IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH MUMBAI

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.2725/Mum/2017
(**Assessment Year :2006-07**)
&
ITA No.2726/Mum/2017
(**Assessment Year :2007-08**)

ACIT-3(1)(1) R.No.607, Aayakar Bhavan Mumbai – 400 020	Vs.	M/s. Bajaj Hindusthan Sugar Ltd., (Formerly Bajaj Hindusthan Ltd., 2nd Floor, Bajaj Bhavan, 226, Nariman Point Mumbai – 400 021
PAN/GIR No. AAACB4351J		
(Appellant)	..	**(Respondent**)

CO No.262/Mum/2018
(Arising out of ITA No.2725/Mum/2017
(**Assessment Year :2006-07**)
&
CO No.263/Mum/2018
(Arising out of ITA No.2726/Mum/2017
(**Assessment Year :2007-08**)

M/s. Bajaj Hindusthan Sugar Ltd., (Formerly Bajaj Hindusthan Ltd., 2nd Floor, Bajaj Bhavan, 226, Nariman Point Mumbai – 400 021	Vs.	ACIT-3(1)(1) R.No.607, Aayakar Bhavan Mumbai – 400 020
PAN/GIR No. AAACB4351J		
(Appellant)	..	**(Respondent**)

Revenue by	Shri Rahul Raman
Assessee by	Shri Nitesh Joshi
Date of Hearing	**12/08/2021**
Date of Pronouncement	**30/08/2021**

आदेश / O R D E R

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

These appeals in ITA Nos.2725/Mum/2017 & 2726/Mum/2017 for A.Y. 2006-07 & 2007-08 respectively and Cross Objection Nos. 262/Mum/2018 & 263/Mum/2018 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-8, Mumbai in appeal No.CIT(A)-8/IT-637/14-15 & CIT(A)-8/IT-638/14-15 dated 13/12/2016 (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 25/03/2014 by the ld. Dy. Commissioner of Income Tax-3(1), Mumbai (hereinafter referred to as ld. AO).

Identical issues are involved, hence, all these appeals are taken up together and disposed of by this common order for the sake of convenience.

2. Let us take up the cross objections of assessee and revenue appeal for A.Y.2006-07. The assessee raised the following grounds challenging the validity of reopening of assessment in its cross objections.

> *"1. On the facts and in the circumstances of the case and ion law, the Commissioner of Income Tax (Appeals) erred in upholding the validity of reopening of assessment u/s.148 of the Act.*

Respondent hereby reserves right to add, alter or amplify the above grounds of cross objection"

2.1 The revenue has raised the following grounds of appeal:-

"1.Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.2,99,98,000/- u/s.69 of the I.T. Act, 1961 made by the AO holding that the statement of Shri Aniruddha V, Phadke, as relied upon by the AO, did not mention the name of the assessee without appreciating that the alleged modus operandi as admitted by Shri Aniruddha Phadke in the statement and assessee's involvement in such modus operandi was established only when Shri Phadke was confronted with documents showing the name of the assessee with details of cash acceptance.

2. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition ofRs.2,99,98,000/- u/s.69 of the I.T. Act, 1961 made by the AO on the ground that the documents showing name of the assessee with details of receipt of cash by it are merely loose papers and not an evidence without appreciating that when these papers on being confronted to Shri Aniruddha Phadke, had established the involvement of the assessee as beneficiary of the modus operandi operated by Shri Phadke and therefore tantamounts to credible evidence.

3. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.2,99,98,000/- u/s.69 of the I.T.Act, 1961 made by the AO on the ground that the assessee was not given opportunity to cross examine Shri Aniruddha Phadke without appreciating the fact that cross examination is warranted when contradictory facts arise whereas in the instant case, the facts were undisputed but the alleged findings were disputed.

4. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of depreciation of Rs.52,49,650/- on the ground that there are no inflated assets of Rs.2,99,98,000/- as held by him on the issue of addition u/s.69 of the I.T. Act. 1961.

5. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

6. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

2.2. We deem it fit to take up the issue of reopening as well as the issue on merits together as they are interconnected.

3. We have heard rival submissions and perused the materials available on record. The assessee is engaged in the business of manufacturing sugar and industrial alchohol. The original return of income for the A.Y. 2006-07 was filed u/s.139(1) of the Act on 28/11/2006 declaring total income of Rs.116,68,23,202/- which was later revised on 03/04/2008 declaring total income of Rs.115,80,24,345/-. The original assessment was completed u/s.143(3) of the Act on 22/12/2008 determining total income at Rs.115,89,20,277/-. Consequent to the order of the ld. Commissioner of Income Tax u/s.263 of the Act, the assessment order was passed on 07/12/2011 determining total income at Rs.120,31,65,190/-. The ld. AO observed in para 2 of his assessment order as under:-

> *"2. An information was received on 28.03.2013 from the office of the DDIT(Inv.)-1(3), Pune vide letter No.PN/DDIT(Inv.)/U-I(3)/PIL-BHL/2012-13/1020 dated 26.03.2013. As per this information a search & seizure action u/s.132 of the IT. Act was conducted in the case of M/s. Praj Industries Ltd. on 03,04.2012. The M/s. Praj Industries Ltd. is engaged in the business of designing, development and installation of distillery equipment and carrying out turnkey projects in brewery and distillery sectors. Further, it has been informed that this company has provided services of installation or modernization of distillery plants in the case of the assessee company i.e. M/s, Bajaj Hindustan Ltd.*
>
> *3. As per intimation, during the course of Search and Seizure proceedings certain incriminating documents were found and seized. As per these documents M/s, Praj Industries Ltd. has indulged in inflating the cost of project as per the needs of the clients and returning the inflated amount in cash. These documents further revealed that the assessee is a <u>beneficiary of such a modus operand! of inflating the cost</u> of project and in turn received the cash equivalent of the price so inflated. The modus operand! facilitates two purposes, firstly it creates unaccounted cash for the assessee and secondly it helps in reducing the quantum of taxable income by claiming*

undue excessive depreciation u/s.32(1)(ii) and 32(1)(iia) of the IT. Act, thereby reducing its tax liability.

Taking into consideration aforementioned findings of the Investigation Wing, the erstwhile assessing officer after recording reasons u/s.!48(2) has issued a notice u/s. 148 of the IT. Act and upon obtaining necessary sanction of commissioner of income tax u/s. 151 of the IT. Act."

3.1. **From the above, it could be seen that the ld. AO of the assessee had received certain information from DDIT (Investigation), Pune on 28/03/2013. Based on this information, the ld. AO came to the conclusion that income of the assessee had escaped assessment and recorded reasons for reopening the assessment for the A.Y.2006-07 on 28/03/2013. Necessary approval u/s.151 of the Act was also obtained for reopening from the competent authority on 28/03/2013. Notice u/s.148 of the Act was issued to the assessee on 28/03/2013. These facts are absolutely not in dispute before us.**

3.2. Since the notice was issued for the A.Y.2006-07 on 28/03/2013 to the assessee, the said reopening has been made beyond four years from the end of the relevant assessment year.

3.3. The reasons recorded for reopening the assessment are as under:-

"Reasons for reopening :

The DDIT (lnv.), Unit 1(3), Pune vide letter No.PN/DDIT(INV)/U1(3)/PIL-BHL/2012-13/1020 dated 26.03.2013 has forwarded the copy of relevant material. On perusal of the material and on going through the case records of the assessee, it is found that the assessee has shown purchase of Plant & Machinery from M/s.Praj Industries Ltd., during ***FY 2005-06.*** *Therefore, it is evident that M/s.Bajaj Hindustan Ltd. has taken accommodation entries and received cash in return in the aforesaid financial years. Therefore, the assessee was indulged in transactions which involved unaccounted cash. The assessee has wrongly claimed depreciation on the Plant & Machinery acquired/installed from M/s.Praj*

Industries Ltd. and has not shown the income in respect of aforesaid cash transactions during the year. The assessee ought to have disclosed and offered to tax the entire ***cash of Rs.2,99,98,000/-*** *in its return of income and ought not to have claim depreciation on said Plant & Machinery acquired/installed from M/s. Praj Industries Ltd. This has resulted into' escapement of income to the tune of* ***Rs.2,99,98,000/-*** *which exceeds Rs.1,00,000/- and involves short levy of tax.*

Explanation 1 to first proviso to Sec. 147 is very clear in this regard, which reads as under :

> *"Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."*

Therefore, the assessee has itself failed to disclose fully and truly all material facts relevant to the assessment year under consideration.

In view of the above, I have reason to believe that the income chargeable to tax exceeding Rs. 1,00,000/- has escaped assessment, resulting into short levy of tax. Hence, the assessee's case is hereby reopened for reassessment u/s. Z47 of the I.T. Act, 1961 for AY 2006-07.

The necessary prior approval in this regard has been given by the CIT-3, Mumbai on 28.03,2013.

Notice u/s. 148 of the I.T.Act is issued."

3.4. The assessee filed objections to the reasons recorded for reopening of assessment vide letter dated 07/08/2013 which are enclosed in pages 11-14 of the factual paper book filed before us. In the said objections, the assessee duly pointed out that the reasons recorded by the ld. AO indicate non-application of mind independently by the ld. AO to the material forwarded to him, so as to form the belief that income chargeable to tax as escaped assessment in the hands of the assessee and consequently the re-assessment notice issued u/s.148 of the Act was without jurisdiction and invalid in law. It was also specifically pointed out to the ld. AO by way of objections that the reasons recorded do not disclose the copy of the relevant material forwarded by the DDIT (Investigation) Unit -I (3), Pune that was perused by the ld. AO and relied

upon by him to arrive at a conclusion that accommodation entries have been taken by the assessee and cash received in return thereon. What was the relevant material that was forwarded along with letter dated 26/03/2013 by DDIT (Investigation) Pune was never made available with the reasons recorded for reopening the assessment. Whether any enquiry was indeed carried out by the ld. AO on the alleged receipt of relevant material before forming a belief that income of the assessee had escaped assessment was also not reflected in the aforesaid reasons recorded. The assessee further pointed out that, in any case, there was absolutely no failure on the part of the assessee to make full and true disclosure of all the material facts during the course of original assessment proceedings. The assessee even drew the attention of the ld. AO to the notice issued u/s.142(1) of the Act dated 14/11/2008 by the ld. AO in the original assessment proceedings along with questionnaire, wherein complete details of additions to fixed assets above Rs.10 lakhs was sought by the assessee in the prescribed format. In response to this notice, the assessee had indeed filed the reply dated 10/12/2008 before the ld. AO. Accordingly, it was pleaded that assessee had indeed furnished full and true particulars of all the purchases of fixed assets above Rs.10 lakhs along with invoices in the prescribed format sought by the ld. AO in the original assessment proceedings, which was duly verified by the ld. AO and assessment completed accordingly by the ld. AO allowing the claim of depreciation.

3.5. The ld. AO disposed of these objections by way of a separate speaking order dated 27/02/2014 by stating that the proviso to Section 147 of the Act would be applicable only when (a) assessment is completed u/s.143(3) or 147 of the Act (b) period of four years from the end of the relevant assessment has lapsed (c) income for the assessment

year was escaped by reason of failure on the part of the assessee to disclose fully and truly all material facts to make the return u/s.139 /142(1) /148. The ld. AO observed that when all the aforesaid three conditions are cumulatively satisfied, the first proviso could be invoked. The ld. AO further proceeded to state that the first condition stipulated hereinabove get satisfied in as much as the fact that the original assessment was completed u/s. 143(3) of the Act. The ld. AO further stated that the original assessment was completed on 22/12/2008 and the pre-requisite stipulated in second condition should be reckoned from the end of the relevant assessment year in which assessment was completed. Since the notice u/s.148 of the Act was issued on 28/03/2013 in the instant case, the ld. AO concluded that the reopening has been made within four years and hence, the second condition stipulated hereinabove does not get satisfied and accordingly, he concluded that the first proviso to Section 147 of the Act cannot be invoked at all in the instant case. With these observations, he dismissed the objections raised by the assessee and proceeded to continue with the re-assessment proceedings.

3.6. We find that the ld. AO had grossly erred in stating that the four years time limit should be reckoned from the end of the relevant assessment year in which original assessment was completed. From the reading of the proviso to Section 147 of the Act it only says where the assessment u/s.143(3) of the Act has been completed, no action shall be taken under this Section after the expiry of four years from the end of the relevant assessment year. The relevant assessment year is A.Y.2006-07. Hence, the four years time limit from said date would expire on 31/03/2011. Since, the notice u/s.148 of the Act in the instant case has been issued on 28/03/2013, the reopening notice has been issued

beyond four years from the end of the relevant assessment year. Hence, the first proviso to Section 147 would certainly come into operation in the instant case.

3.7. Now what is left to be adjudicated is whether there was any failure on the part of the assessee in making full and true disclosure of all material facts before the ld. AO in the original assessment proceedings. As stated earlier, the assessee in response to questionnaire issued by the ld. AO in the original assessment proceedings along with notice u/s.142(1) of the Act dated 14/11/2008, had given a detailed reply vide letter dated 10/12/2008 furnishing the details of additions to fixed assets along with invoices above Rs.10 lakhs in the prescribed format, as desired by the ld. AO. The ld. AO had verified each and every invoice in the original assessment proceedings and thereafter, concluded that assessee would be entitled for depreciation on fixed assets. This goes to prove that assessee had duly discharged its onus and the same had also been verified and examined by the ld. AO in the original assessment proceedings. While this is so, how can there at all be any failure on the part of the assessee to disclose true and material facts before the ld. AO in the original assessment proceedings. The law is very well settled that the assessee is absolutely under no obligation to inform the ld. AO about the possible inferences which might be raised against him. Hence, it could be safely concluded that there was no failure on the part of the assessee to disclose the material facts that are material for the purpose of assessment in the original assessment proceedings, by giving full and true disclosure. With regard to the failure on the part of the assessee, the ld. AR rightly placed reliance on the decision of the Hon'ble High Court in the case of Sesa Sterlite Ltd., vs. ACIT reported in 417 ITR 334(Bom). The relevant operative portion of the said order is reproduced as under:-

> ***"21.*** *The other main objection of the Assessee is that there was no belief on the part of the Assessing Officer that escapement of income had arisen by reason of any failure on the part of the Assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully or truly all material facts necessary for the assessment. It is not good enough for the Assessing Officer to simply make a bald assertion that escapement of income is as a result of failure on the part of the assessee to fully and truly disclose all material facts. He must indicate, however briefly, what is it that was not disclosed and which gives the Assessing Officer reason to believe that income has escaped assessment. The entire case of the revenue is founded on the so-called under-invoicing of exports. It is difficult to fathom what information or particulars was the Assessee expected to disclose in its assessment insofar as the export prices charged by it are concerned and which is now available to the Assessing Officer so as to enable him to form a belief that income has indeed escaped assessment."*

3.8. As stated supra, we find that the information was received from DDIT (Investigation) on 28/03/2013 and the ld. AO had completed all the formalities for reopening the assessment on the very same day and had even issued the notice u/s.148 of the Act on the same day i.e. 28/03/2013. From the sequence of events narrated thereon in para No.3.1. supra, it could be safely concluded that the ld. AO had not independently applied his mind at all to form a belief that based on the information received from Pune DDIT (Investigation) that income of the assessee had escaped assessment. It is humanly impossible for any person to go through the relevant information without causing any enquiry in the hands of the assessee and merely reopening the assessment of the assessee on the alleged formation of belief that income of the assessee had escaped assessment. It is humanly impossible to form a reasonable belief that the alleged material received from DDIT(Investigation)-Pune by the ld. AO constitute income escaping assessment in the hands of the assessee herein. Hence, it could be safely concluded that entire reopening has been done based on complete non-

application of mind. Reliance in this regard was rightly placed by the ld. AR on the decision of the Hon'ble Jurisdictional High Court in South Yarra Holdings v. ITO (2019) 263 Taxman 594 (Bom) dated 01/03/2019. For the sake of convenience, the reasons recorded by the Assessing Officer in that case is reproduced hereunder:-

> *"4. Thereafter on 29.3.2018, the Assessing Officer issued the impugned notice seeking to re-open assessment for A.Y.2011-12. The reasons in support of the impugned notice as communicated to the petitioner reads thus:-*
>
> *"Reasons for reopening u/s 148 for A.Y.2-011-12 is provided as under :*
>
> > *1. The information has been received from DDIT (Inv) Unit 8 (3) Scindia House, Mumbai-38 vide their letter dated 23-3-2018 which is received in this office on 28-03-2018.*
> >
> > *2) The DDIT (Inv) Mumbai has received information that M/s Nivyah Infrastructure & Telecom Services Ltd is a penny stock listed do in BSE with scrip code (517634) and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain or short term capital loss in their books of accounts. It was noticed that share price of M/s Nivyah Infrastructure & Telecom Services Ltd rose from Rs.39 in 21st July 2009 to Rs.2050 on January 2011 and dipped to Rs.47.20 on 18th July 2012. However, the financials of the company for the relevant period do not show any substantial change so as to support such huge share price movement. The company does not have business worth while to justify the sharp rise in market price of shares. The sharp rise in market price of this entity is not supported by the fundamentals of the company. Both purchase and sale of the shares are concentrated within few person/entities.*
> >
> > *2.2. The DDIT (Inv) has traded in the above script namely M/s Nivyah Infrastructure & Telecom Services Ltd during the F.Y. 2010-11 to the tune of Rs.35040000000000000000.*
> >
> > *2.3. The DDIT (Inv) Unit - 8 (3) Mumbai has given a finding that enquiries have been conducted in the penny scrip namely M/s Nivyah Infrastructure & Telecom Services Ltd vis-a-vis facilitating introduction of unaccounted income of members of beneficiaries in the form of exempt Capital gain or Short term Capital Loss in their books of account. These transactions are mostly in view of cash of equal amount and commission is charged over and above at certain fixed percentage for providing such accommodation entry. These accommodation entries were taken from various beneficiaries for introducing their unaccounted cash into their books of accounts without paying the due taxes. 2.4 The detailed investigation report containing the modus operandi of tax evasion through penny stock and discussion in entry operators from brokers and scripts has been provided along with the letter of DDIT (Inv) Mumbai. 2.5. Our assessee is one of the beneficiary who have availed accommodation entries by way of traded in shares to the tune of Rs.3504000,000000000005 in M/s Nivyah Infrastructure &*

Telecom Services Ltd with a view to ultimately reduce tax liability and or to bring capital in the form of equity or debt or tax exempt income or a combination of the above transaction, therefore, it is necessary to verify the actual amount of bogus LTCG analyzing the D-mat statement and bank account statement.

3. In this case return of income as fixed for the year under consideration and regular assessment u/s 143 (3)was made on 27.11.2013. Since 4 years from the end of the relevant year has expired in this case the requirements to initiate proceedings u/s 147 of the IT Act are reasons to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded in paragraph 2 above.

4. In this case more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue the notice u/s148 has been obtained separately from the Pr. Commissioner of Income Tax as per the provisions of section 151 of the Act.

5. Notice u/s 148 was issued with prior approval of Pr. Commissioner of Income Tax-6 Mumbai."

3.9. We find that the Hon'ble High Court dealt with the above in the following manner:-

"5. On receipt of above reasons on 9.8.2018, the petitioner filed its objections to the reasons in support of the impugned notice and in particular pointed out that the assessee had dealt with a company called "S.V.Electricals Ltd" and not with M/s Nivyah Infrastructure & Telecom Services Ltd. The name of company "S.V.Electricals Ltd" had subsequently changed on 14.2.2012 to M/s Nivyah Infrastructure and Telecom Ltd. It had also pointed out in its objection that during the regular assessment proceedings, details of the petitioner's dealing in scrip namely "S.V.Electricals Ltd" had been submitted during the regular assessment proceedings. The objections primarily proceeds on the basis, that the reasons as recorded, display total non-application of mind while forming reason to believe, this as during the relevant time, there was no company by the name "M/s Nivyah Infrastructure and Telecom Services Ltd" in which the petitioner could have dealt. The petitioner's objections were rejected by the Assessing Officer by passing an order on 28.9.2018. The order on objections, does not deal with the petitioner's primary contentions that the petitioner had not dealt with any company by name "M/s Nivyah Infrastructure and Telecom Services Ltd" during the period relevant to the subject assessment. This order dated 28.9.2018 disposing of the objections is completely silent on the above objections while rejecting the petitioner's objections.

6. The respondent's Assessing Officer has filed an affidavit-in reply dated 5.2.2019 of the Assessing Officer. However, the reply does not deal with this objection taken in the petition. Nevertheless, Mr.Suresh Kumar the learned counsel for the revenue submits that all these issues will be subject of consideration during the re-assessment proceedings. Thus, this Court should not interfere at this stage.

7. It is a settled position in law that re-opening of an assessment has to be done by an Assessing Officer on his own satisfaction. It is not open to an Assessing Officer issue a reopening notice at the dictate and/or satisfaction of some other authority. Therefore, on receipt of any information which suggests escapement of income, the Assessing Officer must examine the information in the context of the facts of the case and only on satisfaction leading to a reasonable belief that income chargeable to tax has escaped assessment, that re-opening notice is to be issued.

(Underlining provided by us)

8. From the reasons, it is evident that the impugned notice has been issued on the basis of information received from the Deputy Collector Income Tax (Investigation) alleging that M/s Nivyah Infrastructure & Telecom Services Ltd is a penny stock listed on the Bombay Stock Exchange and that the petitioner had dealt with the same leading to escapement of income. On receipt of information, the least that is expected of the Assessing Officer is to examine the same in the context of the facts of this case and satisfy himself whether the information received does prima facie lead to a reasonable belief that income chargeable to tax has escaped assessment. In this case, the reasons indicate that the Assessing Officer has not carried out such exercise and accepted the report of the Deputy Collector of Income Tax (Investigation) Mumbai to conclude that the petitioner had dealt with Nivyah Infrastructure and Telecom Services Ltd during the previous year relevant to the assessment year 2011-12. Admittedly, there was no company by name "M/s Nivyah Infrastructure & Telecom Services Ltd" in existence during that year for consideration. This clearly shows that the Assessing Officer acted on the satisfaction of the Deputy Collector of Income Tax (Investigation) that income chargeable to tax has escaped assessment. It must also be borne in mind that the impugned notice is issued beyond the period of four years from the end of the relevant assessment year in a case, where the assessment was completed under section 143 (3) of the Act. Therefore, the Assessing Officer would have to examine the information received in the context of the facts on record. If such an exercise were to be done, it is likely that the Assessing Officer would have come to the conclusion that there was no failure to disclose truly and fully all material facts necessary for assessment. Thus, hit by the proviso to section 147 of the Act. However, the Assessing Officer has not applied his mind to the information received in the context of the facts on record. The impugned notice is bad-in-law, as it has not been issued by the Assessing Officer on his satisfaction that there is reason to believe, that income chargeable to tax has escaped assessment.

(Underlining provided by us)

9. In the above circumstances, the impugned notice is un- sustainable in law and therefore, is quashed and set aside.

10. Accordingly, Petition allowed."

3.10. The ld. AR also placed reliance on yet another decision of the Hon'ble Jurisdictional High Court in the case of Nu Power Renewables (P) Ltd., vs. DCIT reported in 94 Taxmann.com 29. The relevant operative portion of the said order is reproduced hereunder:-

"5. *It is also contended by the Petitioner that the reasons recorded in support of the impugned notice, do not indicate any independent application of mind by the Assessing Officer to come to a reasonable belief that income chargeable to tax has escaped assessment for the purpose of assuming jurisdiction to issue the impugned notice. The reasons in support rely upon material/information received from DDIT (Inv.) under letter dated 22nd March, 2017. During the course of hearing, Mr. Suresh Kumar, learned Counsel for the Revenue handed over to us the information which was received under letter dated 22nd March, 2017 from DDIT (Inv.). It is the above communication which forms the tangible material for issuing the impugned notice. The aforesaid letter dated 22nd March, 2017 reads as under:—*

> *"Information has been received that Nu Power Renewables Pvt. Ltd., has issued zero coupon rate Debentures of Rs.64 crores to Supreme Energy Pvt. Ltd., in F. Y. 2009-10. Supreme Energy Pvt. Ltd., has received unsecured loan/debenture of Rs.64 Crores from an undisclosed party which has been used to invest in the Debenture of NuPower Renewables Pvt. Ltd., As per balance sheet as on 31.03.2010 of Supreme Energy Pvt. Ltd., it is shown as unsecured loan of Rs.64,05,03,000/-. However, as per balance sheet as on 31.03.2011 and thereafter, it is shown as Optionally Convertible Debentures (Zeor Coupon) of Rs.64,00,00,000/-.*
>
> *The balance sheet of Supreme Energy Pvt. Ltd., obtained from the website of Ministry of Corporate Affairs (MCA) are enclosed. From the financials, Supreme Energy Pvt.Ltd., is prima facie a shell entity.*
>
> *3. Further, as per the annual returns filed by Supreme Energy Pvt. Ltd. at MCA, the details of debenture holder/unsecured loan lender of Rs.64 crore are not disclosed. The annual returns filed are enclosed.*
>
> *4. Thus, the creditworthiness of the lender and genuineness as well as nature of the transaction is not explained as a supposedly shell company Supreme Energy Pvt. Ltd. has borrowed Rs.64 crores to invest in*

> *debenture of Nu Power Renewables Ltd. and it has done no other business apart from this."*
>
> ***6.*** *The above facts are the very reasons recorded by the Assessing Officer for issuing of the impugned notice. The only words added to the above letter in the recorded reasons are "In this case information received from the Office of the DIT (Investigation) Unit-4, Mumbai on 23rd March, 2017 vide letter dated 22nd March, 2017". This, of course, besides the introductory para and the concluding para where he records that he has reasons to believe that income chargeable to tax has escaped assessment. Thus, prima facie, there has been no independent application of mind on the part of the Assessing Officer to the tangible material received from the Deputy Director of Investigation. The information received has to be examined in the context of the facts on record before coming to a view that income chargeable to tax has escaped assessment on account of failure to disclose fully and truly all relevant facts. In the absence of the above, it amounts to out sourcing of reasons to believe.*
>
> ***7.*** *Therefore, it prima facie, it appears that the Assessing Officer has issued the impugned notice without himself coming to a reasonable belief that income chargeable to tax has escaped assessment. Thus, prima facie, the impugned notice is without jurisdiction."*

3.11 With regard to the adjudication of the issue on merits, the ld. DR drew our attention to the fact that search and seizure operation u/s.132 had happened in the case of Praj Industries Ltd., wherein several incriminating documents were found suggesting that the said company was indulging in providing accommodation entries to various parties. The ld. DR argued that name of the assessee figures in the seized documents comprising of one cash inflow and one cash outflow sheet. Accordingly, there was tangible information available with the ld. AO to reopen the case of the assessee which was duly done after following all the prescribed procedures for reopening. He also argued that there was no full disclosure on the part of the assessee in as much as this information got unearthed only during the search proceedings in the case of Praj Industries Ltd., which had taken accommodation entries from EID Parry Ltd and had provided accommodation entries to assessee. The ld. DR also pointed out that Praj Industries Ltd., had gone before the Hon'ble Income

Tax Settlement Commission (ITSC) and had surrendered income on account of bogus purchases. We find from the perusal of the said Income Tax Settlement Commission's order which was placed on record by the ld. DR and also from the Rule-9 report submitted from the PCIT in the case of Praj Industries Ltd., nowhere the name of the assessee figured. We find that in any case, Praj Industries Ltd., accepted entire cash receipts less cash payments (inflow / outflow excel sheet) as its income before the Hon'ble Income Tax Settlement Commission. Nowhere the name of the assessee is mentioned. There is an abbreviation "BHL" which was used in the said inflow excel sheet statement which was alleged by the ld. AO to be 'Bajaj Hindusthan Ltd'. This allegation was absolutely without any basis and assessee had categorically denied the same. In any case, the same was not even referred by the Pr. Commissioner of Income Tax in his Rule-9 report before the Settlement Commission in the case of Praj Industries Ltd. We find that the ld. CIT(A) in the instant case before us had deleted the additions on merits showing that the seized documents of Praj Industries Ltd., are dumb documents as there are no corroborative evidences involving the assessee thereon. The ld. DR by placing the order of the Settlement Commission and Rule-9 report of Pr. Commissioner of Income Tax in the case of Praj Industries Ltd., was trying to drive home the point that those seized documents are not dumb documents and accordingly, order of the ld. CIT(A) was wrong on merits of the addition. But as stated earlier, we find that in the entire Rule-9 report of PCIT in the case of Praj Industries Ltd., and the order of the Settlement Commission u/s.245D(4) of the Act, name of the assessee does not figure at all.

3.12. More importantly, from the statement recorded by the Investigation wing, Pune from Shri Aniruddha V Phadke, Associate Vice President

(Commercial) of Praj Industries Ltd., on 04/04/2012 u/s.132(4) of the Act, he had categorically stated in response to Question No.12 raised by the Investigation Wing that accommodation entries were provided by inflation of their sale bills only with EID Parry India Ltd., and Rhino Agencies Ltd. For the sake of convenience, the question No.12 raised by the Investigation wing and the reply given by Shri Aniruddha V Phadke is reproduced hereunder:-

> *Q.12. Please state if such type of arrangement of over billing and unaccounted repayment of part of sale receipts in cash was made with all parties?*
>
> *Ans. No, this type of arrangement was made with the following parties only.*
>
> *1. EID Parry India Limited with repayment of Rs.7.86 Crores in cash*
> *2. Rhino Agencies Limited with repayment of Rs.93 Lacs in cash.*

3.13. It is pertinent to note that assessee had made purchases of fixed assets from Praj Industries Ltd., The case of the Revenue as could be seen from the reasons recorded is that assessee had made purchases of fixed assets from Praj Industries Ltd., at an inflated price, made cheque payments to Praj Industries Ltd., and received cash back for the excess component thereon. But this allegation of the Revenue in the reasons recorded is absolutely contradictory to the statement recorded by the Investigation wing, Pune u/s.132(4) of the Act from Shri Aniruddha V Phadke in Question No.12 is reproduced supra. This is an excruciating evidence to prove that the entire reasons recorded by the ld. AO is devoid of merits and total non-application of mind independently by the ld AO. We further find that the reasons recorded thereon, also does not have any live link to form belief that income of the assessee had escaped assessment.

3.14. Similarly, there is one more statement recorded by the Investigation wing, Pune from Shri Aniruddha V Phadke on 04/06/2012 u/s.132(4) of the Act wherein, in response to the question No.9, had explained the entire modus operandi adopted by Praj Industries Ltd for inflation of their purchases. Hence, it could be seen that there are two statements recorded from Shri Aniruddha V Phadke by Investigation Wing, Pune i.e. one on 04/04/2012 wherein, he had given a statement that Praj Industries Ltd., had engaged itself in inflation of sale bills only with EID Parry India Ltd., and Rhino Agencies Ltd., and another statement dated 04/06/2012, wherein he had explained modus operandi to inflation of purchases made by Praj Industries Ltd., We find in none of these places, the name of the assessee is involved. We find that the department had clubbed both the statements and alleged that assessee had taken accommodation bills from Praj Industries Ltd., and made payments by cheque and got back the money in cash from them as per the reasons recorded. This allegation is simply without any basis at all and is not emanating from the facts available on record. The statement recorded from Shri Aniruddha V Phadke dated 04/04/2012 and 04/06/2012 are enclosed in pages 21 to 31F of the paper book filed by the assessee before us. Even otherwise, we find that on merits, the addition has been made by the ld. AO in the sum of Rs.2,99,98,000/- u/s.69 of the Act which talks about unexplained investment. We are unable to persuade ourselves to accept to this proposition of the ld. AO in as much as there is absolutely no investment made by the assessee so as to invoke the provisions of Section 69 of the Act. In any case, the allegation of the revenue seems to be that assessee had made purchases of fixed assets from Praj Industries Ltd., by excess value. The entire purchase of fixed assets has already been recorded by the assessee in its books of accounts. The source for making payments for such purchase of fixed

assets have also been recorded and disclosed in the same books of accounts. Then, where is the question of applicability of provisions of Section 69 of the Act? The entire investments have been duly explained by the assessee. Hence, there cannot be any addition towards unexplained investment u/s.69 of the Act even on merits.

4. Both the parties before us stated that the facts prevailing in A.Y.2006-07 and 2007-08 are exactly identical. In view of the aforesaid observations, the cross objections preferred by the assessee for both the years challenging the validity of reopening of assessment are hereby allowed and the grounds raised by the Revenue challenging the addition on merits are hereby dismissed.

5. In the result, the cross objections of the assessee for both the years are allowed and the appeals of the Revenue for both the years are dismissed.

Order pronounced on 30/ 08 /2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 30/ 08 /2021
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