

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

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

**ITA No.2720/M/2019
Assessment Year: 2010-11**

The ACIT-1(3)(1), Room No.540, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400020	Vs.	M/s. Supreme Holdings & Hospitality (I) Ltd., 1, Pearl Mansion (N), 91, M.K. Road, Mumbai – 400 020 PAN: AABCS9242A
(Appellant)		(Respondent)

**CO No.48/M/2021
(Arising out of ITA No.2720/M/2019)
Assessment Year: 2010-11**

M/s. Supreme Holdings & Hospitality (I) Ltd., 1, Pearl Mansion (N), 91, M.K. Road, Mumbai – 400 020 PAN: AABCS9242A	Vs.	The ACIT-1(3)(1), Room No.540, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Snehal Shah, A.R.
Revenue by : Shri Vijay Kumar Menon, D.R.

Date of Hearing : 10.08.2021
Date of Pronouncement : 28.10.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeal by the Revenue and the cross objection by the assessee have been preferred against the order dated 25.01.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. By way of this appeal the Revenue has challenged the deletion of addition of Rs.2,50,78,748/- by Ld. CIT(A) as made by the AO on account of unexplained cash credit under section 68 of the Act whereas by virtue of cross objection the assessee has challenged the jurisdiction of the AO to reopen the assessment. Since the assessee has raised the legal issue in the cross objection, therefore we are inclined to decide the same before deciding the Revenue's appeal.

CO No.48/M/2021 (Assessee's cross objection)

3. The grounds raised in the cross objections are as under:

"The Respondent objects to issue of notice u/s 148 of the Income Tax Act, 1961 especially since:-

(a) The respondent had offered complete explanation about the nature and source of funds received from Jumbo Bright Group Limited, Honkong during the '**assessment proceedings**' for A.Y. 2009-10 and again during '**reassessment proceedings**' for A.Y. 2009-10 and hence any "**Change of Opinion**" is bad in law and ultra vires the provisions of the Income Tax Act, 1961.

(b) Since there is no fresh / tangible material on record before the learned Assessing officer and further since there is "**no link between the material and the formation of belief**" that the income chargeable to tax has escaped assessment, the sanction given by the Learned Pr. CIT, Mumbai merely seeking for explanation, examination and verification about the nature and source of investment in the form of an "**enquiry**" cannot form the basis to reopen the case of the respondent and hence the notice is bad in law and ultra vires the provisions of the Income Tax Act, 1961.

(c) It is very clear from the reading of the reasons recorded for the reopening as well as the order disposing off the objections that entire belief is based on certain assumptions based on Survey Action u/s 133A disregarding the Legal position and hence the notice under section 148 of the Act, has been issued without any "**Reason to believe**" that income has escaped assessment.

(d) While the learned Assessing officer failed to appreciate that proviso to section 68 of the Act is applicable to a person, being a resident in whose name such credit is recorded and not to Jumbo Bright Group Limited, Hongkong, a "**Non -Resident**". Moreover, the said proviso is inserted by Finance Act, 2012 with effect from 01.04.2013 and is not applicable for the assessment year under reference.

2. The respondent reserves the right to amend, alter or add to the cross objection of appeal."

4. The issue raised in ground No.1(a) is against the order of Ld. CIT(A) upholding the order of AO on the jurisdictional issue of reopening by ignoring the fact that the same addition was made in 2009-10 and accepted in the assessment proceedings which culminated under section 143(3) of the Act and also subsequent reassessment proceedings which culminated in the passing of the order under section 143(3) read with section 147 of the Act accepting the explanation of the assessee qua the nature and source of funds received from M/s. Jumbo Bright Group Ltd., Hong Long. Whereas the issue raised in ground No.1(d) is against the order of Ld. CIT(A) upholding the order of AO on reopening of assessment by ignoring the fact that in the reason recorded the AO has recorded that the income of the assessee has escaped from assessment by treating the money received from M/s. Jumbo Bright Group Ltd. by way of share application who is a non resident and the proviso to section 68 of the Act is applicable only to a resident in whose name the credit is recorded. Moreover the proviso is inserted by Finance Act, 2012 w.e.f. 01.04.2013 and is not applicable to the assessment year under consideration.

5. The facts in brief are that the assessee filed the return of income on 27.09.2010 declaring a loss of Rs.1,05,321/- which was processed under section 143(1) of the Act. There was a survey action on the assessee on 14.09.2016 at its office premises at 1, Pearl Mansion (N), 91, M.K. Road, Mumbai-400020. The promoters of the assessee group are Jatia Family. On the basis of survey finding, the assessment was reopened by issuing notice under section 148 of the Act on 31.03.2017. The

Jatia Hotel and Resort Pvt. Ltd. was amalgamated with the assessee company after the scheme of amalgamation was approved by Hon'ble Bombay High Court vide order dated 29.07.2011. The primary reason for reopening the assessment was that M/s. Jatia Hotel & Resort Ltd. has received by way of share capital and share premium a sum of Rs.2,50,78,748/- during the year by issuing 61,967 equity shares at face value of Rs.10 each at a premium of Rs.790/- per share partly paid up. The assessee has received the share capital along with share premium after obtaining all the permissions and making necessary compliances such as permission from Reserve Bank of India, receipt of amount through foreign inward remittance which is duly supported by foreign inward remittance certificate from bankers, valuation certificate, bank certificate, bank statement reflecting the amount received and other various documents etc. The assessee has received the share capital and share premium in A.Y. 2009-10 also from the same party of Rs.38,66,18,949/- by issuing 4,52,655 equity shares from the same non resident company M/s. Jumbo Bright Group Ltd. However, again the AO after examining the evidences filed by the assessee accepted the same in the order framed under section 143(3) read with section 147 of the Act dated 23.09.2014 and no adverse inference was drawn with regard to identity of the investor, creditworthiness of the investors and genuineness of the investment made by M/s. Jumbo Bright Group Ltd., Hong Kong in the share premium and share capital of the assessee. In this back ground the issue of reopening under section 147 of the Act is being adjudicated in the following paras.

5.1 The assessee has also challenged the reopening of assessment before Ld. CIT(A), however, same was dismissed by observing and holding as under:

“I have considered the AO's contentions, submissions of the appellant and case laws relied upon by the appellant. The AO reopened the assessment by issue of notice u/s. 148 after recording the reasons for reopening and after taking necessary administrative approval u/s. 151(1) of the IT Act, 1961 vide No.Pr.CIT1 /Approval for re-opening/ 2016-17 dated 31.03.2017. Notice u/s 148 of the IT Act, 1961 was issued on 31.03.2017 and served upon the assessee. In response to the same, the assessee vide letter dated 24.04.2017 submitted that copy of the return of income filed on 27.09.2010 be considered as filed in response to the notice u/s. 148. In this letter, he sought for the reasons for reopening the assessment which were provided to the assessee by the AO vide letter dated 16.08.2017. The objections of the assessee were also rejected by the AO by letter dated 2.11.2017.1 find that reopening of the assessment under section 147 of the Act was done/properly following the due process of law and there is no infirmity or illegality in reopening the assessment and the notice issued u/s. 148 for the year under consideration is perfectly legal and valid. Therefore, the ground of appeal no.1 is dismissed.”

5.2 After hearing both the parties and perusing the material on record including the reasons recorded under section 148(2) of the Act for reopening the assessment, we find that the assessee has issued shares 61967 shares partly paid up of face value of Rs.10 each at a premium of 790 and receipt of Rs.2,50,78,748/- and the balance was received in the subsequent year. We find that M/s. Jatia Hotels and Resorts Pvt. Ltd. which is amalgamated with the assessee company has received Rs.38,66,18,949/- from M/s. Jumbo Bright Group Ltd., Hong Kong by issuing 4,52,655 equity shares and the AO has accepted this transaction in the original assessment proceedings vide order dated 07.12.2011 passed under section 143(3) of the Act as well as in the reassessment proceedings vide order dated 23.09.2014 passed under section 143(3) read with section 147 of the Act. Pertinent to mention that the issue was examined in the original assessment proceedings also as well as in the

reassessment proceedings. The reassessment proceedings were only initiated in order to examine this investments in the share capital by fore investor and was accepted by the AO. We are unable to understand as to how the AO under similar facts has again reopened the assessment of the assessee who is a non resident by recording a belief that income has escaped assessment to the extent of Rs.4,95,73,600/- within the meaning of section 147 of the Act. Considering these facts we are of the considered view that AO has failed to apply his mind on the facts of the case and therefore the reassessment proceedings can not be held to be validly initiated. Besides, we note that the AO has recorded a belief in the reason recorded under section 148(2) that the share capital and share premium received in the financial year 2009-10 is not satisfactory and hence required to be treated under section 68 of the Act. This also appears to be a case of total non application of mind on the relevant provisions of the Act by the AO as the provisions of section 68 of the Act are not applicable to a non resident. Further, proviso to section 68 of the Act has been inserted by Finance Act, 2011 w.e.f. assessment year 2013-14 and is not inapplicable to the year under consideration. In view of these facts, we are of the considered opinion that the reassessment jurisdiction exercised under section 147 of the Act by the AO is invalidly exercised and accordingly we quash the reopening and the consequent assessment order.

ITA No.2720/M/2019 (Revenue's appeal)

6. The appeal filed by the Revenue challenging the deletion of addition on merit by Ld. CIT(A) becomes infructuous as we have

already allowed the cross objection of the assessee holding therein that reassessment proceedings are bad in law.

7. In the result, the cross objection of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 28.10.2021.

Sd/-
(Pavan Kumar Gadale)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 28.10.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.