IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.6671/Mum./2016
(Assessment Year : 2005–06)

Dy. Commissioner of Income Tax
Circle–3(3)(1), Mumbai ……. Appellant

v/s

M/s. Satya Securities Ltd.
1009, Maker Chamber–V
10th Floor, Nariman Point
Mumbai 400 021 PAN–AAECS9414M .....Respondent

ITA No.1472/Mum./2017
(Assessment Year : 2005–06)

M/s. Satya Securities Ltd.
1009, Maker Chamber–V
10th Floor, Nariman Point
Mumbai 400 021 PAN–AAECS9414M ……. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–3(3)(1), Mumbai .....Respondent

Assessee by : Shri A.K. Tibrewal
Revenue by : Shri Hoshang B. Irani

Date of Hearing – 01/08/2022	Date of Order – 21/10/2022

O R D E R

PER BENCH

The present cross appeals have been filed by the assessee and the Revenue challenging the impugned order dated 25/08/2016, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by learned Commissioner

of Income Tax (Appeals)–8, Mumbai, ["*learned CIT(A)*"], for the assessment year 2005–06.

ITA no.1472/Mum./2017
Assessee's Appeal – A.Y. 2005-06

2. In its appeal, the assessee has raised following grounds:-

"The following grounds of appeal are independent of, and without prejudice to, one another:

1. The Commissioner of Income-tax (Appeals)-8, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Deputy Commissioner of Income-tax 3(3), Mumbai (hereinafter referred to as the Assessing Officer) in issuing notice under section 148 of the Act.

The appellants contend that on the facts and in the circumstances of the case and in law the notice issued under section 148 is bad in law and consequently, the assessment needs to be quashed.

2. The CIT(A) erred in upholding the action of the Assessing Officer in making the addition under section 68 of the Act in respect of the following loan creditors -

Sr. no.	*Name of the party*	*Amount (Rs.)*
1.	*Rajhans Mercantile Pvt. Ltd.*	*50,00,000*
2.	*Turn Key Steel India P. Ltd.*	*1,00,00,000*
	Total:	*1,50,00,000*

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition inasmuch as all the relevant details have been furnished with the CIT(A) and that he has not appreciated the facts of the case in its entirety and as such. the impugned addition ought to be deleted.

The appellants further, contend that the CIT(A) ought not to have upheld the action of the Assessing Officer inasmuch as the Assessing Officer has violated the principles of natural justice in making the impugned addition and hence, the impugned addition ought to be deleted.

3. The CIT(A) erred in upholding the action of the Assessing Officer in making the following disallowance in respect of a flat at Cuffe Parade, Mumbai, on the ground that the appellants have failed to establish that during the year, the said flat has been exclusively used for the purpose of business -

Sr. no.	*Name of the expense*	*Amount (Rs.)*
1.	*Depreciation*	*5,16,883*
2.	*Maintenance charges*	*3,500*
3.	*Electricity charges*	*26,893*

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned disallowance inasmuch as the impugned expenses have been incurred in the pursuit of business and hence, the impugned disallowance ought to be deleted.

4. The CIT(A) erred in upholding the action of the Assessing Officer in making disallowance of Rs 1.30,000 in respect of rent paid for flat at Kandivli, Mumbai, on the ground that the appellants have failed to establish that the said flat has been used for the purpose of business and that the said expense is personal in nature.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned disallowance inasmuch as the impugned expenses have been incurred for the purpose of carrying on the business of the appellants and further, that there cannot be an expense that can be personal in nature in the case of a corporate entity: as such, the impugned disallowance is not warranted and hence, needs to be deleted.

5. The CIT(A) erred in upholding the action of the Assessing Officer in making a disallowance of Rs 98,940, being 20% of Rs. 4,94,700, paid to Bidhan Resources Pvt. Ltd. by invoking the provisions of section 40A(3) of the Act.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned disallowance inasmuch as the CIT(A) has not appreciated the facts of the case in its entirety and as such, the impugned disallowance ought to be deleted."

3. The assessee, in its appeal, has raised grounds pertaining to invocation of jurisdiction under section 147 of the Act as well as on merits of various additions made by the Assessing Officer ('*AO*'). Therefore, we have first dealt with the issue of invocation of jurisdiction under section 147 of the Act, as raised in the assessee's appeal.

4. The brief facts of the case, as emanating from the record, are: the assessee is engaged in business of trading in shares, goods and merchandise.

For the year under consideration, assessee filed its return of income on 30/10/2005 declaring loss of Rs. 1,28,78,463. The return of income filed by the assessee was selected for scrutiny and notice under section 143(2) was issued and served on the assessee. Thereafter, detailed questionnaire along with notice under section 142(1) of the Act was issued and same was attended by the assessee and submissions were filed. The AO, upon scrutiny of details submitted by the assessee, vide order dated 28/12/2007 passed under section 143(3) of the Act, computed the total loss at Rs. 65,28,333, after making certain disallowances.

5. Subsequently, vide notice dated 29/03/2012 issued under section 148 of the Act, reassessment proceedings were initiated in the case of the assessee on the basis of information received from SP, CBI – Anti Corruption Bureau, Mumbai that assessee is one of the group companies, who are engaged in providing accommodation entries to various person, and its directors are operating 20 dummy concerns which have entered into bogus transactions with several concerns and provided accommodation entries. In response to the aforesaid notice, representation was made on behalf of the assessee and details as sought were filed. The AO vide order dated 30/03/2013 passed under section 143(3) r/w section 147 of the Act computed the total income of the assessee at Rs. 8,93,18,360 after making various disallowances.

6. In appeal, before the learned CIT(A) assessee raised grounds challenging the invocation of jurisdiction under section 147 of the Act as well as on various additions made by the AO. The learned CIT(A), after consideration of remand report filed by the AO and assessee’s reply thereto, inter-alia, dismissed the

appeal filed by the assessee on the issue of initiation of reassessment proceedings. Being aggrieved, the assessee is in appeal before us.

7. During the course of hearing, learned Authorised Representative (‘*learned AR*’), at the outset, inter-alia, submitted that there is no allegation in the reasons recorded for initiating the reassessment proceedings that income has escaped assessment due to failure of assessee to disclose fully and truly all material facts. Further, learned AR submitted that there is no compliance of section 149(1)(b) of the Act in the reasons provided by the AO.

8. On the other hand, learned Departmental Representative (‘*learned DR*’) submitted that assessee has raised no objections against reopening of assessment at any stage of reassessment proceedings. Learned DR further submitted that from the perusal of the reasons recorded for reopening the assessment, allegation of failure to disclose fully and truly all material facts can be reasonably inferred.

9. We have considered the rival submissions and perused the material available on record. In the present case, return of income filed by the assessee was selected for scrutiny and assessment was concluded vide order passed under section 143(3) of the Act. However, after expiry of 4 years from the end of the relevant assessment year, notice under section 148 of the Act was issued to the assessee. While initiating the reassessment proceedings, the Assessing Officer recorded following reasons for reopening the assessment:

> *“The ROI for A.Y.2005-06 was filed on 30-10-2005. In this case, an order u/s.143(3) of the Act 1961 was passed on 28-12 2007 assessing its total loss at Rs.65,28,333/-.*

The ADITInv.), Unit VII-I & II, Mumbai vide letter dated 28.12.2011 has intimated that the assessee company, is one of the group Companies formed by Shri Arun & Harsh Dalmia and is engaged in providing accommodation entries to various persons. The report of the ADICT (Inv.) is based on the report of ACB, CBI, Mumbai where in it is reported that the CBI, ACB, Mumbai has conducted investigation in the affairs of Shri Harsh Dalmia and Shri Arun Lal Saini, who are directors of M/s. Satya Securities P. Ltd. It is reported that they operate 20 dummy concerns which have entered into bogus transactions with several concerns and provided accommodation entries. The relevant part of the scrutiny report along with the covering letter of S.P., CBI and ACB, Mumbai is as under:

SP's Report:

Shri Dalmia's floated 20 companies has never paid taxes to the Government since all his concerns were shown to run in losses in almost all the years. The above said act on the part of Shri Arun Dalmia and Shri Harsh Dalmia constitute evasion of income tax.

CBI and ACB, Mumbai's Report

The CBI has reported that searches at the residence and office premises of Shri M. S. Bali and Dalmia's CBI Prima facie could find substantial material which indicates that 20 firms of Shri Arun Dalmia are engaged in money laundering and income tax evasion. Scrutiny of documents revealed that Shri Arun Kumar Dalmia and his younger son Shri Harsh Dalmia are directors of M/s. Watermark Financial Consultants Ltd., having office at 1010, Maker Chamber No.V, Nariman Point, Mumbai 400 021. They are running the above mentioned companies from the same address and at most of the companies, their employees are directors. They are falsely submitting the business of purchase and sales of software in most of the companies though none of the companies are having any infrastructure or manpower of the same.

Insider Trading with listed company in a stock market)

Shri Arun Dalmia and Shri Harsh Dalmia through their concern namely M/s. Basant Marketing P. Ltd, and M/s. Satya Securities Ltd. has acquired holding of 5.55% in Granules India Ltd. Without following norms of Securities and Exchange Board of India Act, 1992. They in connivance with promoter and brokers namely Mr. Mahendra Kumar Khirodwala and Mr. C. Krishna Prasad MD of M/s. GIL acquired huge quantity of shares in the name himself and his family members. SEBI has levied penalty of Rs.10 lakh on 27.03.2009.

The assessee company is one of the beneficiaries which have received bogus accommodation entries. Investigation carried out by the CBI-ACB has established prima facie that unsecured loans appearing in the books of the assessee company are not genuine loans, but were only bogus entries whose source is not genuine.

Therefore, I have reason to believe that the income chargeable to tax has escaped assessment. Notice u/s. 148 of the I.T. Act, 1961 issued, after obtaining approval of the CIT-3, Mumbai."

10. As per the assessee, in the aforesaid reasons recorded by the AO there is no allegation of any failure to disclose truly and fully all material facts by the assessee, which is a paramount condition for invoking reassessment proceedings under section 147 of the Act, after expiry of 4 years from the end of the relevant assessment year, in case where an assessment under section 143(3) of the Act has been made.

11. At this stage, it is relevant to analyse the provisions of 1st proviso to section 147 of the Act, as it stood prior to its substitution by Finance Act 2021, which reads as under:

> *"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the 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 and truly all material facts necessary for his assessment, for that assessment year."*

12. Thus, as per 1st proviso to section 147 of the Act, in a case where assessment was completed under section 143(3), reassessment under section 147 can be done after the expiry of 4 years from the end of the relevant assessment year, only if income has escaped assessment (i) due to failure on the part of the assessee to make a return under section 139 or in response to notice issued under section 142(1) or section 148; or (ii) due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. In the present case, from the facts it is evident that assessment was completed in the case of the assessee under section 143(3) of

the Act. Further, notice under section 148 of the Act was issued on 29/03/2012 i.e. beyond a period of 4 years from the end of the relevant assessment year i.e. 2005-06. Therefore, it needs to be examined whether the conditions prescribed in 1st proviso to section 147 of the Act are satisfied in the present case. There is no dispute that return of income was filed by the assessee under section 139(1) of the Act. Further, from the perusal of the reasons recorded for reopening the assessment, as noted above, we find that there is not even an allegation by the AO that income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts.

13. In this regard, it is relevant to note following observations of Hon'ble Jurisdictional High Court in Hindustan Lever Ltd vs R.B.Wadkar: [2004] 268 ITR 332 (Bom.):

> *"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against*

arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."

14. Thus, in view of the aforesaid decision rendered by Hon'ble Jurisdictional High Court, we find no merit in the submission of learned DR that allegation of failure to disclose fully and truly all material facts can be reasonably inferred from the perusal of reasons recorded for reopening the assessment, when the said allegation was nowhere made by the AO in the said reasons. Further, we find that in appeal before the learned CIT(A), the assessee specifically raised grounds challenging initiation of reassessment proceedings. The learned CIT(A), during the course of appellate proceedings, sought remand report from the AO and only after consideration of said report and assessee's reply thereto, adjudicated on the ground challenging the reassessment proceedings. We are of the view that once initiation of reassessment proceedings has been challenged by the assessee, all the grounds incidental thereto are available to the assessee to challenge the validity of impugned reassessment proceedings. Therefore, respectfully following the aforesaid decision of Hon'ble Jurisdictional High Court, we are of the considered view that reassessment proceedings initiated by the AO are not in conformity with the provisions of 1st proviso to section 147 of the Act.

15. Further, it is, inter-alia, also the plea of the assessee that since assessment has been reopened after expiry of 4 years from the end of the relevant assessment year, any notice under section 148 of the Act can be issued only if income chargeable to tax, which has escaped assessment

amounts to or is likely to amount to Rs. 1 lakh or more, for that year. In this regard, it is relevant to note the provisions of section 149 of the Act, as it stood prior to its substitution by Finance Act 2021, which reads as under

> *"Time limit for notice.*
> *149. (1) No notice under section 148 shall be issued for the relevant assessment year,—*
>
> *(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*
>
> *(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year."*

16. Thus, as per the aforesaid provisions, where 4 years, but not more than 6 years, have elapsed, no notice under section 148 can be issued unless the income chargeable to tax which has escaped assessment is Rs. 1 lakh or more. We find that while dealing with the issue whether failure on the part of the AO to mention the amount of income which has escaped assessment will result in nullifying the notice issued under 148 of the Act, the Hon'ble Karnataka High Court in Novo Nordisk India (P) Ltd vs DCIT, [2018] 95 Taxmann.com 225 (Karn.) observed as under:

> *"It is mandatory for the Assessing Officer in his reasons recorded, to state that the escaped assessment amounts to, or is likely to be Rs.1,00,000/- or more, to bring it within the ambit of Section 149(1)(b) of the Act. It is based on the reasons assigned by the Assessing Officer, the Commissioner/Sanctioning Authority on application of mind can take a decision whether it is a fit case for issuance of notice under Section 148. The material aspect for invoking the extended period of limitation under Section 149 (1)(b) not being forthcoming, further proceedings in pursuance to the said notice cannot be sustained. The notice issued being not in conformity with the provisions of the Act, it being the base or the foundation, edifice built upon it, has to fall."*

17. Similar view was also expressed by Hon'ble Allahabad High Court in Mahesh Kumar Gupta v. CIT [2014] 363 ITR 300 (All.). As noted above, it is for the AO to record the reasons clearly and unambiguously and no inference can be drawn there from, thus, respectfully following the aforesaid decisions, we are of the considered view that the impugned reassessment proceedings are also not in conformity with the provisions of section 149(1)(b) of the Act.

18. Since the requirement of provisions of 1st proviso to section 147 as well as section 149(1)(b) of the Act are not fulfilled in the present case, therefore, the reassessment proceedings under section 147 of the Act are set aside being bad in law. Accordingly, the impugned order passed by the learned CIT(A), inter-alia, upholding the order passed under section 143(3) r/w section 147 of the Act is set aside. As relief has been granted to the assessee on above aspects, other submissions made by learned AR, pertaining to this ground, are rendered academic in nature. As a result, ground no.1 raised in assessee's appeal is allowed.

19. Since, challenge to jurisdiction under section 147 of the Act has been decided in favour of the assessee, the other grounds raised in assessee's appeal are rendered academic in nature and are left open.

20. In the result, appeal by the assessee is allowed.

ITA no. 6671/Mum./2016
Revenue's Appeal – A.Y. 2005-06

21. In this appeal, the Revenue has raised following grounds:–

"1. Whether on the facts and circumstances and in law, the Ld. CIT(A) was right in deleting the addition of Rs.6,70,95,982/- made u/s.68 of the I.T.Act, 1961 on account of unsecured loans obtained.

2. Whether on the facts and circumstances and in law, the Ld. CIT(A) was right in delete the addition of Rs.69.84.311/-on account of Devaluation of Share Price.

3. Whether on the facts and circumstances and in law, the Ld. CIT(A) was right in deleting the addition of Rs.1,99,365/- on account of disallowance of Salary and Travelling Expenses.

4. Whether on the facts and circumstances and in law, the Ld.CIT(A) has erred in not appreciating the fact that the amount of disallowance u/s.14A of the I.T. Act, 1961 has to be computed as per Rule 8D of I.T.Rules, 1962 when the computation of the assessee was not found to be correct and as held in the order of the Hon'ble High Court in the case of M/s. Godrej & Boyce Manufacturing Co. Ltd.

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.

22. As reassessment proceedings under section 147 of the Act have been found to be not in accordance with the provisions of the Act and, therefore, same are being set aside as bad in law, the grounds on merits raised in Revenue's appeal are rendered academic in nature in the present case. Thus, the same are dismissed.

23. In the result, appeal by the Revenue is dismissed.

Order pronounced in the open Court on 21/10/2022

Sd/-	**Sd/-**
M. BALAGANESH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 21/10/2022

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai