

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No. 1243/Mum/2018
(A.Y.2008-09)**

Dhanshree Infratech Private Limited 303, Western Edge 1, W.E. Highway, Borivali (E), Mumbai – 66	Vs.	ITO-12(2)(1) Aayakar Bhavan, 1 st Floor, Aaykar Bhavan, M.K. Road, Mumbai - 20
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAGCA7306J		
Appellant	..	Respondent

Appellant by :	Girish Dave
Respondent by :	Shailja Rai

Date of Hearing	07.02.2023
Date of Pronouncement	05.05.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed by the Ld. CIT(A)-20, Mumbai dated 29.12.2017 for A.Y. 2008-09. The assessee has raised the following grounds before us:

- “1. The Assessment Order is illegal, void ab initio and bad in law as the Assessing Officer has passed the impugned Order on 24.06.2016 which date is beyond the period of limitation prescribed under Sec. 153 of the Income Tax Act and therefore the entire Assessment Order is non-est and void ab initio and Ld. CIT (Appeals) has erred in holding that the appellant could not substantiate the ground.*
- 2. On the facts and in the circumstances of the case and in law Learned Assessing Officer has erred in issuing notice under Section 148 of the Act beyond a period of four (4) years in terms of 1st proviso to Section 147 of the Act.*

3. *The Lower Authorities failed to appreciate that the Assessment Order is illegal and bad in law as the reassessment proceedings are without jurisdiction for the reason that re-opening of assessment is sought to be done for examination of alleged excess share-premium received and therefore the reasons for reopening of assessment do not disclose any concrete material available with the Assessing Officer to form a prima facie belief that income has escaped assessment at the time of the issue of Notice under Sec. 148 of the Income Tax Act.*
4. *On the facts and in the circumstances of the case and in law Learned Assessing Officer has erred in issuing notice under Section 148 of the Act on erroneous grounds and without valid reason.*
5. *Without prejudice to the aforesaid grounds that the entire reassessment Order is void ab initio, on the facts and in the circumstances of the case and in law the Lower Authorities erred in making an addition of Rs.119,10,07,000/- under Sec.68 of the Income Tax Act.*
6. *On the facts and in the circumstances of the case and in law, the Assessing Officer erred in applying Section 68 to the alleged excess share-premium received by the Assessee amounting to Rs.89,03,07,000/-.*
7. *On the facts and in the circumstances of the case and in law, the Assessing Officer erred in applying Section 68 to the amount received by the Appellant Company from Amaya Infrastructure Pvt. Ltd. amounting to Rs.30,07,00,000/- which was repaid by banking channel in the same year.*
8. *On the facts and in the circumstances of the case and in law, the Lower Authorities erred in ignoring the fact that the identity, capacity and genuineness of the transactions were proved to the hilt by the Assessee Company for which Assessing Officer himself made inquiries from creditors under Section 133(6) of the Act and therefore Section 68 could not have been invoked by the Assessing Officer.*
9. *The Lower Authorities erred in not taking note that the Assessing Officer assessing Amaya Infrastructure Pvt. Ltd. had taxed in the hands of Amaya Infrastructure Pvt. Ltd. the same amount sought to be taxed in the case of the Assessee under Sec.68 of the Income Tax Act and therefore no addition could have been made under Sec.68 of the Income Tax Act in the case of the Assessee as such amount of addition has been held to be income of Amaya Infrastructure Pvt. Ltd. by the department.*

The Appellant craves leave to add, alter, amend, or delete all or any of the aforesaid grounds of appeal.”

2. Fact in brief is that return of income declaring total income of Rs.6,10,726/- was filed on 25.09.2008. The return of income was processed u/s 143(1) of the Act. Subsequently, the case was reopened u/s 147 of the Act by issuing of notice u/s 148 of the Act on 24.03.2015. The assessee is engaged in the business of civil construction. The assessee is a private limited company originally known as M/s Ankita Mercantile

Pvt. Ltd. which was incorporated on 15.10.2007 and presently the companies after name change is known as M/s Dhanshree Infratech Pvt. Ltd. The case of the assessee was reopened on the basis of information that it had received share premium amounting to Rs.89,03,07,000/- on issue of shares during the years.

3. On query, the assessee explained that the civil contracts were undertaken by M/s Dhanshree Developer Pvt. Ltd. (DDPL) mainly from the government, semi-government and from other parties. It was not possible for the M/s DDPL to provide a further sub-contract to the assessee company i.e Dhanshree Infratech Pvt. Ltd. as it was not having sufficient financial strength in the Balance Sheet. Therefore, it was decided to increase the share capital and reserves to the extent that it would be possible for M/s DDPL to sub-contract its work undertaken from the government, semi-government and private parties to the assessee company. For this purpose shares were issued by the assessee company, M/s DDPL and M/s Amaya Infrastructure Pvt. Ltd. to each other. The assessee submitted that the funds were getting transferred from one account to another and being returned in a circular manner from the following three accounts:

Sr. No.	Name of the account holder	Current A/c No.	Name of the bank and branch	Opening balance as on 1.04.2007
1.	M/s Amaya Infrastructure P .Ltd.	1201/779	Model Co-op Bank Ltd. Borvali Branch	NIL
2.	M/s Ankita Mercantile P. Ltd.	1201/774	Model Co-op Bank Ltd. Borvali Branch	NIL
3.	M/s Dhanshree Developers Pvt. Ltd.	1201/679	Model Co-op Bank Ltd. Borvali Branch	Rs.2,07,420/-

One example of circulation of funds between the assessee and M/s Amaya Infrastructure Pvt. Ltd. and M/s DDPL were as under:

EXAMPLE-I

<i>DATE</i>	<i>DESCRIPTION</i>	<i>AMOUNT</i> <i>RS.</i>
08.12.2007	Ankita Mercantile received	8,00,00,000
08.12.2007	Ankita Mercantile paid to M/s. Dhanshree Developers	8,00,00,000
28.12.2007	Dhanshree Developers paid to M/s Amaya Infrastructure P. Ltd.	8,00,00,000
28.12.2007	Amaya Infrastructure paid to M/s. Ankita Mercantile	8,00,00,000
28.12.2007	Ankita Mercantile paid to M/s. Dhanshree Developers	8,00,00,000
28.12.2007	Dhanshree Developers paid back to M/s Amaya Infrastructure	8,00,00,000

The assessee stated that same money was brought into its books in the form of share capital/share premium and the total funds were available with the 3 entities was Rs. 8 crores. The transfer was done through namely banking channel by way of 16 transactions between the period 28.12.2007 and 18.01.2008. The assessee company in turn transferred the same Rs. 120 crores to M/s Ankita Mercantile Pvt. Ltd. as the share application money towards issue of its non-cumulative redeemable transactions shares of Rs.10 each at premium of Rs.990 per preference share. The transfer was made through the same 16 transactions on the same date and for the same account. It was also submitted that because of circular nature of transaction, the actual amount used was only Rs.8 crores which was legitimately available in the bank account of M/s DDPL on 28.12.2007.

4. The A.O has not agreed with the submission of the assessee and stated that a company which was just two months and 13 days old cannot fetch in the market to 250% of its face value with the financial at that point of time. The A.O further stated that assessee company could not substantiate the claim and only delayed and evaded the assessment process. Therefore, the claim of receipt of share premium

was denied and added back u/s 68 of the Act as unexplained cash credit to the total income of the assessee.

5. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

6. During the course of appellate proceedings before us the assessee has filed additional ground of appeal on 24.02.2021 as under:

“11. On the facts and in the circumstances of the case and in law, Learned Assessing Officer has erred in reopening assessment with the issue of notice under Section 148 of the Act without any independent application of mind to tangible material and reasons recorded failed to demonstrate any link between tangible material and formation of reason to believe that income had escaped assessment.

12. Without prejudice to any of the aforesaid grounds, on the facts and in the circumstances of the case and in law, Learned Addl. CIT erred in recording satisfaction in a mechanical manner and without application of mind to accord sanction for the issue of notice under Section 148 of the Act and thus reopening of assessment was invalid.”

The ld. Counsel submitted that additional grounds are the legal grounds challenging the validity of the reopening of the assessment and such ground can be raised by the assessee at any appellate stage and referred the decision of Hon'ble Supreme Court in the case of National Thermal Power Company Vs. CIT, (229 ITR 383).

7. We have heard both the sides and perused the material on record. The ld. Counsel submitted that the additional grounds are the legal ground challenging the validity of reassessment proceedings. The Ld. Counsel also submitted that being legal grounds the same may be decided on the basis of material already on record. Therefore, after considering the decision of Hon'ble Supreme Court as referred supra, these ground of appeal are admitted and are taken for adjudication.

8. The ld. Counsel Shri Girish Dave referred page no. 21 of the paper book comprising copy of reason recorded. After referring reason recorded he first contended that no independent inquiry was made by

the AO after receipt of the alleged information. In this regard the Id. Counsel has placed reliance on the decision of Pr. CIT Vs. Meenakshi Overseas Pvt. Ltd (2017) 82 taxmann.com 300 (Delhi) of Hon'ble Delhi High Court.

9. He has raised second contentions on the following issues:
- i. Mr. Girish Dave submitted that Additional Commissioner of Income Tax has given sanction for issuing of notice u/s 148 of the Act in a mechanical manner without application of mind by stating only "Yes I am satisfied". The Id. Counsel has referred the decision of Hon'ble Supreme Court in the case of CIT, Jabalpur vs. Shri Goyanka Lime & Chemical Ltd. (2015) 64 taxman.com 313 (SC) dated 08.07.2015. He also referred page no. 8 of the paper book comprising copy of notice issued u/s 148 on 24.03.2015 and submitted that at para 3 of the notice it was not mentioned that the notice was issued after obtaining sanction of the Additional CIT. In this regard he has referred the decision of ITAT Delhi in the case of Pioneer Town Planners Pvt. Ltd. Vs. DCIT, Circle 19(2) vide ITA No. 132/Del/2018 dated 06.08.2018.
 - ii. 11. The Id. Counsel has also pointed out that the notice u/s 148 issued by the AO is also not supported by the proper sanction/satisfaction of the higher authority as evident from the Column No. 12 of the form for obtaining the approval of the Addl. Commissioner of Income Tax wherein the Addl. CIT has only mentioned as "Yes I am satisfied." After referring the above he further contended that that there is a non-application of mind on the part of the sanctioning authority while granting the sanction and further after considering the decision of Hon'ble Supreme Court of CIT, Jabalpur vs. Shri

Goyanka Lime & Chemical Ltd. (2015) 64 taxman.com 313 (SC) dated 08.07.2015.

- iii. He further referred page no. 6 of the paper book comprising form for recording the reasons for initiating the proceedings u/s 148 and obtaining the approval of the Additional CIT. He has referred column no. 7 of the proforma wherein the A.O mentioned that provisions of Sec. 147(b) is applicable to the case of the assessee. In this regard the ld. Counsel contended that provision of Sec. 147(b) was not there in the statute on that date in the case of the assessee and such proceedings are not valid. The ld. Counsel has placed reliance on the decision of Hon'ble jurisdictional High Court of Bombay in the case of Smt. Kalpana Shantilal Haria Vs. ACIT W.P. (L) No.3063 of 2017 dated 22.12.2017.

10. On the other hand, the ld. D.R after referring page 5 of the paper book pertaining to the reason recorded submitted that the A.O has made further examination after receipt of information and it had been mentioned in the reason recorded that on perusal of the return of income found that share premium were unjustified and it was substantially more than the intrinsic value of the shares of the company. The ld. D.R also submitted that assessee has participated in the assessment proceedings without raising objections, therefore, the assessee cannot raised the objection against the assessment.

11. Heard both the sides and perused the material on record. We have perused the copy of reason recorded placed in the paper book the extract of the same is reproduced as under:

:: ANNEXURE ::

The return of income was e-filed on 25.09.2008 declaring total income at Rs 6,10,726/-. The assessment was completed u/s 143(1)

Information is received from the investigation wing, DIT-(I & CI) in respect of share premium received by the assessee company amounting to Rs 89,03,07,000/- on issue of shares during the year. On perusal of the return of income filed by the assessee company, it is found that the share premium is unjustified and it is substantially more than intrinsic value of the shares of the company. Prima facie the share premium received is found to be more than the share valuation of the assessee company. Thus, there is reason to believe that the disproportionate share premium charged by the company is out of its own funds received through various channels. Accordingly, the extra amount received by the assessee company routing it through share premium channel requires to be verified. To that extent, I have reason to believe that the income has remained to be taxed in the hands of the assessee company to that extent.

In order to verify the genuineness of the aforesaid transactions, it is necessary to scrutinize the books of accounts/ bills/ vouchers of the assessee company.

In view of the above, there is reason to believe that the assessee has used colourable device to introduce funds by way of share premium which are liable to be taxed. The income chargeable to tax has escaped assessment by virtue of clause (b) to explanation 2 to section 147 for failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment within the meaning of provision to section 147 of the I.T ACT 1961.

Since, the relevant assessment year 2008-09 and that scrutiny assessment order has been passed for this assessment year, necessary permission u/s 151(2) is sought for re-opening of the assessment.

13.03.15
11
AD

(Devidas K Chhabria)
Income tax officer 12(2) (1)

After perusal of the reason recorded it is evident that the assessing officer after receiving all the information carried out the further exercise of verification of the information received from the return of income filed by the assessee company and thereafter come to the satisfaction that share premium was unjustified and it was substantially more than intrinsic value of the shares of the company. Therefore, we consider that A.O has not issued the notice u/s 148 on the borrowed satisfaction and further exercise was carried out by verifying information received with the inputs available in the return of income before coming to subjective satisfaction at the initial stage before issuing notice u/s 148 of the Act.

12. On the second contention raised by the ld. Counsel that in the form for recording the reasons for initiating proceedings u/s 148 and for obtaining the approval of the Addl. Commissioner of Income Tax it was incorporated in the column no. 7 that provision of Sec. 147(b) of the Act

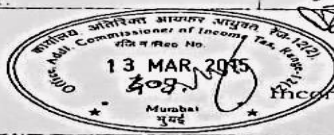
are applicable to the case of the assessee. We have perused the impugned Form for recording the reasons for initiating proceedings u/s 148 and for obtaining the approval of the Addl. Commissioner of Income Tax and found that A.O had specifically mentioned in the above referred Column No. 7 that provisions of Section 147(b) are applicable in the case of the assessee. The impugned form as referred supra which is reproduced as under:

ANNEXURE 'C'

Form for recording the reasons for initiating proceedings u/s 148 and for obtaining the approval of the Addl. Commissioner of Income tax.

1.	Name of the assessee	M/s Ankita Mercantile Pvt. Ltd. (now known as M/s. Dhanshree Infratech Pvt. Ltd.)
2.	PAN	AAGCA7306J
3.	Status	Company
4.	District/Circle/ Ward	ITO 12(2)(1), Mumbai
5.	Assessment year in respect of which it is proposed to issue notice u/s 148	2008-09
6.	The quantum of income which has escaped assessment	Rs. 89,03,07,000/-
7.	Whether the provisions of sec 147(a) or 147(b) or both are applicable	147 (b)
8.	Whether the assessment is proposed to be made for the first time. If the reply is affirmative please state: e. Whether any voluntary return had been filed and f. If so, the date of filing the said return	Yes Yes 25.09.2008
9.	If the answer to item 8 is negative, e. The income originally assessed f. Whether it is a case of under assessment, assessment at too low rate, assessment which has been made the subject of excessive relief or allowing of excessive loss or depreciation	N.A.
10.	Whether the provisions of sec. 150(1) are applicable. If the reply is affirmative, the relevant facts may be stated against item 11 and it may also be brought out that the provisions of sec 150(2) would not stand in the way of initiating the proceedings u/s 147	N.A.
11.	Reasons for the belief that income has escaped assessment.	As per Annexure

Date: 13.03.2015


 (Devidas K Chhabria)
 Income tax Officer 12(2)(1), Mumbai

12.	Whether the Addl. Commissioner is satisfied on the reasons recorded by the ITO that it is a fit case for the issue of notice u/s 148	Yes! I am satisfied! (ABHIJIT PATANKAR) Addl. Commissioner of Income-tax Rg. 12(2), Mumbai
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In this regard, we have perused the decision of Hon'ble jurisdictional High Court of Bombay in the case of Smt. Kalpana Shantilal Haria Vs. ACIT W.P. (L) No.3063 of 2017 dated 22.12.2017 as referred by the Id. Counsel. The relevant operating part of the decision is reproduced as under:

- “6. *The grievance of the petitioner is that there is no proper sanction in view of non application of mind by the Joint Commissioner of Income Tax. The Assessing Officer has invoked a provision of law to sustain the impugned notice which is admittedly not in the statute and the Joint Commissioner has yet approved it.*

7. *Mr. Chanderpal, learned Counsel appearing for the Revenue 7 tendered a copy of the letter dated 19 December, 2017 issued to the petitioner wherein the Assessing Officer has stated that the words *147(b)" were inadvertently filled in the prescribed form, instead of Section 147 of the Act while obtaining the sanction from the Joint Commissioner of Income Tax. It is further submitted on behalf of the Revenue that the same is a curable defect under section 292B of the Act. Therefore, the impugned notice cannot be held to be bad for mere incorrect mentioning of section on account of the mistake.*

8. *There can be no dispute with regard to the application of Section 2928 of the Act to sustain a notice from being declared invalid merely on the ground of mistake in the notice. However, the issue here is not with regard to the mistake / error committed by the Assessing Officer while taking a sanction from the Joint Commissioner of Income Tax but whether there was due application of mind by the Joint Commissioner of Income Tax while giving the necessary sanction for issuing the impugned notice. It is a settled principle of law that sanction granted by the higher Authority for issuing of a reopening notice has to be on due application of mind. It cannot be an mechanical approval without examining the proposal sent by the Assessing Officer. Prima facie, it appears to us that if the Joint Commissioner of Income Tax would have applied his mind to the application made by the Assessing Officer, then the very first thing which would arise is the basis of the notice, as the provision of law on which it is based is no longer in the statute. Non pointing out the mistake/ error by the Joint Commissioner of Income Tax on the part of the Assessing Officer is prima facie evidence of non- application of mind on the part of the sanctioning authority while granting the sanction.”*

Following the decision of Hon’ble jurisdictional High Court as supra on similar issue and identical fact as supra we consider in the case of the assessee had the sanctioning authority applied the mind then the mistake/error on the part of the A.O for issuing the notice on the basis of unexisted provisions of Section 147(b) would have been corrected. Therefore, following the decision of the Hon’ble jurisdictional High Court as referred supra the additional ground filed by the assessee are partly allowed. No arguments were made by the ld. Counsel for the assessee in respect of original ground of appeal, therefore, they are left open for adjudication for the need arise.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 05.05.2023

Sd/-

(Aby T Varkey)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 05.05.2023

Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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