

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

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM**

आयकर अपील सं/ I.T.A. No.6635/Mum/2019

(निर्धारण वर्ष / Assessment Year: 2007-08)

M/s. Radiance Exim Pvt. Ltd. Shiv Chawl No.2, Shiv Sagar Sejar Samiti, Tanaji Nagar, Kurar Village, Malad (E), Mumbai, Maharashtra, 400097.	<b>बनाम/</b> Vs.	ITO-8(1)(1) Room No.621A, 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCR4706L</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Ashok Bansal
Revenue by:	Smt Mahita Nair (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 21/09/2022

घोषणा की तारीख /Date of Pronouncement: 31/10/2022

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-21, Mumbai dated 31.07.2019 for the assessment year 2007-08.

2. At the outset, the Ld. AR of the assessee has challenged the legality/validity of the action of AO to re-open the assessment of AY 2007-08 u/s 147 of the Income Tax Act, 1961 (hereinafter "the Act") by issuance of notice u/s 148 of the Act dated 26.03.2014 and consequent passing of re-assessment order vide order dated 20.03.2015, which according to the Ld. AR, is bad in law for several reasons (infra). According to the Ld. AR, the AO did not had the requisite jurisdiction to re-open the assessment u/s 147 of the Act because the reasons recorded by the AO dated 18.03.2014 (refer page



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18 to 22 PB) was by for non-application of mind which is discernable from perusal of the same, wherein the AO has mentioned that the assessee had taken accommodation entry to the tune of Rs.5,20,00,200/- whereas in the “reasons recorded for reopening” given to the assessee vide letter dated 12.08.2014 (refer page 19-20 PB), accommodation entry is reflected as Rs.2,87,50,000/-. Thus according to the Ld. AR, the AO based on the information from the office of the DGIT(Inv.) which was based on search at the premises of Shri Praveen Kumar Jain group has resorted to reopen the assessment for AY. 2007-08, after issuing notice u/s 148 of the Act dated 26.03.2014. According to the Ld. AR, the fundamental jurisdictional requirement for re-opening an assessment was that the AO had “*reason to believe escapement of income*”. According to him, it is settled law that “*reason to believe*” postulates *foundation based on information and belief based on reason*. And even if, there is foundation based on information is there, still there should be reason warrant holding a belief that income chargeable to tax of assessee has escaped assessment. In this case, according to Ld. AR, the AO after receipt of information from the DGIT(Inv.) has jumped into conclusion that there is escapement of income which fact is evident from the perusal of AO’s letter wherein the reasons are recorded dated 12.08.2014 (refer page 18 PB) in which he has alleged that assessee had introduced Rs.5,20,00,200/- as accommodation entry, whereas it is evident from perusal of the ‘reasons recorded’ given along with letter (refer page 18-20 of the PB) the figure is Rs.2,87,50,000/-. These two



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figures shown in different ‘reasons recorded’ according to Ld AR shows non-application of mind and thus the AO did not had the requisite jurisdiction to reopen the assessment for AY. 2007-08. Moreover, according to the Ld. AR adverse information may trigger “reason to suspect”, (when he received information from DGIT (Inv.) against the assessee) and not reason to believe, which is the requirement of law to re-open, which was absent in this case. According to him, when the AO had adverse information [“reason to suspect”], then the AO had to make reasonable inquiry and collect materials which would make him believe that there is infact any escapement of income, which exercise is totally absent in this case. According to the Ld. AR, based on the borrowed satisfaction of the DGIT(Inv.), the AO has reopened the assessment which he could not have done, so the AO could not have validily re-opened the assessment.

**3.** Further, according to the Ld. AR, the AO (successor of the AO who recorded the reasons for re-opening) has amended the reasons for reopening vide his notice u/s 142(1) of the Act 13.01.2015 (refer page 23 –24 PB) wherein he has admitted that figures/sum noted in the notice u/s 148 of the Act dated 26.03.2014 and other letter dated 12.08.2014 has discepany/mistake. According to Ld AR, this action of the AO (correcting the sum shown to have escaped assessment) could not be taken cognizance by this Tribunal while looking into the validity of the reopening u/s 147 of the Act as settled by the Hon’ble



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Bombay High Court in the case of Hindustan Lever Ltd. (268 ITR 332) wherein their Lordship had inter-alia held '*when the reasons for reopening the assessment are examined, it should be examined on a stand-alone basis. Nothing can be added to the reasons recorded nor anything can be deleted from it.*' So according to Ld. AR, the notice u/s 148 of the Act was issued by AO without having the requisite jurisdiction to re-open the assessment.

4. Further, according to the Ld. AR, the assessee has submitted during the original scrutiny assessment u/s 143(3) of the Act [dated 30.11.2009], all the relevant documents to substantiate the nature and source of share capital collected by assessee i.e. the share applications, balance-sheet of the share applicants, their bank-statements, applicant's ITR acknowledgements confirmation from them and ROC records with respect to the allotment to prove identity, creditworthiness and genuineness of the same. It was also pointed out by the Ld. AR that the AO had issued notice to the share applicants u/s 133(6) of the Act which were duly replied to by the share applicants. So, the AO in the original assessment did not draw any adverse view against the assessee on the issue of share allotment.

5. Further, according to the Ld. AR, the AO did not follow the binding order of the Hon'ble Jurisdictional High Court in the case of Asian Paint Ltd. Vs. DCIT 296 ITR 90 wherein the Hon'ble Bombay High Court held that if the assessee objects to AO regarding his action



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of reopening the assessment, and if the AO over-rules the objection, then the AO should not proceed further in the matter for a period of four (4) weeks from the date of receipt of service of the said order [rejecting the objections], and he drew our attention to the order passed by the Hon'ble High Court wherein the Hon'ble High Court by order dated 29.01.2007 held as under: -

- “1. Heard learned Counsel for the petitioner and the respondent. Rule, returnable forthwith. By consent all the petitions are taken up for final hearing.
2. In all the above petitions, it is a case regarding reopening of the assessment order under Section 148 of the Income-tax Act. In all the above cases, the petitioners have filed their respective objections on January 15, 2007, with regard to reopening of the assessment.
3. The learned senior Counsel for the petitioner pointed out that in some of the cases as soon as the objections were rejected by the concerned Income-tax Officer, even the assessment order has been passed within a very short time whereby the assessee is left without any remedy to challenge such an order of rejection.
4. Hence we make it clear that if the Assessing Officer does not accept the objections so filed, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee.
5. Accordingly, rule is made absolute.



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6. We also direct that the Income-tax Officer concerned shall follow the above procedure strictly in all such cases of reopening of assessment. All the petitions stand disposed of accordingly.”

6. According to Ld. AR, the AO has not followed the binding direction (supra) and to prove that the Ld. AR drew our attention to the date of events as under: -

Date	Particulars
30.10.2007	Return of Income filed
29.09.2008	Notice u/s 143(2) issued after selecting the case for compulsory scrutiny
30.11.2009	Assessment order passed u/s 143(3)
01.10.2013	Search and seizure action took place in case of Shri Pravin Kumar Jain
07.03.2014	Date of letter from DGIT (Inv.) to the AO
18.03.2014	Date of recording reasons by the AO
21.03.2014	Date of approved by the Additional Commissioner
25.03.2014	CIT's approval conveyed by the Additional Commissioner to the AO
26.03.2014	Notice u/s 148 issued by the AO
23.07.2014	Vide letter dated 22.07.2014 appellant requested the AO to treat the return filed u/s 139 as having been filed in response to notice u/s 148. Also, the appellant requested for the reasons.
12.08.2014	Reasons supplied by the AO
19.08.2014	Reasons received by the appellant
03.11.2014	Appellant conveyed to the AO that the reasons are of some other assessee
13.01.2015	Date of notice u/s 142 issued by the AO in which the wrong reasons supplied earlier are corrected Also, next date of hearing fixed on 22.01.2015
02.03.2015	Letter dated 27.02.2015 objecting to the reopening filed by the appellant
05.03.2015	Order passed by the AO disposing of the objections
05.03.2015	Notice u/s 143(2) issued fixing hearing on 13.03.2015
10.03.2015	Order disposing of the objections received by the appellant
19.03.2015	Letter dated 18.03.2015 filed rebutting the AO's order disposing of the objections
20.03.2015	Assessment order passed u/s 143(3) r.w.s. 147

7. Drawing our attention to the aforesaid chart, the Ld. AR submitted that the AO did not wait for four (4) weeks before he passed the order on 20.03.2015 whereas he could have awaited at least till 31<sup>st</sup> March, 2015. According to the Ld. AR, the objection [against re-opening] was disposed of by the AO vide order dated 05.03.2015 by over-ruling the objections raised the assessee; and the re-assessment



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order was passed on 20.03.2015 which is against the binding decision/direction of the Hon'ble High Court dated 29.01.2007 (supra); and he pointed out that in number of cases when AO has not followed the aforesaid order in Asian Paints (supra), the AO's re-assessment order has been quashed. And therefore the Ld. AR pleads that the action of AO not to have followed the binding direction of Hon'ble High Court in Asian Paints itself vitiates the re-assessment order passed within two (2) weeks after disposing of the objection. And thus effectively did not allow the assessee to pursue the extraordinary remedy of approaching the Hon'ble High Court for issuance of writ. So he prays that AO's action of not providing four (4) weeks or at least three (3) weeks after disposing off the objection passed by the assessee against the re-opening of assessment is in violation of Hon'ble High Court order, so the action of AO is not valid on this score alone.

**8.** We find that in this case AO in the first round (scrutiny assessment) had issued notice u/s 142(1) of the Act dated 08.09.2009 and has recorded in the order-sheet that assessee's counsel/AR Shri Sanjay Bansal C.A. has appeared before him and that he has asked him to file eight (8) relevant documents as well as details pertaining to Return of Income of assessee, and especially the documents supporting shares allotted by assessee company (item 8). And the AO acknowledges that pursuant to the same, the assessee had filed the requisite details on 23.09.2009. And thereafter the AO had directed the



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assessee to file certain more details and after fixing the case for few more times, finally passed the assessment order dated 30.11.2009 u/s 143(3) of the Act wherein the AO accepted the share allotment made by assessee during this assessment year.

**9.** Later on pursuant to a search in the premises of Shri P. K. Jain on 01.10.2013, the assessee's assessment for AY. 2007-08 was reopened by AO issuing notice u/s 148 of the Act dated 26.03.2014 (PB page 16). Pursuant to a request by assessee dated (PB page 17) 22.07.2014, the reasons recorded [for re-opening] was given to assessee on 12.08.2014 (page 18-22 PB) wherein there was apparent mistake on face of the letter at page 18 viz in the "reasons recorded" spells out the figure/sum escaped is alleged as Rs.5,20,00,200/- whereas at page 19-20 PB, another reasons recorded (no date) it alleges escapement of income to the tune of Rs.2,87,50,000/- which mistakes according to Ld AR exposes the non-application of mind of AO while recording reasons about the escapement of income. Further according to Ld AR, it is a case of borrowed satisfaction from DIT (Inv.) and not of the AO which itself vitiates the re-opening. Be that as it may, one of the other issue brought to our notice is regarding violation of the order of the Hon'ble High Court's binding direction (supra) to give assessee at least four (4) weeks time, after AO disposes of the objection raised by assessee against re-opening of assessment. In this case, we note that AO has disposed/rejected the objection raised by assessee by order dated 05.03.2015 (refer page 35 PB) and passed the re-assessment order dated 20.03.2015, which clearly shows that AO



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did not give time of four (4) weeks for assessee to avail the extraordinary jurisdiction under Article 226 of the Constitution of India. It is noted that Assessee received said with letter rejecting the objection on 10.03.2015 and the AO passed the re-assessment order on 20.03.2015 which is against the binding direction of Hon'ble High Court in Asian Paints (supra). Therefore on this score alone, we cancel the order of re-assessment passed by AO. All the other legal issues are left open. The merits of the addition becomes academic because assessee succeeded in the legal issue supra.

**10.** In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 31/10/2022.

Sd/-

(S. RIFAUR RAHMAN)  
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/10/2022.  
Vijay Pal Singh, (Sr. PS)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार //Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai