

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

**ITA No. 2661MUM/2017
Assessment Year: 2009-10**

I.T.O. – 8(1)(4)
662, 6th Floor
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

Appellant

M/s Sentia Developers Ltd
S.P. Centre, 41/44
C-Wing, Minoo Desia Marg
Colaba, Mumbai-400 005
PAN No. AALCS2056E
Respondent

Revenue by : Shri Byomakesh Pradipta Kumar
Panda, CIT-DR
Assessee by : Shri K. Gopal, Adv./Om Kandalkar,
Adv.

Date of Hearing : 21/12/2022
Date of pronouncement : 06/01/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against the order dated 14/12/2016 passed by the Ld. Commissioner of Income-tax (Appeals)-8, Mumbai [in short, 'the Ld. CIT(A)] for Assessment Year 2010-11, raising the following grounds:-



- I. *The Learned CIT(A) has erred in law in not appreciating the facts that the AO would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax has escaped assessment.*
- II. *The Learned CIT(A) has erred on facts and in law in deleting the addition without going into the merits of the case.*
2. *The Ld.CIT(A)'s order is contrary in law on facts and deserves to be set aside.*
3. *The appellant craves leave to amend or alter any ground or to submit additional new ground which may be necessary.*
4. *The appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the AO be restored.”*

2. Briefly stated, facts of the case are that the assessee filed its return of income electronically on 21/09/2010 accompanied with balance-sheet, P&L Account, declaring total income at Nil. The return of income filed by the assessee was selected for scrutiny assessment, which was completed on 16/11/.2012 under section 143(3) of Income-tax Act, 1961 (in short, 'the Act') accepting the returned income filed by the assessee.

3. Subsequently, on receipt of information from the Income-tax Officer at New Delhi and Deputy Commissioner of Income-tax, Hyderabad, the Assessing Officer recorded reasons to believe that



income escaped assessment and issued notice under section 148 of the Act. The re-assessment was completed on 30/03/2015 wherein the Assessing Officer considered the loans received by the assessee company from its holding company as benefit under section 28(iv) of the Act amounting to ₹71,99,99,550/-. The Assessing Officer without prejudice, also treated the sum received as an unexplained cash credit under section 68 of the Act.

4. Aggrieved, the assessee filed appeal before the Ld.CIT(A) and challenged the validity of the re-assessment proceedings as well as addition on merit. The Ld.CIT(A), in his detailed finding has quashed the re-assessment proceedings without any finding on the merit of the addition.

5. We have heard rival submission of the parties on the issues and perused the relevant materials on record. We find that Ld.CIT(A) has quashed the re-assessment proceedings on the ground that reasons recorded by the Ld.Assessing Officer are based on mere suspicion without any tangible material, change of opinion



on the same set of facts without application of mind by the Assessing Officer, etc. Therefore, for deciding the issue in dispute of validity of re-assessment proceedings, it is relevant to reproduce the reasons recorded by the Assessing Officer as under:-

"Reasons for reopening U/s 147 of the I.T.Act

The DC IT Cir.-2(3), Hyderabad, has intimated that during the F.Ys. 2008-09 & 2009-10 the company M/s. Sentia Developers Ltd. invested Rs.51 Crore in M/s. Jagati Publication Ltd. towards share application money at a very high premium and was allotted shares during F.Y. 2009-10. The ITO (Inv.) Unit IV(1), New Delhi, has reported that the Director of M/s. Sentia Developers Ltd, did not appear to **explain** the basis for investing at high premium. Further 5,55,555 shares of M/s. Jagati Publication Ltd were purchased by M/s. Sentia Developers Ltd. from M/s. Ramu Real Estates Pvt. Ltd. (presently known as ABIL Infrastructure Ltd.) at Rs.368 per share. All these investments were made out of the interest free unsecured loans procured, from M/s. India Bulls Real Estates Ltd. The DCIT Cir.2(3), Hyderabad observed that the investment made by M/s. Sentia Developers Ltd. has not yielded any benefits in the form of Dividend. Moreover, at the time of investment half of net worth of M/s, Jagati Publications Ltd. had already eroded and the company was in losses. The share prices of media companies do not command such a high price in the open market.

It also needs to be examined whether the amounts received as unsecured interest free loans from M/s. India Bulls Real Estates Ltd. have been repaid by M/s. Sentia Developers Ltd. If the amounts have not been repaid, the payments may be irretrievable in nature and hence may be taxed in the hands of M/s. Sentia Developers Ltd.

The details of investment in M/s. Jagati Publication Ltd. made by M/s Sentia Developers Ltd.. as reported by the ITO (Inv.) Unit IV(1), New Delhi are as under:

Srl. No.	Date	No. of equity shares	Face Value	Premium	Amount (Rs.)
1	21.05.2009	277777	10	350	99999720
2	24.09.2009	555555	10	368	209999790
3	13.11.2009	1138889	10	350	410000040
4	Total	1972221			719999550

Since M/s. Jagati Publication Ltd. is neither listed nor was doing any business activity at the time of investment and since the assessee, M/s. Sentia Developers Ltd. is in a totally different line of business and there is no business activity reported by the assessee either, the transactions relating to such investment is not a normal business transaction and is a colourable device through a corporate medium which is highly suspicious in nature..



The balance sheet of the assessee shows interest free unsecured loans of Rs.71,96,33,000/- in A.Y. 2010-11 as against Rs.9,96,23,000/- in A.Y. 2009-10 which is entirely received from the holding company, M/s. India Bulls Real Estate Ltd. The balance sheet also reflect Long Term investment (at cost) of Rs. 72,00,00,000/- in A.Y. 2010-11 being 1972221 fully paid up equity shares of M/s. Jagati Publications Ltd. (face value of Rs. 10 each) as against 'NIL' in A. Y. 2009-10.

In A. Y. 2009-10 the assessee had obtained. Inter Corporate deposits of Rs.10,01,00,000/- out of which it repaid Rs.4,77,000/- during the same year. The balance deposits of Rs. 71,96,33,000/- have not been repaid. Moreover, the share capital of the assessee company is only Rs.5lakhs. So the question arises as to how the interest free unsecured loans can be paid back by the assessee company.

Since these payments are irretrievable in nature on the basis of the report received from the ITO (Inv Unit-IV(l), New Delhi, the same need to be taxed in (the hands of M s. Sentia Developers Ltd.

In the light of facts mentioned above, it is clear that the -amount of 71,96,33,000/- should have been brought to tax as income in the hands of the assessee. This has resulted in under assessment of Rs.71,96,33,000/- and consequent short levy of tax amounting to Rs.21,58,89,900/-."

6. We find that the Ld.CIT(A) has quashed the re-assessment proceedings observing as under:-

I have carefully considered the facts of the case, assessment order, submissions and contention of the appellant as summarised above and the relevant case laws pertaining to the issues to be decided.

"5.1 Ground No. 1

*5.1.1 This ground relates to reopening of assessment u/s 147 of Income Tax Act, 1961. The assessing officer has extracted reasons for reopening under para 2 of his order and is not reproduced here for the sake of brevity. Inter alia, the assessing officer referred to intimation from DCIT Cir. 2(3), Hyderabad that during FY 2008-09 and 2009-10, the appellant had invested Rs. 51 crore in M/s. Jagati Publication Ltd (JPL) towards share application money at "a very high premium" and the shares were allotted during FY 2009-10. Further, ITO(Inv) Unit IV, New Delhi had informed that the appellant did not explain the basis for the high premium paid for the shares. The assessing officer further observed "It also **needs to be examined** whether the amounts received as unsecured interest-free loans from M/s India Bulls Real Estate's Ltd., have been repaid by M/s Sentia Developers Ltd. If the amounts have not been repaid, the payments **may be irretrievable** in nature and hence **may be taxed** in the hands of M/s Sentia developers Ltd."*

5.1.2 The assessing officer has further expressed doubts about the above-mentioned investment of the appellant with remarks "the transactions relating to



such investment is not a normal business transaction and is a colourable device through a corporate medium which is **highly suspicious in nature.** The assessing officer further refers to the financial statements of the appellant and expresses his suspicions with the remarks, "Moreover, the share capital of the assessee company is only Rs. 5 lakhs. **So the question arises as to how** the interest free unsecured loans can be paid back by the assessee company."

5.1.3 It is noted that at the time of original assessment, all details relating to the impugned investment and loan borrowings were disclosed in the audited accounts provided to the assessing officer. The assessing officer had passed order under section 143(3) of the Income Tax Act, 1961 vide order dated 26/11/2012, **"After discussion and verification of the details filed"**.

5.1.4 From the above discussion, in my opinion, in the instant case, the assessing officer has relied upon and looked at the same details of audited accounts which were already subjected to scrutiny by his predecessor who has admittedly discussed and verified the details before passing assessment order. There is nothing to indicate that the most basic details of investments or loans-taken escaped the notice of the assessing officer at the time of original assessment.

5.1.5, Secondly, the assessing officer has clearly indicated that the reopening is on the basis of certain intimation/report of departmental officers in Hyderabad and New Delhi. In the instant case, the reopening has been done on basis of suspicion aroused as a result of those intimations/reports. There is nothing to indicate that the assessing officer has applied his own mind and excavated any new information or even analysed facts in a new manner.

5.1.6 Thirdly, remarks of the assessing officer like **"needs to be examined..... may be taxed..... highly suspicious in nature So the question arises as to how....."** as highlighted above in extracts of his reasons for reopening indicate that the assessing officer was operating on mere suspicion and was hoping to find some income that had escaped assessment by making fishing inquiries. His predecessor had asked for and obtained details of investments, source of investments and unsecured loans, all submitted by the appellant during original assessment vide letter dated 21/11/2012. Looking at the same details on record, the assessing officer has had a change of opinion and reopened the instant assessment. Moreover, the suspicion of the assessing officer is based on his own understanding of what should or should not be done by a businessman. He is stepping into the shoes of a businessman.

5.1.7 The basic requirement of section 147 is that the assessing officer must have a reason to believe that any income chargeable to tax has escaped assessment and such belief must be belief of jurisdictional assessing officer and not any other assessing officer or authority or department. The assessing officer



merely acting mechanically on the information supplied by other assessing officers or Investigation wing about the investments made or loans taken by the appellant without applying his own mind was not justified, in *ICICI Home Finance Co Limited Vs. AC IT, Circle 10(1), Mumbai and Union of India Writ Petition No.430/2012* the Hon'ble Jurisdictional High Court held that the reason to believe has to be of Assessing officer's own and not of belief of any other authority. The Hon'ble Bombay High Court held as under-

"6. The power to reopen a completed assessment under section 147 of the Act has been bestowed on the Assessing officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be reasonable belief of the Assessing officer himself and cannot be an opinion and/or belief of some other authority"

5.1.8 As discussed above, in the instant case, the assessing officer has borrowed his satisfaction from DCIT Hyderabad and ITO(Inv) New Delhi. He has not formed a belief on his own and hence, his action do not comply with the interpretation of section 147 by various courts. This view is supported by a plethora of decisions across jurisdictions including in *CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 248 CTR 33 (De!hi)(High Court)*.

5.1.9 Further, as observed above, in the instant case, the assessing officer was acting on mere suspicion and trying to make fishing inquiries. Various courts have held that no reopening can be done to make fishing inquiries:

1. *Bhor Industries Ltd. v/s. ACIT-[(2004) 267 ITR 161 (Bom)]*
2. *Hindutan Lever Ltd. v/s. R. B. Wadkar, ACIT-[(2004) 268 ITR 332 (Bom)]*
3. *Bhogwati Sahakari Sakhar Karkhana Ltd. v/s. Dy. CIT [(2004) 269 ITR 186 (Bom)]*
4. *Ajanta Pharma Ltd. v/s. ACIT-[(2004) 267 ITR 200 (Bom)]*
5. *Grindwell Norton v/s. Jagdish Prasad Jabgid, ACIT - [(2004) 267 ITR 673 (Bom)]*

5.1.10 In the instant case, all relevant facts were disclosed in audited financial statements submitted at the time of original assessment. Disclosure in balance sheet also amounts to disclosure of material facts. This has been held in numerous decisions such as:

- *CIT vs. Corporation Ltd (2002) 254 ITR 791 (SC)*
- *Arthur Anderson & Co, vs. ACIT (2010) 324 ITR 240 (Bom)*

5.1.11 As stated, the appellant had already made a disclosure of all material facts and related documents at the time of original assessment. Reopening after full and true disclosures of all material facts had been done at the time of original assessment has been held bad in law in the following decisions:



- Bhagwati Shankari Karkhana (2004) 269 ITR 186 (Bom)
- Western Outdoor Interactive (2006) 286 ITR 620 (Bom)
- Hindustan Lever Ltd. (2004) 267 ITR 161 (Bom)
- Prashant Project Ltd. vs. Asst. CIT (2011) 333 ITR 368 (Bom)
- Hindustan Petroleum Corporation Ltd. vs. Dy. CIT (2010) 328 ITR 534 (Bom)
- Nihilent Technologies (P) Ltd v Dy CIT (2011) 59 DTR 281 (Bom)
- Shriram Foundry Ltd v. Dy.CIT (2012) 250 CTR 116 (Bom.)
- Monitor India(P) Ltd v. UOI (2012) 68 DTR 313 (Bom)
- HCL Corporation Ltd. v. ACIT (2012) 66 DTR 473 (Delhi)(High Court)
- Kimplas Trenton Fittings Ltd. v.ACIT (2012) 340 ITR 299 (Bom.)

5.1.12 As observed above, at the time of original assessment, the assessing officer had made categorical remark of having examined details. The appellant had also filed all relevant details relating to investments, loans etc. Once an assessment has been completed under section 143(3) after raising a query on a particular issue and accepting assessee's reply to the query, the Assessing Officer has no jurisdiction to reopen the assessment merely because the issue in question is not specifically adverted in the assessment order, unless there is tangible material before the Assessing Officer to come to the conclusion that there is escapement of income. In this case, the assessing officer has not brought forth any such tangible material. Various courts have held this view, including in the decisions cited below:

- ' Asst CIT v Rolta India Ltd. (2011)132 ITD 98 (Mumbai) (TM) (Trib)
- CIT vs. Kelvinator of India Ltd (2002) 256 ITR 1 (Del) (FB)
- (Asst yr 1997-1998)Approved by Supreme Court in (2010) 320 ITR 561 (SC)
- D. T. & T. D. C. Ltd. vs. CIT (2010) 324 ITR 234 (Del.).
- M.J. Pharmaceuticals Ltd vs. CIT (2008) 297 ITR 119 (Bom) (Assessment Year 2003-2004)
- Raymond Woollen Mills Ltd. Vs. Income Tax Officer And Others (1999) 236 ITR 34 (S.C.)

5.1.13 Some important jurisdictional case laws on this issue are:

- a. Asteroids Trading & Investment P. Ltd. vs DCIT, (2009) 308 ITR 190 (Bom) (193)
- b. Asian Paints Ltd. vs. DCIT (2008) 308 ITR 195 (Bom) (198)
- c. ICICI Prudential Life Insurance Co. Ltd. (2010) **325 ITR 471** (Bom)
- d. Aventis Pharma Ltd. vs. Astt. CIT (2010) 323 ITR 570 (Bom) (577)
- e. Bhavesh Developers vs. A.O. (2010) 224 CTR 160 (Bom)
- f. International Global Networks BV v. DDIT (IT) (2012) 50 SOT 433 (Mum) (Trib.),
- g. General Insurance Corporation of India v. Dy .CIT (2012) Vol.114(1) Bom . LR. 0246 (High Court)



5.1.14 In view of the ratios of the numerous case laws cited above, which lay down strict parameters within which the powers of reopening assessment are vested in the assessing officer, I find that the action of the assessing officer in reopening the assessment went against every principle laid down by Hon'ble Courts, including jurisdictional courts and the Apex Courts. Therefore, the action of the assessing officer in reopening assessment u/s 147 of the Act is held bad in law. This ground of appeal is allowed."

7. We find that in the reasons recorded information has been stated to have been received from two sources. Firstly, from the Deputy Commissioner of Income-tax, Hyderabad that assessee made investment of ₹51 crores in Jagati Publication Ltd towards share application money at a very high premium. This information, in our opinion, was already available in the financial statement filed by the assessee during the course of original assessment proceedings under section 143(3) of the Act and so, no new additional fact was brought on record indicating any income escaped in the case of the assessee. Secondly, information was received from Income-tax Officer, New Delhi wherein it was reported that director of the assessee company had not appeared before them for explaining the basis of investing at a high premium in the shares of Jagati Publication Ltd. It is evident that Income-tax



Officer, New Delhi has also not brought on record any fresh or additional facts leading to escapement of income by the assessee. The assessment has been reopened based on the facts which were already available on record of the Assessing Officer and, therefore, reasons have been recorded on appreciation of the same set of the facts, thus re-assessment is based on change of opinion by the Assessing Officer, falls in the category of the review, rather than re-assessment. Further, we find that Assessing Officer has mentioned he needs to examine whether any amount of loan was repaid by the assessee to its holding company and if amount has not been repaid, then same shall be irretrievable in nature and hence, taxable in the hands of the assessee. Thus, it is evident that the Assessing Officer has not carried out any verification of the financial statement of either of the assessee or of India Bulls Real Estate Ltd and merely on the basis of suspicion recorded the reasons for reopening the assessment.

8. Before us, the Ld.Counsel of the assessee has referred to the decision of the Hon'ble Supreme Court in the case of **CIT vs**



Kelvinator of India Ltd (2010) 320 ITR 561 (SC) wherein it is held that the Assessing Officer cannot reopen an assessment on mere change of opinion and there has to be tangible material to come to the conclusion that there was escapement of income from the assessment. The relevant finding of the Hon'ble Supreme Court is reproduced as under:-

“ On going through the changes, quoted above, made to section 147 of the Act, we find that prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz. that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post – 1st April 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, 1987. Parliament not only deleted the words “reason to believe” but also inserted the word “opinion” in section 147 of the Act. However, on receipt of representations from the companies against omission of the words “reason to believe”, Parliament reintroduced the said expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow



the relevant portion of Circular o.549 dated October 31, 1989 [1990] 182 ITR (SC).1, 29), which reads as follows :

“7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression ‘reason to believe’ in section 147.- A number of representations were received against the omission of the words ‘reason to believe’ from section 147 and their substitution by the ‘opinion’ of the Assessing Officer. It was pointed out that the meaning of the expression, ‘reason to believe’ had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression ‘has reason to believe’ in place of the words ‘for reasons to be recorded by him in writing, is of the opinion’. Other provisions of the new section 147, however, remain the same.”

9. In view of the facts and circumstances above, we are of the opinion that there is no infirmity in the order of the Ld.CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No.I of appeal of the Revenue is accordingly dismissed.

10. In ground II, the Revenue has raised the issue that Ld.CIT(A) has not adjudicated the issue on merit. In our opinion, once the basis of the re-assessment has been demolished, adjudicating on



merit is merely academic. Therefore, this ground of Revenue is also dismissed.

11. Ground Nos. 3 & 4 are general in nature and do not require any adjudication; hence, dismissed.

12. In the result, appeal filed by the Revenue is dismissed.

**Order pronounced under Rule 34(4) of the ITAT Rules,
1963 on 06/01/2023.**

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 06/01/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Sr. Private Secretary)
ITAT, Mumbai