in the case of E.C.G.C. vs. 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 where there is relevant material on which a reasonable person can form a requisite belief. When an assessment is sought to be reopened within the 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 consequent of this (here 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. 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).

5. Thus, the assessee has failed to disclose fully and truly all material facts necessary for its assessment for A. Y.2010-11. In view of the above facts and the judicial decisions, I have reason to believe that income of Rs.3,70,63,750/- pertaining to A. Y.2010-11 being share premium has escaped assessment in terms of provisions of section 147 of the I. T. Act.

2.4. From the perusal of the aforesaid reasons, we find that the Id. AO had only re-looked the existing facts that are already available with him on records and sought to reopen the assessment of the assessee for the A.Y.2010-11. There is absolutely no tangible material brought on record by the Id. AO in the reasons recorded having any live link for formation of belief that income of the assessee had escaped assessment. This is a classic case of Id. AO trying to review the assessment in the garb of reopening. We find that even though the assessment was originally completed u/s.143(1) of the Act and the reopening being made in the instant case within a period of four years, still the law is very well settled that the necessary ingredients of Section 147 of the Act should be duly satisfied for the purpose of reopening. The necessary ingredients would be availability of tangible material with the Id. AO having a live link which enables him to form a belief that income of the assessee has escaped assessment. From the perusal of the aforesaid reasons, it could be safely concluded that there is absolutely no tangible material available with the assessee to draw to any such conclusion that income of the assessee had

escaped assessment. These facts are very much evident from the bold portion (emphasis supplied by us) in the reasons recorded by the Id AO for reopening the assessment.

2.5. On the contrary, the reasons recorded only indicate that action of the Id AO to reopen the case was for making roving enquiries with regard to the facts already available on record. The AO had effectively tried to frame the assessment u/s.147 of the Act as an alternative for not selecting the case for scrutiny originally. Selection of case for scrutiny is not in the hands of the assessee. It is always left to the wisdom of the Income Tax department to select the case for scrutiny either manually or through computer assisted selection of cases for scrutiny (CASS) based on the respective scrutiny norms issued by the Central Board of Direct Taxes from time to time. We find that the Id AO had also categorically stated in the reasons recorded that since no scrutiny assessment was framed originally, the receipt of share premium was not examined by the revenue. This, in our considered opinion, cannot be a ground for reopening an assessment already completed, unless there is any tangible material available with the Id AO. We hold that there is absolutely no tangible material available with the Id. AO to reopen the assessment in the instant case and hence, the necessary ingredients of Section 147 of the Act have not been fulfilled. It is well settled with the reasons recorded by the Id. AO should be elaborate and should speak for itself about the action of the Id. AO for formation of belief that income had escaped assessment. It should not be vague. It should not be for the purpose of making roving enquiries on an issue. The satisfaction of the Id. AO that income had escaped assessment should emanate from the reasons recorded at the time of initiation of re-assessment itself and the same cannot be ratified or strengthened by subsequent investigations or evidences. Reliance in this regard is placed on the decision of the Hon'ble

Jurisdictional High Court in the case of Hindustan Lever Limited reported in 268 ITR 332 (Bom).

2.6. We hold that there is a conceptual difference between power to review and power to re-assess. The Id. AO had got power only to re-assess but the said re-assessment has to be based on the fulfilment of necessary ingredients of Section 147 of the Act that income of the assessee had escaped assessment which is supported by the tangible material available with the Id. AO. This understanding of law has been approved by the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. reported in 320 ITR 561 (SC).

2.7. It is already very well settled that in determining whether commencement of assessment proceedings was valid or not, it has to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at that stage. This has been laid down by the Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd., vs. ITO and others reported in 236 ITR 34(SC). But we find in the instant case that no such prima facie material is available with the Id. AO or any tangible material that is available with the Id. AO was brought on record in the reasons recorded which would enable the Id. AO to form a belief that income of the assessee had escaped assessment.

2.8. In view of the aforesaid observations in the facts and circumstances of the case, the cross objection preferred by the assessee challenging the validity of reopening of assessment is hereby allowed. Accordingly, re-assessment framed by the Id. AO is hereby quashed.

ITA No.6684/Mum/2017 (A.Y..)

3. Since, the issue is decided in favour of the assessee on legal aspect the adjudication of the ground raised by the revenue on merits becomes infructuous.

4. In the result, appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced in the open court on this 25/10/2019

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 25/10/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai