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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM

आयकर अपील सं/ I.T.A. No.4836/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2006-07)
&
आयकर अपील सं/ I.T.A. No.4827/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2007-08)
&
आयकर अपील सं/ I.T.A. No.4828/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2010-11)

The Income Tax Officer-3(3)(4) Room No. 672, Aayakar Bhavan, Mumbai-400020.	**बनाम** / Vs.	M/s. Watermark Systems (I) Pvt. Ltd. 1009 & 1010, Maker Chambers-V, Nariman Point, Mumbai-400021. **PAN NO:- AAACW5751H**

आयकर अपील सं/ I.T.A. No.4833/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2008-09)
&
आयकर अपील सं/ I.T.A. No.4834/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2009-10)

DCIT-3(3)(2) Room No. 609, 6th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	**बनाम** / Vs.	M/s. Watermark Systems (I) Pvt. Ltd. 1009 & 1010, Maker Chambers-V, Nariman Point, Mumbai-400021. **PAN NO:- AAACW5751H**

आयकर अपील सं/ I.T.A. No.4830/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2007-08)
&
आयकर अपील सं/ I.T.A. No.4831/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2008-09)
&
आयकर अपील सं/ I.T.A. No.4832/Mum/2016
(**निर्धारण वर्ष** / Assessment Year: 2009-10)

DCIT-3(3)(2) Room No. 609, 6th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	**बनाम** / Vs.	M/s. Watermark Financial Consultants Ltd. 1009 & 1010, Maker Chamber-V, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACW3474H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri A. K. Tibrewal/Saurabh Gupta
Revenue by:	Smt. Riddhi Mishra (CIT- DR) Smt. Mahita Nair (Sr.DR)

सुनवाई की तारीख / Date of Hearing: 23/01/2023
घोषणा की तारीख /Date of Pronouncement: 27/02/2023

आदेश / O R D E R

PER ABY T. VARKEY, JM:

There are total eight (8) appeals preferred by the Revenue which are against the order of the Ld. Commissioner of Income Tax (Appeals)-08, Mumbai in the case of M/s. Watermark Financial Consultants Ltd. (hereinafter "M/s. W. Financial") dated 26.04.2016 for AY. 2007-08, AY. 2008-09 & AY. 2009-10; and against the order of the Ld. Commissioner of Income Tax (Appeals)-08, Mumbai dated 25.04.2016 for AY. 2006-07, AY. 2007-08, AY. 2008-09, AY. 2009-10 & AY. 2010-11 in the case of M/s Watermark Systems (India) Pvt. Ltd. (hereinafter "M/s. W. System").

2. At the outset, the Ld. Counsel for the assessee brought to our notice that even though the assessee has not preferred any appeal/cross-objection (CO) against the impugned orders of the Ld.

CIT(A) but is supporting the action of the Ld. CIT(A) deleting the addition made by the AO by preferring an application under Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 (hereinafter "the Rules") wherein the assessee is challenging the jurisdiction of the AO to have re-opened the assessment. According to him, the AO who had initiated the reopening of the assessment itself was not competent to do so because as per the CBDT instruction no. 01/2011, the AO of the assessee ought to have been ITO, Ward -3(3) in respect of M/s. Watermark System India Pvt. Ltd. (hereinafter M/s. W. System) and not DCIT, Circle-3(3). And even for M/s. Watermark Financial Consultants Ltd. (hereinafter M/s. W. Financials) according to the Ld. AR, it should have been the ITO ward 3(3) and not DCIT, Circle-3(3) who had recorded the reasons for reopening the assessment and had issued the notice u/s 148 of the Income Tax Act, 1961 (hereinafter "the Act"). The aforesaid contention assailing the jurisdiction of AO, according to the Ld. AR flows from the CBDT instruction No. 1/2011, F. No 187/12/2010-IT (A) wherein the pecuniary jurisdiction in respect of Corporate entities like assessee companies in these appeals were ITO, Ward-3(3)(4) if the income returned by these companies were below Rs. thirty (30) Lakhs (declared income by assessee in their return of income); and if it was above Rs. thirty (30) Lakhs the jurisdiction was vested with the DCIT. And drew our attention to the CBDT instruction No.01/2011 wherein the CBDT has classified assessee's under two (2) categories (i) Corporate & (ii) Non-corporate;

and thereafter allocated the pecuniary jurisdiction of ITO or DC/AC's based on their returned income and depending whether the assessee's are from Mofussil area or Metro cities. And as per the CBDT instruction (supra) the assessee's being a corporate entities and registered at Mumbai City and their returned income (except for AY. 2009-10) was less than Rs. 30 Lakhs, the assessee's contention is that DC (Deputy Commissioner) has wrongly assumed jurisdiction over assessee's cases and therefore the action of re-opening of assessments for assessment years u/s 147 and issue of notice u/s 148 of the Act (except AY 2009-10) was bad in law. For buttressing this aspect, the Ld. AR drew our attention to the details of the return of income filed by both the assessee's which are given in the chart form below: -

Chart No. 1

Watermark Systems (India) Pvt. Ltd.									
ITA. No.	Asst. Yr	Date Original return filed	Income declared	Pecuniary jurisdiction as per CBDT Circular 1/2011	Date-Return filed u/s 148	Income declared in return filed u/s 148	AO recording reasons and issuing 148 notice	AO completing assessment	remark
4836/M/16	2006-07	27.11.2006	1,89,940	ITO	28.03.2013	1,89,940	DCIT, Circle 3(3)	ITO, Ward 3(3)(4)	
4827/M/16	2007-08	31.10.2007	4,78,300	ITO	28.03.2013	4,78,300	DCIT, Circle 3(3)	ITO, Ward 3(3)(4)	
4833/M/16	2008-09	29.09.2008	1,84,580	ITO		1,84,580	DCIT, Circle 3(3)	DCIT, Circle 3(3)	
4834/M/16	2009-10	30.09.2009	-45,52,893	DC/AC	30.03.2022	-45,52,893	DCIT, Circle 3(3)	DCIT, Circle 3(3)	Reasons recorded are vague and no amount quantified for income escaping assessment
4828/M/16	2010-11	14.10.2010	Nil	ITO	28.112.2013	Nil	DCIT, Circle 3(3)	ITO, Ward 3(3)(4)	

Chart No. 2

Watermark Capital Ltd. (formerly known as Watermark Financial Consultants Ltd.)									
ITA. No.	Asst. Yr	Date Original return filed	Income declared	Pecuniary jurisdiction as per	Date-Return filed u/s 148	Income declared	AO recording reasons and	AO completing assessment	remarks

				CBDT Circular 1/2011			issuing 148 notice		
4830/M/16	2007-08	31.03.2007	24,31,830	ITO	09.12.2013	1,89,940	DCIT, Circle 3(3)	DCIT, Circle 3(3)	
4831/M/16	2008-09	28.09.2008	6,28,140	ITO	23.04.2012	4,78,300	DCIT, Circle 3(3)	DCIT, Circle 3(3)	
4832/M/16	2009-10	30.09.2009	-71,23,213	AC/DC	23.04.2012	1,84,580	DCIT, Circle 3(3)	DCIT, Circle 3(3)	Reasons recorded are vague and the Income escaping assessment has not been quantified

3. Drawing our attention to the chart no. 1, the Ld. AR pointed out that the income declared by the assessee M/s W. System for AY. 2006-07 was only to the tune of Rs.1,89,940/-; and for AY. 2007-08 it was only to the tune of Rs.4,78,300/-; and for AY. 2008-09 it was only 1,84,580/- and for AY. 2010-11, it was Rs. Nil. Likewise, he drew our attention to chart no. 2 in respect of M/s. Financial wherein AY. 2007-08, the income declared was only Rs.24,31,830/-; income declared for AY. 2008-09 was only Rs.6,28,140/-. Thus, according to him, the pecuniary jurisdiction as per the CBDT Instruction No. 01/2011 was with the ITO, Ward-3(3)(4) and not with the DCIT, Circle-3(3). Therefore, the action of DCIT to initiate re-opening of the assessments for assessment years u/s 147 and issue of notice u/s 148 of the Act was bad in law [Except for AY. 2009-10]. However, it was fairly pointed out by the Ld. AR that for AY. 2009-10, (refer chart-1 M/s. W. System) the income declared was loss to the tune of Rs.(-) 45,52,893/-; and for AY. 2009-10 for M/s W. Financial income declared was loss to the tune of Rs.(-)71,23,213/- which according to him, was well within the pecuniary jurisdiction/ taxable jurisdiction (since profit includes loss) of, the DCIT, Circle-3(3) and therefore he was competent to

initiate the re-opening of the assessment for AY. 2009-10 for M/s. W. Systems & M/s. W. Financials and accordingly has framed the assessment. In the facts discussed (supra) therefore, we segregate ITA. No.4834/Mum/2016 for AY. 2009-10 in the case of M/s. Watermark System (India) Pvt. Ltd, and ITA. No. 4832/Mum/2016 for AY. 2009-10 in the case of M/s. Watermark Financial Consultants Ltd which will be adjudicated separately after deciding the other captioned appeals.

4. Coming to the other appeals (except ITA. No. 4834/Mum/2016 & 4832/Mum/2016 for AY. 2009-10), the other captioned appeals would be adjudicated first by taking into consideration the application filed by assessee under Rule 27 of the Rules. Objecting to the admission of the application of the Rule 27 of the Rules raised by the assessee, the Ld. CIT-DR drew our attention to Section 124 of the Act and contended that as per sub-section 3 of Section 124 of the Act, the assessee ought to have raised objection if any, against the jurisdiction at the earliest before the concerned AO (DCIT in this cases); and in case if he has raised it, then, the provisions/procedure as contemplated in sub-section 4 of Section 124 of the Act could have come into play; and in such an event, then the issue/dispute regarding the jurisdiction could have been referred to the competent authority as prescribed therein, who in-turn could have decided the jurisdiction of AO (whether it was ITO or DCIT etc) as per the Section 124 of the Act. According to her, the assessee failed to do so, therefore the assessee is precluded from assailing the jurisdiction of the AO at this belated stage

after the assessment has been framed and for that, she drew our attention to sub section (3) of section 124 of the Act and contended that assessee was prohibited from questioning the jurisdiction thereafter. So according to Ld. CIT DR, the issue of jurisdiction/competence of the AO cannot be raised at this belated stage (at the second appellate stage). Therefore, according to her, the Rule 27 application itself should not be admitted and for that she drew our attention to Rule 27 of the Rules which reads as under:

> "Respondent may support order on grounds decided against him.
> "*The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him*."

5. According to the Ld. CIT-DR, the Rules are very clear. According to her, the respondent/assessee in this case may support the action of the Ld. CIT(A) even if the assessee has not preferred any appeal on any of the grounds decided against it. So according to Ld. CIT DR, in this case, the assessee's Rule 27 application should not be admitted.

6. In the light of the aforesaid discussion, we need to first decide whether the respondent/assessee in this case can take support of Rule 27 of the Rules against the appeals preferred by the revenue, against the impugned order of Ld. CIT(A). The Ld. CIT-DR drew our attention to impugned order passed by the Ld. CIT(A) and took us through the grounds raised by the assessee before the Ld. CIT(A) from

which she brought to our notice that the assessee had only challenged the legality of the reopening of reopening u/s 147 of the Act. And not the competence of the AO to have framed the jurisdiction; in other words, the assessee having failed to assail the jurisdiction of the AO as envisaged u/s 124 of the Act is precluded from raising it by way of Rule 27 application. Since, the assessee never questioned this issue before the Ld. CIT(A) (the issue of pecuniary or territorial jurisdiction of the AO), according to her, the respondent assessee cannot at this belated stage raise the same before this Tribunal by taking support of the Rule 27 of the Rule.

7. Per contra, the Ld. AR of the assessee submitted that by way of Rule 27 application, the assessee is entitled to raise the legal issue of jurisdiction of AO (pecuniary jurisdiction) which if decided in favour of the assessee, it goes to the root of the very jurisdiction of the AO to have even recorded the reason for initiating the reopening of assessment for AY. 2006-07, AY. 2007-08, AY. 2008-09 & AY. 2010-11 (excluding AY. 2009-10). According to him, legal issue can be raised at any stage even before the Hon'ble Supreme in the case of NTPC Vs. CIT (229 ITR 383) (SC) wherein the Hon'ble Supreme Court has held that the legal issue (regarding pecuniary jurisdiction of AO) can be raised even for the first time before this Tribunal. Further according to him, the very same legal issue had been raised before the jurisdictional Hon'ble High Court in the case of Shri Ashok Devichand Jain Vs. Union of India & others (writ petition no. 3489 of 2019 dated

08.03.2021) (refer page no. 535 of PB) wherein that assessee challenged the pecuniary jurisdiction of AO to have issued notice u/s 148 of the Act and the Hon'ble High Court finding that AO didn't enjoy the pecuniary jurisdiction as per instruction 1/2011 dtd 31st Jan 2011 issued by CBDT held in favour of the assessee and quashed the notice u/s 148 of the Act. Further, according to the Ld. AR, the legal issue can be raised before the Tribunal by way of filing of Rule 27 application by assessee. However, this contention of the assessee has been vehemently opposed by the Ld. CIT-DR who relied on the decision of Hon'ble Allahabad High Court order in Shiva Adityiya Jems & Jewellery Pvt. Ltd. Vs. ITO order dated July 14, 2022 wherein when jurisdictional issue came up before the Hon'ble Allahabad High Court, their Lordship's held in favour of the revenue and the issue of jurisdiction was not entertained by the Hon'ble High Court because it was not raised before the AO as per section 124(4) of the Act. According to Ld. CIT-DR the judicial-precedents cited by the Ld. AR of assessee to support the plea against jurisdiction of AO (be it pecuniary or territorial) if examined carefully will reveal that those assessee's have approached Hon'ble High Court at the first instance, after having objected to the jurisdiction of AO as per section 124 of the Act; and since the AO rejected their plea, has filed immediately writ before the respective High Courts; and then in such cases, the Hon'ble High Court including the jurisdictional High Court have held in favour of the assessee. Drawing our attention to both the orders of the

Hon'ble Bombay High Court wherein those assessee's at the first instance, after receipt of the notice u/s 148 of the Act had objected to the jurisdiction of AO to have re-opened/issued notice u/s 148 of the Act i.e. objected to the jurisdiction before the AO; and when the AO rejected the same, they invoked the extra-ordinary jurisdiction of the Hon'ble High Court's under Article 226 of the Constitution of India by filing writ petitions, and then only the Hon'ble High Court had exercised the writ jurisdiction under Article 226 of the Constitution and quashed the action of AO finding it without jurisdiction. Thus Ld. CIT-DR pointed out that those cases as cited by Ld. AR cannot come to the rescue of these two assessee's, because these present assessees has raised it for the first time before this Tribunal at such a belated stage, so such a plea wrapped in Rule 27 should not be admitted. The Ld. CIT-DR also relied on the decision of the Hon'ble Delhi High Court in the case of Shri Syam Sunder Infrastructure Pvt. Ltd. Vs. CIT decided on 04.02.2015 wherein the Hon'ble High Court was pleased to set aside the action of the Tribunal (allowing such a plea of the assessee) holding that since the assessee has not challenged the jurisdiction of the AO as prescribed u/s 124(3) of the Act, it has lost the opportunity to challenge the jurisdiction of AO before the Tribunal. Thus, according to her, the assessee cannot raise the jurisdiction of the AO at this belated stage before this Tribunal by way of application filed under Rule 27 of the Rules.

8. We have heard both the parties and perused the records. On the issue of admission of grounds raised by assessee under Rule 27 application, we first of all note that the Ld. CIT(A) in both the assesee's cases (M/s W. Financial & M/s W. System) had decided in their favour on merits of addition/disallowance. So both the assessee's did not file any cross-appeal or cross objection against the impugned action of Ld. CIT(A). Even though the assessee's legal ground challenging the action of the AO to reopen the assessment has been dismissed by the Ld. CIT(A), the assessee's has not preferred any appeal/cross-objection [i.e. against the action of the Ld. CIT(A) dismissing the legal issue of reopening the assessment]. And on the other hand, the revenue aggrieved by the action of the Ld. CIT(A) giving relief to the assessee on merits, has preferred the captioned appeals.

9. The assessee's has filed applications for admission of the legal ground challenging the competence of AO to have initiated re-opening of assessment for assessment years (except AY 2009-10) and issued notice u/s 148 of the Act, through the Rule 27 application, wherein according to the assessee, the very initiation of reopening i.e. the jurisdiction to reopen the assessment for AY. 2006-7, AY. 2007-08, AY. 2008-09 And AY. 2010-11 [except AY. 2009-10] can be done only by the jurisdictional Assessing Officer i.e. who exercised both territorial as well as pecuniary jurisdiction (except jurisdiction vested by order u/s 127 of the Act); and in these cases jurisdiction of AO is

vested as per the CBDT Instruction No. 01/2011, and by virtue of it for a corporate entity like assessee, if the income returned by assessee is less than Rs. thirty (30) Lakhs, the pecuniary jurisdiction lies with that of the ITO, Ward-3(3) (territorial jurisdiction ITO) and not with the DCIT, Circle-3(3). And since the returned income by assessee (corporate entities) were un-disputably less than Rs.30 Lacs and the assessee being a corporate assessee, the pecuniary jurisdiction was only with the territorial ITO and not before the DCIT (if returned income is more than Rs.30 Lakhs which is not the case). Therefore, in order to re-open an assessment for an assessment year, the first step/requirement of law is that jurisdictional AO has to record satisfaction that income of assessee has escaped assessment for an assessment year as contemplated u/s 147 of the Act; and the next step which is consequential is issuance of statutory notice u/s 148 of the Act. Both these steps has to be under-taken/ done by the AO having jurisdiction over the assessee both territorial/pecuniary (except in cases u/s 127 of the Act); and if not carried out by the jurisdictional AO, that defect/error itself would render the action (of re-opening the assessment and subsequent action of framing the assessment) without authority of law; and consequently bad in law. And for that the assessee has relied on the decision of the Hon'ble Bombay High Court in the case of Shri Ashok Devichand Jain (supra) wherein deciding a similar ground of appeal of the assessee allowed the plea of assessee by observing as under: -

> "the notice u/s 148 of the Act is jurisdictional notice and any inherent defect therein is not curable. In the facts of the case, notice having been issued by an officer who had no jurisdiction over the petitioner, such notice in our view, has not been issued validly and is issued without any authority in law."

10. In aforesaid case of Shri Ashok Devichand Jain (supra), we note that petitioner/assessee had declared in the return of income Rs.64,34,663/- as his income; and according to the assessee the jurisdiction (pecuniary) as per the CBDT instruction No. 01/2011, would be that of Deputy Commissioner/Additional Commissioner (DC/AC) and not Income Tax Officer (ITO). However, in that case, the notice u/s 148 of the Act for re-opening the assessment was issued by the ITO and not by the DC/AC (by an officer who did not had the pecuniary jurisdiction over the petitioner). Therefore, the assessee assailed the notice u/s 148 of the Act issued by ITO to be bad in law and since ITO had no authority in law to issue the notice, the Hon'ble Bombay High Court was pleased to set aside the notice u/s 148 of the Act dated 30.03.2019. Countering the submission of Ld. CIT DR, that relief was granted to assessee's only by exercise of writ jurisdiction by Hon'ble High Courts, the Ld. AR drew our attention to the decision of the Hon'ble Bombay High Court in the case of Peter Vas Vs. CIT (2021) 128 taxmann.com 180 (Bom) which was passed on 05.04.2021 (which is found placed at page no. 453 of the PB). In this case, (Peter Vas) the Tribunal did not admit the Rule 27 application filed by the

assessee before it. And in that case by filing Rule 27 application before the Tribunal, the assessee (Peter Vas) had raised a legal ground challenging the jurisdiction of the AO u/s 153C of the Act. The Tribunal's action for not admitting and considering the ibid Rule 27 application was not countenanced by the Hon'ble High Court and the matter was remitted back to the Tribunal to decide the legal ground u/s 153C of the Act raised by assessee by filling under Rule 27 application. Further, the Ld. AR of the assessee, drew our attention to the decision of the Hon'ble Gujarat High Court in the case of PCIT Vs. Sun Pharmaceuticals Industries Ltd. (2017) 86 taxmann.com 148 (placed at page 38 to 446 of PB wherein similar application under Rule 27 was filed by the assessee challenging the jurisdiction of AO which was admitted by the Tribunal and the revenue challenged it before the Hon'ble High Court of Gujarat High Court wherein their Lordship framed the following question of law and decided as under: -

1. Whether the Income Tax Appellate Tribunal was right in law in allowing the respondent-assessee to raise the question of validity of the notices for reopening of the assessments taking recourse to Rule 27 of the Rules without the assessee having filed cross appeal or cross objection before the Tribunal against the orders of the Commissioner (Appeals)?

2. Whether the finding of the Tribunal that the notices of reopening of assessments in both the assessment years is sustainable in law?

11. And the Hon'ble High Court answered the question of law as under: -

> **6.** Regarding the first question we may notice that Section 253 of the Act pertains to appeals to Appellate Tribunal. Under sub-section (1) of section 253 any assessee aggrieved by any of the orders mentioned therein could appeal to the Appellate Tribunal which includes an order passed by a Deputy Commissioner (Appeals) or, as the case may be, a Commissioner (Appeals) under various provisions contained in the Act. Under sub-section (2) of section 253, the Principal Commissioner or Commissioner may, if he objects to any order passed by a Deputy Commissioner (Appeals), or a Commissioner (Appeals) as the case may be, passed under section 154 or 250 of the Act, could direct the Assessing Officer to appeal to the Appellate Tribunal against such order. Sub-section (3) of section 253 lays down the period of limitation for filing such appeals. Sub-section (4) of section 253 pertains to cross-objections by the person against whom such appeal has been preferred before the Tribunal and reads as under:
>
> "[(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals) has been preferred under sub-section (1) or sub-section (2) by the other party may, notwithstanding that he may not have appealed against such order or any part thereof; within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Assessing Officer (Appeals) and such memorandum shall be disposed of by the

Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).]"

7. Under sub-section (4) of section 253 thus, either an Assessing Officer or the assessee, on receipt of a notice that an appeal against the order of the Commissioner (Appeals) has been preferred before the Tribunal may notwithstanding the fact that he may not have appealed against such order within thirty days of the receipt of the notice, file a memorandum of cross-objections against any part of the order of the Commissioner (Appeals) and such memorandum would be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3). In plain terms, sub-section (4) of section 253 gives the right to the Assessing Officer as well as to the assessee to challenge the order of the Commissioner (Appeals) or part thereof upon receipt of the notice issued by the Tribunal in an appeal filed by the other side, even though previously he may not have preferred any such appeal and if such cross-objection is filed within the time mentioned in sub-section (4), the same would be treated as an appeal filed within the time prescribed under sub-section (3).

8. Rule 27 of the Rules reads as under:

"Respondent may support order on grounds decided against him.

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."

9. This Rule thus provides that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. This rule embodies the

fundamental principle that the person, who may not have been aggrieved by an order of the lower authority or the Court and has therefore not filed any appeal against such order, is free to defend the order before the Appellate Forum on all grounds including the ground, which may have been held against him by the lower authority or the Court, whose order is otherwise in his favour.

10. The contention of the counsel for the Revenue was that the assessee had to file independent appeals or cross-objections in terms of section 253 (4) of the Act to enable the assessee to raise the ground of validity of the notices for reopening of the assessments since the said ground was held by the Commissioner (Appeals) against the assessee. For multiple reasons, we cannot accept this contention. As noted, under sub-section (1) of section 253, an appeal can be filed before the Appellate Tribunal by an assessee being aggrieved by the order of the Appellate Commissioner. Under sub-section (2) of section 253, only if the Principal Commissioner or the Commissioner objects to any order passed by the Appellate Commissioner, he would direct the Assessing Officer to file appeal before the Appellate Tribunal. Essentially therefore, an appeal before the Tribunal against the order of Appellate Commissioner would lie against an order which is adverse to the appellant. May be, on one out of two grounds if the appeal of the assessee is allowed by the Appellate Commissioner in its entirety, he cannot be stated to be a person aggrieved by such order. His appeal under sub-section (1) of section 253 would not be maintainable. The assessee cannot file a standalone appeal challenging a finding of

the Appellate Commissioner which may be against the assessee as long as the appellate order of the Commissioner is entirely in favour of the assessee and no part of the appeal of the assessee's claim is rejected. Under sub-section (4) of section 253, it is open for a person either an Assessing Officer or, the assessee, upon receipt of a notice of the appeal filed before the Tribunal to file cross-objection against any part of the order of the Commissioner (Appeals) and such cross-objection would be dealt with by the Tribunal as if it were an appeal presented within the time specified. Two things thus become clear. A cross-objection under section (4) of Section 253 could be directed against any part of the order of the Appellate Commissioner and if so presented, it would be disposed of by the Tribunal in the manner an appeal would be decided. In other words, such cross-objection would have independent existence even if for some reason, the appeal of the opponent does not survive. The cross-objection could be filed only against any part of the order of the Appellate Commissioner and necessarily therefore, that part of the order of the Commissioner (Appeals) has to be adverse to the person raising the cross-objection. Rejection of a ground, an argument or a contention would not come within the expression "any part of the order of the Commissioner" in context of which, the said phrase has been used in sub-section (4) of section 253.

11. To put the controversy beyond doubt, Rule 27 of the Rules makes it clear that the respondent in appeal before the Tribunal even without filing an appeal can support the order appealed against on any of the grounds decided against him. It can be

easily appreciated that all prayers in the appeal may be allowed by the Commissioner (Appeals), however, some of the contentions of the appellant may not have appealed to the Commissioner. When such an order of the Commissioner is at large before the Tribunal, the respondent before the Tribunal would be entitled to defend the order of the Commissioner on all grounds including on grounds held against him by the Commissioner without filing an independent appeal or cross-objection.

12. Rule 27 of the Rules is akin to Rule 22 Order XLI of the Civil Procedure Code. Sub-rule (1) provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been decided in his favour; and may also take any cross-objection to the decree which he could have taken by way of an appeal. In case of *Virdhachalam Pillai* v. *Chaldean Syrian Bank Ltd.*AIR 1964 SC 1425 in context of the said Rule the Supreme Court observed as under:

"32. Learned Counsel for the appellant raised a short preliminary objection that the learned Judges of the High Court having categorically found that there was an antecedent debt which was discharged by the suit-mortgage loan only to the extent of Rs. 59,000/- and odd and there being no appeal by the Bank against the finding that the balance of the Rs. 80,000/- had not gone in discharge of an antecedent debt, the respondent was precluded from putting forward a contention that the entire sum of Rs. 80,000/- covered by Exs. A and B went for the discharge

of antecedent debts. We do not see any substance in this objection, because the respondent is entitled to canvass the correctness of findings against it in order to support the decree that has been passed against the appellant."

13. Likewise, in case of *S. Nazeer Ahmed* v. *State Bank of Mysore* AIR 2007 SCW 766 it was held and observed as under:

"7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of Order II Rule 2 rendered by the trial court."

14. Similar issue came-up before Division Bench of this Court in case of *Dahod Sahakari Kharid Vechan Sangh Ltd.* v. *CIT* [2006] 282 ITR 321/[2005] 149 Taxman 456 (Guj.) in which the Court observed as under:

"17. Taking up the second issue first, the Tribunal has committed an error in law in holding that the assessee having not filed cross-objection against findings adverse to the assessee in the order of Commissioner (Appeals), the said findings had become final and remained unchallenged. The Tribunal apparently lost sight of the fact that the assessee had succeeded before the Commissioner (Appeals). The appeal had been allowed and the penalty levied by the assessing officer deleted in entirety. In fact, there was no occasion for the assessee to feel aggrieved and hence, it was not necessary for the assessee to prefer an appeal. The position in law is well settled that a cross objection, for all intents and purposes, would amount to an appeal and the cross objector would have the same rights which an appellant has before the Tribunal.

18. Section 253 of the Act provides for appeal to the Tribunal. Under sub-section (1), an assessee is granted right to file an appeal; under sub-section (2), the Commissioner is granted a right to file appeal by issuing necessary direction to the assessing officer; sub-section (3) prescribes the period of limitation within which an appeal could be preferred. Section 253(4) of the Act lays down that either the assessing officer or the assessee, on receipt of notice that an appeal against the order of Commissioner (Appeals) has been preferred under sub-section (1) or subsection (2) by the other party, may,

notwithstanding that no appeal had been filed against such an order or any part thereof, within 30 days of the notice, file a memorandum of cross objections verified in the prescribed manner and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within the period of limitation prescribed under sub-section (3). Therefore, on a plain reading of the provision, it transpires that a party has been granted an option or a discretion to file cross objection.

19. In case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof which was against the respondent. The Tribunal has, in the present case, unfortunately drawn such an inference which is not supported by the plain language employed by the provision.

20. If the inference drawn by the Tribunal is accepted as a correct proposition, it would render Rule 27 of the Tribunal Rules redundant and nugatory. It is not possible to interpret the provision in such manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and an interpretation which makes other connected provisions otiose has to be to avoided. Rule 27 of the Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to provisions of Section 253(4) of the Act. The Tribunal was, therefore, in error in holding that the finding recorded by the Commissioner

> (Appeals) remained unchallenged since the assessee had not filed cross objections."
>
> **15.** The first question is, therefore, answered against the Revenue and in favour of the assessee.

12. It would be gainful to take guidance from the Hon'ble jurisdiction High court in the case of (i) Peter Vaz Vs. Commissioner of Income Tax (2021) 128 taxmann.com 180 (Bombay). In this case the Hon'ble Bombay High Court referred to the judgment in the case of B. R. Bamassi-Vs.- Commissioner of Income Tax Bombay (1972) 83 ITR 223 (Bom) and further held that the respondent in an appeal is entitled to raise a legal ground although no cross-objection was filed by the respondent assessee and the Hon'ble High Court has framed an additional question of law which reads as under: -

> "Whether in the facts and circumstances of the present case, it was open to the appellant/assessee to have support the orders of the Commissioner (Appeals), based on the ground that the jurisdictional parameters prescribed under section 153C of the Act were not fulfilled, even without the necessity of filing any cross objections.?."

13. The relevant portion of the judgment of Hon'ble Jurisdictional High Court is as under: -

> **30.** Rule 27 of the Appellate Tribunal Rules, 1963 reads as follows:—
>
> "Respondent may support order on grounds decided against him.

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."

31. In this case, the assessees merely wanted to support the order made by the CIT (Appeals), which was entirely in their favor. The assessees wished to raise an issue, that was at least *prima facie* going to the root of jurisdiction to initiate proceedings under section 153C of the IT Act. Having regard to the provisions of rule 27 referred to above, the ITAT in our opinion should have permitted the assessees who were Respondents before it, to support the orders of CIT (Appeals) on this ground, even without the necessity of filing any cross-objections.

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38. In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate Tribunal Rules, 1963 as also the provisions of section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in *S. Nazeer Ahmed* (*supra*) we think that the ITAT should not have precluded the assessees from raising the issue in the appeals instituted by the Revenue, even without the necessity of filing any cross-objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assessees and against the Revenue.

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43. The ITAT in the present matters, has not referred to the above principles explained by the Hon'ble Supreme Court in considering applications for condonation of delay. This was a case where the final order made by CIT(appeals) was entirely in favor of the assesses. They had nothing to gain by delaying the filing of cross-objections. According to us, even without filing cross-objections, the assesses could have supported the order appealed by the revenue by urging an issue mainly of law that, at least *prima facie* went to the root of jurisdiction. All these aspects were not taken into account by the ITAT while refusing to condone the delay in filing the cross-objections."

14. And the Hon'ble High Court has dealt in the aforesaid case (peter vaz) with the objection raised in the present appeals by Ld. CIT-DR that since assessee has not raised objection against jurisdiction of AO at the first instance (during assessment proceedings) as contemplated u/s 124 of the Act, sub-section 124 precludes the assessee to raise the same at this stage (before the Tribunal) has been answered by the Hon'ble High Court at para 44 (Peter Vaz case) though in the context of Section 153C of the Act wherein that case, the assessee supported the action of Ld. CIT(A) by raising the legal issue of lack of jurisdiction u/s 153C of the Act, which was not entertained by Tribunal inter-alia on the failure of assessee not to have raised before AO u/s 124 of the Act. The Hon'ble High Court clarified that section 124 of the Act deals only with territorial jurisdiction of AO and

sub-section (3) of section 124 of the Act would not preclude an assessee to raise any other legal issue which may go to the root of the jurisdiction of AO by explaining section 124 of the Act as under: -

> "**44.** The ITAT with respect has misconstrued the provisions of Section 124 of the IT Act. Sections 120 to 124 of the IT Act no doubt refer to the jurisdiction of the Income-tax Authorities. However, from the scheme of these provisions, it is apparent that reference is to the territorial jurisdiction of the authorities. Section 124(1) refers to direction or order issued under section 120 vesting with jurisdiction in the Assessing Officer over any area, limits of an area, etc. Section 124(2) provides that where a question arises under this Section as to whether the Assessing Officer has jurisdiction to assess any person, the question will have to be determined by the authorities specified which will include, in a given case the Board. Section 124(3) then provides that no person shall be entitled to call in question the jurisdiction of an Assessing Officer, where an action has been taken under section 132 or 132A after the expiry of one month from the date on which he was served with a notice under section 153C or after the completion of the assessment, whichever is earlier. Now, this provision refers to mainly the territorial jurisdiction of the Assessing Officer. This provision cannot be interpreted to mean that an assessee is left without a remedy where the Assessing Officer invokes the provisions of Section 153C of the IT Act without fulfillment of the jurisdictional parameters prescribed therein."

15. Further, the Ld. AR of the assessee, drew our attention to the order passed by the Tribunal in assessee's group cases (sister concern) in the case of DCIT Vs. Satya Securities Ltd. (ITA. Nos. 6669 & 6673/Mum/2016 dated 04.11.2022) which is found at page no. 403 to 418 of PB wherein similar grounds were raised by the assessee in department appeals through Rule 27 of the Rule wherein the Tribunal admitted the assessee's Rule 27 application and similar/identical grounds of appeal (i.e. the issue of validity of reopening of the assessment) and thereafter, the Tribunal was pleased to find the legal issue in favour of the assessee.

16. Now, the question before us, is regarding admission of Rule 27 application filed by the assessee. After having gone through the decisions cited before us by both parties and after going through the order cited in favour of revenue as well as that of assessee, we find that the issue raised albeit through Rule 27 if found in favour of assessee goes to the root of the jurisdiction of the AO. Therefore, we are inclined to admit the grounds raised by the assessee through application dated 21st Dec 2021 under Rule 27 of the Rules which even though is a general ground challenging the validity of the re-opening of the assessment by issuance of notice u/s 148 of the Act, we after hearing the assessee and the Revenue are inclined to frame the ground (except for appeal for AY 2009-10) as under:-

"That the Ld. CIT(A) erred, on facts and in law in dismissing the legal ground taken before him regarding the validity of the re-assessment

proceedings intitated by the AO by issue of notice u/s 148 of the Act who, didn't had the pecuniary jurisdiction as prescribed by CBDT instruction no. 01/2011 [F. No. 187/12/2010-IT (A-D)] dated 31.01.2011".

17. We having admitted the legal issue, after hearing both the parties, we note that Ld. CIT(A) has given relief to the assessee on merits. The assessee has assailed the action of the AO (Deputy Commissioner) to have recorded reasons for re-open the assessment (except for AY 2009-10 in both assessee's case) and consequent issue of notice u/s 148 of the Act, without authority of law and in contravention to that of CBDT instruction No. 01/2011 [F. No. 187/12/2010 – IT (A-D) Dated 31.01.2011. For effective adjudication and easy reference, the ibid instruction of CBDT is reproduced below: -

SECTION 119 OF THE INCOME-TAX ACT, 1961 - INCOME-TAX AUTHORITIES - INSTRUCTIONS TO SUBORDINATE AUTHORITIES

INSTRUCTION NO. 1/2011 [F. NO. 187/12/2010-IT(A-1)], DATED 31-1-2011

References have been received by the Board from a large number of taxpayers, especially from mofussil areas, that the existing monetary limits for assigning cases to ITOs and DCS/ACS is causing hardship to the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The Board had considered the matter and is of the opinion that the

existing limits need to be revised to remove the abovementioned hardship.

An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001, when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:-

	Income Declared (Mofussil areas)		Income Declared (Metro cities)	
	ITOS	ACs/DCs	ITOS	DCS/ACS
Corporate returns	Upto Rs. 20 lacs	Above Rs. 20 lacs	Upto Rs. 30 lacs	Above Rs. 30 lacs
Non-corporate returns	Upto Rs. 15 lacs	Above Rs. 15 lacs	Upto Rs. 20lacs	Above Rs 20 lacs

Metro charges for the purpose of above instructions shall be Ahmedabad, Bangalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011.

18. From a perused of the aforesaid instruction of CBDT which is binding on Income Tax Authorities, it is clear that in respect of Corporate entities (Metro Cities), who are assessee's then if the returned income is less than Rs. 30 lacs, then the jurisdiction is vested with ITO's (Income Tax Officers), and if it is above Rs. 30 lacs then it is with the Deputy Commissioner/Additional Commissioner (DC/AC); Hence, in the present cases we note that except for AY 2009-10, the returned income of both assessee's were below Rs. 30 Lakhs, so the jurisdiction of assessment lies with I.T.O who had territorial jurisdiction u/s 124 of the Act i.e. ITO- Ward 3(3). Admittedly in all these cases, the reasons have been recorded (for re-opening)

as envisaged u/s 147 of the Act has been recorded by Deputy Commissioner-3(3) and consequent to which had issued the notice of re-opening u/s 148 of the Act, which as seen (supra) he didn't had power to do so. Since, the authority to assess such corporate entities were with the ITO viz ITO ward- 3(3). For holding such a view, we rely on the ratio of the decision of the Hon'ble jurisdiction High Court in the case of Shri Ashok Devichand jain vs (supra) wherein similar issue came up before the Hon'ble High Court and the Hon'ble High Court held in favour of assessee as under: -

> "Petitioner is impugning a notice dated 30 March, 2019 issued under section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2012-13 and order passed on 18th November, 2019 rejecting Petitioner's objection to reopening on various grounds.
>
> 2. The primary ground that has been raised is that the Income Tax Officer who issued the notice under section 148 of the Act, had no jurisdiction to issue such notice. According to Petitioner as per instruction No. 1/2011 dated 31st January, 2011 issued by the Central Board of Direct Taxes, where income declared/returned by any Non-Corporate assessee is up to Rs. 20 lakhs, then the jurisdiction will be of ITO and where the income declared returned by a Non Corporate assessee is above Rs. 20 Lakhs, the jurisdiction will be of DC/AC.
>
> 3. Petitioner has filed return of income of about Rs. 64,34,663/- and therefore, the jurisdiction will be that of DC/AC and not ITO. Mr. Jain submitted that since notice under section 148 of the Act has been issued by ITO, and not by DC/AC that is by a person who did

not have any jurisdiction over Petitioner, such notice was bad on the count of having been issued by an officer who had no authority in law to issue such notice.

4. We have considered the affidavit in reply of one Mr. Suresh G. Kamble, ITO who had issued the notice under section 148 of the Act. Said Mr. Kamble, ITO, Ward 12(3)(1), Mumbai admits that such a defective notice has been issued but according to him, PAN of Petitioner was lying with ITO Ward (12)(3)(1), Mumbai and it was not feasible to migrate the PAN having returned of income exceeding Rs. 30 lakhs to the charge of DCIT, Circle 12(3)(1). Mumbai, as the time available with the ITO 12(3)(1) was too short to migrate the PAN after obtaining administrative approval from the higher authorities by 31 March, 2019.

5. The notice under section 148 of the Act is jurisdictional notice and any inherent defect therein is not curable. In the facts of the case, notice having been issued by an officer who had no jurisdiction over the Petitioner, such notice in our view, has not been issued validly and is issued without authority in law.

6. In the circumstances, we have no hesitation in setting aside the notice dated 30th March, 2019.

7. Consequently the order dated 18th November, 2019 rejecting Petitioner's objection is also quashed and set aside.

19. In the present captioned appeals, it is undispued that other than assessment for AY. 2009-10 (supra), in all other appeals, the assessee has filed return of income which is less than Rs.30 Lacs. As per the CBDT instruction No. 01/2011, in case of an assessee which is a corporate assessee, the pecuniary jurisdiction if it is below Rs.30 Lacs

it lies before the Jurisdictional ITO; and if the return of income filed by a corporate assessee is above 30 Lacs it lies before the jurisdictional DCIT/ACIT. In these appeals for AY. 2006-07, AY, 2007-08 & AY 2008-09 and AY 2010-11 respectively for both assessee's (of the assessee's) admittedly the reasons have been recorded by the DCIT and not by ITO which is in direct contravention of the CBDT instruction No. 01/2011 conferring/allocating the pecuniary jurisdiction. It is settled position of law that the CBDT instruction is binding on all Income Tax Authorities. Therefore, the income tax authorities ought to have followed the CBDT instruction in letter & spirit and any contravention will be offending Article 14 of the Constitution of India which tantamount to arbitrary action of the authorities and also against the basic feature of the Constitution of India i.e. Rule of Law', which require all authorities of the Government to act in accordance to the law. The expression 'Rule of law' requires the Government to act in accordance to law and so the AO had to act in accordance to law as prescribed by the CBDT in this case. And it should be borne in mind that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. [Taylor Vs. Taylor (1875) LR 1ch.D-426 quoted and followed by Hon'ble Supreme Court in Rao Shiv Bahadur Singh Vs. State of Madhya Pradesh (AIR 1954 SC 322) and in a plethora of cases and recently in Zuari Cements Vs. ACIT (2015) 7 SCC 690. Therefore, as per the CBDT instruction (supra) in the present cases,

only the territorial ITO had the jurisdiction to re-open the cases of the assesse (except AY 2009-10); and the DCIT by usurping this jurisdiction to re-open the assessment has wrongly assumed jurisdiction which he didn't enjoy. Therefore, the action of the DCIT in these cases to have recorded the reason for re-opening the assessment for AY. 2006-07, AY. 2007-08, AY. 2008-09 & AY. 2010-11 (in respective cases) and consequent issue of notice u/s 148 of the Act is bad in law, since the issuance of notice u/s 148 of the Act is a jurisdictional notice and this defect, goes to the root of re-opening itself; and is not a curable defect; therefore, the ground raised in Rule 27 applications of assessee are allowed. And therefore, all the captioned appeals (except for AY 2009-10) of the revenue has been rendered academic. And therefore, the same stands dismissed. Viz ITA. No.4836/Mum/2016, ITA. No. 4827/Mum/2016, ITA. No. 4828/Mum/2016, ITA. No. 4833/Mum/2016, ITA. No. 4830/Mum/2016 & ITA. No. 4831/Mum/2016 are dismissed.

20. Now coming to the other two appeals ITA. No. 4834/Mum/2016 for AY. 2009-10 (M/s. Watermark System India Ltd) and ITA. No. 4832/Mum/2016 for AY. 2009-10 (M/s. Watermark Financial Consultant Ltd.) by way of Rule 27, the assessee has challenged the validity of reopening of the assessment by the DCIT by issue of notice u/s 148 of the Act on 30.03.2012. For that let us having look at the reasons recorded by the AO to reopen the assessment in this case of M/s Watermark Capital Ltd (formerly M/s Watermark Financial

Constitute Ltd) herein after M/s W Financials which is reproduced as under: -

> "The assessee filed its return of income for the A. Y. 2009-10 by way of 'e-filing' declaring current year's loss at Rs.71,23,213-on 30-09-2009. The return of income was processed us. 143(1) of the Act on 29-09-2010, accepting the return of income. Further, scrutiny assessment u/s 143(3) of the Act was completed on 24-03-2011 determining the total loss at Rs 43,70 4877-.
>
> 2. The assessee company is operating from 1010, Maker Chamber V, Nariman Point, Mumbai- 400 021. Further, Shri Arun Dalmia and Shri Harsh Dalmia are the directors of the assessee company. As per the records the assessee company engaged in the business of financial consulting, brokering for land deals and arranging for term loans and working capital loans.
>
> 3. Concrete information is received from a government investigation agency that the directors of the above said company namely Shri Arun Dalmia and Shri Harsh Dalmia, floated certain dummy concerns including the assessee company viz, M/s. Watermark Financial Consultants Pvt. Ltd., vide which they are providing accommodation entries. Further, the investigation agency also examined the accounts of various concerns floated by the directors of the assessee company and concluded that the above said directors through their companies engaged in money laundering business. By doing so, the directors of the assessee company always show losses and thereby evade the income- tax. For evading the tax the director's

shows camouflage transactions in the books of accounts in the garb of purchases, sales and advances.

4. In light of the above findings, the material available with this office has been verified, which reveals that for the year under consideration the assessee has declared loss of Rs.81,29,284/- in its Profit & Loss Account which is primarily on account of share trading activity. Further, the assessee has also claimed substantial expenditure of Rs. 1.53,85,370/- under the head 'administrative expenses, which includes the expenditures in the form of business guest expenditure, travelling and conveyance. Since the expenditure under the above head is very high, the genuineness of such claims vis-à-vis the business nexus thereon has to be examined for allowability of the said expenditure under the I.T. Act. Also the assessee has shown high value receipts from various entities which have been accounted under the head loan syndication fees! Therefore, the receipts from the said entities vis-à-vis the TDS claims thereon needs full verification in light of the information received from the investigation agency.

5. From the above facts, it is evident that the assessee's books of account contain camouflage entries though the bank statements of the assessee company reveal high value transactions embedded with the element of taxable income which the assessee has not disclosed in the return of income. Therefore, I have reason to believe that income for the year under consideration has escaped assessment within the meaning of section 147 of the I. T. Act, 1961. Hence, notice u/s. 148 issued to the assessee."

21. Referring to the aforesaid reasons recorded, the Ld. AR pointed out that the based on the aforesaid reasons the AO has issued notice u/s 148 of the Act to re-open the assessment for AY 2009-10. This impugned action of the AO have been challenged by the assessee by raising the legal issue against the validity of the re-opening of assessment. Before we advert to the legal issue let us look at the settled position law regarding re-opening of the assessment. The concept of assessment is governed by the time-barring rule; and an assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence regarding undisclosed income or AO has information in his possession showing escapement of income as stipulated u/s 147 of the Act. As per Section 147 of the Act, if the AO intends to re-open the assessment, then AO has to record the reason to reopen the assessment, wherein he should record the "*reason to believe, escapement of income*". It is settled principle of law that "*reason to believe*" postulates a foundation based on information and belief based on reason. After a foundation based on information is there, still, there must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In other words, before the AO issues notice u/s 148 of the Act, he must have recorded the *reason to believe escapement of income*. It is no doubt true that this Tribunal cannot go into the sufficiency or adequacy of the material and substitute its own opinion

for that of the AO on the point as to whether action should be initiated for re-opening the assessment. At the same time, we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant or remote and far-fetched, which would warrant the formation of belief relating to escapement of income. It is well settled in law that reasons as recorded by AO for re-opening the assessment, are to be examined on a stand-alone basis. Neither anything can be added to the reasons so recorded, nor can anything be deleted from the reason so recorded. The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom) has inter alia observed that "……*it is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded by him. He has to speak through the reasons*". Their Lordship added "*The reasons recorded should be self-explanatory and should not keep the assessee guessing for reason. Reason provide link between conclusion and the evidence*…". So as held by the jurisdictional High Court that while examining the jurisdiction of AO to have re-opened the assessment, we have to only consider the *reasons recorded* by the AO on a stand-alone basis and adjudicate as to whether AO has satisfied in the reasons recorded, the condition precedent i.e, *reason to believe escapement of income*) to validly reopen the assessment.

22. Since we are going to examine the validity of re-opening the assessment, we have to first examine the "*reasons recorded by AO'* as it is i.e. on a stand-alone basis (without making any addition or deletion; and the inference can be drawn only from the facts stated therein). So when we examine the "reason recorded" as such by AO in respect of M/s. W. Financial (supra) we note that there are five (5) paragraphs, wherein AO has noted his reasons for re-opening. Out of it first & second paragraphs contain only the facts which are in the public domain (Return of Income filed on 30.09.2019 declaring loss of Rs. 71,23,213/- and the same had undergone scrutiny assessment u/s 143(3) on 24/3/2011 wherein the total loss was assessed at Rs. 43,70,487/-). And thereafter the assessee's address is given & that Shri Arun Dalmia & Shri Harish Dalmia are the directors of assessee and that they are engaged in business of financial consulting, brokering for land deals and arranging for term loans and working capital (loans). At paragraph 3, the AO is stating about information received from a government agency (no names given) that the aforesaid directors has floated dummy concerns including the assessee company which are providing accommodation entries. (allegation that assessee is an entry-operator but no more information as to whom the assessee is providing accommodation entry, nature, form of entry-operators viz share-capital/premium/loan/bills etc is not mentioned). Then AO stated that investigation agency after examining the accounts of various concerns

floated by the directors (Arun & Harish Dalmia) have concluded that they were into money-laundering. (Even though this serious allegation has been made no relevant facts on the basis of which such a conclusion has been made by investigation Agency is absent). Thereafter the AO, states in his own words "by doing so, the directors of assessee always show losses and there by evade income tax; and for that they camouflage the transaction in the books as purchases, sales & advances" (first allegation is assessee has indulged in providing accommodation entries; second is that assessee is into money laundering. And assessee by doing that shows losses by entering in the books bogus purchases, sales & advances and thus evade income tax. This assertion of AO at para 3 is difficult to understand being vague and shows per-se non-application of mind of AO).

23. Coming to paragraph 4 of the reasons recorded, the AO state that in the light of the information as aforesaid, he verified the materials available in his office (regarding AY 2009-10) and noticed that assessee has declared loss of Rs. 81,29,284/- in its Profit and Loss account which was primarily on account of share-trading activity. (No new information since assessee has under gone scrutiny assessment u/s 143(3) dtd 24.03.2011). Further AO noted that assessee has claimed substantial expenditure of Rs. 1,53,85,370/- under the head 'administration expense' which inter-alia includes guest expenditure, travelling etc. (No new facts are stated there in and the aforesaid facts are already known to the AO since it has been disclosed by it).

Thereafter the AO notes that since expenditure is very high, the genuiness of the claim need to be examined especially the business nexus of the expenditure. (So AO wants to review the action of his predecessor AO regarding the expenses claimed by the assessee). Then AO observes that assessee has shown high value receipts from various entities which have been accounted under the need "loan syndication fees" (Nothing new, since AO admits that the assessee itself has shown the same, so no new facts). In the light of the above information from Investigation Agency, the AO states that the receipts from the said entities vis-a vis TDS claims needs full verification (only vague allegation without any new facts or relevant facts to base the allegations and finally the AO is saying he needs to fully verify the expenditure claimed by the assessee). And in fifth para, the AO concludes that from the afforested facts the assessee's books of account contain camouflage entries through bank statement which reveal high value transaction embedded with element of taxable income which assessee has not disclosed in the return of income. And therefore he proposed the re-opening of the assessment of M/s. W. Financial for AY. 2009-10.

24. Having analysed the reason recorded by AO for re-opening the assessment for AY 2009-10 in the case of M/s W. Financial Ltd, since assessee has challenged the legal issue in respect of other assessee (M/s W. System), let us look at the reasons recorded by AO for re-

opening the assessment of M/s W. System which is reproduced as under: -

> "The assessee filed its return of income for the AY 2009-10 by way of e-filing declaring current year's loss of Rs 45,52,893/- on 30-09.2009. The return of income was processed u/s 143(1) of the Act on 06.01.2011 accepting the return of income Further, no scrutiny assessment u/s.143(3) of the Act was made in this case.
>
> 2. The assessee company is operating from 1010, Maker Chamber V Nariman Point, Mumbai- 400 021. Further, Shri Arun Dalmia and Shri Harsh Dalmia are the directors of the assessee company The assessee company claimed to have been engaged in the business of trading in shares and other securities listed and non-listed.
>
> 3. Concrete information was received from an investigation agency of government that the directors of the above said company namely Str Arun Dalmia and Shn Harsh Dalmia, floated certain dummy concerns including the said company vide which they are providing accommodation entries. Importantly, the directors of the assesse company always show losses and thereby evade the income-tax. For evading the tax the director's show camouflage transactions in the books of accounts in the garb of purchases, sales and advances Interesting for the year under consideration the assessee has shown share trading loss besides claiming huge expenditures under various heads.
>
> 4. From the above facts it is evident that the assessee's books of account contain camouflage entries though the bank statements of the assessee company reveal high value transactions embedded with the element of taxable income which the assessee has not

disclosed in the return of income. Therefore, I have reason to believe that income for the year under consideration has escaped assessment within the meaning of section 147 of the I. T. Act. 1961. Hence, notice u/s 148 issued to the assessee."

25. From the reading of the aforesaid reasons recorded by the AO to re-open the assessment in the case of M/s W System for AY 2009-10, the AO has noted that assessee had declared loss of Rs. 45,52,893/- by filling return of income on 30.09.2009. Thereafter the return was accepted u/s 143(1) of the Act on 06.11.2011 accepting the loss returned by the assessee. And the assessment for this relevant year has not been taken up for scrutiny. (All facts in Public Domain). And thereafter the AO notes the address of the assessee and states that Shri Arun Dalmia and Shri Harsh Dalmia are the directors of assessee company which are engaged in the business of trading in shares and other securities both listed and non-listed.(No new facts in the reason recorded). The AO thereafter notes that he has received information from investigation agency of the government (No names given) that the aforesaid directors had floated several dummy concerns including the assessee company which are providing accommodation entries. According to the information the directors of the assessee company always shows losses and thereby evade Income Tax. According to the AO, for evading the tax, the directors show camouflage transactions in the books of account in the garb of purchases, sales and advances. (All general allegation, no incriminating facts referred to base the allegation). According to the AO it is interesting to note that assessee

has shown share trading loss besides claiming huge expenditures under various heads. Therefore, according to the AO, the assessee's books of account contain camouflage entries though the bank statement of the assessee company reveal high value transactions embedded with the element of taxable income which the assessee has not disclosed in the return of income (Vague allegation; without specifying what was the nature of un-disclosed income; bald allegation). Therefore, he has reasons to believe that income of the year under consideration (AY 2009-10) has escaped assessment (Non-application of mind writ large on the allegations without referring to any facts stated therein the reasons recorded) and therefore he issued notice u/s 148 of the Act proposing re-opening of assessment of M/s. W. System for AY. 2009-10.

26. Since, we have analysed the "reasons recorded" by the AO for both the assessee's for AY 2009-10, first all we take up the case of assessee M/s W Financials Ltd. We have noted the original assessment in this case was done u/s 143(3) of the Act on 24.03.2011. And the AO had received information from some government agency (no name specified as which Agency) had alleged that the assessee company is controlled by the Shri Arun Dalmia and Shri Harsh Dalmia and they are providing accommodation entries and that they are also into money laundering. According to the AO by doing such activity the directors of the assessee company shows losses and thereby evade the income tax. We note that other than the bald allegation the AO has not spelt

out any material/facts on the basis of which AO has made such allegation. Serious allegation have been leveled against the assessee (money laundering) by refereeing to the some unknown government investigation agency. As held by the Hon'ble jurisdictional High Court in Hindustan Levers (supra) the reasons recorded for reopening an assessment has to be examined on a stand-alone basis without adding or subtracting anything in it. The reasons recorded shows non-application of mind. Moreover, we note the main propose of reopening was to examine/verify the substantial expenditure made by the assessee. It is also noted that the AO states that assessee books of account contain entries (camouflage) which reveal high value transactions, which he suspects must be embedded with the element of taxable income which according to him has escaped assessment and on the other hand he says that assessee is in to accommodation entry (which means only paper transactions for beneficiaries lieu of a small commission). Thus there is contradiction in the allegation itself. On a reading of the reasons recorded shows that the AO has resorted to reopening only for the purpose of roving inquiry which cannot be the ground (reason to believe escapement of income) rather it can be term as reason to suspect which is not the jurisdictional requirement for reopening an assessment. Therefore, re-opening is bad in law and the assessee succeeds in the legal challenge it has raised against the action of AO to have reopened the assessment and therefore, we quash the

notice issued by the AO u/s 148 of the Act for reopening the assessment of M/s W Financials Ltd.

27. Coming to the case of M/s W System it is noted from the analysis we had made about the reasons recorded by AO to re-open (supra) that again the AO has resorted to reopening the assessment for AY. 2009-10 for finding out the taxable income embedded in the transactions (accommodation entries) which also fall foul of the requirement of law for successfully reopening the assessee u/s 147 of the Act. At the most it (reason recorded) only gives rise to '*Right to Suspect* ' and not '*Right to believe*' escapement of income, which is not sufficient to successfully re-open an assessment. Therefore, the re-opening of assessment for AY. 2009-10 is bad in law and the assessee succeeds on the legal issue raised against M/s W System Ltd. Therefore, the appeal filed by both the assessees for the AY 2009-10 are allowed. Therefore the revenue appeals for AY 2009-10 against both assesses are academic and so dismissed.

28. In the result, all the appeals of the revenue are dismissed.

Order pronounced in the open court on this 27/02/2023.

Sd/-	Sd/-
(GAGAN GOYAL) **ACCOUNTANT MEMBER**	**(ABY T. VARKEY)** **JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 27/02/2023.
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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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