

ITA No.9/GAU/2021(A.Y. 2012-13)
M/s. Linkstar Promoters Pvt. Limited

&

ITA No.13/GAU/2021(A.Y. 2012-13)
M/s. Winner Dealtrade Pvt. limited

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-GUWAHATI 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Dr. Manish Borad, Accountant Member
&
Shri Sonjoy Sarma, Judicial Member**

**I.T.A. No. 9/GAU/2021
Assessment Year: 2012-2013**

***Assistant Commissioner of Income Tax,.....Appellant
Circle-1, Guwahati,
Room No. 613, 6th Floor,
Aayakar Bhawan, G.S. Road,
Christian Basti, Guwahati-781005***

-Vs.-

***M/s. Linkstar Promoters Pvt. Limited,.....Respondent
5/1, Clive Row, Dalhousie, 5th Floor,
Kolkata-700001
[PAN: AACCL1852C]***

&

**I.T.A. No. 13/GAU/2021
Assessment Year: 2012-2013**

***Assistant Commissioner of Income Tax,.....Appellant
Circle-1, Guwahati,
Room No. 613, 6th Floor,
Aayakar Bhawan, G.S. Road,
Christian Basti, Guwahati-781005***

-Vs.-

***M/s. Winner Dealtrade Pvt. Limited,.....Respondent
7th Floor, Maharishi Debendra Road,
Kolkata-700007
[PAN: AABCW1326R]***

Appearances by:

Shri Jay Prakash Gupta, FCA, appeared on behalf of the assessee

Shri N.T. Sherpa, JCIT, appeared on behalf of the Revenue

Date of concluding the hearing : June 26, 2023

Date of pronouncing the order : September 25, 2023

ORDER

Per Dr. Manish Borad, Accountant Member:-

The captioned appeals bearing in ITA No. 9/GAU/2021 and ITA 13/GAU/2021 at the instance of different assesseees for assessment year 2012-13 are directed against the separate orders of Id. Commissioner of Income Tax (Appeals), Guwahati-1, Guwahati evenly dated 02.09.2020, are arising out of the order under section 143(3)/147 of the Act dated 31.12.2019 framed by Id. ACIT, Circle-1, Guwahati.

2. The issues raised in these appeals are common and relate to the same group of assesseees. These are heard together and disposed of by a common order for the sake of convenience and brevity.

3. The grounds of appeal in ITA No. 9/GAU/2021 read as under:-

- (1) *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.*
- (2) *On facts and circumstances of the case and as well as in law, the Ld. CIT(A) erred in deleting the addition of Rs.98,42,000/- as share capital and Rs.12,07,58,000/- as share premium made by the AO under section 143(3)/147 of the IT Act, 1961.*
- (3) *On facts and circumstances of the case, the Ld. CIT(A) erred in quashing the order passed by the AO under section 143(3)/147 of the Act holding that the order passed by the AO is illegal, void and is a nullity at law.*
- (4) *On facts and circumstances of the case, the Ld. CIT(A) erred in facts as well as in law in deleting the addition of Rs 13,06,00,000/- made under section 68 of the IT Act, 1961 holding that there was no failure on the part of the assessee to disclose truly all material facts necessary for his assessment. However, the fact is that neither the Director of the assessee company nor the directors of the allotted companies appeared before the AO to verify the genuineness of transaction, identity and creditworthiness of the shareholders of the assessee-company.*

4. The grounds of appeal in ITA No. 13/GAU/2021 read as under:-

- (1) *On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.*
- (2) *On facts and circumstances of the case and as well as in law, the Ld. CIT(A) erred in deleting the addition of Rs.18,14,000/- as share capital and Rs.16,38,36,000/- as share premium made by the AO under section 143(3)/147 of the IT Act, 1961.*
- (3) *On facts and circumstances of the case, the Ld. CIT(A) erred in quashing the order passed by the AO under section 143(3)/147 of the Act holding that the order*

passed by the AO is illegal, void and is a nullity at law.

(4) On facts and circumstances of the case, the Ld. CIT(A) erred in facts as well as in law in deleting the addition of Rs.16,56,50,000/- made under section 68 of the IT Act, 1961 holding that there was no failure on the part of the assessee to disclose truly all material facts necessary for his assessment. However, the fact is that neither the Director of the assessee company nor the directors of the allotted companies appeared before the AO to verify the genuineness of transaction, identity and creditworthiness of the shareholders of the assessee-company.

5. Since the issues raised in both the appeals are similar, for the purpose of adjudication of the common grounds of appeals raised by the Revenue, we will take up the facts in the case of assessee namely M/s. Linkstar Promoters Pvt. Limited (A.Y. 2012-13) and our decision shall apply *mutatis mutandis* on the grounds of appeal raised in the case of M/s. Winner Dealtrade Pvt. Limited (A.Y. 2012-13).

6. Facts in brief are that the assessee is a Private Limited Company engaged in business declared a loss of Rs.3915/- in the return of income for A.Y. 2012-13 furnished on 11.02.2013. The assessment proceeding was carried out under section 143(3) of the Act and completed on 31.03.2015 assessing income at 'NIL'. Subsequently search and seizure operations were conducted in Mittal group of cases on 01.08.2016, wherein one of the group concern i.e. assessee was found to have routed Rs.13.06 crores in its regular books of account with the help of Kolkata based Jamakarchi Companies. The reasons for initiation of proceedings

under section 147 of the Act were recorded and notice under section 148 of the Act was issued. However, the objections raised by the assessee were addressed by the ld. Assessing Officer and reassessment proceedings were carried out. The ld. Assessing Officer noticed that during the year under consideration, the assessee-company issued equity shares and received Rs.98,42,000/- towards share capital and share premium of Rs.12,07,58,000/-. The assessee was asked to prove the identity and creditworthiness of the share applicants and genuineness of the transactions. The assessee furnished various documents but failed to produce the Directors of all the share subscriber companies before the ld. Assessing Officer to verify the authenticity and genuineness of such share transactions. Due to such non-appearance, summons was issued under section 131 of the Act. The ld. Assessing Officer doubted the nature and source of the alleged share application money and formed an opinion that the assessee had adopted a colourable device and camouflaged its unaccounted money in the form of share application money to legalize its own unaccounted income. Accordingly Section 68 of the Act was invoked and taxed under section 115BBE of the Act at Rs.13.06 crores, which was added to the income of the assessee.

7. As far as the another assessee namely Winner Dealtrade Pvt. Limited, all the facts and the observations of the ld. Assessing Officer remained the same except for the change of figure, which in this case, the addition was Rs.16,56,50,000/-

under section 68 read with respect to section 115BBE of the Act towards unexplained share capital and share premium received in the year. Aggrieved, the assessee preferred appeal before the ld. CIT(Appeals).

8. The assessee apart from raising the grounds on merit challenging the additions made by the ld. Assessing Officer also challenged the validity of the re-assessment proceedings carried out under section 147 read with section 143(3) of the Act contending them to be illegal, void and nullity in the eyes of law. It was stated by the assessee that for the same reasons, the assessee was scrutinized under section 143(3) of the Act. Further all the issues raised in the reassessment proceedings stand already raised by the ld. Assessing Officer while carrying out assessment proceeding under section 143(3), which was completed on 31.03.2015 and all the documents and evidences in support of the alleged share subscribers proving their identity and creditworthiness and genuineness of the transactions as envisaged under the provisions of section 68 of the Act, stood filed and after considering the submissions of the assessee, the ld. Assessing Officer was satisfied. Now on the very same reasons, the case of the assessee has been reopened, which is nothing but mere change of opinion of the ld. Assessing Officer and for such change of opinion, ld. Assessing Officer cannot assume jurisdiction for carrying out the reassessment proceeding. In support of his contention, he relied on plethora of judgments, which have been considered by the ld. CIT(Appeals).

9. The ld. CIT(Appeals) after considering the submissions of the assessee and also on examining the assessment records as well as the questionnaire issued by the ld. Assessing Officer for carrying out the original assessment proceedings came to a conclusion that during the course of original assessment proceedings, notices were issued under section 133(6) of the Act to all the share applicants, which were duly served and replies were received from them by the ld. Assessing Officer alongwith all the financial documents including identity proof, income tax return, Bank statement, confirmations, audited balance-sheet etc. The ld. CIT(Appeals) also noticed that during the course of original assessment proceedings, the appellant had disclosed all the preliminary facts, which were necessary for completing the assessment. The ld. CIT(Appeals) further held that if at the time of original assessment proceedings, the ld. Assessing Officer has raised wrong inference from the facts disclosed by the appellant, then, appellant cannot be penalized for the wrong inference of facts and law by the ld. Assessing Officer and the assessment of the appellant cannot be reopened after four years from the end of relevant A.Y. once again under section 147 of the Act. In support of this finding, reliance was placed by ld. CIT(Appeals) on the judgment of the Hon'ble Supreme Court in the case of *ITO, Ward-16(2) -vs.- M/s. Techspan India Private Limited & Another (2018) 4 TMI 1376 (Supreme Court)* and in the case of *CIT, Delhi -vs.- M/s. Kelvinator India Limited (2010) 1 TMI 11 (SC)*. Further ld. CIT(Appeals) held that there is no failure on the part of the

appellant to disclose fully and truly all material facts necessary for his assessment in the original return. He also held that the reasons to believe recorded by the ld. Assessing Officer also prove that there was no failure on the part of the appellant to disclose fully and truly all material facts necessary for his assessment in the original return of income filed for A.Y. 2012-13. Apart from questioning the reassessment proceedings on the ground of change of opinion, ld. CIT(Appeals) also quashed the assessment proceedings for the gross violation of the principle of natural justice in the light of the judgment of the Hon'ble Apex Court in the case of *GKN Driveshafts (India) Ltd. -vs.- ITO reported in 259 ITR 19*, since the ld. Assessing Officer while rejecting the objections filed by the appellant, did not deal with the contentions raised by the appellant by speaking order. Accordingly addition under section 68 of the Act at Rs.13.06 crores was deleted.

10. Aggrieved, Revenue is now in appeal before the Tribunal.

11. Ld. D.R. vehemently argued supporting the order of ld. Assessing Officer and further stated that during the course of search at Mittal Group, Shri Madanlal Mittal admitted the fact of routing unaccounted cash of the family groups to the regular books of account of the family group of companies with the help of Kolkata based Jamakarchi Companies. The ld. D.R. also stated that all the alleged share applicants/concerns are not having

sufficient net worth to invest in the company and they are merely routing the funds in order to provide accommodation entries.

12. On the other hand, Id. Counsel for the assessee vehemently argued supporting the detailed finding of the Id. CIT(Appeals) and stated that in the original assessment proceedings, the alleged issue has been examined at length and the reopening proceedings have been initiated on the very same reasons, which tantamount to change of opinion and for such change of opinion, assumption of jurisdiction for carrying out the reassessment proceedings is not allowed under the Act.

13. We have heard rival contentions and perused the records placed before us. Addition under section 68 of the Act made in the hands of assessee namely M/s. Linkstar Promoters Pvt. Limited and M/s. Winner Dealtrade Pvt. Limited deleted by the Id. CIT(Appeals) on legal ground is under challenge before us at the instance of Revenue. As we have discussed about the facts of M/s. Linkstar Promoters Pvt. Limited and the same being identical in the case of M/s. Winner Dealtrade Pvt. Limited, we notice that both the assessees were subjected to scrutiny proceedings under section 143(3) of the Act subsequent to filing of their return of income for A.Y. 2012-13. It is not in dispute that thorough examination of all the share applicants have been carried out by the Id. Assessing Officer during the course of original assessment proceedings. Notices under section 133(6) of the Act were sent to all the share subscribers, which were duly

served and replies to each of such notices were received by the ld. Assessing Officer alongwith all the financial documents including identity proof, income tax return, Bank statement, confirmations, audited balance-sheet etc. All these details were filed by the assessee to prove the nature and source of the share application money and to prove the identity and creditworthiness of the share applicants and genuineness of the transactions. After carrying out the thorough examination of these documents, ld. Assessing Officer was satisfied with the explanation offered by the assessee to explain the alleged sum. In other words, the assessee discharged its primary onus casted upon it u/s. 68 of the Act to explain the alleged cash credits to the satisfaction of the ld. Assessing Officer and there being no further inquiry conducted by the ld. Assessing Officer means that the ld. Assessing Officer was satisfied with the explanation offered by the assessee. Therefore, ld. Assessing Officer did not make any addition under section 68 of the Act during the course of original assessment proceedings. Subsequently re-assessment proceedings were initiated and reasons were recorded for reopening and the said reasons were only to examine the amount received by the assessee-company towards share capital and share premium. The ld. D.R. failed to rebut this fact that the issues, which have been thoroughly examined by the ld. Assessing Officer during the course of original assessment proceedings, have again formed the reason for reopening of assessment proceedings. Thus for the very same issue, the assessee has been subjected to reassessment proceedings. Now

under the given facts and circumstances, of the care whether such reassessment proceedings are valid, needs to be examined into in the light of various judicial pronouncements, which we notice to have been referred in detail by the ld. CIT(Appeals) in the impugned order.

14. On perusal of the impugned order, we notice that while dealing with the legal issues raised by the assessee for the wrongly assuming jurisdiction for reopening of the assessee's case, gross violation of principle of natural justice since the ld. Assessing Officer did not give proper opportunity to assessee and confront with the evidence on record. So far as the issue for validity of reassessment proceedings, the ld. CIT(Appeals) has firstly referred to a letter dated 17.09.2019 written by ACIT, Circle 1, Guwahati addressed to the Managing Director, M/s. Linkstar Promoters Pvt. Limited for furnishing the reasons recorded for initiating proceedings under section 148 of the Income Tax Act, which are placed at pages 20 to 22 of the impugned order and refers to the alleged share capital and share premium received by the assessee during the year. Since the issue for reopening was same and during the course of original assessment proceedings, ld. Assessing Officer has issued notices under section 133(6) of the Act to all the share subscribers, who have duly received the same and replied to the said notice under section 133(6) of the Act based on which ld. Assessing Officer was satisfied with the nature and source of the alleged sum. Thus we find that there was no failure on the part of appellant to disclose

fully and truly all material facts necessary for reassessment during the course of original scrutiny proceedings. Therefore, the first proviso to section 147 of the Act which requires for recording the reasons to believe is not satisfied because the reasons for reopening have already been addressed by the assessee in the course of original assessment proceedings and such reopening is only based on the *change of opinion*. The Id. CIT(Appeals) has quashed the impugned reopening proceedings, which have been commenced on a mere change of opinion by referring to the judgment of the Hon'ble Supreme Court in the case of *M/s. Techspan India Private Limited & Another (supra)* and in the case of *M/s. Kelvinator India Limited (supra)* observing as follows:-

“Thus, a perusal of the aforesaid replies (each reply duly stamped by the office of the AO) received from the share applicants of the Appellant in response to the notices issued to them by the AO under Section 133(6) of the Act in conjunction with the aforesaid original assessment order, dated 31.03.2015 passed by the AO under Section 143(3) of the Income Tax Act, 1961, it is clear that, during the course of the original assessment proceedings, no addition had been made in the case of the Appellant on account of the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- and the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- had been accepted in toto, after due examination, by the AO.

This singularly proves that the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine and it was the Department which was in complete know of the fact of raising of the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- by the Appellant. In-fact the Department had duly examined the genuineness of this very share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- in the scrutiny proceedings which took place under Section 143 of the Act.

Thus, there was no failure on the part of the Appellant to disclose fully and truly all material facts necessary for his assessment during the course of the origin a I scrutiny assessment

proceedings under Section 143 of the Act which culminated in the assessment order dated 31.03.2015 passed under Section 143(3) of the Act and in which the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine. That being so, the conditions precedent for invoking the 1st Proviso to Section 147 of the Income Tax Act, 1961 for recording the "reasons to believe", issuing the notice under Section 148 of the Act and re-assessing the income of the Appellant under Section 147 of the Income tax Act, 1961 were NOT satisfied in the case of the Appellant and, hence, the subsequent "reasons to believe" recorded by the AO, the notice under Section 148 of the Act issued by the AO and the re-assessment order, dated 31.12.2019, passed by the AO re-assessing the income of the Appellant under Section 147 read with Section 143(3) of the Income tax Act, 1961 are without jurisdiction and nullities at law.

Hence, in this case there was a full and true disclosure of primary facts by the Appellant in the original round of assessment proceedings which culminated in the assessment order, dated 31.03.2015, passed under Section 143(3) of the Act in which the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine. Enquiries had been duly conducted by the AO with regard to the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- by issuing of notices under Section 133(6) of the Act and replies to the said notices had been obtained from various share-capital subscribers by the AO. Only after due examination of the aforesaid share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/-, it was accepted, as genuine, by the AO and not added back to the income of the Appellant. Thus, there was a full disclosure of all material facts by the Appellant before the AO. From a perusal of the material placed before me during the course of the appellate proceedings, I see no evidence of any information/material which was hidden/suppressed by the Appellant from the AO during the course of the original round of assessment proceedings. Thus, as far as the disclosure of material facts by the Appellant in the original round of assessment proceedings is concerned, I find the disclosure made by the Appellant a true and full disclosure of all material facts necessary for its assessment. During the course of the original assessment proceedings, the Appellant had disclosed, before the AO, all primary facts which were necessary for his full and true assessment. The Assessing Officer had been apprised, by the Appellant, of all the primary facts necessary for the assessment of the Appellant in the first or original round of assessment proceedings which culminated in the assessment order, dated

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31.03.2015, passed under Section 143(3) of the Act and in which the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine. If, at the time of original round of assessment proceedings, the AO had raised wrong legal or factual inferences from the facts disclosed by the Appellant, then the Appellant cannot be penalized for the wrong inferences of facts and law by the AO and the assessment of the Appellant cannot be re-opened once again thereafter under Section 147 of the Act. Thus, in this case, the AO was not entitled, on a mere change of opinion, to commence proceedings for reassessment of the income of the Appellant.

It is settled law that proceedings for reassessment of the income of an assessee under Section 147 of the Act cannot be commenced on a mere change of opinion. In support of my conclusion above, I derive strength from the judicial pronouncements cited below.

In the case of Income Tax Officer Ward No. 16 (2) vs. M/s. Techspan India Private Ltd. & Another [2018 (4) TMI 1376 - Supreme Court], it was held, as follows, by the Hon'ble Supreme Court:

"The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the I.T. Act so as to empower the Assessing Authorities to re-assess any income on the 1 round which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

(9) Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to reassess and not the power to review.

(10) To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

(11) It is well settled and held by this court in a catena of judgments and it would be sufficient to refer Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320ITR 561(SC) wherein this Court has held as under:-

"5.... where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe"

Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open.

6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7. *One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."*

(12) Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings."

In the case of Income Tax Officer Ward No. 16 (2) vs. M/s. Techspan India Private Ltd. & Another [2018 (4) TMI 1376 - Supreme Court], it was held, as follows, by the Hon'ble Supreme Court:

"However, a bare perusal of notice dated 09.03.2004 which was issued in the original assessment proceedings under Section 143 makes it clear that the point on which the re-assessment proceedings were initiated', was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 09.03.2004 was that the assessee was not maintaining any separate books of account for the said two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under Section 10A of the IT Act was well considered in the original

assessment proceedings itself. Hence, initiation of the re-assessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under Section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings.

(14) In light of the forgoing discussion, we are of the view that impugned judgment and order of the High Court dated 24.02.2006 does not call for any interference. The appeal is accordingly dismissed with no order as to costs."

In the case of Commissioner of Income Tax, Delhi vs. M/s. Kelvinator India Limited [2010 (1) TMI 11 - Supreme Court of India], it was held, as follows, by the Hon'ble Supreme Court:

"5. After the Amending Act, 1989, Section 147 reads as under:

"Income escaping assessment.147:- If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."

6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a

schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws(Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

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

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writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

7. For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs"

15. Further, we find that there is not failure on the part of the appellant to disclose fully and truly all material facts necessary for his assessment and, therefore, as provided in the first proviso to section 147 of the Act, where an assessment under section 143(3) or 147 has been made for the relevant assessment year and where the assessee disclosed fully and truly all material facts necessary for his assessment for that assessment year, then, assessment order cannot be reopened after four years from the end of the relevant assessment year. Therefore, since any income chargeable to tax has not escaped assessment for the reason of failure on the part of the assessee, such reopening proceedings cannot be held to be valid. We would like to place reliance on the judgment of the Hon'ble Supreme Court in the case of *Parashuram Pottery Works Co. Limited -vs.- ITO (1977) 106 ITR 1 (SC)* as well as that in the case of *Chhugamal Rajpal -vs.- SP Chaliha, ITO & Others (1971) 79 ITR 603 (SC)* and that of the Hon'ble Delhi High Court in the case of *Sarthak Securities Co. Pvt. Limited -vs.- ITO (2010) 329 ITR 110*. We are of the view that the reassessment proceedings carried out under section 147 of the Act after the lapse of four years from the end of the relevant assessment year and there being no reason to believe that the

assessee had failed to disclose fully and truly all material facts necessary for his assessment are bad and illegal. The finding of the Id. CIT(Appeals) on this issue extracted below is in consonance to our observation:-

“Thus, in this case there was a full and true disclosure of primary facts by the Appellant in the original round of assessment proceedings which culminated in the assessment order, dated 31.03.2015, passed under Section 143(3) of the Act in which the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine. Enquiries had been duly conducted by the AO with regard to the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- by issuing of notices under Section 133(6) of the Act and replies to the said notices had been obtained from various share-capital subscribers by the AO. Only after due examination of the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/-, it was accepted, as genuine, by the AO and not added back to the income of the Appellant. Thus, there was a full disclosure of all material facts by the Appellant before the AO. From a perusal of the material placed before me during the course of the appellate proceedings. I see no evidence of any material or primary fact which was hidden or suppressed by the Appellant from the AO during the course of the original round of assessment proceedings. Thus, as far as the disclosure of material facts by the Appellant in the original round of assessment proceedings is concerned, I find the disclosure by the Appellant as a true and full disclosure of all primary material facts before the AO.

As seen above, in this case, during the course of the original assessment proceedings, the Appellant had disclosed, before the AO, all the primary facts which were necessary for his full and true assessment. The Assessing Officer had been apprised, by the Appellant, of all the primary facts necessary for the assessment of the Appellant in the first or original round of assessment proceedings which culminated in the assessment order, dated 31.03.2015, passed under Section 143(3) of the Act and in which the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine. If, at the time of original round of assessment proceedings, the AO had raised wrong legal or factual inferences from the facts disclosed by the Appellant, then the Appellant cannot be penalized for the wrong inferences of facts and law by

the AO and the assessment of the Appellant cannot be re-opened at the whims of the AO.

The words used in Section 147 are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". The first proviso postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee or discovered by him on the basis of the facts disclosed or otherwise, the assessing authority has to draw inferences as regards certain other facts and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

In view of the above discussion, I hold that there was no failure on the part of the Appellant to disclose fully and truly all material facts necessary for his assessment during the course of the original scrutiny assessment proceedings under Section 143 of the Act which culminated in the assessment order dated 31.03.2015 passed under Section 143(3) of the Act and in which the share capital of Rs. 98,42,000/- and the share premium of Rs. 12,07,58,000/- was accepted by the AO as genuine.

Further, 4 years had already elapsed from the end of the relevant assessment years when the notice under Section 148 of the Act was issued to the Appellant on 29.03.2019. That being so, the conditions precedent for invoking the 1st Proviso to Section 147 of the Income Tax Act, 1961 for recording the "reasons to believe", issuing the notice under Section 148 of the Act and re-assessing the income of the Appellant under Section 147 of the Income tax Act, 1961 were NOT satisfied in the case of the Appellant and, hence, the subsequent "reasons to believe", recorded by the AO, the notice issued by the AO under Section 148 of the Act and the re-assessment order, dated 31.12.2019, passed by the AO re-assessing the income of the Appellant

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under Section 147 of the Income tax Act, 1961 are without jurisdiction and nullities at law.

Thus, as per the provisions of the Statute and the settled law for invoking the 1st Proviso to Section 147 of the Income Tax Act, 1961 for issue of notice under section 148 of the Act, the 3 (three) conditions i.e.

(a) Income chargeable to tax should have escaped assessment for such assessment year;

(b) Four years should have expired from the end of the relevant assessment year for which re-assessment proceedings are to be undertaken by way of issue of notice under Section 148 and

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(c) Income chargeable to tax for that assessment year should have escaped assessment for by the reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, be satisfied.

These conditions were not satisfied in the case of the Appellant and, hence, the subsequent "reasons to believe", recorded by the AO, the notice under Section 148 of the Act issued by the AO and the re-assessment order, dated 31.12.2019, passed by the AO re-assessing the income of the Appellant under Section 147 of the Income tax Act, 1961 are without jurisdiction and nullities at law:.

16. Even on the ground of violation of principle of natural justice, assessee deserves to succeed as the assessee was not given sufficient opportunity to explain various evidences in support of its contention that alleged share application money in the form of share capital and share premium is genuine and the share applicants were having sufficient creditworthiness to invest in the equity shares of the assessee-company. The ld. CIT(Appeals) has mentioned the facts on this grounds observing as follows:-

“After a careful perusal of the aforesaid material i.e. the submission, dated 24.12.2019, made by the Appellant before the

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AO, the submission, dated 27.12.2019, made by the Appellant before the AO and the note-sheets of the appellate proceedings before the AO, I tend to agree with the contention of the Appellant that in the circumstances wherein even curfew was imposed in Guwahati and the internet connectivity was absent, the Appellant indeed did not get a meaningful and proper opportunity of being heard and presenting evidence in the matter before the AO. From a perusal of the note-sheets of the appellate proceedings before e AO, I also note that notices under Section 133(6) of the Act to various share-capital subscribers of the Appellant and the summonses to Directors under Section 131 of the Act have been issued by the AO at the fag end of the assessment proceedings on 23.12.2019, the compliance for which has been fixed on 26.12.2019, which in itself renders the process of enquiry as a mere eyewash since it is impossible for the share-capital subscribers of the Appellant and the Directors of the Appellant to collect the necessary material and respond at such a short notice especially when the condition in Guwahati were extremely tense on account of the protests related to Citizenship Amendment Bill. No one else but I, myself, am a witness to the turmoil the city of Guwahati went through in the month of December, 2019 due to the agitation related to the Citizenship Amendment Bill. No one could have left their homes in those days due to the severe violence which had engulfed the city of Guwahati and the State of Assam. Further, one of the intervening days between 23.12.2019 (day of issue of show-cause notice) and 26.12.2019 (day of hearing) i.e. 25.12.2019 was a holiday, being the festival day of Christmas.

Another glaring aberration in the way enquiry was conducted by the AO even at the fag end of the assessment proceedings is that the notices under Section 133(6) to various share- capital subscribers [i.e. M/s. Amity Sales P. Ltd. and 10 other share-capital subscribers], notice under Section 131 to various Directors of the Appellant and the show-cause to the Appellant have all been given simultaneously on 23.12.2019. The mere factum that the show-cause for addition of the share capital of Rs.98,42,000/- and the share premium of Rs.12,07,58,000/- to the Appellant was simultaneously given on 23.12.2019 along-with the notices under Section 133(6) to various share-capital subscribers and notice under Section 131 to various Directors of the Appellant singularly proves that the AO had already (even prior to the result of the enquiry) made up his/her mind to add the aforesaid share capital of Rs.98,42,000/- and the share premium of Rs.12,07,58,000/-. If at all there was an intention on the part of the AO to have given a proper and meaningful opportunity of hearing to the Appellant, then the notices under Section 133(6) to

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various share-capital subscribers and notice under Section 131 to various Directors of the Appellant should have been given prior to the show-cause notice to the Appellant and only after the dates of hearing in respect of these notices under Section 133(6) to various share-capital subscribers and notice under Section 131 to various Directors of the Appellant had passed, the show-cause notice should have been issued to the Appellant. Before passing of the dates of hearing in the case of the notices under Section 133(6) to various share-capital subscribers and notice under Section 131 to various Directors of the Appellant, how could the AO aware whether these would be complied with or not? And, in that scenario, the show-cause could not have been issued prior to the result of the enquiry under Section 133(6) and 131.

Thus, in the absence of a meaningful and proper opportunity of being heard and presenting evidence, the AO was not correct in holding, in the impugned assessment order, that the share capital of Rs.98,42,000/- and the share premium of Rs.12,07,58,000/- was "bogus" especially when in the original assessment proceedings, the same share capital of Rs.98,42,000/- and the share premium of Rs. 12,07,58,000/- had been accepted as "genuine". In view of the above discussion, the impugned assessment order does not pass the test of Principles of Natural Justice and is, therefore, illegal, void and is a nullity at law. I hold so and, hence, the impugned assessment order is quashed on this ground also".

17. The above finding of the Id. CIT(Appeals) is supported by the judgment of the Hon'ble Supreme Court in the case of *CIT -vs.- Dhakeshwari Cotton Mills Limited (1955) AIR 65* and *GKN Driveshafts (India) Ltd. -vs.- ITO reported in 259 ITR 19*. Thus to conclude we find that on the legal ground itself, the assessee deserves to succeed, firstly that the reopening proceeding has been carried out on the *mere change of opinion* and there is no proper reason to believe to reopen the proceedings. Secondly the reopening proceedings carried out after the lapse of four years from the end of the relevant assessment year, without there being any evidence, which could prove that the assessee had not

disclosed fully and truly all material facts relevant to the reasons to believe for which the reassessment proceedings have been carried out and lastly the assessee was not provided sufficient opportunity at the time of reassessment proceedings, which was the gross violation of principle of natural justice. Though the assessee has filed complete details before the Id. CIT(Appeals) in order to prove that even on merit also, assessee deserves to succeed but since we have already confirmed the finding of Id. CIT(Appeals) quashing the assessment proceedings on the legal ground as discussed in the preceding paragraph, we find it merely academic to deal with the merits of the case. Accordingly the grounds raised by the Revenue challenging the finding of Id. CIT(Appeals) on the legal ground raised in Grounds No. 1 & 3 are hereby dismissed and the remaining grounds being on merit of the assessee need no adjudication since we have already held that Id. CIT(Appeals) has rightly quashed the reassessment proceedings being illegal, bad-in-law and nullities in the eyes of law. Thus no interference is called for in the finding of Id. CIT(Appeals) and accordingly Revenue's appeal in the case of M/s. Linkstar Promoters Pvt. Limited is hereby dismissed.

18. Since the facts and issues raised in the case of M/s. Winner Dealtrade Pvt. Limited are same with the issues raised in the case of M/s. Linkstar Promoters Pvt. Limited, reassessment proceedings carried out under section 147 of the Act are held to be illegal, bad in law and nullity in the eyes of law and our decision in the case of M/s. Linkstar Promoters Pvt. Limited shall

apply *mutatis mutandi* to the issues raised in the case of M/s. Winner Dealtrade Pvt. Limited. Accordingly no interference is called for in the finding of Id. CIT(Appeals). Thus the appeal of the Revenue in the case of M/s. Winner Dealtrade Pvt. Limited is dismissed.

19. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 25th September, 2023.

Sd/-

(Sonjoy Sarma)
Judicial Member

Sd/-

(Manish Borad)
Accountant Member

Kolkata, the 25th day of September, 2023

*Copies to :(1) Assistant Commissioner of Income Tax,
Circle-1, Guwahati,
Room No. 613, 6th Floor,
Aayakar Bhawan, G.S. Road,
Christian Basti, Guwahati-781005*

*(2) M/s. Linkstar Promoters Pvt. Limited,
5/1, Clive Row, Dalhousie, 5th Floor,
Kolkata-700001*

*(3) M/s. Winner Dealtrade Pvt. Limited,
7th Floor, Maharishi Debendra Road,
Kolkata-700007*

*(4) Commissioner of Income Tax (Appeals),
Guwahati-1, Guwahati;*

(5) Commissioner of Income Tax- ;

ITA No.9/GAU/2021(A.Y. 2012-13)
M/s. Linkstar Promoters Pvt. Limited
&
ITA No.13/GAU/2021(A.Y. 2012-13)
M/s. Winner Dealtrade Pvt. limited

(6) *The Departmental Representative*
(7) *Guard File*
TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.