

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 68/Ind/2023 (AY: 2015-16)

M/s DB Power Limited, Office Block, 1A, DB City Park, 5 th Floor, Corporate Block, Opp. M.P. Nagar Zone-1, Arera Hills, Bhopal (PAN:AACCD5475F)	बनाम/ Vs.	ACIT, Central Circle-1, Bhopal
(Assessee/Appellant)		(Revenue/Respondent)

ITA No. 73/Ind/2023 (AY: 2015-16)

ACIT, Central Circle-1, Bhopal	बनाम/ Vs.	M/s DB Power Limited, Office Block, 1A, DB City Park, 5 th Floor, Corporate Block, Opp. M.P. Nagar Zone-1, Arera Hills, Bhopal (PAN:AACCD5475F)
(Revenue/Appellant)		(Assessee/Respondent)

Assessee by	CA Shri Anil Garg and CA Arpit Gaur, Ld. AR
Revenue by	Shri Ashish Porwal, Ld. DR

Date of Hearing	09.11.2023
Date of Pronouncement	24.01.2024

आदेश / ORDER

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 30.12.2022 passed by Commissioner of Income-tax (Appeal)-3, Bhopal ["CIT(A)"] which in turn arises out of assessment-order dated 30.03.2022 passed by ACIT, Central

Circle-1, Bhopal ["AO"] u/s 147 of the Income-tax Act, 1961 ["the Act"] for assessment-year ["AY"] 2015-16, the assessee and revenue both sides have filed the captioned cross-appeals.

2. The background facts leading to present matters are as under:

- (a) The assessee is a closely-held company incorporated under the provisions of Companies Act, 1956 on 12.10.2006. It has been incorporated with the main object of generation, transmission and distribution of power. During the relevant AY 2015-16 under consideration, the commissioning of assessee's plant was in progress and hence the assessee was not having any income from business. However, the assessee filed its original return of income u/s 139(1) on 28.09.2015 declaring a total income of Rs. 22,73,04,890/- from interest on bank deposits. This return was processed u/s 143(1) of the Act. Subsequently, the AO re-opened assessment by issuing notice dated 30.03.2021 u/s 148 calling the assessee to re-file return. In response, the assessee re-filed return on 28.04.2021 repeating the same income of Rs. 22,73,04,890/-. Thereafter, the AO issued statutory notices u/s 143(2) and 142(1) from time to time which the assessee complied with. The assessee submitted details/documents as required by AO from time to time. Finally, the AO completed assessment vide order dated 30.03.2022 u/s 147 assessing total

income at Rs. 61,84,54,919/- with three (3) types of additions/
adverse conclusions as under:

- (i) The AO made an addition of Rs. 38,08,18,089/- u/s 56(2)(viib) on the premise that the assessee had received excessive consideration for issue of shares;
 - (ii) The AO made an adverse conclusion that the assessee had received cash of Rs. 34,43,98,002/- from different vendors from whom depreciable fixed assets were acquired. Since the assessee had not claimed any depreciation in current year due to non-commencement of business, the AO made an adverse conclusion in Para No. 5.5 of assessment-order for disallowing deprecation in subsequent years on the enhanced value of Rs. 34,43,98,002/- of fixed assets.
 - (iii) With respect to (ii), the AO also made an addition of Rs. 1,03,31,940/- u/s 69C on the premise that the assessee must have paid commission to those vendors who returned cash to assessee.
- (b) Aggrieved by order of AO, the assessee carried matter in first-appeal before CIT(A). During first-appeal, the assessee not only contested the merits of the additions/adverse conclusion made by AO but also challenged the legality of re-assessment proceeding having been

conducted by AO u/s 148/147 on multiple grounds. One of the legal grounds raised by assessee was such that the AO had issued notice u/s 148 on an illegal approval u/s 151. The assessee made a detailed submission to CIT(A) *qua* this ground but the CIT(A) remained unconvinced and vide Para No. 3.1.2 to 3.1.3 / Page No. 32 to 47 of his appeal-order, he rejected assessee's ground. On merits of three (3) addition/adverse conclusions made by AO as noted earlier, the CIT(A) granted relief *qua* (i) but upheld (ii) and (iii).

- (c) Now, both sides are aggrieved by order of CIT(A) and accordingly come in these cross-appeals on their respective claims. We proceed to dispose of both matters by this common order starting first with assessee's appeal.

Assessee's appeal:

3. The assessee has raised following grounds:

1(a). That, the act of the Ld. CIT(A) in confirming the actions of the AO of issuing notice under s. 148 of the Income-Tax Act, 1961 [‘the Act’] and thereafter, passing of the assessment order under s. 147 of the Act in pursuance thereof, is quite unjustified, unwarranted, without jurisdiction and bad-in-law.

1(b). That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuance of the notice under s. 148 of the Act, merely on the basis of borrowed satisfaction of some other officer without having any satisfaction of his own on the subject issues.

1(c). That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuance of the notice under s. 148 of the Act, without considering the material fact that the notice under s. 148 of the Act was issued by the AO without first obtaining an appropriate sanction from an appropriate authority as prescribed under the then prevailing provisions of section 151 of the Act.

1(d). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuance of the notice under s. 148 of the Act, without considering the material fact that first of all, the sanction was granted by an inappropriate authority and secondly, the sanction so granted was not in accordance with law, inasmuch, the sanction was granted in a mechanical manner and without application of mind.

2(a). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in upholding the findings given by the AO to the effect that the appellant company had booked excessive capital expenditure in its books of account under the garb of bogus payments aggregating to a sum of Rs.34,43,98,002/- to vendors during the relevant previous year and as also, in upholding the findings of the AO to the effect that the depreciation claimed by the appellant company in the subsequent years, on the enhanced value of Rs. 34,43,98,002/-, be disallowed in such years, without properly considering and appreciating the facts and circumstances of the case and as also detailed explanation of the appellant, made before him along with necessary documentary evidences.

2(b) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in upholding the AO's allegation of bogus payments to vendors, merely on the basis of a statement of one of the employees of the appellant company recorded during the course of search, without considering the material fact that such statement was subsequently retracted and therefore, the same was not having any evidentiary value in the eyes of law.

2(c) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in upholding the AO's allegation of bogus payments to vendors, without considering and appreciating the material fact that during the course of the assessment proceedings, the appellant was not given any opportunity of cross- examination of the persons on whose statements the AO had placed reliance for drawing adverse inferences against the appellant.

2(d) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in upholding the AO's allegation of bogus payments to vendors, by placing reliance upon the data allegedly recovered from the electronic devices without first complying with the provisions of the Indian Evidence Act, 1872 and The Information Technology Act, 2000 in letters and spirit.

2(e) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in upholding the AO's allegation of bogus payments to vendors, merely on the basis of certain excel sheets recovered from some personal email correspondence by one of the ex-employees of the appellant company, without considering and appreciating the material fact that at the first place, such excel sheets were not having any evidentiary value and secondly, the same were neither prepared by any of the authorized functionaries of the appellant company, nor the appellant company was aware of any preparation of such excel sheets.

2(f) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the AO's allegation of bogus payments to vendors, without considering and appreciating the material fact that during the course of the assessment proceedings, the AO had not made any independent inquiry by way of issuance of any summons under s.131 or letter under s.133(6) of the Act to the concerning vendors.

3(a) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.1,03,31,940/- made by the AO in the appellant's income on the allegation of payment of commission to various vendors in lieu of bogus capital expenditure, by holding the same as unexplained expenditure of the appellant under s. 69C of the Act without properly considering and appreciating the explanation of the appellant to the effect that the entire financial transactions undertaken by it during the relevant previous year with various vendors were fully genuine and duly supported by credible evidences and therefore, it was neither required, nor it had made any payment of commission to any vendor at any point of time.

3(b) That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the impugned addition of Rs. 1,03,31,940/- made by the AO in the appellant's income, under s. 69C of the Act, without considering the material fact that the entire capital expenditure incurred by the appellant were fully explained and were also supported by documentary evidences and therefore, the action of the Id. CIT(A) in upholding the AO's action of invoking the provisions of section 69C of the Act, without first finding any defect or discrepancy in the explanation and the documentary evidences furnished by the appellant, was completely unjustified, unwarranted and bad-in-law.

3(c) That, without prejudice to the above and without in any manner admitting any payment of commission, the learned CIT(A) grossly erred, both on facts and in law, in confirming the impugned addition of Rs.1,03,31,940/- in the appellant's income as unexplained expenditure under s. 69C of the Act, without considering the material fact that the sources of the alleged commission payment were fully explained being out of the alleged cash generated through vendors, as per the version of the AO himself.

4. That, without prejudice to the above and without in any manner admitting any of the allegations made against the appellant, the CIT(A) grossly erred in confirming the AO's presumption drawn against the appellant to the effect that the appellant had not actually incurred certain capital expenditure as claimed by it in its books of account, merely on the assumption of receipt of cash by the appellant company from the various vendors, without considering and appreciating the material fact that such an assumption as regard to the receipt of cash from the vendors, ipso facto, could not have been a reason for making assumption as regard to the non- incurrence of capital expenditure by the appellant."

4. Ld. AR for assessee started pleadings *qua* Ground No. 1(a), 1(c) and 1(d). In these grounds, the assessee assails the AO's action of issuance of notice u/s 148 as well as passing of assessment-order u/s 147 on the basis of illegal approval u/s 151 obtained by AO from inappropriate authority. For this purpose, Ld. AR carried us to section 147 which is the primary section empowering the AO to make assessment or reassessment. The said section 147 reads thus:

*"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 section 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 recompute 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.)"*

[Emphasis supplied]

5. Ld. AR submitted that the section 147 is '*subject to the provisions of section 148 to 153*' and sections 148 to 153 prescribe different-different requirements, conditions, time-limitations, etc. Section 151 is one section falling in the series of sections 148 to 153 and therefore section 147 is also subject to section 151. The means, the AO must follow the provision of section 151 but in present case, there is a violation of section 151.

6. To show such violation, Ld. AR carried us to various Pages of Paper-Book to apprise the factual position. Firstly, he demonstrated that the AO issued notice dated 30.03.2021 u/s 148 to assessee, the said notice is scanned and re-produced below:

ANNEXURE: -A-3.00



GOVERNMENT OF INDIA
 MINISTRY OF FINANCE
 INCOME TAX DEPARTMENT
 OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
 DCIT/ACIT 1(1), BHOPAL

To: DB POWER LIMITED OFFICE BLOCK, 1A DB CITY PARK , 5TH FLOOR, CORPORATE BLOCK OPP.M.P NAGAR ZONE-1, ARERA HILLS BHOPAL, BHOPAL 462016 , Madhya Pradesh India

PAN: AACCD5475F	AY: 2015-16	Dated: 30/03/2021	DIN & Notice No : ITBA/AST/S/148/2020-21/1031920718(1)
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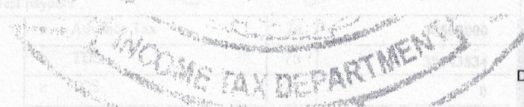
Notice Under Section 148 Of The Income Tax Act, 1961

Sir/ Madam/ M/s,

Whereas I have reasons to believe that your Income chargeable to Tax for the Assessment Year 2015-16 has escaped Assessment within the meaning of section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/ re-assess the income/ loss for the said Assessment Year and I hereby require you to deliver to me within 30 days from the service of this notice, a return in the prescribed form for the said Assessment Year.

This notice is being issued after obtaining the necessary satisfaction of the RANGE 1, BHOPAL



SHOBHNA MEENA
 DCIT/ACIT 1(1), BHOPAL

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

This document has been digitally signed by: **SHOBHNA MEENA** In the capacity of: **DIRECTOR**
 Designation: **DCIT/ACIT 1(1)** Email ID Address: **1031920718@1031920718** On: **30-03-2021** At: **BHOPAL**


DO NOT SEND THIS ACKNOWLEDGEMENT TO CPC, BENGALURU

Note: If digitally signed, the date of digital signature may be taken as date of document.
 ROOM NO:109,I Floor, Aaykar Bhawan, 48, ARERA HILLS, HOSHANGABAD ROAD, BHOPAL, Madhya Pradesh, 462011
 Email: BHOPAL.DCIT1.1@INCOMETAX.GOV.IN Office Phone:07552525341
 * DIN-Document identification No.

This document is digitally signed
 Signer: SHOBHNA MEENA
 Date: Tuesday, March 30, 2021 3:57 PM
 Location: BHOPAL

7. Then, he showed that for obtaining approval u/s 151, the AO sent a proposal dated 22.10.2019 to the Joint Commissioner of Income-tax-I, Bhopal whereupon the Joint Commissioner granted approval on 23.10.2019 as under:

ANNEXURE - A-5.05 (13)


GOVERNMENT OF INDIA
वित्त मंत्रालय / MINISTRY OF FINANCE
राजस्व विभाग / DEPARTMENT OF REVENUE
कार्यालय उप.आयकर आयुक्त-1(1), भोपाल
OFFICE OF THE DEPUTY COMMISSIONER OF INCOME TAX-1(1), BHOPAL
कक्षा नं 109, आयकर भवन, होशंगाबाद रोड, भोपाल-462011/Room No. 109, Aayakar Bhawan, Hoshangabad Road, Bhopal - 462011
e-mail-bhopal.dcit1.1@incometax.gov.in

22 OCT 2019
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जय / सेवुक्त आयकर आयुक्त
आयकर
जि.1, भोपाल

Dated: 22.10.2019

F.No.:DCIT-1(1)/BPL/151(1)/2019-20

To
The Joint Commissioner of Income Tax-I
Bhopal

Sir,

Sub : Approval u/s 151(1) of the Income Tax Act, 1961 for issue of notice u/s 148 for the A.Y. 2015-16 in the case of M/s DB Power Ltd. (PAN: AACCD5475F)- reg-.

Kindly refer to the above subject.

In this regard, find enclosed herewith revised proposal for approval to issue notice u/s 148 of the Income Tax Act, 1961 in the below mentioned case for the A.Y. 2015-16 in the prescribed proforma:

S. No	Name of the assessee	PAN	A.Y.
1	M/s DB Power Ltd., Office Block, 1A, DB City Park, 5th Floor, Corporate Block, Opposite MP Nagar, Zone-1, Bhopal	AACCD5475F	2015-16

The approval u/s 151(1) of the Income Tax Act, 1961 may kindly be accorded.

Yours faithfully,
(RAJAT SINGHAI)
Dy. Commissioner of Income tax 1(1),
Bhopal

22/10

109

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

1	Name and address of the assessee	M/s DB Power Limited, Office Block, 1A, DB City Park, 5 th Floor, Corporate Block, Opposite MP Nagar, Zone-1, MP Nagar, Arera Hills, Bhopal -462016 AACCD5475F
2	PAN/GIR No.	Company
3	Status	DCIT I(1), Bhopal
4	District/Circle/Range	2015-16
5	Assessment Year in respect of which it is proposed to issue notice u/s.148.	Rs 38,08,18,090/-
6	The quantum of income which has escaped assessment	---
7	Whether the provisions of sec. 147(a)/147(b)/ 147(c) are applicable or both sections are applicable	---
8	Whether the assessment is proposed to be made for the first time. If the reply is affirmative, please state: (a) Whether any voluntary return had already been filed; and (b) If so, the date of filing the said return.	Yes (a) Yes (b) 28.09.2015
9	If the answer to item 8 is in the negative, please state: (a) The income originally assessed (b) Whether it is a case of underassessment, assessment at too low rate, assessment which has been made the subject of excessive relief or allowing of excessive loss or depreciation.	---
10	Whether the provisions of sec. 150(1) are applicable. If the reply is in affirmative, the relevant facts may be stated against item No.11 & it may also be brought out that the provisions of sec. 150(2) would not stand in the way of initiating proceedings u/s.147	---
11	Reasons for the belief that income has escaped assessment	As per Annexure-A

Dated 22.10.2019

(Rajat Singhai)
 Dy. Commissioner of Income Tax
 Circle - I(1), Bhopal

12	Whether the Addl./Joint Commissioner / Commissioner/Board is satisfied on the reasons recorded by the AO that it is a fit case for issue of notice u/s.148	Yes, I am satisfied that it is a fit case for issue of notice u/s 148 on the Reason recorded by the A.O.A.Y. 2015-16
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Date:

(Alpesh Parmar) 23/10/19
 Joint Commissioner of Income-Tax
 (Bhopal, Bhopal)
 (ALPESH PARMAR)
 संयुक्त आयकर अधिकारी
 Joint Commissioner of Income Tax
 क्षेत्र-1 भोपाल, Range - Shop

132

ANNEXURE - A.S.04



भारत सरकार / GOVERNMENT OF INDIA
वित्त मंत्रालय / MINISTRY OF FINANCE
राजस्व विभाग / (DEPARTMENT OF REVENUE)

कार्यालय
सहायक आयकर आयुक्त-1(1) भोपाल
21/10/19
पत्र प्रेषित रजिस्टर क्रम सं.

OFFICE OF THE JOINT COMMISSIONER OF INCOME TAX, RANGE-1, BHOPAL
कमरा नं. 203, आयकर भवन, 48 अरेरा हिल्स, होशंगाबाद रोड, भोपाल-462011
ROOM NO. 203, AAYAKAR BHAWAN, 48, ARERA HILLS, HOSHANGABAD ROAD, BHOPAL-462011
E-mail ID bhopal.addict1@incometax.gov.in & Phone No. 0755-2523347

F. No. JCIT/R-1/BPL/u/s 148 Approval/2018-19/ Dated : 23/10/2019

To,
The Deputy Commissioner of Income Tax-1(1),
Bhopal

Sub-Approval u/s 148 of the Income Tax Act, 1961 - reg. -

Please refer to your letter F.No. DCIT/Circle-1(1)/148 Proposal/2019-20 dated 22.10.2019 on the above subject.

2. Approval are hereby accorded for issuance of notice u/s 148 of I.T. Act, 1961 in respect of following cases as proposed by you.

S.No	Name & Address of the Assessee	PAN	A.Y.	Amount (in Rs.)
1	M/s Daulatram Engineering Services Pvt Ltd Khasra No. 10/2, N.H. - 12, VII- Simrai, Mandideep, Dist - Raisen	AABCD3596Q	2018-19	10,21,14,725/-
2	M/s DB Power Ltd., Office Block, 1A, DB City Park, 5 th Floor, Corporate Block, Opposite M.P. Nagar, Zone-1, Bhopal	AACCD5475F	2015-16	38,08,18,090/-

3. The satisfaction note of the undersigned is enclosed for further necessary action at your end.

Encl: As above.

Pl. Pl. Upload
u/s 27B A.

(ALPESH PARMAR)
Joint Commissioner of Income-tax, Range-1
Bhopal

8. Thus, Ld. AR successfully demonstrated that the AO issued notice dated 30.03.2021 u/s 148 for AY 2015-16 on the basis of approval obtained from and granted by Joint Commissioner. Having shown this, Ld. AR submitted that the AY 2015-16 expired on 31.03.2016 and 4 years' period expired on 31.03.2020 and the AO issued notice on 30.03.2021 after expiry of 4 years. Therefore, the assessee's case is covered by section 151(1) and not by section 151(2). For the sake of immediate understanding, the section 151 is re-produced below:

"151. Sanction for issue of notice.

(1) No notice shall be issued under section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under sub-section (1), no notice shall be issued u/s 148 by an Assessing Officer, who is below the rank of Joint Commissioner unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice."

Ld. AR submitted that the section 151(1) clearly prescribes that no notice 'shall' be issued u/s 148 by AO after expiry of four years from the end of relevant assessment year unless the *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* is satisfied, on the reasons recorded by AO that it is a 'fit case' for issue of notice. Admittedly, the AO issued notice on 30.03.2021 for AY 2015-16, after expiry of four years, on the strength of approval from Joint Commissioner and not from

competent authority i.e. *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* as prescribed in law. Therefore, the notice issued by AO u/s 148 is violative of section 151(1) and illegal in the eyes of law. When it so, the ultimate passing of assessment-order u/s 147 is also illegal. Therefore, the entire proceeding done by AO has to be quashed.

9. Then, the Ld. AR submitted that the assessee raised this very claim before CIT(A) and made a detailed submission also but the CIT(A) has wrongly rejected assessee's submission and upheld AO's action. The Ld. AR made following pleadings to oppose the CIT(A)'s order:

9.1 The CIT(A) has observed that the AO sent proposal to Joint Commissioner on 22.10.2019 and the Joint Commissioner had also granted approval on 23.10.2019, which was before 31.03.2020 i.e. before expiry of 4 years' period from end of AY 2015-16; therefore the AO was having a valid approval in possession in terms of section 151(2). Ld. AR submitted that such observation made by CIT(A) is very much faulty for the simple reason that the AO actually issued notice to assessee on 30.03.2021 which was beyond the outer limit of four years. He argued that the section 151(1) and 151(2) are independent of each other and prescribe clear-cut and altogether different provisions for issuance of notices based on time-frame. While section 151(1) requires approval to be taken from higher authorities, namely *Principal Chief Commissioner or Chief Commissioner or Principal*

Commissioner or Commissioner for issuance of notice after expiry of four years, section 151(2) permits issuance of notice within four years after obtaining approval from much lower-level authority, namely Joint Commissioner. When the law provides a clear-cut mechanism, the statutory function has to be performed in the manner prescribed or it is not to be done at all; there cannot be any other option. Ld. AR submitted that if the AO is allowed to obtain approval within four years from lower-authority in terms of section 151(2), just keep such approval in file and subsequently issue notice after four years, it would be a clear-cut case of circumventing, defiance and violation of section 151(1) and by-passing the authority vested in *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* who are only the competent authorities to grant approval. Therefore, any such attempt or action of AO must be viewed illegal and invalid.

9.2 That the CIT(A) has also observed that the issuance of notice on 30.03.2021 by AO is saved by Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31.03.2020 ["TOLA"] promulgated to deal with Covid-19 pandemic. But such observation of CIT(A) is also bad. To show this, Ld. AR has filed a copy of TOLA in Case-law Paper-Book and invited our attention to the following provision thereof:

"3(1) Where, any time limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020 or such other date after the 29th

day of June, 2020 as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as –

(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or

(b) / (c) XXX (not re-produced being irrelevant)"

Ld. AR submitted that it is true that TOLA has granted several extensions/relaxations to tax authorities due to Covid-19 Pandemic but there are two vital propositions in assessee's case to be taken note of. These are as follows : (i) The assessee's case relates to AY 2015-16 for which the AO had time to issue notice u/s 148, *of course after obtaining a proper approval u/s 151(1)*, within 6 years from end of AY 2015-16, therefore the time-limit to issue notice would expire on 31.03.2022. Being so, the TOLA is not applicable because section 3(1)(a) of TOLA, re-produced above, clearly prescribes its applicability to cases where the time-limit for issuing notice was to expire during 20.03.2020 to 29.06.2020 or such other date after 29.06.2020 as the Central Govt. may notify. Since the Central Govt. ultimately notified 31.03.2021, the section 3(1)(a) was applicable only for the situations where the time-limit would expire upto cut-off date of 31.03.2021. In assessee's case, the time limit to issue notice was not expiring on 31.03.2021, the AO had time-limit upto 31.03.2022; and (ii) Even if the TOLA may have extended the time-limit to issue notice as prescribed in section 149 of the Act but that would not amount to amending the provisions of section 151(1)/(2) requiring approval from a specific authority.

Ld. AR submitted that exactly these twin-propositions of assessee's case have been dealt and decided by Hon'ble Mumbai High Court in a series of decisions wherein the Hon'ble High Court was pleased to quash the proceedings undertaken by AO:

- (a) JM Financial and Investment Consultancy Services Private Limited Vs. ACIT, Circle-3(2)(1) and others order dated 04.04.2022: (2023) 451 ITR 205 (Bombay HC) / (2022) (4) TMI 1446
- (b) Voltas Limited Vs. ACIT, Circle-8(3)(1), Mumbai (2022) (4) TMI 594, order dated 05.04.2022
- (c) Asian Paints Ltd. Vs. ACIT, Circle-3(4), Mumbai and others (2022) (5) TMI 61, order dated 26.04.2022
- (d) Johnson and Jonson Private Limited Vs. DCIT, Circle-3(4) and others (2022) (5) TMI 339, order dated 04.05.2022.

10. With these submissions, Ld. AR strongly contended that the notice issued by AO u/s 148 after expiry of four years from end of relevant assessment-year without taking approval of competent authority prescribed in section 151(1) is absolutely bad, illegal, invalid and cannot be sustained. Therefore, the entire proceeding done by AO on the basis of such illegal notice including passing of order u/s 147, is invalid in the eyes of law and the only option is to quash the same as decided in various decisions quoted by him.

11. Replying to above, Ld. DR for revenue submitted that the assessee has raised this issue before CIT(A) but the CIT(A) has rejected after due consideration. Ld. DR submitted that the AO has sent a valid proposal dated 22.10.2019 to Joint Commissioner and obtained a valid approval on

23.10.2019; both of these events have taken place within 4 years. Ld. DR submitted that there is no requirement in law that the AO must issue notice immediately after receiving approval. According to Ld. DR, once the AO had taken a valid approval from Joint Commissioner within 4 years in terms of section 151(2), the AO could validly issue notice u/s 148 even after expiry of 4 years without taking approval from authorities prescribed in section 151(1). Therefore, there is nothing wrong in the notice issued by AO. Without prejudice, Ld. DR also submitted that w.e.f. 15.03.2020/20.03.2020, there was Covid-19 Pandemic in the country due to which the entire system had come to a halt. Hence the AO could not issue notice before 31.03.2020. Ld. DR submitted that had there been no Covid, the AO would have perhaps issued notice before 31.03.2020. But since the TOLA extended time-limit uptill 31.03.2021, the AO issued notice on 30.03.2021. Therefore also, the notice is saved by TOLA. Ld. DR made one more submission that the assessee never objected AO's action during assessment-proceeding and participated in assessment proceeding, therefore the irregularity in obtaining approval, even if there be, is saved by section 292BB and the assessee is precluded from raising such an objection due to bar imposed in section 292BB.

12. In re-joinder, Ld. AR submitted that just to address the contention raised by Ld. DR and without prejudice to his earlier submission, when the AO got approval as early as on 23.10.2019 and the Covid Pandemic came into being on 15.03.2020/20.03.2020, the AO had about 5 months' ample

time to issue notice but the AO did not. Thus, the AO himself made a serious lapse and now the revenue is just trying to cover up the AO's lapse by gaining sympathy and support from Covid-19 pandemic whereas the Covid came into being in March, 2020. Therefore, the revenue cannot be granted any such concession to cover up the lapse of AO. With regard to the rescue sought by revenue on the strength of section 292BB, Ld. AR submitted that the section 292BB applies in different situations, it does not apply where the AO has not obtained a valid approval as mandated by section 151(1) and yet issued notice to assessee.

13. We have considered rival contentions of both sides and perused the orders of lower-authorities as well as the material held on record to which our attention has been drawn. The issue being contested by assessee is with respect to legality of notice issued u/s 148 by AO after expiry of four years without having a valid approval in terms of section 151(1). The admitted facts are such that the AO issued notice u/s 148 on 30.03.2021 on the basis of approval dated 23.10.2019 obtained from Joint Commissioner in terms of section 151(2). The assessee's stand is that the AO issued notice after expiry of four years from end of relevant assessment-year which could have been done only after taking approval from *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* u/s 151(1) but since the AO has failed to do so, the notice is violative of section 151(1) and illegal. We have analysed the situation of present case with reference to the legal provisions and decided cases. At first, we find that section 147

which enables the AO to undertake re-assessment proceeding as has been done in present case, is subject to section 148 to 153 and thereby subject to section 151. There can hardly be any dispute over this aspect. Going next, we find that the section 151 is a mandatory provision which is very clear from phraseology of section 151(1)/(2) itself. For the sake of immediate reference, even at the cost of repetition, we re-produce section 151 which reads as under:

“151. Sanction for issue of notice.

(1) No notice shall be issued under section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under sub-section (1), no notice shall be issued u/s 148 by an Assessing Officer, who is below the rank of Joint Commissioner unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.”

A careful reading of above provision of section 151 shows that the sub-section (1) as well as (2) use the wording “no notice shall be issued”. Thus, the phraseology used by Parliament is negative and very much stricter. It stops the AO from issuing a notice unless the proper authority prescribed therein is satisfied that “it is a fit case for the issue of notice”. It is further noteworthy that sub-section (1) prescribes a higher authority if the notice is to be issued after expiry of four years. There is a significant purpose involved in prescribing higher authority of department in sub-section (1) as

compared to sub-section (2). The language is also very clear and does not leave any scope of ambiguity and the words are very plain and specific. It is clearly prescribed in sub-section (1) that "*No notice shall be issued under section 148 by an Assessing Officer, after the expiry of a period of four years*". Thus, if the AO wants to issue notice after expiry of four years, this can be done only under the approval of *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner*. The language does not give any scope or flexibility to AO to obtain approval within four years from lower-authority u/s 151(2), keep such approval in file and subsequently issue notice after four years without taking approval from higher authority u/s 151(1). Ld. AR is very much correct in submitting that if such an approach is allowed to AO, this would be a clear circumvention as well as defiance and violation of section 151(1) made by Parliament. We may be hastened to add here that although in present appeal, the Ld. DR is supporting AO's approach just to save this case of department but otherwise even the *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* would not accept such approach of AO and they would certainly say that such approach of AO is unauthoritative and invalid. We may also add here that the AO was having time to issue notice uptill 31.03.2022, therefore the AO could very well obtain a fresh approval from *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* u/s 151(1) and issue notice to assessee after four years even though he had taken earlier approval u/s 151(2) from Joint

Commissioner. In that case, there would have not been any lapse. But the AO has not done so. Therefore, in the present case, we agree with Ld. AR's pleading that the AO was not having a valid approval from a competent authority as required u/s 151(1), hence the notice issued u/s 148 suffers from an invalidity.

14. One important argument placed by Ld. DR that the AO had taken approval on 23.10.2019 and the four years period was available upto 31.03.2020 but the AO could not issue notice because of Covid-19 pandemic is not having any strength. We find a strong merit in the argument of Ld. AR that the AO got approval as early as on 23.10.2019 and the Covid Pandemic came into being on 15.03.2020/20.03.2020, therefore the AO had about 5 months' ample time to issue notice but still the AO did not issue. Thus, the AO himself made a serious lapse and now the revenue is just trying to cover up the AO's lapse by gaining sympathy and support from Covid-19 pandemic whereas the Covid came into being in March, 2020. Therefore, the revenue cannot be granted any such concession to cover up the lapse of AO. We are in full agreement with Ld. AR's submission. There is one more dimension to this very argument being claimed by revenue. The revenue is claiming that due to Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31.03.2020 ["TOLA"], there was an extension of time-limit. But this argument is also not acceptable because of direct decisions of Hon'ble Mumbai High Court governing assessee's facts/propositions as discussed in foregoing Para No. 9.2 at length. While

Ld. AR has quoted several decisions but we re-produce below the first in sequence referred by Ld. AR i.e. **JM Financial and Investment Consultancy Services Private Limited Vs. ACIT, Circle-3(2)(1) and others order dated 04.04.2022: (2023) 451 ITR 205 (Bombay HC) / (2022) (4) TMI 1446:**

"1 Petitioner is impugning a notice dated 31st March 2021 issued under Section 148 of the Income Tax Act, 1961 (the Act) for Assessment Year 2015-2016, an order dated 24th January 2022 rejecting petitioner's objections to reopening, the sanction granted under Section 151 of the Act dated 26th March 2021 for issuance of notice under Section 148 of the Act and a subsequent notice dated 24th January 2022 under Section 142(1) of the Act.

2. We would straightaway go to the sanction granted under Section 151 of the Act. It is petitioner's case that the approval obtained for issuing notice under Section 148 of the Act is not in accordance with the mandate of Section 151 as the said approval is of Additional Commissioner of Income Tax instead of Principal Commissioner of Income Tax. It is petitioner's case that the reasons put up for approval on 23rd March 2021, which is after the expiry of four years from the end of the relevant assessment year and approval was granted on 26th March 2021. Therefore, Dr. Shivram submitted that as per Section 151 of the Act, as four years have elapsed at the time of reopening, the sanction is required to be obtained from the Principal Commissioner of Income Tax and since the sanction has not been obtained from the Principal Commissioner of Income Tax, the notice issued is bad in law. Of course, Dr. Shivram also submitted that the sanction granted itself indicates non application of mind but he did not wish to elaborate on that since the Court, after considering the documents annexed to the petition, felt that the approval granted was not in accordance with Section 151 of the Act.

3. Sub-Section 1 of Section 151 provides that no notice shall be issued under Section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice.

4. Admittedly in this case, four years from the end of the relevant assessment year has expired before the issuance of notice and the approval also has been obtained from the Additional Commissioner of Income Tax and not Principal Commissioner of Income Tax. In the affidavit in reply filed through one Nikhil Bansal affirmed on 4th March 2022, these facts have not been disputed but according to respondents, the approval granted by the

Additional Commissioner of Income Tax was a valid approval because the Additional Commissioner of Income Tax was a competent authority.

5. Respondents have relied upon a letter dated 18th March 2021 issued by one Income Tax Officer, who has given an opinion to the Additional Commissioner of Income Tax that in view of the Taxation and other Laws (Relaxation of Certain Provisions) Act, 2020 (Relaxation Act), limitation, *inter alia*, under provisions of Section 151(1) and Section 151(2), which were originally expiring on 31st March 2020 stand extended to 31st March 2021. According to the Income Tax Officer, in view of the above, Assessment Year 2015-2016 which falls under the category within four years as on 31st March 2020, the statutory approval for issuance of notice under Section 148 of the Act for the Assessment Year 2015-2016 may be given by the Range Head as per the said provisions. Mr. Sharma clarifies that the Income Tax Officer is only conveying the view of the Principal Commissioner of Income Tax because this letter has been issued on the letterhead of Principal Commissioner of Income Tax.

6. ***Even for a moment we agree with the view expressed by the Principal Commissioner of Income Tax, still it applies to only cases where the limitation was expiring on 31st March 2020. In the case at hand, the assessment year is 2015-2016 and, therefore, the six years limitation will expire only on 31st March 2022. Certainly, therefore, the Relaxation Act provisions may not be applicable. In any event, the time to issue notice may have been extended but that would not amount to amending the provisions of Section 151 of the Act.***

7. ***In our view, since four years had expired from the end of the relevant assessment year, as provided under Section 151(1) of the Act, it is only the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner who could have accorded the approval and not the Additional Commissioner of Income Tax. On this ground alone, we will have to set aside the notice dated 31st March 2021 issued under Section 148 of the Act, which is impugned in this petition. In view thereof, the consequent orders and notices will also have to go.***

8. *Petition is allowed in terms of prayer clause - (a)..."*

[Emphasis supplied]

We have already noted the propositions of assessee's case in foregoing Para No. 9.2 and need not re-narrate same to avoid repetition. We only suffice to mention that there is no rebuttal or contradiction by revenue against those

propositions. Therefore, the assessee's case is straightaway covered by Para No. 6 & 7 of the above decision of Hon'ble Mumbai High Court. Respectfully, following the same, we are of the considered view that the TOLA is not applicable and in any case, the TOLA has not amended section 151. Hence, the revenue's claim that its case is protected by TOLA is meritless and liable to be rejected.

15. The last argument being taken by Ld. DR for revenue is such that the assessee never objected to AO's action during assessment proceedings and participated in assessment proceedings, therefore the irregularity in obtaining approval is saved by section 292BB and the assessee is precluded from raising such an objection due to the bar imposed in section 292BB. In this regard, we re-produce section 292BB which reads as under:

"292BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—

(a) not served upon him; or

(b) not served upon him in time; or

(c) served upon him in an improper manner:

***Provided** that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."*

Thus, the section 292BB has a limited application, it operates in only one of the three situations mentioned in (a), (b) or (c) which are basically situations of irregularity in "service" of notice. In the present case of the assessee, the AO has issued notice u/s 148 without having a valid approval u/s 151(1) which is

not at all covered by section 292BB. Therefore, the Ld. DR's pleading that the revenue has protection of section 292BB is meritless and liable to be rejected.

16. In our extensive discussions in preceding paragraphs, we have dealt all contentions of parties. That brings us to conclude that the AO has issued notice u/s 148 without having a valid approval mandated by section 151(1). Being so, we are of considered view that the revenue's case is suffering from jurisdictional defect and the entire proceeding u/s 148 / 147 undertaken by AO is illegal and unsustainable. We, therefore, allow ground 1(a), 1(c) and 1(d) of assessee's appeal and quash the order passed by AO. Consequently, we make it clear that not only the additions made by AO are deleted but also the adverse conclusion made by AO for not allowing depreciation in subsequent years on enhanced value of assets is also quashed. The AO shall allow depreciation on full value of assets (including the enhanced value of Rs. 34,43,98,002/- alleged by AO) in subsequent years. Ordered accordingly.

17. Since we have already quashed AO's order, other grounds raised by assessee whether on legality or merits are not required to be adjudicated, those grounds are left open.

Revenue's appeal:

18. The revenue has raised grounds assailing the relief granted by CIT(A) in first-appeal. But since we have already quashed AO's order, there is no

scope for survival of revenue's appeal. Consequently, revenue's appeal is dismissed.

19. Resultantly, assessee's appeal is allowed and revenue's appeal is dismissed.

Order pronounced in open court on 24.01.2024.

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/ Dated : 24.01.2024.

CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore