

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA NO. 639/MUM/2018

:

A.Y : 2008-09

Income Tax Officer – 12(3)(3),
Room No.224, 2nd Floor,
Aayakar Bhavan,
M. K. Road,
Mumbai – 400 020

Vs. M/s. Manhattan Impex Pvt. Ltd.,
G-7, Unique House,
Cardinal Gracious Road,
Chakala,
Andheri East,
Mumbai – 400 099
PAN : AAECM6220F

(Appellant)

(Respondent)

Appellant by : Shri Gaurav Kabra, A.R.

Respondent by : Shri Sajit V. Nair, D.R.

Date of Hearing : 19/01/2021

Date of Pronouncement : 08/03/2021

ORDER

PER RAJESH KUMAR, AM :

This appeal by the Revenue is directed against the order of learned Commissioner of Income Tax (Appeals) - 20, Mumbai (in short 'the CIT(A)') dated 31.03.2016 pertaining to Assessment Year 2008-09.

2. The issue raised in ground No.1 is against the order of Ld. CIT(A) wherein the Ld. CIT(A) has quashed the jurisdiction exercise under section 147 of the Act by the AO as bad in law.

3. The facts in brief are that the assessee has not filed any return of income during the year. Since the assessee has not filed any return of income the AO selected the case of the assessee under scrutiny under section 147 read with section 148 of the Act by issuing notice dated 24.03.2015 which was complied with by the assessee by filing a return of income on 10.10.2015 declaring nil income. The reasons recorded for reopening assessment under section 148(2) of the Act are reproduced as under for the sake of ready reference:

“In this case, the assessee has not filed return of income for the year under consideration. The information gathered from ROC, it is noticed that the assessee has received share premium to the tune of Rs.1,12,41,000/- during the F.Y. 2007-08 relevant to A.Y. 2008-09.

Further, the share premium is also not verifiable from the record, as the assessee has not filed any return of income for the above mentioned assessment year and therefore, I have reason to believe that income chargeable to tax as indicated above to the tune of Rs.1,12,41,000/- has escaped assessment within the meaning of section 147 of the Income Tax Act,1961. Therefore, I am satisfied that this is a fit case to issue notice u/s 148 r.w.s. 147 of the Income-tax Act, 1961.”

4. The AO framed the assessment under section 143(3) read with section 147 of the Act vide order dated 09.03.2016 by making an addition of Rs.4,79,90,000/- being unexplained cash credit under section 68 of the Act.

5. The assessee has challenged the reopening of assessment under section 147 of the Act before Ld. CIT(A) who, after taking into account the contentions and pleas of the assessee, allowed the appeal on jurisdictional issue by observing and holding as under:

“5.4.1 Decision on ground no. 1 & 2:

5.4.2 I have considered the submissions of the appellant. As per para 4 of the assessment order, the reasons recorded for reopening the assessment are as under:

"In this case, the assessee has not filed return of income for the year under consideration. The information gathered from ROC, it is noticed that the assessee has received share premium to the tune of Rs.1,12,41,000/- during the F.Y. 2007-08 relevant to A.Y.2008-09.

Further, the share premium is also not verifiable from the record, as the assessee has not filed any return of income for the above mentioned assessment year and therefore, I have reason to believe that income chargeable to tax as indicated above to the tune of Rs.1,12,41,000/- has escaped assessment within the meaning of section 141 of the Income-tax Act, 1961. Therefore, I am satisfied that this is a fit case to issue notice u/s. 148 r.w. 147 of the Income-tax Act, 1961."

5.4.3 In this case the AO found that the genuineness of the appellant's claim of having received premium of Rs. 1,12,41,000/- during the F.Y. 2007-08 was not verifiable. Based on this fact, the AO formed his belief that income chargeable to tax had escaped assessment.

5.4.4 It is nobody's case that all cases where the assessee declares receipt of premium, are cases where income escapes assessment. Therefore, in this case the AO could not have logically inferred that income had escaped assessment based on the information that the appellant had claimed to have received premium. The AO did not bring any material on record to make a prima facie case that the premium shown is bogus. Therefore, there was no material before the AO based on which the AO could have formed the reason to believe that income has escaped assessment. Thus it was a mere suspicion of the AO, that prompted him to initiate assessment proceedings under section 147, which is neither countenanced, nor sustainable in law.

5.4.5 The Hon'ble Supreme Court in the case of ITO vs. Lakhmani Mewal Das, 103 ITR 437 (SC), held as under:

"As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were

there in section 34 of the Act of 1922 at one time before its amendment in 1948 arc not there in section 147 of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence"

5.4.6 Therefore, I agree with the AR that there was no nexus between the material received and the reason to believe formed by the AO. Therefore, in my view, the reopening of the assessment is bad in law. **I, therefore, allow the ground of appeal no. 1 & 2."**

6. The Ld. D.R. submitted that in this case the assessee has not filed any return of income. The AO on the basis of information from ROC found that the assessee has received huge share application money during the year and issued shares of Rs. 10/- each at a premium of Rs. 90/- and also at Rs. 390/- thereby increasing its share capital and share premium by aggregate amount of Rs. 4,79,90,000/-. The Ld. D.R. argued that in this case the AO has tangible and fresh material to form a belief that income has escaped assessment. The Ld. D.R., while referring to the reasons recorded, submitted that it is clearly mentioned in the reasons recorded under section 148(2) of the Act that share premium to the tune of Rs.1,12,41,000/- was received by the assessee during the year. The Ld. D.R. submitted that it has been clearly recorded in the reason that the said premium is not verifiable as the assessee has not filed any return of income and needs proper verification and thereafter the AO formed the belief that income chargeable to tax has escaped assessment. The Ld. D.R., therefore, prayed that the ld CIT(A) has wrongly allowed the appeal of the assessee on this jurisdictional issue by holding that there is no nexus between the material and reasons to believe and the ground no. 1 raised by the revenue may kindly be

allowed. The ld. DR prayed that in view of these facts and circumstances especially independent and tangible materials received from ROC , the legal ground raised by the revenue may kindly be allowed by setting aside the order of Ld. CIT(A) on this issue.

7. The ld AR on the other hand strongly opposed the arguments of the ld DR and vehemently submitted before the Bench that reopening of assessment proceedings of the assessee was done without valid and lawful jurisdiction by the AO and therefore the assessment proceedings as well as the consequent assessment framed by the AO are void ab-initio and bad in law. The Ld. A.R. while taking us through the reasons recorded for reopening the assessment contended that the reasons to believe as recorded by the AO under section 148(2) of the Act have only stated in the last para that assessee has raised share premium to the tune of Rs. 1,12,41,000/- and all these facts and information need verification. Thus in view of these facts , the AO have reason to believe that income chargeable to tax has escaped assessment and therefore the case is required to be reopened under section 147 of the Act to tax the said escaped income. The Ld. A.R. vehemently argued before the Bench that the recourse can not be had to the provisions of section 147 of the Act just for making verification of facts and information which have been received by the AO. The Ld. A.R. contended that the AO is required to form a belief on the basis of said information received that income of the assessee has escaped assessment failing which the AO has no jurisdiction to initiate the proceedings

under section 147 read with section 148 of the Act. The Ld. A.R. argued that the AO is required to form a reasonable belief that that income chargeable to tax has escaped assessment on the basis of information available to him which is missing in the instant case as is apparent from the reasons reproduced above. The AO has resorted to the provisions of section 147 of the Act to merely verify the information received from ROC and therefore the notice issued under section 148 for verification of information received is invalid and unsustainable in the eyes of law. The Ld. A.R. argued that AO can not be allowed to take recourse under section 147 of the Act to undertake fishing or robbing enquiry or to seeking to verify claims as if it were a scrutiny assessment. Therefore, the Ld. A.R. submitted that if verification is proposed in the reasons recorded, the same can not be a substitute for reason to believe which empowers the AO to reopen the assessment on the ground that income chargeable to tax has escaped assessment. The Ld. A.R. therefore, argued before the Bench that there is no formation of belief or finding by the AO that income has escaped assessment and therefore the assessment proceedings as well as the consequent assessment order are bad in law and has rightly been held so by Id CIT(A). In defence of his arguments, the Ld. A.R. relied on a series of decisions as under:

1. PCIT v Manzil Dineshkumar Shah (406 ITR 326)(Guj)
2. SLP dismissed by the Hon'ble Supreme Court against the judgment of the Hon'ble Gujrat High Court in the case of PCIT v Manzil Dineshkumar Shah
3. Inductotheran (India) P. Ltd. v DCIT (356 ITR 481) (Gujarat)
4. Chhugamal Rajpal v S P Chaliha and Ors. Ltd. (416 ITR 435) (SC)
5. Nivi Trading Ltd v Union of India (375 ITR 308) (Bombay HC)
6. CIT v Maniben Lalji Shah (283 ITR 453) (Bombay HC)
7. CIT v Batra Bhatia Company (321 ITR 526) (Delhi HC)
8. Swatik Safe Deposit & Investment Ltd. vs. ACIT (265 Taxman 164) (Bombay HC)

9. NuPower Renewable Pvt. Ltd. vs. ACIT WPN0.3618 of 2018 dated 07.03.2019 (Bombay HC)

8. The Ld. A.R., therefore, prayed that in view of the ratio laid down by the Apex Court and various High Courts, the assumption of jurisdiction under section 147 of the Act for verification of facts/information received from ROC is bad in law and so is the consequent assessment framed u/s 143(3) r.w.s. 147 of the Act which has rightly been decided by the Ld. CIT(A) in favour of the assessee by holding the proceeding under section 147 is bad in law and therefore prayed before the Bench that appeal of the Revenue on this legal issue may kindly be dismissed.

9. We have heard the rival submissions of both the parties and perused the material on record including the impugned order and the reasons recorded under section 148(2) of the Act. We note that in this case the assessee has raised share capital and share premium to the tune of Rs.4,79,90,000/-. The AO has recorded the reasons as required u/s 148(2) of the Act to reopen the assessment after receiving information from ROC and recorded in the concluding para of the reasons that facts and information as to receipt of share premium to the tune of Rs.1,12,41,000/- by the assessee are not verifiable as the assessee has not filed the return of income. For the sake of convenience and ready reference the said paras are extracted again as under:

“In this case, the assessee has not filed return of income for the year under consideration. The information gathered from ROC, it is noticed that the assessee has received share premium to the tune of Rs.1,12,41,000/- during the F.Y. 2007-08 relevant to A.Y. 2008-09.

Further, the share premium is also not verifiable from the record, as the assessee has not filed any return of income for the above mentioned assessment year and

therefore, I have reason to believe that income chargeable to tax as indicated above to the tune of Rs.1,12,41,000/- has escaped assessment within the meaning of section 147 of the Income Tax Act,1961. Therefore, I am satisfied that this is a fit case to issue notice u/s 148 r.w.s. 147 of the Income-tax Act, 1961.”

10. Thus we note that the AO has mentioned in the reasons recorded that the facts and information as regards share premium are not verifiable as no return of income has been filed by the assessee and considering these facts, he has reason to believe that income chargeable to tax has escaped assessment and accordingly initiated proceedings under section 147 of the Act. We find merit in the contentions and arguments of the Ld. A.R. that the AO has not formed any independent belief or recorded a finding that income of the assessee has escaped assessment but merely stated in the reason to believe that these facts and information need proper verification and hence reopened the case in order to carry out the verification of these facts which are not permissible under the Act. The case of the assessee is squarely covered by a series of decisions as referred to during the hearing by the ld counsel of the assessee and are discussed hereunder:

(a) In the case of PCIT vs Manzil Dinesh kumar Shah (supra), the Hon'ble Gujrat High Court has held that formation of independent opinion by the AO is mandatory condition and mere mentioning of need for deep verification of information received is not a valid ground for reopening. The Hon'ble court has held that reopening of assessment could not be permitted for fishing or robbing enquiry as it would not satisfy the requirement of the AO having reasons to believe that income chargeable to tax has escaped

assessment. In this case, the AO has recorded that I have reason to believe that income chargeable to tax has escaped assessment for the assessment year 2009-10 due to omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and thus the case needs to be reopened as the information received by this office needs deep verification. The Hon'ble Court has held that had the AO on the basis of information made available to him and upon applying his mind to such information formed a belief that income chargeable to tax has escaped assessment, the court would have rightly allowed him to reassess the income but in the present case he recorded that information required deep verification and later reconstitution of mandatory words that he believed that income chargeable to tax has escaped assessment would not cure this fundamental defect. The Hon'ble Supreme Court has dismissed the special leave petition filed by the Revenue in the above case as reported in (2019) 101 taxmann.com 259 (SC) wherein thereby upholding the view taken by the Hon'ble Gujarat High Court in the above case.

(b) In the case of Inductotheran (India) P. Ltd. v DCIT (supra) the Hon'ble Gujarat High Court has held that the reassessment notice is not permissible merely for verification of claim made under section 80HHC of the Act. The relevant extract of the decision of the Hon'ble Gujarat High Court is reproduced below:

"18. Reverting to the facts of the present case, we notice that in two out of the four reasons recorded by the Assessing Officer for reopening the

assessment, he stated that he need to verify the claims. In the second ground, he had recorded that the admissibility of the bad debts written off required to be verified. In the fourth ground also, he had recorded that the admissibility of royalty claim was required to be verified. We are in agreement with the contention of the counsel for the petitioner that for a mere] verification of the claim, the power for reopening of assessment could not be exercised. The Assessing Officer in the guise of power to reopen ai assessment, cannot seek to undertake a fishing or roving inquiry and see] to verify the claims as if it were a scrutiny assessment.”

(c) In the case of *Chhugamal Rajpal v S P Chaliha and Ors. Ltd.* (supra), the Hon’ble Supreme Court has held that the AO must have prima facie grounds for issuing notice u/s 148. The operative part is reproduced as under:

“Held, (i) that the Income-tax Officer had not even come to a prima fade conclusion that the loan transactions to which he referred were not genuine transactions : he appeared to have only a vague feeling that they might be bogus transactions. Such a conclusion did not fulfil the requirements of section 151(2). Under that section he had to give reasons for issuing a notice under section 148. He should have some prima facie grounds before him for taking action under section 148. His conclusion that there was a case for investigating the truth of the alleged transactions was not the same thing as saying that there were reasons for the issue of the notice. The Commissioner had mechanically accorded permission. The important safeguards provided in sections 147 and 151 were lightly treated by the officer and the Commissioner. The Income-tax Officer could not have had reason to believe that income had escaped assessment by reason of the appellant-firm's failure to disclose material facts and if the Commissioner had read the report carefully he could not have come to the conclusion that this was a fit case for issuing a notice under section 148. The notice issued under section 148 was therefore invalid.”

Thus the court observed that AO has recorded in his report that there is a case for investigation as to the truth of the alleged bogus transactions and court held that this does not meet the requirements to issue notice under section 148 of the Act.

(d) In the case of Nivi Trading Ltd v Union of India (supra) & others (supra) the Hon'ble Bombay High Court has held that if more details are sought or some verification is proposed that can not be a substitution for reason which led the AO to believe that income chargeable to tax has escaped assessment. The court has held as under:

“Held, allowing the petition, that the return of income was filed. There was a processing and verification thereof. In the return of income and on the respondents' own showing on its verification, the long-term capital gains and dividend income in the sum came to be disclosed and equally another sum (Rs. 1,21,33,429) as gift. The Revenue proceeded on the footing that these shares were gifted without consideration. It was this fact which it wanted to verify and particularly whether the value of these shares had been computed on the market value. The tax authorities did not state that any income chargeable to tax had escaped assessment: All that the Revenue desired was verification of certain details and pertaining to the gift. That was not founded on the belief that any income which was chargeable to tax had escaped assessment and, hence, such verification was necessary. That belief was not recorded. The notice of reassessment was not valid.”

(e) In the case of CIT v Maniben Lalji Shah (supra) the Hon'ble Bombay High Court has held that the reopening of assessment under section 147 to scrutinize the investment made in the flat purchased is not valid as the AO only seeks to find out the source of funds and same does not constitute any reason for belief that income has escaped assessment so as to invoke section 148 of the Act and accordingly the appeal of the Revenue was dismissed.

(f) In the case of CIT v Batra Bhatia Company (supra) the Hon'ble Delhi High Court has held while dismissing the appeal of the Revenue that Ld. CIT(A) as well as Tribunal had given a concurrent finding that there was no material

before the AO on the basis of which the AO would have had a belief that agricultural land sold by the assessee was a capital receipt within the meaning of section 2(14) of the Act and expression of the AO “requires much deeper scrutiny” indicated that he was mere embarking on mere presumptions without any belief much less belief based on reason and material and thus the reassessment was not valid.

11. In view of the ratio laid down in the various decisions as discussed above vis-a-vis facts of the assessee case, we are of the considered view that the AO has not formed a prima facie and independent belief in the reasons recorded that income has escaped assessment but initiated proceedings u/s 147 of the Act for carrying out the verification of facts/information qua the share premium raised by the assessee. Under these facts and circumstances, we are in full agreement with the finding of the Ld. CIT(A) holding the proceedings under section 147 of the Act as invalid. Under these facts and circumstances, the order of Ld. CIT(A) is required to be upheld on the jurisdictional issue. Consequently the legal ground raised by the Revenue is dismissed.

12. In the other grounds of appeal, the Revenue has raised the deletion of addition of Rs.4,79,90,000/- by Ld. CIT(A) which has been made by the AO on account of unexplained cash credit under section 68 of the Act.

13. Since we have upheld the order of Ld. CIT(A) on jurisdictional issue, the grounds raised on merit by the Revenue are not being adjudicated.

14. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 08.03.2021.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Mumbai, Date : 08.03.2021

Kishore

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "F" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai