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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI PADMAVATHY S, AM

आयकर अपील सं/ I.T.A. No.1168/Mum/2023
(**निर्धारण वर्ष** / Assessment Years: 2009-10)

Neel Ventures Pvt. Ltd B-47/187, Kalina Sunder Nagar CHS, Santacruz (East), Mumbai-400098.	**बनाम** / Vs.	ITO-15(2)(3) 432, Aayakar Bhavan, Maharashi Karve Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCN7025R		
(अपीलार्थी / **Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Ashok Bansal
Revenue by:	Shri Ashok Kumar Ambastha (Sr. DR)

सुनवाई की तारीख / Date of Hearing: 22/02/2024
घोषणा की तारीख /Date of Pronouncement: 28/02/2024

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 10.02.2023 for the assessment year 2009-10.

2. The assessee has challenged the validity of the reopening by AO (jurisdiction) u/s 147 of the Income Tax Act, 1961 (hereinafter "the Act"). So the legal issue is taken up first.

3. Brief facts relevant to challenge made by assessee against the jurisdiction of the AO u/s 147 of the Act are that the assessee had filed its return of income on 21.09.2009 for AY. 2009-10 declaring loss of (Rs.72,855/-). Thereafter, the AO issued notice u/s 148 of the Act dated 29.03.2016 and the assessee requested for copy of the "*reasons recorded"* for the re-opening of the assessment which was provided to the assessee which was dated 14.03.2016 (*Copy found placed at page*

no. 3 of PB) and the assessee objected to the re-opening vide letter dated 15.11.2016 (*Copy of which found placed at page no. 36 to 39 dated 14.11.2016 of PB)* which was rejected by the AO vide order dated 15.11.2016. Thereafter, the AO completed the assessment and made an addition of Rs.50 Lakh and Rs.3.07 cr and Rs.5,97,65,000/- total of Rs.9,53,92,150/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to dismiss the appeal of the assessee on merits as well as on the legal issue raised by the assessee.

4. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee has raised *inter-alia* several legal issues as well as on merits. And since the assessee has challenged the jurisdiction of the AO to re-open the assessment on the ground that the AO did not had "*Reasons to believe, escapement of income*", and therefore did not had the jurisdiction to re-open the assessment, we will first of all, examine the legal issue, and for that we need to examine the "*reasons recorded"* by AO, to see whether he had satisfied the condition precedent necessary for re-opening the assessment u/s Section 147 of the Act i.e. Firstly whether AO has recorded the reasons before reopening the assessment. And if so, whether the reasons recorded fulfil the requirement of law or not. The fundamental requirement of law as stipulated u/s 147 of the Act is that before reopening an assessment the AO has to record the reasons wherein he has to spell out the "*Reasons to believe, escapement of income*". It is well settled that "*Reasons to believe*" postulates foundation based on information and belief based on reason. After a foundation based on information is made, there still must be

some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. In addition, one should bear in mind the fine distinction between "*Reason to Suspect*" and "*Reason to believe*". Information adverse may trigger "*Reason to Suspect*" which is not sufficient to reopen an assessment because as per section 147 of the Act, AO should have "*Reasons to believe*", *escapement of income*" and not Reasons to suspect escapement of income. Therefore, when AO receives adverse information against an assessee, he should make preliminary inquiry and collect material, which would make him form a belief, that there is in fact an escapement of income. Then only AO should record the "*reason to believe escapement of income*" and thereafter only, he should issue the notice u/s 148 of the Act. Once the AO satisfies the aforesaid requirement of law, then only invocation of jurisdiction of reopening assessment be held to be valid in the eyes of law. Further, we have to bear in mind that, when the validity of re-opening of an assessment is tested, the *reasons recorded* by AO for re-opening the assessment needs to be tested on a *standalone* basis. Nothing can be added nor anything be deleted from the reasons so recorded by AO. No inference can be allowed to be drawn on the basis of reasons not recorded by him. AO has to speak through the reasons so recorded by him. The reasons recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide the link between conclusion and evidence. So the reasons recorded by the AO before re-opening as it is, it should be examined to see whether AO had met in the "*reasons recorded*", the essential condition precedent to do so i.e. "*Reason to believe, escapement of*

income". So in this backdrop let us look at the reasons recorded in this case by AO to re-open the assessee's assessment for AY 2009-10, which is reproduced as under:-

Reasons for re-opening recorded u/s 147 of the I. T. Act.

The assessee filed the return of income for A Y 2009-10 on 21.09.2009 declaring total income of Rs. Nil. The said return of income was processed u/s. 143(1) of the I T Act on 31.10.2016.

2. In this regard, information is received from the office of the ITO 6(1)(1), Mumbai vide letter No. ITO 6(1)(1)/Information/2015-16 dated 07.03.2016 that the assessee has made an investment of Rs, 50,00,000/- for procuring 50,000 equity shares at a premium of Rs. 90/- per share of M/s. Abikaran Trading Pvt Ltd during F.Y. 2008-09 relevant to AY 2009-10.

3. As there was no scrutiny assessment done for this year, the so called share premium having been received by the assessee was not examined. Considering the above the huge sums introduced in the books of the assessee as receipt of money has not been explained/established, it is in the nature of unexplained cash credit. In view of the ratio of the decision of Rajesh Jhaveri Stock Brokers Pvt Ltd. 291 ITR 500 (SC) no assessment u/s. 143(3) has been carried out by the Assessing Officer with a result that 'nature' and 'justification' for charging share premium ever and above intrinsic value of the share remains unexplained.

4. I have reasons to believe that income to the extent of amount of share premium charged over and above the intrinsic value of the share has escaped assessment. In the view of the facts discussed above and in the light of the ratio of the decision cited above, I have reason to believe that income to the extent of amount of share premium charged

> over and above the intrinsic value of the share has escaped assessment.
>
> (Vijay D Gaikwad)
> ITO 15(2)(2), Mumbai
>
> Date: 14.03.2016

5. From a perusal of the reasons recorded shows in 1st paragraph that the assessee has filed the return of income for AY. 2009-10 on 21.9.2009 declaring total income of Rs. Nil. And that the return of income was processed u/s 143(1) of the Act on 31.10.2010. In Paragraph 2, the AO take notice of the information, he received from the office of the ITO-6(1)(1), Mumbai dated 07.03.2016 which revealed that the assessee has made an investment of Rs.50,00,000/- for procuring 50,000 equity shares at a premium of Rs.90/- per share of M/s. Abhikaran Trading Pvt. Ltd during the relevant assessment year under consideration i.e. AY. 2009-10. In paragraph 3, the AO observes that since there was no scrutiny assessment done for this year, the so called share premium having been received by the assessee could not be examined. Therefore, according to him, considering the huge sum introduced in the books of the assessee as receipt of money has not been explained/established by the assessee which it is in the nature of unexplained cash credit. And since there was only processing of return u/s 143(1) of the Act, the '*nature*' and '*justification*' for charging share premium over and above intrinsic value of the share remains unexplained. At paragraph 4, the AO states that he has reasons to believe that income to the extent of amount of share premium charged over and above the intrinsic value of the share has escaped

assessment. In view of the above discussion, he has reasons to believe that income to the extent of amount of share premium charged over and above the intrinsic value of the share has escaped assessment.

6. From the aforesaid contents of the "*reasons recorded"* by the AO to re-open the assessment, we find that he got an information stated at para 2 [i.e. assessee had invested/applied for 50,000 equity share of M/s. Frugal Trading Company Pvt. Ltd. now known as M/s. Abhikaran Trading Pvt. Ltd. at a premium of Rs. 90/- per share and invested total amount of Rs. 50,00,000/- in that company]. After, taking note of the information of fact, (supra at para 2), the AO was bound to spell out the reasons for arriving/forming the belief of escapement of income which is missing in the *reasons recorded* by AO because at para no. 3 & 4 he states about receiving money/charging premium, which is per-se contradicting the fact stated at para 2 of the reasons recorded. At Para no. 2, the AO takes note of the information that in the year under consideration assessee had invested of Rs.50,00,000/- for procuring 50,000 shares at a premium of Rs. 90/- per share of M/s. Frugal Trading Company Pvt. Ltd (now known as Abhikaran Trading Pvt. Ltd.). After having recorded the foundational fact/information about such an investment made by assessee in M/s. Abhikaran Trading Pvt. Ltd, the AO while giving his reasons to believe escapement of income, states totally contradictory facts which is stated at Para 3 & 4 wherein he speaks about share premium received by assessee, [which has been introduced in the books of assessee], which fact according to him, needs to be

explained/established by the assessee [as it is in the nature of cash credit]. According to AO, share premium charged over and above the intrinsic value of shares have escaped assessment. According to Ld. AR, from the averment made at para 3 & 4 [reasons recorded (supra)] the AO appears to have been re-opened the assessment in the light of the new provisions inserted by Finance Act, 2012 viz Sec 56(2)(viib) of the Act, which is effective from 01.04.2013. According to him, apart from the non-applicability of these provisions for relevant AY.2009-10, it is also pertinent to note that even as per the new provisions, share premium over and above the intrinsic value can be taxed only in the hands of the recipient of such excess consideration viz, the entity which issued the shares, and not in the hands of the assessee who is the share subscriber. In other words, such excess consideration can be taxed only in the hands of M/s. Abhikaran Trading Pvt. Ltd. The reasons recorded by the assessing officer indicate escapement of income in the hands of M/s. Abhikaran Trading Pvt. Ltd and not in the hands of the assessee. Further, according to him, reasons recorded must have a link with the formation of the belief that income has escaped assessment. Since the reasons recorded by the assessing officer indicate escapement of income in the hands of M/s. Abhikaran Trading Pvt. Ltd, the same cannot be the basis for initiation of proceeding in the case of the assessee. Thus, the proceedings initiated in the assessee's case are ab-initio invalid and deserve to be struck down. The Ld. DR justifying the action of AO to re-open the assessment, contended that in the year under consideration, the invested Rs.50 Lakhs in shares of M/s. Abhikaran Trading Pvt. Ltd at

a premium of Rs.90 per share which information was the basis for re-opening since this investment/share premium has not been examined because the return of income was processed only u/s 143(1) of the Act and not scrutinized u/s 143(3) of the Act, the AO rightly re-opened and he relied on the decision of the Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd (supra) to justify re-opening of the assessment. In this regard, we note that since the assessee's return of income was only processed u/s 143(1) of the Act, the AO had power to re-open the assessment but only if, he satisfies the fundamental requirement of law to re-open the assessment viz that he should record "*Reasons to believe, escapement of income*". As noted (supra), it is well settled that "*Reasons to believe*" postulate foundation based on information and belief based on reason. Even if, there is foundation based on information is made, there still must be some reason which should warrant the holding of a belief that income chargeable to tax has escaped assessment. The last limb (*reason warrant holding of belief that income chargeable to tax has escaped assessment*) is missing in this case. This is a case wherein we note that at para 2 [*reasons recorded (supra)*] AO notes the information he received about assessee's investment of Rs.50 Lakhs in shares M/s. Abhikaran Trading Pvt. Ltd at premium of Rs.90 per shares. And at para 3, AO states about the assessee receiving share premium which is totally contrary to each other. And exposes the confused/non-application of mind, which vitiates the formation of belief regarding escapement of income and consequent re-opening exercise of the AO. The Ld. AR rightly pointed out that the assessee company had shown investment of

Rs.50,00,000/- in shares of M/s. Frugal Trading Company Pvt. Ltd (now Abhikaran Trading Pvt. Ltd.) at a premium of Rs.90 per shares which was duly shown in the balance-sheet and the share premium given by assessee could not have been brought to tax in the year under consideration i.e. in AY. 2009-10 in the hands of assessee; and even if it can be taxed it can be only in the hands of receipt M/s. Abhikaran Trading Pvt. Ltd. as held by the Hon'ble Bombay High Court in a plethora of cases. In the light of the aforesaid discussion, the reasons recorded by AO does not satisfy the requirement of law, consequently, the AO does not have the jurisdiction to re-open the assessment. Therefore, the notice issued u/s 148 of the Act dated 29.03.2016 is vitiated and is bad in law. And therefore, consequent action of framing the assessment also stands quashed.

7. Before parting, we would like to deal with the contention of Ld. DR who pointed out that the AO in the assessment order has discussed other materials/facts which would show escapement of income. However, we are precluded from considering other material which is not mentioned in the *reasons recorded* because the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. 268 ITR 332 has held that when the validity of re-opening of an assessment is tested, the reasons recorded by AO for re-opening the assessment needs to be tested on a *standalone* basis. Nothing can be added nor anything be deleted from the reasons so recorded by AO. No inference can be allowed to be drawn on the basis of reasons not recorded by him. AO has to speak through the reasons so recorded by him. The reasons

recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide the link between conclusion and evidence. So the reasons recorded by the AO before re-opening as it is, it should be examined to see whether AO had met in the "reasons recorded", the essential condition precedent to do so i.e. "*Reason to believe, escapement of income*". The Ld. DR also relied on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Ltd. (2011) 331 ITR 236 (Bom) which decision is not applicable to the fact of this case because the usurpation of the jurisdiction to re-open itself has been held to be bad in law. Therefore, the assessee succeeds on the legal issue. The other legal issues inter-alia about non-issuance of notice u/s 143(2) of the Act are all left open.

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

Order pronounced in the open court on this 28/02/2024.

Sd/-	**Sd/-**
(PADMAVATHY S)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 28/02/2024.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, 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**