

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. No.223/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2010-11)

Shruti Vinimay Private Limited 502, Mahalaxmi Apartment Shivaji Nagar, Nagpur (Urban) Nagpur-440010, Maharashtra, India.	बनाम/ Vs.	DCIT, Central Circle-4(3) Room No.1921, 19 th Floor, Air India Building, Nariman Point, Mumbai- 400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAJCS4629R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Bhupendra Shah
Revenue by:	Shri Ganesh Shah (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 22/08/2023

घोषणा की तारीख /Date of Pronouncement: 20/09/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax-52 [hereinafter referred to as "the CIT(A)], Mumbai dated 15.12.2022 for assessment year 2010-11.

2. At the outset, the Ld. AR of the assessee, after a preliminary hearing has not pressed ground no. 1 & 2 raised in the revised/additional ground of appeal filed before us viz action of the transfer of the case from Kolkata to Mumbai u/s 127 of the Income Tax Act, 1961 (hereinafter "the Act) as well as the action of AO first of all, dropping the proceedings initiated u/s 153C of the Act and instead resorting to the impugned re-opening of assessment, which according to assessee is bad in law. Since the aforesaid two (2) grounds have not been pressed by the Ld. AR both grounds stands dismissed.

3. Coming to the next ground of appeal of the assessee, which is against the action of the AO to have reopened the assessment u/s 147 of the Act by issuance of notice u/s 148 of the Act which according to the assessee is bad in law. Since it is a legal issue the same is dealt with.



ITA No.223/Mum/2023
A.Y. 2010-11
Shruti Vinimay Ltd

4. For adjudicating the legal issue against the action of the AO re-opening the assessment u/s 147 of the Act, we have to first look at the reasons recorded by the AO for usurping the reopening jurisdiction u/s 147 of the Act. Before, we look into the reasons recorded let us re-visit the settled position of law regarding re-opening of assessment u/s 147 of the Act. It must be borne in mind that the very concept of assessment is governed by the time-barring rule; and an assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed only when there is information or evidence regarding undisclosed income or AO had information in his possession showing escapement of income as stipulated u/s 147 of the Act. As per Section 147 of the Act, if the AO had to re-open the assessment, then AO has to record the reason to reopen the assessment, wherein he should record the "*reason to believe, escapement of income*". It is settled position of law that '*reason to believe*' postulates a foundation based on an information and belief based on reason. After a foundation based on information is there, still, there must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In other words, before the AO issues notice u/s 148 of the Act, he must have recorded the "*reason to believe, escapement of income*". It is no doubt true that this Tribunal cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the AO on the point as to whether action should be initiated for re-opening the assessment. At the same time, we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant or remote and far-fetched, which would warrant the formation of belief relating to escapement of income. And it is well settled in law that *reasons as recorded by AO* for re-opening the assessment, are to be examined on a *stand-alone* basis. Neither anything can be added to the reasons so recorded, nor can anything be deleted from the reason so recorded. The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd.



ITA No.223/Mum/2023
A.Y. 2010-11
Shruti Vinimay Ltd

(2004) 268 ITR 332 (Bom) has *inter alia* observed that ".....it is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded by him. He has to speak through the reasons". Their Lordship added "The reasons recorded should be self-explanatory and should not keep the assessee guessing for reason. Reason provide link between conclusion and the evidence...". So, while examining the jurisdiction of AO to have re-opened the assessment, we have to only consider the *reasons recorded* by the AO on a standalone basis and adjudicate as to whether AO has satisfied in the reasons recorded, the condition precedent (i.e., *reason to believe escapement of income*) to validly reopen the assessment. It is also settled position of law that adverse information against an assessee may trigger "*reason to suspect*", and not '*reason to believe*', which is the essential jurisdictional requirement for successfully reopening the assessment. And in case AO receives adverse information, then, as noted it would only trigger "*reason to suspect*", and in such an event, the AO to make reasonable inquiry and collect material which would make him believe that there is in fact escapement of income and thereafter, record his '*reason to believe, escapement of income*' and then issue notice u/s 148 of the Act and proceed against the assessee.

The reasons recorded by the AO for reopening the assessment is found placed at page nos. 31 & 32 of the PB which is reproduced as under: -

Reason for reopening in the case of M/s. Shruti Vinimay Pvt. Ltd.

Name of the assessee : M/s. Shruti Vinimay Pvt. Ltd.

PAN : AAJCS4629R

A.Y. : 2010-11

STATUS : Company

In this case, return of income was filed electronically on 13.05.2011 declaring total income of Rs.24,58,276/-. The same was processed u/s 143(1).



ITA No.223/Mum/2023
A.Y. 2010-11
Shruti Vinimay Ltd

2. A search action was carried out on RK Kedia Group of cases on 13.06.2014. During the course of Search action on RK Kedia group of cases, residential and many of the office premises of entry operators were also covered. During the course of search and post search proceedings It was established that a lar, of entitles were managed and controlled by these operators. The main business of the concern managed and controlled by the entry operators Was sale and purchase of shares of listed & non-listed companies and giving and taking unsecured loans.
3. It was noticed from the ITD system of the income Tax Department and ROC database that most of these investor /fund providing companies have very weak balance sheet with meager turnover / PBT figures. Further, most of these investor / fund providing companies are found to be based / registered at many of Kolkata/Mumbai based addresses notorious for being used by various accommodation entry providers. Further, as per the data gathered from the Kolkata Investigation Wing, many of such investor / fund providing companies have been admitted to be bogus paper companies without any business activity and that these companies are controlled and managed by various accommodation entry providers for earning commission income, which was undisclosed for taxation.
4. On perusal of the assessee company's Balance Sheet for F.Y.2009-10, it is observed that the assessee company has Issued shares during the year on substantial premises. The assessee company has issued total 130000 (Nos.) shares, shares having face value of Rs10/- at a whopping premium of Rs.40/- per share. Total capital of Rs.52,00,000/- was raised by the assessee company, it is pertinent to mention here that the assessee company has filed its of income for A.Y, 2008-09, 2009-10 and 2010-11 declaring its income to the tune of Rs. NIL, Rs.1,839/- and Rs.24,58,276/- respectively.
5. Considering the financials of the assessee company, the shares issued could not have commanded such a high security premium. This view-also gets support from the decision rendered by the Hon'ble High Court of Bombay in the case of Major Metals Ltd Vs. Union of India [2012] 359 ITR 450 that the Settlement Commission was correct in its finding that the two companies which have invested Rs, 6 crores in the assessee company, and had been allotted shares at huge premium of Rs.990/- have no financial standing to invest such a huge amount and further, past performance of the assessee company did not justify such huge premium that the purported transactions were not genuine. it held that the claim of having received such high premium on shares was fictitious and an attempt by the assessee to launder its own unaccounted funds in the guise of such receipts. it is, therefore, held that the amount shown in the books of account of the assessee as share premium was liable to taxed in accordance with the provision of section 68.
6. further, the Hon'ble [TAT Delhi in the case of Zars Trading Pvt Ltd (2010) TIOL-308-ITAT Del and Kushara Real Estate Pvt Ltd ITA No 4247/DEL/2009, has restored



ITA No.223/Mum/2023
A.Y. 2010-11
Shruti Vinimay Ltd

the case to the files of the assessing officers to decide reasonableness of premium, thereby impliedly holding that if the quantum of share premium is unreasonable, addition to Total income can be made.

7. In view of the above, I have reason to believe that income chargeable to tax in the garb of share premium to the tune of Rs.52,00,000/- received by the assessee has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. Therefore, a notice u/s 148 r.w.s. 147 is therefore, is being issued to re-assess such income and also any other income chargeable to tax which has escaped assessment which comes to my notice subsequently in the course of the assessment proceedings.

8. Reasons for the reopening in this case has been recorded after taking due approval from Pr. CIT(A)-2, Mumbai as per provisions of section 151 of the IT Act, 1961.

(N. Ashok Babu)
Deputy Commissioner of Income Tax
Centre Circle-4(3), Mumbai.

5. On the strength of the reasons stated (supra) the AO has usurped the reopening jurisdiction u/s 147 of the Act, which action of AO is assailed before us.

6. As noted the condition precedent for reopening the assessment u/s 147 of the Act is that the AO should have the requisite “*reasons to believe escapement of income*”. The expression “*Reasons to believe*” postulates foundation based on information and belief based on reason. Even if there is foundation based on information, there still must be some *reason* warrant holding a belief that income chargeable to tax has escaped assessment. It is also settled position of law that adverse information may trigger “*reason to suspect*”, which is not sufficient to re-open an assessment because the requirement of law is “*reasons to believe escapement of income*” and not “*reason to suspect*”. This fine distinction should be borne in mind and when an AO receives an adverse information against an assessee, then he must make reasonable



ITA No.223/Mum/2023

A.Y. 2010-11

Shruti Vinimay Ltd

inquiry and collect material which would make him believe that there is in fact escapement of income. It is also settled position of law that when the validity of the “*reasons recorded*” is tested, then it should be examined on a standalone basis. Nothing can be added or subtracted. The AO should speak through the “*reasons recorded*” and the assessee should not be guessing as to what was the reasons for which the AO has reopened the assessment.

7. With the aforesaid principles in mind, when we analyzed the “*reasons recorded*” by AO in the instant case (supra), we note from the contents of para no. 2 & 3 of the reasons recorded that pursuant to a search carried out on RK Kedia Group on 13.06.2014 and in the premises of some entry operators, it was found that those entry operators were managing and controlling several entities which were utilized for providing accommodation entry in the form of purchase and shares and unsecured loans for commission. And these entities/companies were registered in Kolkata/Mumbai and those accommodation providing companies/investors had very weak balance-sheet with meagre turnover, which facts narrated are general in nature and narrates partly the setting up of /modus operandi of accommodation entry operators through establishment of entities controlled by them. In para no. 4, the AO speaks about the activity of assessee and observes that it had issued 130000/- shares of face value of Rs.10/- (i.e, Rs.13 Lakhs) for a premium of Rs.40 per share i.e. Rs.52 Lakhs. According to the AO, the assessee had shown income for AY 2008-09 and AY 2009-10 Rs.1,839/- and for AY 2010-11



ITA No.223/Mum/2023
A.Y. 2010-11
Shruti Vinimay Ltd

Rs.24,58,276/- which means that assessee's shares could not have commanded high premium of Rs.40/- per share; And at para 5 & 6 AO after citing few decisions of the Hon'ble High Court and Tribunal was of the opinion that there was "*reasons to believe*" income chargeable to tax in the garb of share premium to the tune of Rs.52 Lakhs have escaped assessment. From an analysis of the aforesaid "*reasons recorded*" by AO, it is discerned that in the relevant year under consideration the assessee company had issued shares for a premium of Rs.40 per share and in that process assessee has collected share-premium of Rs.52 Lakhs which have escaped assessment. In this factual context it is noted that the settled position of law is that adverse information against an assessee would trigger only "*reason to suspect*". Once the AO found that the assessee had issued 1,30,000 shares of face value of Rs.10/- for share premium of Rs.40 per share, then, he ought to have conducted a preliminary inquiry from which he should have found as a matter of fact who were the investors of these 1,30,000 shares; and whether those investors were paper companies providing only accommodation entry etc. And thereafter, he should have recorded the reasons as to whether the assessee had engaged in taking accommodation entry from the entry operators as revealed from search operation conducted at RK Kedia Group/Entry Operators as stated in para 2 & 3 of reason recorded. Since AO has not carried out even the preliminary enquiry after taking note of assessee collecting share capital with premium, the AO cannot be said to be possessing the requisite *reason to believe, escapement of income*, which omission is evident from reading of the *reasons recorded* [supra] wherein AO in



ITA No.223/Mum/2023

A.Y. 2010-11

Shruti Vinimay Ltd

the recorded reasons failed to provide the name of the investors which AO suspects to be entry operators [*which names of investors we find from the re-assessment order that there were four (4) companies*]. Thus, the AO failed to even mention the name of the investor/accommodation entry operators/paper companies, in his recorded “*reasons to believe escapement of income*” and bring out the nexus of these investors with the entry operators. In this case, as discussed (supra), it is clear that AO had only information which can raise “*reasons to suspect*” and not “*reasons to believe*” which is not sufficient for usurping the reopening jurisdiction u/s 147 of the Act. Therefore, since, the reasons recorded by AO does not satisfy the requirement of law, the action of the AO to have initiated re-opening of the assessment is found to be without jurisdiction and is therefore quashed.

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

Order pronounced in the open court on this 20/09/2023.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 20/09/2023.

Vijay Pal Singh, (Sr. PS)



ITA No.223/Mum/2023
A.Y. 2010-11
Shruti Vinimay Ltd

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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