

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "A" DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER  
And  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.7921/DEL/2019  
Assessment Year 2010-11

<b>Bhaijee Commodities Pvt. Ltd.</b> 14, Central Market Ashok Vihar New Delhi	v.	<b>ACIT</b> Circle-4(2) New Delhi.
TAN/PAN: AAACB8905G		
(Appellant)		(Respondent)

ITA No.9133/DEL/2019  
Assessment Year 2010-11

DCIT Central Circle-8 New Delhi	v.	Bhaijee Commodities Pvt. Ltd. 14, Central Market Ashok Vihar New Delhi
TAN/PAN: AAACB8905G		
(Appellant)		(Respondent)

Assessee by:	Shri Surinder Mahajan CA Shri Samir Mahajan CA		
Department by:	Shri Kanav Bali, Sr.DR		
Date of hearing:	20	06	2023
Date of pronouncement:	07	08	2023

**ORDER**

**PER PRADIP KUMAR KEDIA, A.M.:**

The captioned Cross Appeals have been filed at the instance of the Assessee and the Revenue against the order of the Commissioner of Income Tax (Appeals)-2, Delhi ['CIT(A)' in short], dated 09-08-2019 arising from the reassessment order dated 22-12-2017 passed by the Assessing Officer (AO) under Section 147 r.w.s 143(1) of the

Income Tax Act, 1961 (the Act) concerning AY 2010-11 in question.

2. The Grounds of Appeal raised by the assessee read as under:

- “1(i) That on facts and circumstances of the case, the Ld. CIT(A) has erred in upholding validity of notice u/s 148 and consequential reassessment proceedings u/s 147 even though the same are without recording proper reasons in terms of provisions of section 147 of the Income tax Act, 1961 and requisite approval in terms of provisions of section 151 of the Act.*
- (ii) That the reasons have been recording solely on the basis of information from investigation wing and there being no independent application of mind, the reopening u/s 147 is merely on the basis of borrowed satisfaction and not sustainable under the law*
- (iii) That information from investigation wing being not in the nature of tangible material, the reasons are merely recorded on the basis of suspicion and as such the notice u/s 148 is illegal and without jurisdiction.*
- (iv) That the assessing office having failed to properly deal with and dispose- off objection to notice u/s 148, the reassessment proceedings are in disregard to principle laid down Apex Court and are liable to be quashed.*
- 2(i) That on facts and circumstances of the case, the Ld. CIT(A) has erred in confirming addition of Rs. 50,00,000/- u/s 68 being share capital received from M/s. Shalini Holding P. Ltd. in total disregard to documentary evidence placed on record and remand report of the assessing officer.*
- (ii) That transaction of share capital being supported from relevant documentary evidences and there being no dispute with regard to identity and genuineness of the party, the impugned addition u/s 68 is misconceived and merely on arbitrary basis.*
- (iii) That the notice u/s 133(6) was duly complied with by the share applicant during remand proceedings and the existence and identity of the share applicant having been accepted by the assessing officer in remand report, the impugned order is contrary to facts and not sustainable*

*under the law.*

- (iv) *That appellant having discharged the burden of proof and in absence of any adverse material, the addition u/s 68 is on the basis of conjectures and surmises.*
- 3(i) *That on facts and circumstances of the case, the Ld. CIT(A) has grossly erred in upholding addition of Rs. 2,35,49,859/- being profit earned from transactions undertaken on NCME platform without appreciating that such profit has duly been accounted for and corroborated from audited accounts.*
- (ii) *That the allegation of fictitious profits is unsubstantiated, whimsical and merely on the basis of information from investigation wing without verifying the books of account and there exists no valid basis of presuming any undisclosed income in respect of transaction carried out at NCME platform which is a recognized stock exchange particularly when the entire profit arising out of the impugned transactions have been duly disclosed.*
- (iii) *That such profit is part of business activities and allegation of same being fictitious and unaccounted is highly arbitrary and unjustified.*
- (iv) *That similar claim of profit having been accepted in immediately subsequent AY 2011-12 vide order u/s 147/143(3), the impugned addition is illegal and without any basis.*
- (v) *That the action of the assessing Officer is illegal and merely on surmises and conjectures and resulting in double assessment of same profit.*
- 4(i) *That on the facts and circumstances of the case, the Ld. CIT(A) was not justified in the confirming addition to the extent of Rs.14,12,991/- on the alleged ground of unexplained expenditure in respect of commission charged in respect of above mentioned transactions carried on NCME platform.*
- (ii) *That the said addition is illegal and arbitrary basis merely on surmises and conjectures.*
5. *That the orders passed by lower authorities are not*

*sustainable on facts and are bad in law.*

6. *That the appellant craves leaves to add, alter, amend, forgo any of the grounds of appeal before or at the time of hearing.”*

3. The assessee has also raised the additional grounds of appeal touching the jurisdiction. Having regard to the submissions made that the relevant facts are available on record which may require for adjudication of additional grounds, we may consider it expedient to advert to the additional ground of appeal under Rule 11 of the Income Tax [Appellate Tribunal] Rules, 1963. The version of the assessee in its petition for admission of additional grounds of appeal thus read as under:

“That very initiation of proceedings u/s 148 is bad in law in as much as action has been taken on the basis of a document found at the premises of a third party, thus proceedings if at all, were required to be initiated under the provisions of Section 153C of the Act.

It may kindly be held that notice u/s 148 issued by the AO was illegal and invalid and consequent assessment framed u/s 147/148 of the Act be held illegal and bad in law.

Additional ground involving legal issues can be raised, keeping in view Judgment of the Apex court in the case of **National Thermal Power Co Ltd. v.v. Commissioner of Income Tax 229 ITR 383.**”

4. The prayer for admission of additional grounds noted above which are not set forth in memorandum of appeal are being admitted for adjudication in terms of Rule 11 of Income Tax (Appellate Tribunal) Rules, 1963 owing to the fact that objections raised in additional grounds are legal in nature for which relevant facts are stated to be emanating from existing records.

5. Concurrently, the Revenue by way of its grounds of appeal has also challenged the part relief granted to the Assessee by the

CIT(A). The Grounds raised are also reproduced hereunder:

- “1. *That the order of the Ld.CIT(A) is not correct in law and on facts.*
2. *That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the additions of Rs.1,50,00,000/- made by the A.O. without verifying the capacity of the lenders and genuineness of the transactions.*
3. *Whether the Ld.CIT(A) was correct in law and facts in deleting the addition made by the A.O. without examining the source of share capital invested in Assessee Company”*

6. Briefly stated, the assessee-company is a brokerage house engaged in the services of commodities. The assessee has *inter alia* executed transactions towards commodities trading on by using National Multi-Commodity Exchange (NMCE) platform through certain brokers and sub-brokers. The assessee filed its return of income on 29.07.2010 declaring total income at Rs.26,49,495/- concerning Assessment Year 2010-11 in question. The return filed was assessed under Section 143(1) of the Act. Subsequently, on the basis of certain information received from investigation wing of the deptt, the re-assessment proceedings were initiated and the notice under Section 148(1) was issued on 31.03.2017 to assume jurisdiction for re-assessment under Section 147 of the Act. The re-assessment proceedings under Section 147 were completed vide reassessment order dated 22.12.2017 after making additions to the extent of Rs.4,49,62,850/-. The details of additions made by the Assessing Officer are listed hereunder:

- “a. *Addition u/s. 68 in respect of Share Capital Rs.2,00,00,000/-*
- b. *Addition in respect of undisclosed profit earned Rs.2,35,49,859/-*

*c. Addition of Notional Commission Rs.14,12,991”*

7. Aggrieved, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee challenged the action of the Assessing Officer both on (a) lack of jurisdiction under S. 147 of the Act as well as (b) lack of merits in additions carried out by the AO. The CIT(A) did not see any merit in the challenge to jurisdiction assumed by the AO under S. 147 of the Act and endorsed the assumption of jurisdiction for reassessment of income. However, on appraisal of facts on merits, the CIT(A) granted partial relief to the extent of Rs.1,50,00,000/- out of additions of Rs.2 crores made under Section 68 in respect of share capital subscribed by various parties. Thus, on merits, the CIT(A) sustained the additions to the extent of Rs.50 lakh under section 68 on account of subscription of share in relation to one of the parties namely; ‘Shalini Holdings Pvt. Ltd.’ on the premise that this subscriber co. is a shell co. engaged in providing accommodation entries and is found to be controlled and operated by one Shri S.K. Jain Group as alleged by the Investigation Wing of the deptt. pursuant to search conducted on S K Jain group. The additions of Rs.50 lakh on account share subscription by Shalini Holding was thus confirmed by the CIT(A) while other subscription by other 3 parties were found to be boanfide and thus additions for remaining amount of Rs. 1.5 cr. was cancelled. Similarly, the CIT(A) declined to interfere with the additions of Rs.2,35,49,859/- made by the Assessing Officer on account of fictitious gains from transactions carried out on NMCE [National Multi Commodity Exchange] platform. The CIT(A) upheld the additions made by the Assessing Officer alleging indulgence in tax evasion practices by the assessee by claiming fictitious profits/losses by using NMCE platform. The CIT(A) also declined to interfere with the additions made amounting to Rs.14,12,991/- by the Assessing Officer alleging

unexplained expenditure on account of commission paid to indulge in obtaining fictitious profits by misusing NMCE platform.

8. Aggrieved by the first appellate order wherein some relief was granted by the CIT(A), both the Assessee and Revenue have filed respective appeal as captioned above.

9. The grounds of appeal raised by the assessee in ITA No.7291/Del/2019 are three fold; (i) challenge to the assumption of jurisdiction under section 147 /148 r.w.s 151 (ii) wrong assumption of jurisdiction under S. 147 instead of statutory path available under s. 153C of the Act and (iii) challenge to the action of the Assessing Officer (AO) in making certain additions /disallowances on merits in pursuance of the assumption of jurisdiction under s.147 of the Act.

10. The Revenue, on the other hand, has challenged the action of the CIT(A) in granting relief out of additions made by the Assessing Officer under Section 68 on account of share capital subscription.

11. When the matter was called for hearing, the Id. counsel for the assessee adverted to the main grounds and strongly voiced objection on legal ground of lack of jurisdiction available under Section 147 of the Act. The Id. Counsel contended that the assumption of jurisdiction by the AO in the instant case is without meeting the pre-requisites ordained in S. 147 and s. 151 of the Act. As per the additional ground, the assessee has impugned the action of the AO for exercising powers available under s. 147 rather than the legal recourse available under s. 153C as per the scheme of the Act. The Id. counsel for the assessee made wide ranging objections towards lack of jurisdiction which are dealt with at appropriate place in the

succeeding paragraphs. The Ld. Counsel also assailed the action of the AO and CIT(A) on aspects of merits. The Revenue, on the other hand, defended the action of the Assessing Officer and CIT(A) on the point of jurisdiction but assailed the relief granted by the CIT(A) to the extent of Rs. 1.50 Crs. out of additions of Rs. 2 Crs. carried out by the AO.

12. As noted above, the assessee has *inter alia* challenged the jurisdiction of the Assessing Officer assumed under Section 147 rws s.148 rws 151 of the Act. Since, the challenge to the legality of reopening being jurisdictional one and goes to the root of the whole controversy, it will be appropriate to adjudicate this aspect of the appeal first.

13. The reasons recorded under Section 148(2) of the Act being *germane* to the adjudication of jurisdictional issue, are reproduced hereunder:

*“Reasons recorded for initiating proceedings u/s 148 of the I.T. Act, 1961 In the case of M/s Bhaijee Commodities Pvt Ltd (PAN : AAAC8890S6)- A.Y. 2010-11 Information had been received from DIT(Inv.)-II, New Delhi vide letter F.No DIT(Inv.)-II/U/s148/2012-13/198 date/12.03.2013 & also from the DDIT(Inv.), Unit-VI(2), New Delhi vide letter F.No.DDIT(Inv.)/ U-VI(2)) / information sharing / 2012-13/ 133 dated 22.03.2013 that a search & survey action was conducted by the investigation wing, Delhi the case of Shri Surendra Kumar Jain (S K Jain) on 14.09.2010. It was gathered that Shri Surendra Kumar Jain and his brother Sh. Virendra Jain were engaged in the business of providing accommodation entries by providing RTGS/Cheques/PO/DD in lieu of cash, to a large number of beneficiary companies through various paper and dummy companies floated controlled by them.*

2. *Further, it has been revealed from the aforesaid information /details that M/s. Bhaijee Commodities Pvt. Ltd has received accommodation entries in the form of share*

*capital/premium during the financial year 2009-10 relevant the AY 2010-11 from the following companies managed and controlled by S K Jain Group:*

<i>Sr. No.</i>	<i>Name of Company operated by SK Jain Group</i>	<i>Name of the Beneficiary company</i>	<i>PO/Cheque No./RTGS</i>	<i>Dated</i>	<i>Bank</i>	<i>Amount (Rs.)</i>
1.	<i>M/s. Shalini Holding Pvt ltd.</i>	<i>M/s. Bhaijee Commodities Pvt. Ltd.</i>	<i>RTGS</i>	<i>06.04.2009</i>	<i>Axis</i>	<i>50,00,000</i>
<i>Total :</i>						<i>50,00,000</i>

3. *Now, the Income Tax Return of assessee company i.e. M/s Bhaijee Commodities Pvt Ltd has been downloaded from the ITD system .On comparative examination of return of Income of the assessee company for A.Y. 2009-10 & 2010-11, the following has been observed with regard to the share capital and share premium of the assessee company:-*

<i>Sr. No.</i>	<i>Particulars</i>	<i>A.Y 2009-10</i>	<i>A.Y. 2010-11</i>	<i>Increase (+)/Decrease (-)</i>
1.	<i>Authorized Share Capital</i>	<i>Rs.3,00,00,000</i>	<i>Rs.10,00,00,000</i>	<i>Rs.7,00,00,000 (+)</i>
2.	<i>Issued Subscribed and paid up capital</i>	<i>Rs.2,00,00,000</i>	<i>Rs.4,00,00,000</i>	<i>Rs.7,00,00,000 (+)</i>
3.	<i>Security Premium/ Account</i>	<i>Nil</i>	<i>Nil</i>	<i>Nil</i>
4.	<i>Unsecured Loan</i>	<i>Nil</i>	<i>Nil</i>	<i>Nil</i>

*From the above tabulated data, it is observed that the assessee company has increased its Authorized Share Capital / share premium/security premium Account/unsecured loan.*

*Thus the Information received from the investigation wing is corroborated by the particulars shown by the assessee company in its return of income.*

4. *Simultaneously, Information has been received from*

*Deputy Director of income TAX (Inv.), unit - 3(1), Kolkata vide letter F. No. DDIT(inv.)/ Kol./ NMCE/ Report/ 2016-17/6104 dated 17.03.2017 wherein it is informed that some companies have indulged in tax evasion practices by claiming fictitious profits/losses by creating artificial volume in commodity trading by using National Multi-Commodity Exchange {NMCE} platform.*

5. *Based on the Forward Market Commission (FMC) report that "clients/members of NMCE were found to be involved in creating artificial volume and suspected evasion of Income Tax by misuse of NMCE platform", a focused survey action u/s 133A of the Income Tax Act, 1961 was conducted by Pf. Director of Income Tax (Inv.),' Ahmedabad at the premises of NMCE and backup of the NMCE trade was taken. The information in the database was perused and analyzed and a list of 85 suspicious parties was generated. After analysis, most of the companies in the said list were found to be shell companies and were not filing Returns of Income and some who filed UR, did not claim loss from the transactions as mentioned above in their return of income. On detailed analysis, it was established that the brokers have misused NMCE platform and created non genuine losses and profit which were given to different clients/beneficiaries according to their requirement.*

6. *As per the information, M/s Bhaijee Portfolio Ltd. (PAN No. AACCB9390H) was found to have indulged in getting/obtaining fictitious profit/loss entries through NMCE platform available with brokers during the F.Y. 2009-10. The details of such transactions are as under:-*

<i>PAN of Beneficiary Client</i>	<i>Name of Beneficiary Client</i>	<i>Whether fictitious Profit or Loss</i>	<i>Name of Sub Broker</i>	<i>Amount in Rs.</i>
<i>AAACB8905G</i>	<i>Bhaijee Commodities Pvt. Ltd</i>	<i>Profit</i>	<i>Advent Commodities</i>	<i>11,79,079</i>
<i>AAACB8905G</i>	<i>Bhaijee Commodities Pvt. Ltd</i>	<i>Profit</i>	<i>Fairdeal Vincom Pvt</i>	<i>1,32,81,789/-</i>
<i>AAACB8905G</i>	<i>Bhaijee Commodities Pvt. Ltd</i>	<i>Profit</i>	<i>Gulistan Vaniya</i>	<i>2,96,750/-</i>
<i>AAACB8905G</i>	<i>Bhaijee Commodities Pvt. Ltd</i>	<i>Profit</i>	<i>Gubert Merchant</i>	<i>17,37,000/-</i>
<i>AAACB8905G</i>	<i>Bhaijee Commodities Pvt. Ltd</i>	<i>Profit</i>	<i>Hemant Saraogi</i>	<i>49,57,554/-</i>

AAACB8905G	Bhaijee Commodities Pvt. Ltd	Profit	Manobir Synthetic	10,22,850/-
AAACB8905G	Bhaijee Commodities Pvt. Ltd	Profit	Rupam Traders	8,22,700/-
AAACB8905G	Bhaijee Commodities Pvt. Ltd	Profit	Yashwi commodities Pvt. Ltd.	2,52,137/-
<i>Total</i>				2,35,49,853/-

7. On perusal of the above table, it appears that M/s Bhaijee Commodities Pvt. Ltd. made use of non-genuine NMCE transactions to book contrived gains. The total amount of transactions in the form of fictitious gains involves Rs. 2,35,49,859/-. On perusal of the ITR of M/s. Bhaijee Commodities Pvt., it is observed that the profit so earned has not been reflected by the assessee company. At the same time, as per prevalent market practice, payment of commission ranging from 3% to 6%, amounting to Rs. 14,12,991/- (Rs. 2,35,49,859/- @ 6%) were also made by assessee outside its books of accounts which needs to be brought to tax.

8. I have carefully perused and analyzed the facts of the case as detailed above and the following facts emerge from the same:-

(i) Particulars of parties are found recorded in the information received from investigation unit, from whom the assessee company has received fictitious gain/loss

(ii) Perusal of the information in table, it clearly shows that the name- of the assessee company M/s. Bhaijee Portfolio Ltd. appears as beneficiary who were provided fictitious profits/loss entries from various parties by misusing the NMCE platform.

On perusal of the assessment records, it appears that the assessee company has not disclosed any expense on account of commission paid for obtaining fictitious gain/loss from the transactions carried out through NMCE platform.

9. From the above discussion, it is evident that the undisclosed income amounting to Rs. 50,00,000/- in this case has been introduced by Shri SK Jain Group of companies in the form of share capital/premium/loan and assessee company has also obtained fictitious entries of profits amounting to Rs. 2,35,49,859/- to cover unaccounted income and reduce tax Instance from the transactions carried out through NMCE

*platform and in the process has also Incurred-commission expenses amounting to Rs.14,12,991/- outside its books of accounts. The assessee has, thus failed to disclose fully & truly all material facts necessary for assessment. Therefore, after consideration the information received and facts of the case, I have reason to believe that income chargeable to tax to the tune of Rs.2,99,62,850/- has escaped assessment by reason of failure on the part of the assessee to disclose all material facts fully and truly which requires to be now brought for taxation by invoking the provisions of section 147 of the Income tax act, 1961.”*

14. In response to the notice issued under Section 148(1) proposing reopening of the assessment, the assessee denied any escapement of income and filed objection dated 02.05.2017 before the Assessing Officer in this regard. The Assessee also called upon the AO to supply the basis or material for escapement alleged in the reasons recorded. The Assessing Officer, in turn, disposed of the objection vide order dated 28.07.2017 and observed that the jurisdiction under Section 147 has been rightly assumed by the Assessing Officer to assess the income escaped assessment. The CIT(A) also found merit in the assumption of jurisdiction in the first appeal.

15. The contentions of the Assessee on lack of jurisdiction under s. 147 are broadly outlined hereunder;

(i) The reasons recorded would make it evidently clear that the Assessing Officer has acted in a mechanical manner and without application of mind and without objectively ascertaining the facts before recording the reasons towards alleged escapement. The assessment has been reopened on the basis of borrowed satisfaction without independent application of mind and thus consequential action and proceedings are illegal and bad in law. On facts, all the commodities transactions mentioned in the reasons were duly recorded in

the books of account and the profits arising thereon has been duly incorporated in the taxable income and there was no failure on the part of the assessee to disclose all material facts. Similarly, no reference to any adverse material is placed on record to suspect the propriety of share capital issued at par to Shalini Holdings'. Placing reliance on the judgment rendered in the case of Pr. CIT vs. RMG Polyvinyl (I) Ltd. 396 ITR 5 (del.), the Ld. Counsel contended that in the absence of any tangible material whatsoever brought on record, reopening an assessment based on unsupported and generalized information of investigating wing per se is wholly arbitrary exercise of powers and thus untenable. The information provided by the investigation wing to the AO itself is delightfully vague and non-descript and not backed by any tangible material detected in the course of search or at any other stage of enquiry. The modus operandi narrated in the case of S. K, Jain group would not give rise to any prima facie belief towards escapement in the hands of assessee. Such assertions made in the report of investigation wing would at best give rise a reason to initiate enquiries to ascertain the correctness of suspicion which is wholly distinct from the pre-eminent expression 'reason to believe'. The 'reason to believe' is the fulcrum for exercise of powers under s. 147 of the Act. The 'believe' fostered, although subjective in nature, must trigger from reasons which are objective in nature and need to be based on something tangible and substantive. The belief on escapement thus could not have been made in the instant case in the absence of any objective material.

(ii) The competent authority has also granted a perfunctory approval under Section 151 of the Act in a mechanical manner

enabling the Assessing Officer to reopen the assessment. Such mechanical approval has also vitiated the assumption of jurisdiction under Section 147 of the Act on a standalone basis.

16. We shall address ourselves with the main objections raised on account of assumption of jurisdiction under Section 147 of the Act without satisfying conditions of Section the Act.

16.1 A perusal of the reasons recorded would show that the completed assessment has been reopened on two counts, namely,

(a) receipt of accommodation entries in the form of share capital/premium during Financial Year 2009-10 from M/s. Shalini Holdings Pvt. Ltd., a company stated to be managed and controlled by Shri S.K. Jain Group in the light of information disseminated by DDIT(inv.) New Delhi.

(b) misuse of NMCE Stock Exchange platform by the brokers to create non-genuine losses and profits and allocation thereof to various clients / beneficiaries and one of the beneficiary of fictitious profits is the assessee herein as observed in the information provided by DDIT (Inv.) Kolkata. The assessee has allegedly obtained fictitious gains involving Rs.2,35,49,859/- by such process to route its unaccounted money in the books of account.

16.2 With reference to reasons so recorded, the assessee contends that;

(i) all the commodity transactions carried out by the Assessee are already recorded in the books and are fully verifiable from the audited accounts and consequently there is no case of any omission or failure to disclose trading transactions and all

material facts thus were duly incorporated while filing the return of income. The AO, on the other hand, neither provided transaction-wise details even before the Tribunal giving rise to alleged fictitious profits nor it is available in the possession of the AO. The so called belief formed towards escapement and initiation of vexatious proceedings is without such elementary details. The onus has been shifted on the assessee in vacuum without being in possession of even most basic and preliminary details. The AO has dismally acted on dotted line at the dictate of the investigation wing without application of mind to such facts.

(ii) despite categorical objections filed by the assessee in the course of the assessment proceedings, the underlying material forming basis for formation of impugned 'believe' was not provided. Also, it is self evident that the objection so raised vide application dated 02.05.2017 was cursorily disposed off in a sweeping manner by the Assessing Officer vide order dated 18.07.2017. The order disposing objections only evidences only conclusion and no reasons. Similarly, as regards second point of contention, the subscription towards share capital by Shalini Holdings Pvt. Ltd. was duly reflected in the books of account as well as the audited financial statement. The share were issued and allotted at par similar to allotment to other entities about the same time and same terms which was not subject matter of allegation in the reasons. No iota of adverse material was referred in the report of the investigation wing or made available to the AO except the observation that 'Shalini Holdings Pvt. Ltd.' is allegedly controlled by S K Jain Group and as a corollary all transactions carried out by the subscriber co. are presumably

sham and a make believe. No evidence of any underlying cash repayment as a *quid pro quo* were found by the investigation team as categorically averred in the investigation report itself. Be it as it may, the reference to any material is conspicuously absent in the reasons recorded.

(iii). Significantly, the report of the Deputy Director of Income Tax (Inv.) Unit-VI(2) New Delhi clearly records that name of the beneficiaries were not found recorded in the seized documents and efforts were statedly made in the post search investigation in the case of S.K. Jain Group whereby it was claimed to be found that the assessee company is one of the beneficiaries of accommodation entry to the extent of Rs.50 lakh. To reiterate, there is no reference to any material in the investigation report to hold that the subscription by Shalini Holdings Pvt. Ltd. in the company is in the nature of accommodation entry. No basis whatsoever has been given to such adverse conclusion. No entry has been found to be reported towards any cash transaction in lieu of the subscription of shares in the seized documents. The case of the assessee has been covered under the umbrella of Section 147 solely for the reason that transaction of subscription in shares of the company has occurred with Shalini Holdings Pvt. Ltd. which was tainted in the opinion of the investigation wing. There is nothing tangible brought out to suspect the propriety of the subscription. Impliedly, the onus to prove propriety was shifted on the assessee in the garb of reassessment proceedings. To support the bonafides of the subscriber on merits, the Assessee contends that Capital and Reserve of M/s. Shalini Holdings is in the vicinity of Rss.124.87 crore and therefore, company of such huge net worth cannot be regarded

as accommodation entry provider more so where no evidence has been collected despite extreme action of search. The important fact of allotment of shares at par resulting in creation of valuable rights as a shareholder has not been weight at all.

(iv) With regard to share/commodity transactions at the platform of NMCE Exchange, the assessee submits that the Assessing Officer himself alleges that the assessee has obtained fictitious profit rather than actual profit by misuse of the Exchange Platform. The assessee thus submits that it is a bizarre observation and it is difficult to understand as to why the assessee will obtain fictitious profit and pay taxes thereon and how such action is prejudicial to the interest of the Revenue to provide basis for reopening the assessment in the proceedings under Section 147 of the Act.

(v) The evidence gathered by the Department for making serious allegations on the propriety of commodity transactions on NMCE platform as well as propriety of receipt of share capital subscription from Shalini Holdings Pvt. Ltd. was not provided despite specific request in this regard vide letter dated 02.05.2017 addressed to the Assessing Officer. Such action of the Assessing Officer is in contravention of the judgment rendered by Hon'ble Delhi High Court in the case of *Sabh Infrastructure vs. ACIT (2017) 398 ITR 198 (Del)* and *Micro Marbles Pvt. Ltd. vs. ITO, 331 CTR 329 (Raj.)* As per the aforesaid judgments, the assessee is required to be supplied with material giving rise to the reason of believe.

(vi) Owing to perfunctory disposal of the objection without expressing a single word on alleged manipulation on NMCE platform, the assessee, on its part, made efforts with the

department and ultimately filed RTI Application dated 24.01.2019 requiring the PIO to provide material available on the record of the AO in support of allegation of accommodation entry of Rs.50 lakhs. The investigation report without any tangible material was thus supplied.

(vii) The reasons recorded states that information has been received by DDIT (Inv.) New Delhi adverse to the assessee dated 22.03.2013 however no action of reopening was taken despite efflux of nearly 4 years and case was reopened only on the last day of the limitation period for issue of notice. Such conduct clearly reflects the reluctance of the AO to initiate reopening proceedings based on some generalized and uncorroborated information. The notice issued on the last day on 31.03.2017 was impliedly under compulsion to save on limitation.

(viii) To demonstrate the inherent lack of application of mind and nonchalance in this regard firstly by the AO under s. 148(2) and thereafter by the PCIT under S. 151, the Assessee points out that as regards allegation of receipt of fictitious profits entries through NMCE platform, the paragraph 6 of the reasons recorded records that as per information, "Bhaijee Portfolio Ltd." was found to have indulged in obtaining fictitious profits / losses entries through NMCE platform available with brokers. The name of the assessee is "Bhaijee Commodities Pvt. Ltd." in distinction to "Bhaijee Portfolio Ltd." Similar reference has been repeatedly made in paragraph 8(ii) of the reasons recorded where the allegations in the reasons recorded is *qua* "Bhaijee Portfolio Ltd." Based on such factually incorrect reasons thus, the assessee could not be included in the clutches of vexatious reassessment

proceedings. The PCIT has also merrily granted approval under S. 151 to reopen the case of assessee despite such allegation qua a different entity showing obvious non application of mind, first by the AO and by the PCIT as a sequel thereto. The Assessing Officer in the reasons recorded has alleged fictitious gains aggregating to Rs.2,35,49,859/- and further alleged that profits so earned has not been reflected in the books of accounts. Such observations are factually incorrect. While making wild allegations against the assessee, the commodity transactions giving rise to alleged fictitious gains are not identified at all. The details of transactions giving rise to fictitious profits has not been made available till date either. The assessee claims that notwithstanding the lack of identification by the AO, all the transactions executed on the NMCE platform were duly reflected and included in the books of accounts as asserted again and again before lower authorities.

17. As further contended, not only the reasons recorded by the Assessing Officer are devoid of 'reason to believe' and are without application of mind, the approval of PCIT under s. 151 suffers from non application of mind for yet another reason. As per the approval memo presented by the AO before PCIT for his approval, the Assessing Officer stated that scope of exercise of powers under S. 147 by him is to be adjudged with reference to '*clause (b) to Explanation 2 of Section 147*' of the Act. As a corollary, other part of S. 147 stood excluded for the purposes of his approval. As further adverted, Explanation-2 merely explains the chargeable income 'deemed to have escaped assessment' and once a resort to Explanation-2 to Section 147 has been taken for the purposes of

approval in exclusion to other part of the provision of Section 147, it would imply that the requirement of holding 'reason to believe' has been dispensed with by the AO and what has been supported is 'escapement of income' alone. The satisfaction drawn and approval accorded by the Pr.CIT is thus restricted to clause (b) to Explanation-2 of Section 147 of the Act only. The approval sought and granted on such narrow compass manifests the action of approval to be an illusory exercise and an idle formality. A reference was made to the judgment of the Hon'ble High Court in the case of Kalpana Shantilal Hariya vs. ACIT W.P no. 3063/ 2017 (Bom.).

18. On the basis of aforesaid contentions and submissions, the ld. counsel in essence contends that the reasons recorded under Section 148(2) are (a) vague and nondescript (b) no reference to any material to support the generalized allegations (c) the most basic details like transactions giving rise to fictitious gains in commodity transactions alleged not available at the time of reopening (d) no reference to incriminating document or tangible material to corroborate the alleged lack of bonafides in the subscription by Shalini Holdings except an investigation report, which in turn, do not make reference to any documents and is of inferential nature (e) notwithstanding, the information/material if any, never supplied to the assessee despite specific request (f) grossly incorrect repeated reference towards allegation of fictitious profits through NMCE platform attributable to a different assessee namely 'Bhaijee Portfolio Ltd.' (g) all transactions carried on the NMCE platform duly incorporated in the return ignored (h) the reasons recorded by the Assessing Officer clearly on borrowed satisfaction of the other officer of the Department and proceeded on dotted lines without the

availability of so called material in possession of the Assessing Officer and no analysis of material if any and without confronting the same to the assessee and thus the belief held is pretense (h) the assessment has been reopened on hypothesis and wrong inferences (i) the approval granted by the Pr.CIT under Section 151 is mechanical and perfunctory and without application of mind for multiple reasons namely, the name of other entity mentioned for commodity transaction and scope of approval for reopening was confined by AO to Explanation 2 to Section 147 and consequent approval thus does not travel beyond existence of allegation of escapement. To put it differently, the approval given is not qua other mandatory pre-conditions inbuilt in the provisions of s. 147 of the Act.

19. The assessee thus contends that for multiple reasons on standalone and cumulative basis, the reopening under Section 147 of the Act does not meet the requirement of law at all and thus jurisdiction usurped under Section 147 is apparently without sanction of law.

20. To support the additional ground, the Assessee contends that the entire edifice for initiation of proceedings under Section 147 is certain information collected by the Department through its Investigation Units. The Assessing Officer has formed the belief towards escapement of income on the basis of communication received from the Investigation Wing of the Department. Therefore, where pursuant to search in the case of third party giving rise to material pertaining to the Assessee and where the provisions of Section 153A of the Act were initiated in the case of third party, i.e., S.K. Jain Group, the only course of action available to the AO

was resort to S. 153C and the provisions of S. 147 stood ousted in the present case. The proceedings, if any, can lie in the case of the assessee under Section 153C alone in exclusion to Section 147 of the Act. The whole proceedings under Section 147 is *void ab initio* and bad in law in the light of several judgment of the Co-ordinate Bench listed hereunder:

- a. Nawal Oils & Containers P. Ltd. Vs ITO ITA. No. 852/DEL/2019
- b. M/s Saurashtra Color Tones Pvt. Ltd. Vs ITO ITA. No. 6276/DEL/2018
- c. City Life Projects Pvt. Ltd. Vs ITO ITA. No. 2668/DEL/2019
- d. Pr. CIT (Central) & Ors. Vs Anand Kumar Jain (HUF) & Ors. (2021) 432 ITR 0384 (Del)
- e. Shri Sanjay Singhal Vs DCIT ITA No. 702 to 704/CHD/2018
- f. Rajat Shubra Chatterji Vs ACIT ITA No. 2430/DEL/2015
- g. The ITO Vs Shri Arun Kumar Kapoor, Prop. M/s Vishnu Textiles ITA No. 147/ASR/2010
- h. Shri Janak Raj S/o Shri Murari Lai Vs ITO ITA No.744/ASR/2013
- i. Shri Adarsh Agarwal vs Income Tax Officer ITA No. 777/DEL/2019
- j. Sushil Gaur & Shelly Agarwal Vs ITO ITA No. 1500 & 1501/DEL/2017

21. Per contra, the revenue seeks to plead that the Assessing Officer in the present case has fully satisfied the conditions of Section 147 independent of Section 153C of the Act. The revenue contends that in a case where the satisfaction by the AO of the searched person has not been recorded under Section 153C, the AO of the Assessee cannot be prevented to exercise powers conferred under section 147 of the Act to assess the escaped income. It was further contended that assumption of jurisdiction under Section 153C is dependent upon its own set of pre-requisites and Assessing Officer cannot be faulted for assumption of jurisdiction under Section 147 in the absence of any statutory dictate adverse to exercise of wide powers under s. 147 which is coupled with duty.

22. On merits, the assessee contends that in the remand

proceedings, the Assessing Officer as per the remand report dated 4<sup>th</sup> July, 2019 has clearly made an averment to the effect that the shareholder company namely 'Shalini Holdings Pvt. Ltd. [now known as Alstone Textiles (India) Ltd.] has provided documentary evidences in support of purchase of shares of the assessee company. The bank statement of shareholder company shows that the shareholder company has made payment of Rs.50 lakh through banking channel on 06.04.2009. Copy of ITR along with balance sheet was also obtained by the Assessing Officer and submitted before the CIT(A) in the remand proceedings. The subscriber gas also confirmed the subscription. The assessee thus contends that on the face of tell-tale evidences and in the absence of any incriminating material shown against the assessee except bald information from DDIT(Inv.), the addition could not be made and sustained under Section 68 merely on the basis of baseless perception and conjectures. The ld. counsel also contends that the assessee has issued share capital to several companies at the same price.

23. As regards the profits / losses arising on commodity transactions carried through registered brokers NMCE platform, the assessee submits that all the transactions have been duly reported and the profits arising thereon has been fully accounted and included as part of chargeable income and thus it fails to understand as to how the escapement of such income from taxation has taken place. The AO has proceeded against the assessee on the factually incorrect allegation and data of other entity i.e Bhajee Portfolio. The Assessing Officer has rather not provided any details of alleged unaccounted fictitious profits to enable the assessee to corroborate its assertions of full disclosure.

24. It goes without saying that the reasons recorded are the manifestation of mind of Assessing officer. It is the tool for judging the validity of order under challenge. It gives opportunity to the appellate forums and Courts to objectively see whether or not the AO has proceeded on the relevant material and evidence while invoking drastic provisions of S. 147. It is no longer res integra that the evaluation of correctness of assumption of jurisdiction is confined to recorded reasons only. Expression 'Reason to believe' is the most salutary safeguard to prevent arbitrary exercise of power and source of jurisdiction arises to belief towards escapement of chargeable income on the basis of reasons i.e. relevant material. The material before the AO should be such which outweighs the doubtful circumstances. S. 147 being substantive provision which bestows jurisdiction to back assess the return of earlier years, strict compliance of the conditions mentioned therein are required to be observed before resorting to the section. The courts have not been permitting reopening on irrelevant or extraneous material. Also, the information gathered per se does not tantamount to realization or belief therein. The information received may however give birth to realization. Furthermore, standalone information per se does not ipso facto tantamount to evidence. While information in the possession of AO cannot be subjected to sufficiency test but however relevancy test can not be wished away. It is also trite that the reopening of assessment is not automatic on receipt of some unsubstantiated information from other officer of the deptt. The 'information' received per se can not be regarded as 'belief'. It can possibly give birth to requisite belief. Thus, it was incumbent upon Assessing Officer to test the material himself and apply his own mind to the material, if any, which has given rise to alleged information from DIT(Inv.). He is required to form his independent

reason to believe on escapement. It is well settled that the formation of belief is a statutory function which can not be relegated. Also, the formation of belief being statutory power can not be exercised without application of mind. Various Courts have also consistently observed that the 'belief' of AO must be induced by reasons and a mere belief in existence of reasons or to say, contents of reasons does not provides source of power for exercise of jurisdiction.

25. In the absence of material, the alleged information from other officer of the deptt. has to be reckoned as abstract, bald and bare one and thus has no rational probative value and could be acted upon by the AO under law. The AO is duty bound to test the alleged information himself in the light of relevant material and weigh the credibility of information and consequently disclose his 'process of reasoning' to arrive at the 'reason to belief' contemplated under S. 147. The appraisal of the material needs to be carried out by the AO and none other. The process of holding 'reason to belief' being justiciable and open to judicial review, the reference to material relied upon while holding requisite belief of escapement of chargeable income is a *sin qua non*. It is the only visible safeguard against possible injustice and arbitrariness. Mere adoption of some information from other officer straightaway can not be characterized as bonafide belief of AO in the absence of some cogent and demonstrable material. The AO can not merely be 'satisfied' on the alleged information. He is required to undergo strictier test for reopening the case. The statute has made careful selection of expression 'reason to believe' and not mere 'satisfaction'. Further, it is not belief per se that is a pre-condition for invoking section 147 of the said Act but a belief founded on reasons. The expression used in erstwhile section 147 is 'If the Assessing Officer has reason to

believe' and not 'If the Assessing Officer believes'.

26. On appraisal of the reasons recorded under Section 148(2) and approval thereon under Section 151 of the Act and in the light of contentions raised on behalf of the assessee, it is noticed that the case has been reopened on the last date of the limitation period for two reasons, namely, accommodation entry of Rs.50 lakh in the form of share capital from M/s. Shalini Holdings Pvt. Ltd. and allegation of undisclosed fictitious profit to the extent of Rs.2,35,48,859/- derived from transactions on NMCE platform. The Assessing Officer has proceeded under Section 147 r.w. Section 148 of the Act on the basis of information received from DDIT (Inv.) New Delhi and DDIT (Inv.) Kolkata. The DDIT (Inv.) New Delhi has alleged the assessee company to be beneficiary of accommodation entry in form of share capital from Shalini Holdings Pvt. Ltd. whereas the DDIT (Inv.) Kolkata has alleged misuse of NMCE platform which has resulted in fictitious profits received by the assessee. On perusal of the reports of the Investigation Wing as placed on record, we find merit in the plea canvassed on behalf of the assessee that the allegation against the assessee towards accommodation entries from 'Shalini Holdings P Ltd.' are bald and generic and without any specific material in support. No material has been referred in the note of the Investigation Wing which may possibly implicate the subscription receipts by the assessee in any objective manner. The report primarily revolves around the modus operandi of S K Jain Group. Likewise, the allegation of fictitious profits is qua other entity. The so called 'belief' formed by the Assessing Officer towards escapement of chargeable income is thus without the availability of relevant or tangible material and merely follows the opinion expressed by the investigation wing. The reasons assigned

by the Assessing Officer towards escapement is *dehors* any tangible material which may give rise to a *prima facie* belief to attack the propriety of the share subscription. Likewise, the allegation of fictitious profits is also bald one and premised in incorrect recording of facts. The particulars of transaction giving rise to alleged unaccounted fictitious profits is not made available at any stage of the proceedings beginning with issuance of notice under Section 148 till the matter is traveled to the Tribunal. No instance of unreported profits has been identified even in the assessment as well. The onus has been wrongly shifted on the assessee without providing the details/particulars of transactions in commodity exchange towards alleged fictitious profits. The formation of 'reason to believe' is thus clearly extraneous to any material relevant for formation of *prima facie* belief. No live link or direct nexus between the so called information and the belief is found. Noticeably, the objection of the Assessee has also been disposed in a summary manner disregarding the points raised by the assessee. The order disposing objections does not utter a single word on the nature of material available or transaction carried at NMCE platform. The assessee thus has sufficiently demonstrated that neither there is any relevant material to make wide ranging allegations towards accommodation entry and earning fictitious profits nor the reasons recorded spells out the exact particulars of transactions giving birth to such allegations. No culpability can be inferred at the stage of reopening notice based on quality of information gathered against the assessee. This apart, the approval granted under Section 151 is also clearly demonstrated to be out of sync with the duty cast under Section 151 of the Act. In the present case, the exercise appears to have been ritualistic and formal rather than meaningful, which is the rationale for the safeguard of an approval by a higher ranking officer. The Pr.CIT has granted approval without observing the

inconsistency and glaring inadequacy in the approval memo placed before him wherein the scope of reopening was curtailed to mere case of alleged 'escapement' qua Explanation-2 disregarding other overwhelming conditions of the main provision thereof. In terms of approval memo, the reasons recorded thus can be read to be approved towards 'escapement' contemplated under Explanation -2 but such approval would not extend to existence of other conditions such as holding of 'reason to belief' etc. The approval granted under Section 151 thus runs contrary to the ratio of judgment of the Hon'ble Bombay High Court in the case of *Smt. Kalpana Shantilal Hariya vs. ACIT in W.P. No. 3063/2017*. The Pr.CIT has been weighed and endorsed the action of reopening under Section 151 apparently without any application of mind to such deficiencies in approval memo. The reasons so recorded, thus has no leg to stand in the eyes of law when tested at the counters of prerequisites of Sections 147 and 151 of the Act.

27. It is also noticed that in the similar fact situation, the reassessment under Section 147 on the grounds of fictitious transaction at NMCE platform has been cancelled by the Co-ordinate Bench in *Gangeshwari Metal Pvt. Ltd. vs. ITO* reported in (2020) 60 CCH 154 (Delhi Tribunal) relevant to Assessment Year 2010-11. The Co-ordinate Bench in that case observed that the Assessing Officer has proceeded merely on the basis of report given by the investigation wing without any application of mind and the Assessing Officer was not even aware of the actual profits earned by the assessee from commodities. The reopening action of the Assessing Officer was discarded and quashed by the Co-ordinate Bench.

28. We also bear in mind the observations made by the Hon'ble Delhi High Court in the case of *Pr. CIT vs. G & G Pharma Pvt. Ltd.*, 384 ITR 147 (Del) & *Sarthak Securities Co. (P) Ltd.* 329 ITR 110 (Del.) wherein it was held that it is the basic requirement of law that Assessing Officer himself applied his mind to the underlying material which led him to hold belief that the income of the assessee has escaped assessment and such reference to the material is sorely missing. Similar judgements have been rendered by the Hon'ble Delhi High Court in the case of *Krown Agro Foods Pvt. Ltd. vs. ACIT (2015) 375 ITR 460 (Del)*; *CIT vs. Insecticides (India) Ltd. (2013) 357 ITR 330 (Del)* *Orient Craft Ltd. vs. CIT (2013) 354 ITR 536 (Del)* and other plethora of other judgments.

29. We thus find overwhelming potency in the plea of the assessee that reasons recorded and approval granted thereon under Section 151 do not meet the requirement of law at all and thus the issuance of notice under Section 148 based on cryptic and nondescript reasons combined with a mechanical approval of the Pr.CIT that too on a narrow compass under Section 151 is not permissible in law. We thus have no hesitation to hold that the notice issued under Section 148 is thus without jurisdiction and consequently reassessment framed for Assessment Year 2010-11 is bad in law and hence quashed.

30. In the light of the delineations made above, we are not inclined to go to the other aspects emerging from main grounds and additional grounds. We are also not inclined to adjudicate the action of the Assessing Officer on merits.

31. The appeal of the assessee is thus allowed and the appeal of

the Revenue is dismissed.

**Order was pronounced in the open Court on 07/08/2023.**

**Sd/-**

**[CHANDRA MOHAN GARG]  
JUDICIAL MEMBER**

**Sd/-**

**[PRADIP KUMAR KEDIA]  
ACCOUNTANT MEMBER**

**DATED: 07/08/2023**

*Prabhat*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar