आयकर अपीलीय अधिकरण, कोलकाता पीठ ''सी'', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्यके समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. Nos. 606, 607 & 608/Kol/2022
Assessment Year: 2009-10, 2010-11 & 2011-12

M/s Ajanta Merchants Pvt. Ltd. (PAN: AACCA 1566 G)	Vs.	ITO, Ward-8(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	15.02.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	28 .03.2023
For the Appellant/ निर्धारिती की ओर से	Shri S.M. Surana, Advocate
For the Respondent/ राजस्व की ओर से	Shri G. Hukugha Sema, CIT

ORDER / आदेश

Per Rajesh Kumar, AM:

These are the appeals preferred by the assessee against the separate orders of the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi (hereinafter referred to as the Ld. CIT(A)"] dated 27.09.2022 for the AY 2009-10, 2010-11 & 2011-12.

2. First we shall adjudicate in ITA No. 606/Kol/2022 for AY 2009-10. In this appeal ,the assessee has assailed the order of Ld. CIT(A) on various legal grounds as well as on merit. The First issue assailed by the assessee on legal grounds is that the reason recorded by the AO were wrong and factually incorrect and therefore the reopening of assessment proceeding u/s 147 of the Act is bad in law.

3. Facts in brief are that the assessee filed return of income on 01.10.2009 declaring total income of Rs. 5,58,890/- which was processed u/s 143(1) of the Act. The case of the assessee was reopened u/s 147 of the Act after the AO received letters dated 19.02.2016 & 23.02.2016 from the DDIT, Unit-1, Dehradun stating that in the course of enquiry made by DDIT(Inv), Dehradun, the net deposit and withdrawals of the assessee company with various banks during the year were found to be at Rs. 3,31,51,744/- and Rs. 2,15,26,825/- respectively. The case was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act which was served on the assessee through e-mail on 17.03.2016. In response to the said notice, the assessee filed e-return of income afresh on 22.08.2016 and thereafter upon request of the assessee a copy of reasons recorded was supplied vide letter dated 06.05.2016. Thereafter the statutory notices was issued and served upon the assessee. The assessee complied with various notices by filing details and information and finally assessment was framed vide order dated 16.12.2016 passed u/s 147 read with Section 143(3) of the Act wherein an addition was made of Rs. 2,45,50,810/-.

4. The assessee challenged the order before the Ld. CIT(A). The Ld. CIT(A) dismissed ground raised by the assessee challenging the reopening of assessment u/s 147 by observing and holding as under:

> *"7.3. The contentions of the appellant have been duly considered. In my considered view, the information available with the AO of high volume of deposits and withdrawals in the bank accounts of the assessee and of making investments in various properties was credible and actionable, and was sufficient to invoke the provisions of Sec 147 of the Act. I would like to mention that at the time of issue of notice u/s 148, the AO is only required to form a broad opinion about income escaping tax in the hands of the assessee and he is not required to exactly quantify the amount of concealment. The sufficiency of reason cannot be challenged at the time of reopening of assessment as held by the Hon'ble Supreme Court in the cases of Raymond Woollen Mills (236 ITR 34) and Rajesh Jhaveri Stock Brokers (161 Taxman 316). In the instant case the AO has recorded the reasons after due application of mind on the basis of the information of deposits in the bank account of the assessee and of making undisclosed investment in property and copy of the reasons recorded have also been provided to the assessee.*
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> *7.4. It is relevant to note that the Hon'ble Delhi High Court in the case of Kelvinator of India (123 Taxman 433) has held that an assessment can be re-opened only on the basis of fresh tangible evidence. This decision of the Hon'ble Delhi High Court has also been affirmed by*

the Hon'ble Supreme Court (187 Taxman 312). In the instant case, it is observed that the AO was in possession of fresh tangible evidence in the form of information that the appellant had unexplained deposits/withdrawals in/from its bank accounts and had made investments in various properties. Therefore, the reopening of assessment by the AO in the case of the assessee on the basis of fresh tangible evidence of unexplained deposits/withdrawals in/from its bank account of and of making investments in various properties, cannot be faulted. Accordingly, no infirmity is found in the action of the AO of re-opening the assessment Accordingly, Grounds of Appeal Nos. 2 to 4 of the appellant are dismissed."

5. The Ld. A.R vehemently submitted before us that the order passed by the Ld. CIT(A) is factually incorrect and against the facts on record and not sustainable in the eyes of law. The Ld. A.R. referred to reasons recorded by the AO u/s 148(2) of the Act for reopening the assessment and submitted that the assessment was reopened u/s 147 for the reasons that the assessee has not disclosed the bank account with Vijaya Bank and therefore he has reasons to believe that income to the tune of Rs. 3,31,53,744/- has escaped assessment u/s 147 of the Act. The Ld. A.R thereafter referred to the audited annual accounts of the assessee, a copy whereof is filed at Page no. 5 to 14 of the P.B. The Ld. A.R referred to Schedule No. 4 which is qua cash and bank balances annexed with balance sheet and submitted that Vijaya Bank accounts have duly been shown under the Schedule "Cash and Bank Balances" with aggregate balance as on 31.03.2009 of Rs. 33,53,702/-. The Ld. A.R therefore submitted that reasons recorded by AO were factually incorrect and against the facts on record. The Ld. A.R further submitted that there is a complete non-application of mind at the time of recording the reasons and therefore reopening is bad in law. The Ld. A.R in defense of its argument relied on the two decisions namely the decision of Co-ordinate Bench of Kolkata in the case of Ganapati Developers vs. ACIT in ITA No. 139/Kol/2020 for AY 2013-14 dated 02.11.2020 and the decision of Hon'ble Gujarat High Court in the case of Mumtaz Haji Mohmad Memon vs. ITO in Civil Application No. 21030 of 2017 dated 21.03.2018.

6. The ld. D.R on the other hand relied heavily on the order of AO and Ld. CIT(A) on this issue on the ground that at the time of reopening the assessment, the AO has to be form an opinion that income has escaped income whereas detailed verification is carried out during the course of assessment proceedings. The Ld. D.R

submitted that the AO has sufficient material before him in the form of letters received from DDIT(Inv)-Dehradun. The ld DR contended that after examining the transactions in the bank accounts of the assessee and only thereafter the reasons were recorded and accordingly the assessment was reopened which is valid as per the provisions of the Act and therefore the grounds raised by the assessee assiling the re-opening of assessments may kindly be dismissed.

7. We have heard rival submissions and perusing the material on record including reasons recorded by the AO u/s 148(2) of the Act for reopening the assessment u/s 147 of the Act. For the sake of convenience and ready reference, the said reasons recorded by the AO are extracted as under:

Reason recorded in the case for issue of notice u/s. 148 of the I. T. Act, 1961.

The assessee filed revised retun of income for A.Y.: 2009-10 electronically on 01.10.2009 declaring total income of Rs.5,58,890/- which was duly processed u/s. 143(1). This office is in possession of an information forwarded by DDIT (Inv.), Unit- 1, Dehradun vide his letter nos. DDIT/Inv./Unit-1/DDN/SIT Monitored/2015-16/585 dtd: 19.02.2016 & DDIT/Inv./Unit-1/DDN/SIT Monitored/ 2015-16/653 dtd: 23.02.2016 whereby it has been reported that on the basis of STR in the case of Miss. Ilina Nayak who happens to be one of the Directors of M/s. Ajanta Merchants Pvt. Ltd., summon u/s. 131(1A) of the Act was issued to Miss. Ilina Nayak for furnishing details regarding ITR, source of income, details of investment made, bank account details etc. It has been further reported that information received from CBI Dehradun stating that there are various properties to which the holders are shown as company, M/s. Ajanta Merchants Pvt. Ltd. with Anurag Mishra and Miss. Ilina Nayak as its Directors. In the course of enquiry made by DDIT(Inv.), Dehradun the net deposits and withdrawal amount of M/s. Ajanta Merchants Pvt. Ltd. with various banks are as detailed below :-

Ajanta Merchants Pvt. Ltd.					
Sr. No.	F.Y.	Bank A/C no.	Name of bank	Total of deposit	Total of withdrawal
1	2008-09	060102000028468	IDBI bank	270690	226825
2	-do-	711203311000216	Vijaya Bank	11881054	--
3	-do-	71120003721001	-do-	11000000	11000000
4	-do-	711200301000090	-do-	10000000	10300000
	Total			**33151744**	**21526825**

On examination of the copy of ITR for A.Y.: 2009-10 on system, it is found that the aforesaid assessment company has not disclosed the bank accounts with Vijaya Bank.

In view of above, I have reason to believe that the income of Rs.3,31,51,744/- of the aforesaid assessee company on account of deposits in the above bank accounts during the F.Y.: 2008-09 relevant to A.Y.: 2009-10 has escaped assessment within the meaning of Section 147 of the I. T. Act, 1961.

From the perusal of above reasons particularly a table in the middle of the reasons has details of bank accounts maintained by the assessee with two banks i.e. IDBI Bank (1 account) (sl. No. 1) and Vijaya Bank (3 accounts) (Sl. No. 2 to 4). The aggregate

deposits as per the table were Rs. 3,31,51,744/- and aggregate withdrawals of Rs. 2,15,26,825/-. On the basis of said table the AO formed a belief that income of the assessee to the tune of Rs. 3,31,51,744/- has escaped assessment. We have also examined the balance sheet of the assesse especially Schedule no. 4 in respect of "Cash and Bank Balances" copy of which is available in the paper book at page no. 10 and observe that the assessee has duly disclosed the accounts with Vijaya Bank in the said schedule meaning thereby cash and bank balances shown in the balance sheet as on 31.03.2009 are inclusive of the accounts maintained by the assessee with Vijaya Bank. Considering this factual matrix and the arguments of the assesse, we hold that the reasons were factually incorrect and against the facts on record as there was complete non-application of mind on the part of the AO while recording the reasons. In our opinion, the reopening of assessment in a mechanical and casual manner is not permissible under the Act as it would put the assessee to lot of inconveniences because of already settled assessment would be thrown open to scrutiny merely on the basis of incorrect formation of belief. In the present case the AO has recorded wrong reasons that the assessee has not shown bank accountsmaintained with Vijaya Bank. As a matter of fact, the assessee has duly shown this bank accounts in the balance sheet. Considering these facts, we are of the considered view that the reopening of assessment done by the AO is bad in law and nullity. The case of the assesse finds support from the case of Ganapati Developers vs. ACIT (supra) wherein the Co-ordinate Bench has dealt with the similar issue wherein it has been held that reopening made on the basis of reason in which the mistakes were there, the reopening of assessment would be bad in law. In para 13 of the said decision , the Co-ordinate Bench has considered the decision of the Hon'ble High Court of Bombay in the case of Ankita A. Choksey vs. ITO in [2019] 411 ITR 207 (Bom) wherein the Hon'ble Court has held that the reason to believe that income chargeable has escaped assessment must be on correct facts. The relevant parts are reproduced as under:

> *"6. It is a settled position in law that the Assessing Officer acquires jurisdiction to issue a reopening notice only when he has reason to believe that income chargeable to tax has escaped Assessment. This basic condition precedent is applicable whether the return of income was processed under Section 143(1) of the Act by intimation or assessed by scrutiny*

under Section 143(3) of the Act. [See Asst Commissioner of Income Tax v/s. Rajesh Jhaveri Stock Brokers (P) Ltd., (SC) 291 ITR 500 and PCIT v/s. M/s. Shodimen Investments (Bombay) 2018 (93) Taxman.Com 153].

Further, the reasons to believe that income chargeable to tax has escaped Assessment must be on correct facts. If the facts, as recorded in the reasons are not correct and the assessee points out the same in its objections, then the order on objection must deal with it and prima facie, establish that the facts stated by it in its reasons as recorded are correct. In the absence of the order of objections dealing with the assertion of the Assessee that the correct facts are not as recorded in the reason, it would be safe to draw an adverse inference against the Revenue.

7. Thus, we are of the view that even in cases where the return of income has been accepted by processing under Section 143(1) of the Act, reopening of an assessment can only be done when the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The mere fact that the return has been processed under Section 143(1) of the Act, does not give the Assessing Officer a carte blanc to issue a reopening notice.

The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts, must be satisfied by the Assessing Officer so as to have jurisdiction to issue the reopening notice. In the present case, the Assessing Officer has proceeded on fundamentally wrong facts to come to the reasonable belief conclusion that income chargeable to tax has escaped assessment.

Further, even when the same is pointed out by the Petitioner, the Assessing Officer in its order disposing off the objection does not deal with factual position asserted by the Petitioner. Thus, it would safe to conclude that the Revenue does not dispute the facts stated by the Petitioner. On the facts as found, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment."

Based on the above decision, the Co-ordinate Bench held that the reopening of assessment is bad in law and similarly the Hon'ble High Court of Gujarat in the case of Mumtaz Haji Mohmad Memon (supra) has has quashed the notice issued u/s 148 by observing and holding as under:

"12. The Assessing Officer may be correct in pointing out that when the sale consideration as per the sale deed is Rs.50 lakhs but the registering authority has valued the property on the date of sale at Rs. 1,18,95,000/-for stamp duty calculation, section 50C of the Act would apply, of course, subject to the riders contained therein. However, this is not the cited reason for reopening the assessment. The reasons cited are that the assessee filed no return and that 1 /3rd share of the assessee from the actual sale consideration of Rs. 1,18,95,000/-therefore, was not brought to tax. These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually incorrect, Revenue simply cannot hope to salvage the impugned notice. Through the affidavit inreply a faint attempt has been made to entirely shift the center of the reasons to a completely new theory viz. the possible applicability of section 50C of the Act. The reasons recorded nowhere mentioned this possibility. Reasons recorded, in fact, ignored the fact that the sale

consideration as per the sale deed was Rs.50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gain."

8. Considering the above facts of the assessee's case and ratio laid down in the above decisions we are of the considered opinion that the case of the assessee has been re-opened by recording reasons which are factually incorrect and therefore the reopening cannot be sustained. Consequently we reverse the order of Ld. CIT(A) on this issue and quash the reopening of assessment proceedings. The legal issue raised by the assessee is allowed.

9. The other grounds raised by the assessee are not adjudicated as we have quashed the reopening of assessment, however these issuesare left open if need arises at a later stage. Accordingly the appeal by the assessee is allowed.

10. Now we shall adjudicate in ITA No. 607/Kol/2022 for AY 2010-11. On the request of the Counsel of the assessee Shri S.M. Surana we take up for adjudication the ground no. 6. The ground no. 6 is extracted below for the sake of convenience and ready reference:

"6. For that the Ld. CIT(A) erred in confirming the assessment when no notice was issued u/s 143(2) when it was specifically noted by the Ld. CIT(A) from the submissions of the assessee that a letter was duly filed to treat the original return as return in response to notice u/s 148 which has been ignored by the Ld. CIT(A) while passing the order."

11. Facts in brief are that the assessee filed return of income in the instant year on 11.10.2010 declaring total income of Rs. 4,59,208/- which was processed u/s 143(1) of the Act. Thereafter the case of the assessee was reopened u/s 147 of the Act after the AO received information from DDIT(Inv),Unit-1, Dehradun that the bank deposits of the assessee were not from explained sources. Accordingly a notice u/s 148 of the Act dated 30.03.2017 was issued after recording reasons to believe. In compliance to the said notice the assessee vide letter dated 8.4.2017 informed Income Tax Officer, Ward-8(1), Kolkata that return filed originally u/s 139(1) of the Act on 11.10.2010 may kindly be treated as return filed in response to notice u/s 148 of the Act. At page

no. 2 of the assessment order, the AO noted that the Ld. Counsel for the assessee filed the necessary documents as called for during the assessment proceedings along with copy of return filed u/s 148 on 24.08.2016 whereas the purported notice u/s 148 was issued on 30.03.2017 and thus rejected the contention of the assessee to treat the return filed u/s 139(1) of the Act in response to notice u/s 148 of the Act on 30.03.2017 and thus proceeded to frame the assessment u/s 144 of the act. Finally the assessment was completed vide order dated 26.12.2017 passed u/s 147 read with 144 of the Act.

12. Aggrieved by the order of AO the assessee challenged the order on legal issue before the Ld. CIT(A) who dismissed the appeal of the assessee by observing and holding as under:

> *"6.4. It is relevant to note that the Hon'ble Delhi High Court in the case of kelvinator of India (123 Taxman 433) has held that an assessment can be re-opened only on the basis of fresh tangible evidence. This decision of the Hon'ble Delhi High Court has also been affirmed by the Hon'ble Supreme court (187 Taxman 312). In the instant case, it is observed that the AO was in possession of fresh tangible evidence in the form of information that the appellant had unexplained deposits in its bank account of and had made undisclosed investment in property. Therefore, the reopening of assessment by the AO in the case of the assessee on the basis of fresh tangible evidence of unexplained deposits in its bank account of and of making undisclosed investment in property, cannot be faulted. As regards, the contention of the appellant that no notice u/s 143(2) was issued and therefore the reassessment is invalid, it is noted that the AO in para 3 of the assessment order has noted that the appellant filed some documents and also acknowledgement of return filed by it dated 24.08.2016. However, since the appellant did not inform that this return is to be treated as in response to notice u/s 148, the AO proceeded u/s 144 as if no return has been filed in response to notice u/s 148. Moreover, it is noted that the appellant has never challenged this aspect of non-issue of notice u/s 143(2) in the assessment proceedings, therefore the provisions of Section 292BB also come into play and now the appellant cannot challenge the validity of reassessment proceedings in the appellate stage. Accordingly, no infirmity is found in the action of the AO of reopening the assessment and proceedings u/s 144 against the appellant. Accordingly, Grounds of appeal Nos. 1 to 4 of the appellant are dismissed."*

13. The Ld. A.R vehemently submitted before us that the order passed by the Ld. CIT(A) is patently wrong and against the provisions of the Act and also the ratio laid down in the various decisions by various judicial forums. The Ld. A.R while referring to the assessment order in Para 1 stated that return by the assessee was filed on 11.10.2010 declaring total income of Rs. 4,59,208/- which was processed u/s 143(1) of the Act. The Ld. A.R submitted that the case of the assessee was thereafter

reopened u/s 147 by issuing notice u/s 148 of the Act on 30.03.2017. The Ld. A.R thereafter pointed out by referring page 34 of PB which contained a letter addressed to the AO wherein the assessee made compliance to the notice issued u/s 148 dated 30.03.2017 stating that the return already filed u/s 139(1) of the Act may kindly be treated as return filed in response to notice issued u/s 148 of the Act. The ld AR submitted that the assessee has made proper and full compliance to the impugned notice issued u/s 148 of the Act and the AO has simply ignored the said letter of the assessee by stating that the ITR acknowledgment produced by the counsel of the assessee along with various documents pertains to date prior to the date of issuance of notice i.e. 30.03.2017 and thus noted in the assessment order at page 2 in para 2 that there has been no compliance to the notice issued u/s 148 of the Act and proceeded to frame the assessment u/s 144 of the Act. The ld. Counsel for the assessee pointed out that since the assessee has made compliance to the notice issued u/s 148 of the Act dated 30.03.2017 vide letter dated 8.4.2017 wherein it was stated that return filed u/s 139(1) may kindly be treated as return filed in response to notice issued u/s 148 and thus the AO has grossly erred in framing the assessment u/s 144 read with Section 147 of the Act. The Ld. Counsel for the assessee stated that the AO has not issued notice u/s 143(2) of the Act which is undisputed position as per the records of the AO and was duly admitted by the Ld. CIT(A) in his order as extracted above. The Ld. A.R. submitted that once the assessee has complied with the notice issued u/s 148 of the Act by stating or mentioning that return file may kindly be treated as return file to the impugned notice issued u/s 148 of the Ac, the AO is duty bound to issue notice u/s 143(2) of the Act otherwise the reassessment proceedings could be rendered as nullity and void in the eyes of law. The ld. A.R submitted that the Ld. CIT(A) has simply passed the order without application of mind that AO has noted in the assessment order that acknowledgment filed by the assessee was relating to the date which falls prior to the date of issuance of notice u/s 148 of the Act. However no cognizance was taken to the request of the assessee as made on 8.4.2017. The Ld. A.R therefore prayed before the Bench that the assessment order passed by the AO and sustained by the Ld. CIT(A) may kindly be held as bad in law and may be quashed accordingly.

The Ld. A.R. in defense of his argument relied on the decision of Co-ordinate Bench of Kolkata in the case of DCIT, Circle-4(2), Kolkata vs. M/s Sudarshan Paper & Board Pvt. Ltd. in ITA No. 130/Kol/2018 for AY 2011-12 dated 23.10.2019 wherein the Co-ordinate Bench has decided the issue under similar facts in favour of the assessee by holding that where the assessee has complied with the notice issued u/s 148 of the Act by filing a letter stating therein that return filed originally u/s 139(1) may be treated as return filed in response to notice u/s 148 then it is mandatory to issue u/s 143(2) of the Act because the assessee has complied with notice issued u/s 148 of the Act failing which the assessment framed u/s 147 read with 144 of the Act is rendered void ab-initio and was quashed and the appeal of the revenue was also dismissed by the Hon'ble Jurisdictional High Court against the said order in the case of PCIT vs. M/s Sudarshan Paper & Board Pvt. Ltd. in ITAT/182/2022, IA No. GA/1/2022, GA/2/2022 dated 5.12.2022 by upholding the order of Tribunal. The Ld. A.R therefore prayed that in view of the ratio laid down above the assessment framed may kindly be quashed.

14. The Ld. D.R on the other hand relied on the order of authorities below and submitted that the assessment has been framed as per the provisions of the Act and was correctly upheld by the Ld. CIT(A).

15. After hearing the rival contentions and perusing the material on record including the copies of notices and replies thereto filed by the assessee in the assessment proceedings. The undisputed facts are that the assessee filed return of income u/s 139(1) of the Act which was processed u/s 143(1) of the Act. Thereafter the case of the assessee was reopened u/s 147 of the Act after the AO received information from DDIT(Inv), Unit-1, Dehradun by issuing notice u/s 148 on 30.03.2017. The assessee complied with the said notice vide letter dated 8.4.2017 submitting therein the return filed originally u/s 139(1) may be treated as compliance to the notice issued u/s 148 of the Act dated 30.03.2017. The AO however was of the view that the acknowledgement of return filed was prior to the date of issuance of notice and therefore refused to take cognizance of the same and proceededto frame

assessment u/s 144 of the Act without issuing notice u/s 143(2) of the Act on the ground that the assessee has not complied with the notice issued u/s 148 of the Act. The Ld. CIT(A) simply affirmed the findings of the AO by reiterating the same facts by failing to note that once the return was filed u/s 139(1) of the Act and the assessee has intimated the AO to treat the same return as filed in response to the notice issued u/s 148 of the Act ,it is mandatory to issue notice u/s 143(2) of the Act to assume the jurisdiction to proceed with the reassessment proceedings. In our opinion, the assessment framed u/s 147 read with 144 of the Act dated 26.12.2017 suffers from incurable and substantive infirmities and flaws which go to the roots of the assessment. In our opinion the assessment framed by the AO is void and nullity in the eyes of law. In holding so we find support from the decision of Co-ordinate Bench in the case of M/s Sudarshan Paper & Board Pvt. Ltd. (supra) wherein the Co-ordinate Bench has held as under:

> *5. We have heard the arguments of both the sides and also perused the relevant material available on record. In support of the Revenue's case on the preliminary issue involved in Ground No. 1 relating to the validity of the assessment made by the AO u/s 147/144, the learned DR has contended that there being no return of income filed by the assessee in response to the notice issued by the AO u/s 148, there was no requirement of issue of notice u/s 143(2) and the Ld. CIT(A) is not justified in quashing the assessment made by the AO u/s 147/144 for want of issue of notice u/s 143(2). In support of this contention, he has relied on the decision of Hon'ble High Court of Jammu & Kashmir in the case of Pr. CIT vs Broadway Shoe Co. 259 Taxman 223 wherein it was held that where there was no return filed in pursuance to notice issued u/s 148, issue of notice u/s 143(2) was not required for making the assessment.*
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> *6. The learned counsel for the assessee, on the other hand, has submitted that a letter was submitted by the assessee during the course of reassessment proceedings before the AO on 09.07.2014 stating that the return originally filed u/s 139 on 26.09.2011 may be treated as the return filed in response to notice u/s 148. He has contended that the notice issued u/s 148 thus was duly complied with by the assessee and it was mandatory for the AO to issue a notice u/s 143(2) before proceedings to make an assessment u/s 147. In this regard, the learned DR has contended that the letter filed by the assessee cannot replace the return and by filing such letter, the assessee cannot be said to have complied with the requirement of filling the return of income in response to notice issued u/s 148. It is however observed that this aspect has already been considered by Hon'ble Delhi High Court in the case of Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 448 cited on behalf of the assessee and relied upon by the Ld. CIT(A) in his impugned order wherein a letter was filed by the assessee on 16.12.2010 informing the AO that the return originally filed should be treated as the return filed pursuant to the notice u/s 148. The AO thereafter, proceeded to complete the reassessment without issuing a notice u/s 143(2) and it was held by the Hon'ble Delhi High Court that the failure by the AO to issue a notice to the assessee u/s 143(2) subsequent to 16.12.2010 when the*

assessee made the statement before the AO to the effect that the original return filed should be treated as a return filed pursuant to a notice u/s 148 of the Act, was fatal to the order of reassessment. It was held that there was thus no legal infirmity in the order of the Tribunal cancelling the reassessment made by the AO on the ground that the same was made without issue of notice u/s 143(2). In our opinion, the ratio of the decision of Hon'ble Delhi High Court in the case of Jai Shiv Shankar Traders Pvt. Ltd. is squarely applicable in the facts of the present case and the Ld. CIT(A) was fully justified in quashing the assessment made by the AO u/s 147/144 of the Act by treating the same as void ab initio by relying on the same. We, therefore, uphold the impugned order of the Ld. CIT(A) on this preliminary issue and dismiss Ground No. 1 of the Revenue's appeal."

Further we observe that the said decision of the Co-ordinate Bench has been upheld by the Hon'ble High Court by dismissing the appeal of the revenue by observing and holding as under:

"The revenue has raised the following substantial question of law for consideration:

i) Whether on the facts and circumstances of the case and in law the Learned Income Tax Appellate Tribunal is justified in upholding the order of the Learned Commissioner of Income Tax (appeal), quashing the order of the Assessing Officer under Section 147/144 of the Income Tax Act, 1961 for non- issuance of notice under section 143(2) of the Act, without appreciating the facts that assessee did not comply with the notice under section 148 of the Income Tax Act, 1961 and as such notice under section 143(2) of the Income Tax Act, 1961 is not required in assessee's case ?

On perusal of the order passed by the learned Tribunal we find the legal issue involved in the case has been rightly dealt with by the learned Tribunal affirming the order passed by the Commissioner of Income Tax (Appeals) and quashing the reassessment proceeding for want of notice under Section 143(2) of the Act. In this regard usual reference may be made to the decision of the High Court of Madras in M/s. Sapthagiri Finance & Investments -vs- The Income Tax Officer TC(A) No. 159 of 2006 dated 17.07.2012. In the said decision after taking note of the decision of the Hon'ble Supreme Court in Asstt. CIT v. Hotel Blue Moon; [2010] 321 ITR 362(SC) the reassessment proceeding was set aside. The initial view was that failure to issue notice is an irregularity, which is curable when subsequently the law is well settled that it being an inherent defect is not curable. To the same effect are the decisions in Principal Commissioner of Income Tax-vs-Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 448 (Delhi) and Tiwari Kanhaiya Lai -vs- Commissioner of Income-Tax 154 ITR 109 (Raj).

In the light of the above, the order passed by the learned Tribunal is legal and valid and does not call for any interference.

Accordingly, the appeal filed by the revenue is dismissed and the substantial question of law is answered against the revenue."

In view of the present facts and ratio laid down in the above decisions, we quash the assessment framed on the preliminary issue.

16. As we have quashed the assessment framed u/s 147 read with Section 144 of the Act on the preliminary issue, the other grounds raised by the assessee are not being adjudicated and are left open to be adjudicated at any later stage if the need arises for the same. Accordingly the appeal of the assessee is allowed.

ITA No. 608/Kol/2022 for AY 2011-12.

17. At the request of the Counsel of the assessee we are adjudicating the issue on merit as raised in ground no. 5 by the assessee. The said ground is extracted below:

> *"5. For that the Ld. CIT(A) erred in confirming the action of the AO in adding back Rs. 2,87,43,923/- by application of Section 69C when the purchase was part of the books of accounts duly produced and was reflected in the audited accounts in the bank account the source of which was available from books of accounts and bank statement and the addition by application of Section 69C was not at all justified."*

18. Issue raised in ground no. 5 is against the confirmation of addition of Rs. 2,87,43,923/- which was confirmed by the Ld. CIT(A) thereby upholding the addition made u/s 69C of the Act towards purchase of shares.

19. Facts in brief are that the assessee did not file any return for the instant assessment year. Since the assessee has not filed any return of income, the AO invoked the provisions of Section 147 (explanation-2) and accordingly issued notice u/s 148 of the Act. In response to the notice issued u/s 148 of the Act, the assessee filed return of income afresh on 19.08.2016 declaring total income of Rs. 48,720/- and copy of the acknowledgment was filed before the AO on 01.09.2016. The AO observed that during the course of assessment proceedings, the assessee has sold shares worth Rs. 94,86,503/-. The AO further noted that the opening stocks during the relevant year were Rs. 2,10,80,488/- whereas the closing stocks were Rs. 4,83,95,560/-. According to the AO, the details filed by the assessee during the scrutiny proceedings did not match with the figures shown in the return of income as well as audited final accounts of the assessee. Besides the assessee did not submit the details of the transaction disclosed in its return of income of Rs. 96,86,503/-. The AO

on the basis of income tax return and tax audited report found that the assessee had purchased shares worth Rs. 3,82,30,426/- and sold shares of Rs. 94,86,503/- during the year with opening and closing stocks as stated above. According to the AO, the purchase of shares of Rs. 3,82,30,426/- could not be verified. The assessee has not filed any details during the assessment proceedings and therefore cannot be allowed the benefit of carrying forward of closing stock of shares amounting to Rs. 4,83,95,560/-. The AO further observed that the assessee did not furnish as to how the shares were acquired and source used in the stocks in the said shares. The AO noted from the balance sheet that the loan and advances as on 01.04.2010 amounting to Rs. 28,98,81,492/- had reduced to Rs. 24,81,20,332/- as on 31.03.2011 and details of loan and advance s were also not given during the course of assessment proceedings. The AO treated share purchase during the year of Rs. 3,82,30,426/- as unexplained purchase u/s 69 of the Act however deduction was allowed in respect of share sold during the year of Rs. 94,86,503/- and thereby making an addition of Rs. 2,87,43,923/-.

20. In the appellate proceedings, the Ld. CIT(A) upheld the order of AO by observing that the assessee has not filed any details of share purchased during the year and thus justified the addition u/s 69C to the tune of Rs. 2,87,43,923/- on account of unexplained purchases.

21. The Ld. A.R submitted before the Bench that the order passed by the First appellate Authority is suffering from the vice of infirmities legal as well as factual. The Ld. A.R submitted that the addition was made by the AO u/s 69C of the Act which is totally wrong and against the provisions of Act. The ld. A.R referred to the balance sheet of the assessee as filed at page Nos. 89 to 95 of PB and submitted that these transactions were duly disclosed by the assessee in the audited annual account. The Ld. A.R submitted that the opening stock of shares as on 01.04.2010 was Rs. 2,10,80,488/- whereas closing stock was Rs. 4,83,95,560/-. The Ld. A.R further submitted that the assessee purchased shares worth Rs. 3,82,30,426/- and also sold shares worth Rs. 94,86,503/-. The Ld. A.R submitted that the main reasoning of the

Ld. CIT(A) in upholding the order of AO is that the assessee has not filed the sources of purchase of shares before the AO by overlooking the fact that these shares were duly purchased out of sources available in the books of account of the assessee. The Ld. A.R submitted that assessee has produced bank statements, books of account and also explained the realizations from loan and advances. The Ld. A.R argued that as to how the provisions of Section 69C of the Act was applied which deals with the unexplained expenditure incurred by the assessee for which source is not explained or the explanation offered by the assessee is not satisfactory in the opinion of the AO. The Ld. A.R submitted that once the purchases are made out of sources available in the books of account which are placed before the authorities below, then the source is automatically explained. However both the authorities below have drawn wrong conclusion that the provisions of section 69C are applicable. The Ld. A.R therefore prayed that the grounds raised by the assessee may kindly be allowed by setting aside the order of Ld. CIT(A) and directing the AO to delete the addition.

22. The Ld. D.R on the other hand relied heavily on the orders of authorities below by submitting that though there has been wrong application of provisions of Section 69C of the Act as the assessee has shown transaction in the books of accounts however the fact remains that due to non-production of the necessary documents as directed by the AO the purchase of shares remained unexplained. The Ld. D.R therefore prayed before the Bench that the appeal of the assessee may kindly be set aside to the file of the AO, so that all the issues could be examined and verified and may be decided de-novo.

23. After hearing the rival contentions and perusing the material on record, we observe that the assessee has entered into share transactions of purchase as well as sale. The opening stocks were Rs. 2,10,80,488/- as well as closing stocks were Rs. 4,83,95,560/-. We note that assessee purchased shares worth Rs. 3,82,30,426/- and sold shares of Rs. 94,86,503/- which were duly disclosed in the books of account. We note that once the transactions were made in the books of account obviously the payments would also be made out of the available sources of the assessee which were

before the AO and therefore the invocation of Section 69C of the Act is totally wrong and against the provisions of the Act. For the sake of ready reference we would like to extract the provisions of Section 69C of the Act as under:

> "Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the [57][Assessing] Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :]
>
> [61][**Provided** that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.]"

Thus it is clear from the perusal of the above provisions that this section can be invoked if the assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof or the explanation, if any, offered by him is not, in the opinion of the AO, satisfactory then that amount could be covered and would be treated as unexplained expenditure u/s 69C of the Act but in the present case before us the facts are different. The assessee has made investments which were disclosed in the books of account and which were purchased out of the sources available in the books of account. We also note from the balance sheet that loan and advances have come down from Rs. 28,98,81,492/- to Rs. 24,81,20,332/- meaning thereby the assessee has sufficient funds and realization forms, loans and advances. We also note that the trading account of sale and purchase of shares, copy of which is filed at page 95 of PB was accepted by the AO and the loss of Rs. 14,28,851/- was also accepted. Accordingly we set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

24. Issue raised in ground no. 6 is against the confirmation of addition of Rs. 3,59,76,493/- by the Ld. CIT(A) as made by the AO towards unexplained money.

25. Fact in brief are that the AO observed that on the basis of bank statements that the assessee has deposited Rs. 3,59,76,493/- in two banks i.e. IDBI Bank and Vijaya Bank as per details given in para 7 of assessment order. The AO added the amount to

the income of the assessee be the assessee did not offer any explanation by treating the same as unexplained investments and added the same to the income of the assessee in the assessment framed u/s 143(3) read with 147 of the act dated 16.12.2016.

26. In the appellate proceedings, the Ld. CIT(A) simply dismissed the appeal of assessee on this issue by recording a finding that the assessee has failed to explain the source with evidences. The Ld. CIT(A) also noted that in the appellate proceedings, the assessee has filed certain evidences but failed to prove the source of said deposit and thus affirmed the order of AO.

27. After hearing the rival contentions and perusing the material on record, we observed from the assessment order that the AO recorded a finding that the loan and advances as on 01.04.2010 has come down Rs. 24,81,20,332/- vis-à-vis Rs. 28,98,81,492/- as on 31.03.2011. Similarly in para 7, the AO has noted that there were deposits in two banks i.e. IDBI Bank and Vijaya Bank (Three accounts) to the tune of Rs. 3,59,76,493/-. After examining the abovenoted facts and from the arguments of the assessee, we find that the deposits were partly out of the reduction in the advances of Rs. 4,17,61,160/- and also out of the maturity receipts of FDR as well as sale of shares. The assessee were made deposits and also made withdrawals from the bank accounts which were represented by the corresponding entries in the books of account. We note that the assessee has produced before the authorities below these bank statements and offers/ explanations of the deposits and sources. However the same were rejected on the ground that the necessary evidences were not produced. In our considered view when the deposits in the bank accounts are apparent out of receipts as shown in the books of accounts which were either on the account of rent receipts / interest on FDR, sale of shares, mainly proceeds of FDRs and reduction in the loan and advances. In our considered opinion, the said deposits in the bank account are fully explained and therefore we are not in concurrence with the conclusion drawn by the Ld. CIT(A) on this issue as the Ld. CIT(A) has overlooked the documents, statements/ explanation furnished by the assessee. We have examined that the evidences qua deposits/withdrawals as filed by the assessee before us and observe that

these were duly recorded in the books of accounts. Accordingly we set aside the order of Ld. CIT(A) on this issue and direct the AO to delete the addition.

28. In the result, all the appeals of the assessee are allowed.

Order is pronounced in the open court on 28th March, 2023

Sd/-	Sd/-
(Sonjoy Sarma /संजय शर्मा)	(Rajesh Kumar/राजेश कुमार)
Judicial Member/न्यायिक सदस्य	Accountant Member/लेखा सदस्य

Dated: 28th March, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s Ajanta Merchants Pvt. Ltd., Room No. 301, Avani Signature, 91A/1, Park Street, Kolkata-700016
2. Respondent – ITO, Ward-8(1), Kolkata
3. Ld. CIT(A)-NFAC, Delhi
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata