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

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA No. 89/MUM/2017 (A.Y. 2009-10)

Income Tax Officer – 1(2)(4) 536, Aayakar Bhavan, M.K. Road Mumbai - 400020	*v.*	M/s. Perfect Nano Solar Pvt. Ltd., B-17, 1st Floor, Chottu Tarace SBS Road, Colaba, Mumbai - 400005 **PAN: AAECP5136F**
Appellant		**Respondent**

C.O. NO.165/MUM/2018
[ARISING OUT OF ITA No. 89/MUM/2022 (A.Y. 2009-10)]

M/s. Perfect Nano Solar Pvt. Ltd., B-17, 1st Floor, Chottu Tarace SBS Road, Colaba, Mumbai - 400005 **PAN: AAECP5136F**	*v.*	Income Tax Officer – 1(2)(4) Room No. 536, Aayakar Bhavan M.K. Road, Mumbai - 400020
Appellant		**Respondent**

Assessee Represented by	**:**	**Shri Aditya Sharma**
Revenue Represented by	**:**	**Shri R.N. D'Souza**
Date of Hearing	**:**	**21.07.2022**
Date of pronouncement	**:**	**12.10.2022**

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal and cross objection are filed by the revenue and assessee against order of the Learned Commissioner of Income Tax–2, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 21.09.2016for the A.Y.2009-10.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2009-10 on 15.09.2009 declaring total loss of ₹.4,444/-. The return was processed u/s. 143(1) of the Income-tax Act, 1961 (in short "Act"). Subsequently, Assessing Officer received information from the Registrar of Companies (ROC) that assessee has received huge share premium amounting to ₹.1,47,25,000/- during the Financial Year 2008-09. Assessing Officer observed that since there was no scrutiny assessment done for this assessment year and he was of the opinion that share premium having been received by the assessee was not examined (the intrinsic value of the share in comparison to the excess premium received), therefore he has reason to believe that the income has escaped assessment. Accordingly, he issued notice u/s. 148 of the Act for the A.Y.2009-10 on 28.03.2014.

3. In response, Ld. AR of the assessee filed relevant information vide its letter dated 03.04.2014, it enclosed the copy of return of income which was filed on 15.09.2009. Accordingly, Assessing Officer issued notices u/s.143(2) and 142(1) of the Act alongwith the questionnaire and served on the assessee. In response Ld. AR of the assessee attended and filed the relevant information as called for.

4. Assessee company is incorporated in the year 2008, i.e., in the current Financial Year under consideration and engaged in the business of Energy and Exhibition Structures. The Assessing Officer observed from the information that assessee has issued 77,500/- equity shares at the face value of ₹.10/- per share with a share premium amount of ₹.190/- per share and these shares are allotted to Rajkishore Maniyar (49500 shares) and Brijkishore Maniyar (28000 shares). Further, Assessing Officer observed that assessee has issued shares with huge share premium and it was observed by him that the assessee has advanced ₹.95,00,000/- to Utkarsh Shelters & Estates P. Ltd., when the assessee was asked to submit documentary and supporting evidences with detailed notes of the factors considered for allotting shares at premium, in response, assessee filed vide letter dated 02.02.2015 and

submitted that assessee has allotted 77500 equity shares with premium and it was submitted that in order to justify the identity, genuineness and creditworthiness of the shareholders, the assessee has relied upon the following documents: PAN details of the shareholders, share application forms, mode of payment, Number of shares subscribed etc. Form No. 2 filed before ROC and copy of the share certificate and in their response assessee has justified that assessee has fulfilled all the conditions provided in section 68 of the Act.

5. Further, assessee submitted letter dated 16.02.2015 with justification regarding the funds requirements and uses, for the sake of clarity it is reproduced below: -

> *"JUSTIFICATOIN REGRADING THE FUNDS REQUIREMENTS & USES:*
>
> *The assessee company is currently engaged in the business of Solar Energy & Exhibition structure business.*
>
> *PERFECT NANO SOLAR PRIVATE LIMITED [PNSPL] has been incorporated as a Private Limited company under the Companies Act, 1956 in the year 2008 on the name of Puniya Networks & Communication Pvt. Ltd. with the main object of carrying on the business of Import, Export, but and sell or act as agent, develop, analyze, improve, implement, setup, hire & install and deal in every description and kinds of High end electronic system, CCTV, Smoke detectors & software technologies equipment for profit, goods and products, whether domestically, or in international. Subsequently w.e.f.19.09.2008 the company has changed it's name to Perfect Nano Solar Pvt. Ltd.*

The company has further, identified and focused in the products such as with the main objects of carrying on the business of Import, Export, buy and sell or act as agent, of Generators and Dealers in Nano Solar Cell, Nano Solar Energy, Green Energy, Power, Gases, Electricity etc.

The company was intended to business in Solar Energy plants in Mumbai. The plan was with the tie-up of BEST in Mumbai, and was from Bandra to Colaba area. The energy saver plan was in break-up of 400wts., 250wts., 150wts. &70wts. Instruments. The company was intended to require the Funds for the following factors:

- *Working Capital Requirements.*
- *Purchases for the Fixed Assets.*
- *Initial requirements for the execution of the Projects.*

Since the company is a private company, its shares are not quoted in the stock exchange and hence the need is felt to value the business/shares of the company for the purpose of its issue and decide upon the price at which the same should be issued to the proposed investor. The company intends to issue the shares for Meeting its working capital requirements and others as above and as such the company has issued the shares on premium for fulfilling its capital requirements in future aspects.

The company was expecting to growth & large opportunities in the same business project even the revenue was also expecting very good with the consecution growth and development in future prospects. But later due to some political issues & legal obligation the company could not performed the same & have to stop the plan on initial stages.

The intention of the company was to focus on future growths & revenue with the expanding of the projects and business development plans.

Your honor the fund received from the Share premium was also invested as per the project plans of the company to execute on

the ground level as same. The company was also performing well & running till to date also. We are also enclosing herewith the Xerox copy of the Share Valuation Report for your reference."

6. After considering the detailed submissions, Assessing Officer rejected the submissions made by the assessee and observed the following reasons for rejecting the submissions made by the assessee.

(i). The assessee's claim that the future earning justify the premium collected is totally hypothetical and is not supported by subsequent return of income filed by the assessee.

(ii). In the subsequent year i.e., AY 2010-11 assessee has further received share premium of Rs. 16,00,000/-. During the year under consideration and the subsequent years there was no receipts from operations and the income shown by the assessee company was only interest income.There is no revenue from operations in the subsequent years also.Therefore the projections shown in the valuation report is hypotheticaland baseless.

(iii). The assessee's claim that the provisions of section 68 is not acceptable in the case of assessee as the source and nature of receipts has been explained is not correct because the assessee has proved source of premium but the nature of receipts not explained. Further, the nature of receipts cannot be merely explained on the basis of Board of Directors resolutions, unless & until the same is supported by valuation report & other documents in support of justification for premium collected.

(iv). Further, the assessee's claim that the provision to section 68 is applicable w.e.f. 01.04.2013 is also not correct because if the nature of credits is not explained, it can be added in its hand u/s 68 of the I.T. Act. even before the amendment to section 68. Therefore, it is equally important to explain the nature of receipt / credit along with source thereof. Any one out of both, i.e. the source or the nature of credit, if not explained, such credit can be added as unexplained cash credited in the hands of

assessee u/s 68 of the I.T. Act. The assessee failed to explain the nature of credits satisfactorily.

(v). There are several case laws in which it was held that the unjustified share premium can be added u/s 68 of the 1.T. Act. The case laws areas under :

a. Major Metals Ltd. Vs. Union of India (207 Taxman 185)(Bomba) (HC)

b. ZARS Trading Pvt.Ltd. (ITA No.3284/Del/90) (Delhi) (2010 TIOL308)

c. Kushara Real Estate Pvt.Ltd. (ITA NO.4247/Del/2009)

7. The Assessing Officer based on his above observations on record and he observed that assessee has issued shares with premium at the initial stage itself when the business of the assessee is not commenced. He also observed that company does not have any reserves, assets or any hidden assets to justify the premium collected. Further, he observed that even DCF valuation report filed by the assessee company does not justify the premium collected and financial result of the assessee company in subsequent Assessment Years has also failed to justify the share premium collected. Accordingly, Assessing Officer observed that assessee has not satisfied the conditions provided in section 68 of the Act for issue of shares in premium. Accordingly, he treated the above share premium as income u/s. 68 of the Act.

8. Aggrieved, assessee preferred an appeal before the CIT(A)-2, Mumbai and filed detailed submissions in which assessee has challenged the validity of the reopening of assessment and challenged the additions made u/s. 68 of the Act on merit. After considering the submissions of the assessee, Ld.CIT(A) partly allowed the appeal filed by the assessee, with regard to challenge on reopening of assessment, since assessee has not pressed this ground, Ld.CIT(A) dismissed the same and with regard to addition u/s. 68 of the Act he relied on the decision of the Coordinate Bench in the case of Green Infra Ltd. *v.* Income Tax Officer (2014) 159 TT (Mum) 728 dated 23.08.2013 and decision in the case of CIT *v.* Lovely Exports [229 ITR 261 (SC)] and decided the issue in favour of the assessee.

9. Aggrieved, revenue is in appeal against the order of the Ld.CIT(A) and assessee has filed cross objection.

10. We observe from the record that both revenue as well as assessee has filed the appeal as well as cross objection with a delay of 46 days and 56 days respectively. The bench condoned the above said delay and proceeded to dispose off the appeals. Since there is an issue of

jurisdictional issue raised by the assessee in cross objection, we proceed to hear the jurisdictional issue first. Accordingly, we hear the Ld. AR as under.

11. Ld. AR submitted that assessment was reopened by issuing a notice u/s. 148 of the Act dated 28/03/2014 informing the assessee that its income for the A.Y. 2009-10 has escaped assessment within the meaning of section 147 and required the assessee to furnish the return of income within 30 days from the date of service of the notice. The copy of the said notice dated 28/03/2014 is placed on record. However, no return of income was filed in response to the said notice u/s. 148 of the Act. In spite of the fact that no return of income in response to notice u/s. 148 was filed, on 19/8/2014, the Assessing Officer issued a notice u/s. 143(2) of the Act stating that there are certain points in connection with the return of income submitted by the assessee on 15/09/2009. The Assessing Officer failed to appreciate that notice could not be issued in respect of a return of income filed on 15/09/2009 the said notice also accompanied with a notice u/s.142(1) of the Act along with a query sheet of even date. Copy of the notice under section 143(2), 142(1) and query sheet are placed on record. In response to letter dated 12/1/2015 (refer

Page No.5-6 of paper book), the assessee filed its reply dated 15/1/2015(refer page No..7 of paper book). vide letter dated 2/2/2015 the assessee submitted documents filed with ROC and further details in respect shareholders to whom shares were issued along with copy of bank statements and form No.2 etc (page No..8-14 of paper book).

12. With regard to validity of the order, Ld. AR submitted that the law has laid down certain procedures for the purposes of proceedings under Income Tax Act. It is settled law that the authority who has passed the order must legally assume jurisdiction over the assessee. Any deviation from the procedure or mandatory requirement may result into the declaration of an order a nullity. There are certain procedures and requirement /preconditions laid down for the purpose of reopening the assessment and its completion. If any of the preconditions remained unfulfilled or the authority is used / exercised in an arbitrary manner or the orders are passed on mere suspicion, the resultant order does not stand to the scrutiny of law and deserve to be quashed. The impugned assessment order is also suffering from various infirmities and therefore it deserves to be quashed and set aside.

13. Further, with regard to Satisfaction of escapement by Assessing Officer only assessment cannot be reopened on suspicion or to verify certain facts, Ld. AR submitted that the assessment can be reopened only if the assessing officer has reason to believe not reason to suspect that income of the assessee has escaped assessment. Assessing Officer's own satisfaction and belief about the escapement is the condition precedent to form the belief of escapement. The assessment cannot be reopened on the basis of an information received from the registrar of companies that assessee has received huge share premium. No independent inquiry was conducted/carried out by the Assessing Officer even to find about whether the information was correct or not. Assessing Officer didnot even bother to enquire whether the parties to whom shares were allotted exist or not. The Assessing Officer did nothing but simply reopened the assessment just to make roving enquiries on the reasoning that there was no scrutiny assessment done for the year under consideration and so called share premium could not be examined. Nothing prevented the Assessing Officer to take up the matter for scrutiny assessment as all the information were there on record. No tangible material was brought on record to reach to a conclusion that there was an escapement otherwise also share premium is a capital receipt. The reopening was based on a

mere suspicion and to allegedly verify certain facts. It is also not clear from the order as to on what date these reasons were recorded. The Assessing Officer has also not disclosed the fact as to on what date he received the information from the Registrar and what enquiries he conducted in order to reach to the belief that income of the assessee has escaped assessment. It is an admitted position that the Assessing Officer has not doubted or questioned the genuineness of allotment of shares or the premium received. The assessee submits that the assessment was reopened on the reasoning that the assessee had received huge share premium and that cannot be the reason for reopening the assessment. The very mention of the Assessing Officer clearly suggest that the reopening of the assessment was bad and illegal and reopening was done without application of mind. It is submitted that the assessment was reopened merely on suspicion. The Delhi Tribunal in the case of Monarch Educational Society v. ITO (E) (2015) 37 ITR 512 (Delhi) held that where the Assessing Officer had simply reproduced the details received from the Director of Income-tax, Investigation Wing, without any verification and examination of the information received. Notice u/s. 148 of the Act and all the subsequent proceedings were not sustainable.

14. For the above contentions, Ld. AR relied on various judicial pronouncements, the Hon'ble Allahabad High Court in the case of CIT *v.* Laxmi Mehrotra (Smt.) (2014)222 Taxman 111(Mag.) (All) (HC) held that the Assessing Officer received information from investigation wing that assessee has purchased a plot and thereby constructed a house on the said plot. The re-assessment proceeding for the A.Y. 1987-88 was initiated in 1997-98 and in between the period of 10 years the jurisdiction of A.O. might have changed. The figure furnished in the return filed for the AY. 1987-88 were acted upon even though the loans/other amounts said to have been stated in the return has been added. The CIT(A) allowed the appeal by stating that, the assessment has not been validly reopened and the A.O. has simply acted on the information of Investigation Wing without application of his mind. Once the assessee has disclosed all the particulars in the original return, it is not correct to reopen the assessment to find out as to whether these particulars have been disclosed or not i.e. purchase of land and construction thereupon, no matter who has given the information, without correlating the information with the original return. This precisely has been done by the Assessing Officer. The A.O. himself accepted the stated profit and loss account, capital account and balance sheet as filed

by the assessee along with account and balance sheet along with original return as correct. This shows that the assessment has not been validly reopened. There was no application of mind at the time of reopening of assessment. On receipt of the information from Investigation Wing, assessments were mechanically reopened without any reference of the original returns. therefore, no assessment because of action u/s 148 does not lie. The Tribunal has accepted the reasons given by the CIT(A) and is perfectly justified in quashing the order of reassessment proceedings as the action was mechanical in nature and without ascertaining. The High Court held quashing the reassessment proceedings that action of assessing officer was mechanical in nature and reassessment was made without ascertaining as to whether the assessee had disclosed the factum of purchase of plot and cost of construction in the original return.

15. The Hon'ble Delhi High Court in the case of ACIT *v.* Devesh Kumar (Delhi) (Trib.) (ITA No.2068/Del/2010, Dt. 31.10.2014.) held that reopening solely on the basis of information received from the investigation wing & without independent application of mind is void. In this case The AO proceeded to initiate proceedings u/s 147 of the Act and to issue notice u/s 148 of the Act on the basis of information received

from Investigation Wing of the department in the form of a CD prepared by Shri Sanjay Shah and Shri Vishesh Prakash, ITOs of Unit V, New Delhi. Subsequently, the AO reproduced details gathered from the CD and without application of independent mind, held that the assessee was beneficiary of accommodation entries amounting to Rs.4,51,000. In the main part of reason to believe, there is no mentioning of nature of transaction to establish and fortify the fact thatthe impugned transactions were in the nature of accommodation entries. We also observe that there is no mentioning of date therein and it can safely be presumed that the AO had not examined the assessment record of the assessee which was processed u/s 143(1)(a) of the Act on 15.3.2005 for forming a belief that the income of the assessee had escaped assessment. There was no material on record to show that the AO had applied her independent mind in forming a belief which may result in the required reason to believe as per provisions of section 147 and 148 of the Act. We also held that the CIT(A) was right in following the ratio of the decision of apex court in the case of CIT vs Sun Engineering Works Pvt. Ltd. and the decision of Hon'ble Jurisdictional High Court of Vipin Khanna vs CIT (supra), Amrinder Singh Dheeman vs ITO (supra) which have been fully re elucidated and affirmed by subsequent decision of Delhi High Court in

the case of Jai Bharati Maruti Ltd. Va CIT (supra). In this situation, the CIT(A) was justified and reasonable in quashing the notice u/s 148 of the Act and entire reassessment proceedings conducted there under.

16. The Mumbai Tribunal in the case of Lark Chemicals P. Ltd. *v.* ACIT (Mum.) (Trib.) (ITA No. 2636/M/2013 dt. 06/02/2015) (AY. 2004-05) held that where Allegation of bogus billing proved wrong, reassessment was held to be bad in law. In this case Assessee's assessment was reopened after four years on the basis of statement of one Mr.Parag Mehta u/s 132(4) wherein the assessee was indicated as one of the beneficiaries of bogus bills. During the year, the assessee had received ₹.5 crores from one of the alleged bogus bill provider. On the issue of reopening, the assessee contended that it had no business dealings except for receipt of share allotment money, and hence, there was no question of bogus billing, and that till date shares are owned by that entity. Also, even in the statements, Mr.Parag Mehta and others did not allege that money invested in the assessee was bogus.

17. The Tribunal found that all material facts such as details of allotment of shares, application for allotment, company board resolution,

return of allotment with ROC etc. had been filed, and when the very reasons which formed the basis of reopening were proved to be wrong, reassessment was not permissible. Furthermore, the reopening was done for suspected bogus billing which was different from the reason for actual additioni.e. share application money received i.e. unexplained cash credits. Therefore even on this ground, reassessment had to be held bad in law In the case of the assessee the reopening was done on the reasoning that no scrutiny was done for the year under consideration and therefore the issue could not be examined cannot be the reason for reopening In view of the fact that all the subscribers are income tax payee, share price was paid through account payee cross cheques all the details were furnished before ROC the reopening of assessment was without any justification and therefore reopening is invalid and so as further proceedings taken up in pursuance of the invalid reopening.

18. Ld. AR with regard to "No escapement of income" submitted that in this case there is no case of escapement of income at all. The assessment was reopened on the reasoning that there was no scrutiny assessment done for that year. During the assessment proceedings all the documents which were furnished before ROC, bank statement, mode

of payment details of parties and confirmation from them were furnished, the Assessing Officer has not denied these facts. The question of application of provisions of sec.68 does not arise at all as the amount received on capital account. The Assessing Officer did not bring anything on record to prove that the amount received by the assessee is on revenue account looking at facts there was no escapement of income at all.

19. The precondition in reassessment proceedings is that there has to be some escapement of income. The escapement must be real and not imaginary or based on mere surmises. There have to be some tangible evidences coming to the possession of the Assessing Officer to reach to a belief that the income has really escaped assessment. Tangible material would mean factual material and not inference or opinion on material already in existence on record. The belief should not be the result of mere suspicions and conjectures. The information must come from some definite source and must be reliable so as to ensure that the completed assessment are not disturbed lightly. The Hon'ble Supreme Court has held in the case of Mehta Parikh &Co Ltd .30 ITR 181(SC) that a suspicion how so ever strong it may be cannot take place of an evidence.

20. Ld. AR relied on various judicial pronouncements, in the case of Plus Paper Food Pac Ltd vs. ITO (Bombay High Court) (judgment dated 31.3.2015) the Hon'ble court held though the power to reopen is much wider, but the interpretation that the words "reason to believe" must receive an interpretation which is in consonance with the scheme of the law. There cannot be arbitrary powers to the Assessing Officer to reopen assessment. The kind attention of your goodself is further attracted to the judgment in the case of Ramjidas Mahaliram (1936)42 ITR 25(Cal) where it was held that ITO cannot give him jurisdiction on an erroneous finding that income has escaped assessment, he cannot initiate proceedings on the basis of mere suspicion

> *(iii) Assessment order is invalid as no return was filed by the assessee the issuance of Notice under section 143(2) was premature /the notice was invalid as it was issued in respect of the return filed on 15/09/2009*

21. The assessment of the assessee has been completed under section 143(3) r.w.s147. For completing the assessment under section 143(3) r.w.s.147 it is legal requirement that the assessee must have filed a valid return in response to the notice under section 148.In case the assessee does not file the return of income in response to the notice under section 148,the only remedy lies with the department to complete the

assessment under section 144 of the Act.Section 148 mandates that before making the assessment or reassessment the Assessing Officer shall serve a notice on the assessee requiring him to furnish the return of his income the section further mandates that the provisions of this Act shall apply as if such return were a return required to be filed u/s. 139 of the Act. Section 143(2) mandates that where a return has been furnished under section 139 the Assessing Officer shall serve on the assessee a notice requiring him either to attend his office or produce or caused to be produced any evidence on which the assessee may rely Section 143(3) mandates that soon after hearing such evidences and after taking all relevant material which he has gathered the Assessing officer shall by an order in writing make an assessment of the total income or loss of the assessee and determine the sum payable. The crux of the matter is that there has to be a valid return on record so as to invoke the provisions of section 143 (2) and 143(3). Needless to say that if there is no valid return of income on record no assessment can be made under section 143(3). It is an admitted fact that no return of income was filed by the assessee nor he informed the Assessing Officer to treat the original return filed by him as the return filed in response to section 148 notice.

22. Ld AR brought to our attention order of ITAT Bangalore in the case of Shri G. N. Mohan Raju, v/s ITO in ITA No.242& 243(Bang) (2013) where it was held that notice u/s 143(2) issued prior to filing of return in response to notice u/s 147 is invalid, even if return is filed late. Assessing Officer could not treat a return filed prior to issue of notice u/s 148 of the Act as a return filed by the assessee, pursuant to such notice unless and until assessee had given a direction or request on these lines. Operation of Section 143(2) of the Act is with reference to a return filed by the assessee. The assessments were completed u/s 143(3) r.w.s.147 of the Act and not u/s 144 of the Act. Unless and until the assessee had either filed a return pursuant to the notice u/s 148 of the Act or made a request for treating the earlier return filed by it to be one filed pursuant to notice u/s 148 of the Act. AO could not proceed with an assessment u/s 143(3) of the Act. There could be no presumption that a return filed prior to a notice issued u/s 148 of the Act is one under or in pursuance to such notice. Hon'ble Bench has held as under:

> *"Once the original return filed by the assessee was subject to processing u/s 143(1) of the Act, the procedure of assessment pursuant to such a return, in our opinion came to an end, since AO did not issue any notice within the 6 months period mentioned in proviso to section 143(2)(ii). No doubt, if the income has been understated or the income has escaped assessment, an AO is having the power to issue notice u/s 148*

of the IT Act. Notice u/s 148 of the Act, issued to the assessee required it to file a return within 30 days from the date of service of such notice. There is no in the Act, which would allow an AO to treat the return which was already subject to a processing u/s 143(1) of the IT Act, as a return filed pursuant to a notice subsequently issued u/s 148 of the Act. However, once an assessee itself declare before the AO that his earlier return could be treated as filed pursuant to notice u/s 148 of the IT Act, three results can follow. Assessing Officer can either say no, this will not be accepted. you have to file a fresh return or he can say that 30 days time period being over will not take cognizance of your request or he has to accept the request of theassessee and treat the earlier returns as one filed pursuant to the noticeu/s 148 of the IT Act. In the former two scenarios, AO has to follow the procedure set out for a best of judgment assessment and cannot make an assessment under section 143(3). On the other hand, if the AO chose to accept assessee's request, he can indeed make an assessment under section 143(3). In the case before us, assessments were completed under section 143(3) read with section 147. Or in other words AO accepted the request of the assessee. This in turn makes it obligatory to issue notice u/s 143(2) after the request by the assessee to treat his earlier return as filed in pursuance to notices u/s 148 of the IT Act was received. This request, in the given case, has been made only on 05-10-2010. Any issue of notice prior to that date cannot be treated as a notice on a return filed by the assessee pursuant to a notice u/s 148 of the Act. Or in other words, there was no valid issue of notice u/s 143(2) of the IT Act, and the assessments were done without following the mandatory requirement u/s 143(2) of the IT Act. This in our opinion renders the subsequent proceedings all invalid"

In view of the above submission and in view of the fact that no return of income was filed by the assessee in response to the notice under section 148, the assessment is illegal and deserves to be quashed."

23. Ld. AR submitted that with regard to the notice under section 143(2) dated 19/8/2014 (page 2 of the paper book), it was issued in respect of return of income filed on 15/09/2009 being original return and therefore the said notice is barred by limitation and cannot acted upon and will be of no consequence even if assessee co-operated in assessment proceedings. It is a precondition that a proper and valid notice must be served upon the assessee before he is fastened with the tax liability. Issuing and serving a valid notice u/s. 143(2) is mandatory under the law. The said notice clearly speaks that it is not related to the reassessment proceedings but was issued in respect of return of income filed originally on 15/09/2009. The Hon'ble supreme Court in the case of CIT vs Kurban Hussain Ibrahimji Mithiborwala (1971)82 ITR 821(SC) has held that The ITO's jurisdiction to reopen an assessment under section 34of 1922 Act depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction. In the case of Thyyabali Mulla Jeevaji Kapasi (1967)66ITR 147(SC) it was held that the notice prescribed by section 34 of the 1922 Act (corresponding to sec. 148of the 1961 Act) cannot be regarded as a procedural requirement; it is only if the said notice is served on the assessee as required that the ITO would

be justified in taking proceedings against him. If no notice is issued or if the notice is shown to be invalid, then the validity of the proceedings taken by the ITO without a notice or in pursuance of an invalid notice would be illegal and void….. In the case of Bhagwandevi Saragoi *v.* ITO (1979)118 ITR 906) (Cal) it was held that any amount of acquiescence on the part of the petitioner could not confer any jurisdiction on the ITO if the ITO lacked jurisdiction for failure to serve a valid notice in accordance with law. The validity of the notice cannot be tested or judged in the light of the conduct of the parties concerned. If the notice is otherwise invalid or bad in law the invalidity or illegality of the notice cannot be cured by any act of the assessee to whom they said notice has been issued and the notice issued is illegal and invalid the entire reassessment proceedings is without jurisdiction and is void and illegal. In the case of Sewall Daga *v* CIT (1965)55 ITR 406(cal) it was held that a reassessment initiated without the service of a valid and proper notice is invalid Even if the assessee has waived the irregularity by responding to such notice. In the case of CIT vs. Tayaballi Mulla Jivaji Kapasi (1962) 45 ITR 304(Ker) Waiver of notice under section 34 must be conscious and intentional relinquishment of an existing right and mere filing of return in pursuance of invalid notice or improper notice is not sufficient to

constitute waiver. It was held in the case of ITO vs Rajendrea Prasad Gupta (2011) 135 TTJ (UO) 9 (Jodh) the provisions contained in section 292Bmay be restored to in a case of any administrative or clerical omission but it cannot be restored to for curing a jurisdictional defect which is fundamental in nature and goes to the root of the matter. In the case of ITO vs Naseman Farms (P) Ltd (2010) 134 TTJ472(Del) it was held that Section 292 BB does not cure jurisdictional defect in the notice. The notice which is not in accordance with the provisions of the Act it was a jurisdictional defect which could not cured.

24. In view of the fact that that there was no return filed in response to notice. under section 148, the question of issuance of notice u/s. 143(2) does not arise at all. Moreover, the notice u/s. 143(2) dated 19/8/2014 was in respect of original return and therefore barred by limitation. The assessment completed under section 143(3) r.w.s 147 was bad for want of valid return of income and notice in order to assume jurisdiction. The notice issued by the Assessing Officer is invalid and as a result it has caused a jurisdictional defect which is incurable even with the assessee's consent. The notice issued by the Assessing Officer is not in accordance with law. The validity of the notice cannot be tested or judged in the

light of the conduct of the parties concerned. If the notice is otherwise invalid or bad in law, the invalidity or illegality of the notice cannot be cured by any act of the assessee to whom they said notice has been issued and if the notice issued is illegal and invalid, the entire reassessment proceedings is without jurisdiction and is void and illegal. The provisions contained in section 148of the Act with regard to escaped assessment must be construed strictly with regard to procedure prescribed for escaped assessment. Even provision of section 292B cannot cure this defect as it is jurisdictional defect and not merely a clerical or administrative omission as no notice under section 143(2) was issued in respect of reassessment proceedings.

25. On the other hand, Ld.DR rebutted the submissions made by the Ld.AR. He brought to our notice Page No. 2 of the Assessment Order and submitted that assessee has already filed return of income before the Assessing Officer and based on that Assessing Officer proceeded to issue notice u/s. 143(2) of the Act. On the submission that assessee has not received reasons for reopening, Ld.DR filed copy of the reason for reopening. With regard to merit on the issue, he submitted that assessee has not pressed the ground challenging the reopening of assessment

before the Ld.CIT(A). Therefore, since there is no ground or additional ground filed by the assessee before Ld.CIT(A), in this regard he also brought to our notice Page No. 2 of the Ld.CIT(A) order to draw our attention that assessee has not pressed the ground on reopening of assessment. With regard to merits, he submitted that Ld.CIT(A) was only focused on addition made u/s. 68 of the Act and accordingly, he heavily relied on the decision of the Green Infra Ltd., *v.* Income Tax Officer (supra) and CIT v. Lovely Exports (supra).

26. Ld. DR relied on the decision of Coordinate Bench in the case of M/s. Pratik Syntex Private Limited *v.* ITO in ITA.No. 6690/Mum/2016 dated 11.05.2018 and in the case of ACIT *v.* Shri Devesh Kumar in ITA.No. 2068/Del/2010 dated 31.10.2014. Further, he relied on the case of DCIT *v.* Leena Power Tech Engineers Pvt. Ltd., in ITA.No. 1313/Mum 2020 dated 21.09.2021. Ld.DR prayed that the issue involved is relating to share premium and considering the decision in the DCIT *v.* Leena Power Tech Engineers Pvt. Ltd., (supra), which held that the whole transaction is bogus, he prayed that the issue may be decided in favour of the revenue.

27. On the other hand, Ld. AR in the rejoinder submitted that the nature of this transaction already available on record as Assessing Officer has already recorded the same in Assessment Order. He brought to our notice Para No. 6.2 of the Ld.CIT(A) order and submitted that all the information relating to share holders, their PAN, share application form and all relevant informations were already submitted before the Assessing Officer. Therefore, it clearly shows that the nature is already explained before the Assessing Officer and it clearly justifies the genuineness of the transactions. With regard to identity and credit worthiness it has already proved beyond doubt before the Assessing Officer. Therefore, the assessee has already fulfilled the onus of proof laid upon it.

28. Considered the rival submissions and material placed on record. We observe from the detailed submissions made by the Ld AR on the reopening of the assessment, we infer from the documents submitted before us clearly indicate that assessee had filed letter in response to reopening and filed copy of the original return of income. Based on the submissions, the Assessing Officer issued statutory notices u/s 143(2) and 142(1) of the Act. Now assessee has raised several argument

contesting that Assessing Officer cannot issue notice u/s 143(2) in absence of any return of income filed in response to notice u/s 148 by relying several case law. However, this argument cannot be accepted with the fact on record that the assessee had already filed the original return of income and subsequently filed same original return of income in response to notice issue u/s 148. Once the assessee has filed original return of income in response to notice u/s 148, it amounts to filing of return u/s 148, it is not necessary that assessee had to file a different return of income, it is enough that assessee to file a return of income, it can be fresh or original return of income. Therefore, this argument is not proper and not entertained, further the case law relied by the assessee are distinguishable to the facts on record. Therefore, the issue raised in the jurisdictional issue is dismissed.

29. Coming to the next issue, whether the Assessing Officer can reopen the assessment based on the information received from the ROC that the assessee has issued share capital along with the huge share premium, yes, prima facie, the Assessing Officer can rely upon the information from the other agencies, however Assessing Officer has to evaluate the information received from the other agencies and form a

independent opinion whether the information received leads to form an opinion that he has reasons to believe such income has escaped assessment. In this case we observe that the reassessment was initiated within four years from the original assessment year and prima facie the information received from the ROC establishes that the assessee in fact issued shares alongwith huge share premium, in order to verify the transaction, he has proceeded to reassess the income, even though all the information were submitted during 143(1) proceedings, the Assessing Officer had no opportunity to verify the same, therefore, in our view the Assessing Officer had prima facie has reason to believe to initiate the reassessment proceedings, accordingly, the submissions made by the assessee are dismissed.

30. Coming to the merits of the case, we observe that the Assessing Officer has received information from the ROC that the assessee had issued share capital with huge premium and reassessed the income of the assessee, by doing so, he merely analysed the financial statement and information available on the record. He has not investigated the genuineness of the transactions by verifying identity of the share holders, how the funds were brought on record. Assessing Officer

merely interpreted the financial information and observed that the assessee has not carried on any business activities and it does not justify issue of shares with share premium. We observe that the assessee had filed justification for issue of shares with premium and Assessing Officer had not found any mistake in determining the valuation of shares and he gone ahead commenting on the subsequent year performance of the company. In our view, the assessee has issued share capital and there is no doubt on the nature of the transaction as such and assessee has issued the share capital with the share premium, which is legally permissible as per Companies Act, by following the standard procedure laid down in that Act. The Assessing Officer has treated the above transaction as income u/s 68 of the Act. We observe that the assessee had filed all the relevant information relating to the transactions, which clearly proves the genuineness of the issue of share capital, proved the identity and credit worthiness of the investors. In order to make addition u/s 68, there has to be credit entry in the books of account, mere credit will not suffice but it should be supported by the documents, which assessee has submitted before Assessing Officer. Assessing Officer has to investigate considering the nature of credit in the books of account. In this case, the nature is already and clearly disclosed in the

books of account that the assessee has issued share capital. It is the duty of the Assessing Officer to investigate the identity and credit worthiness of the investors, with regard to genuineness, the transaction is already proved that these are share transaction. We observe that Assessing Officer has not verified the credit worthiness of the investors and identity. He merely discusses whether the assessee can issue shares with share premium and its circumstances. He has actually not established how the share transaction is non genuine, merely because the shares were issued with premium, the transactions cannot be held to be non genuine. We also observe that the Ld DR relied on the decision of Leena Power Tech Engineers Pvt. Ltd., (supra) but in the above said case, it is clearly established that the investors were non genuine and shell companies. Further, it was found that the assessee company as well as other companies through which the assessee has received share application monies are shell or having very little means to make investments. No such investigations were made by the Assessing Officer. Therefore, it is distinguishable to the facts in this case.

31. In our considered view, even though, Ld CIT(A) relied on the decision of Lovely exports to give relief, still, in our view, Assessing

Officer has actually not established how the share transactions can be brought to tax u/s 68 of the Act. Therefore, we are inclined to accept the conclusions reached by the Ld CIT(A). Accordingly, the grounds raised by the revenue is dismissed.

32. In the result, appeal filed by the revenue is dismissed and cross objection filed by the assessee also is dismissed.

Order pronounced in the open court on 12th October, 2022.

Sd/-	Sd/-
(AMIT SHUKLA)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 12/10/2022
Giridhar, 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, Mum