

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "I", MUMBAI  
BEFORE SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
& SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER

**ITA No. 727/Mum/2024 (A.Y.2017-18)**

**Gateway Investments Singapore Pte Ltd.**

1 Maritime Square, # 12-03  
Harbour Front Centre  
Singapore-99 253  
PAN No. : AAECG1565B

..... Appellant

Vs.

**INT Tax Circle 2(3) (2)**

1711, 17<sup>TH</sup> Floor, Air India  
Building, Nariman Point  
Mumbai - 400 021.

..... Respondent

Appellant by : Shri Ajit Jain & Ms. Shikha Mehta  
Respondent by : Shri Anil Sant-Addl.CIT-DR  
Date of hearing : 02/09/2024  
Date of pronouncement : 09/09/2024

**ORDER**

**PER GAGAN GOYAL, A.M:**

This appeal by the assessee is directed against the order of ACIT (Int. Tax)-2(3)(2), Mumbai/DRP dated 11.01.2024 passed u/s. 147 of the Income Tax Act r.w. section 144C(13) of the Act , 1961 (in short 'the Act') for A.Y. 2017-18. The assessee has raised the following grounds of appeal:-

1. *On the facts and circumstances of the case and in law, the learned AO has erred in computing the total income of the appellant at INR 10,57,65,000/- as against NIL income declared by the appellant in Return of Income and consequentially leading to demand payable of INR 8,32,72,140/-.*
2. *On the facts and circumstances of the case and in law, the learned AO / Hon'ble DRP has erred in making an addition of INR 10,57,65,000/- under section 56(2)(viiia) of the Act.*
3. *On the facts and circumstances of the case and in law, the learned AO / Hon'ble DRP has erred in applying the provision of section 56(2) (viiia) of the Act on 'Rights issue' of equity shares.*
4. *On the facts and circumstances of the case and in law, the learned AO / Hon'ble DRP has erred in wrongly applying the provision of section 56(2) (viib) of the Act on the current facts.*
5. *On the facts and circumstances of the case and in law, the learned AO / Hon'ble DRP has erred in applying DCF valuation method as prescribed under section 56(2) (viib) r.w.r. 11UA of the Rules.*
6. *Without prejudice to the above, on the facts and circumstances of the case and in law, the learned AO / Hon'ble DRP has erred in relying upon DCF valuation modified during the assessment proceedings of MALSP and referred to the learned AO of the Appellant.*
7. *On the facts and circumstances of the case and in law, the*

*learned AO has erred in initiation of penalty proceedings under section 270A read with section 274 of the Act.*

2. The assessee has also filed additional grounds of appeal vide letter dated 19.08.2024 filed on 22.08.2024. The additional grounds are reproduced hereunder:

8. On the facts and circumstances of the case and in law, the learned AO has erred in issuing notice u/s. 148A (b) dated 1 June 2022, notice u/s. 148 of the Act dated 28 July 2022 and order u/s. 148A (d) 148 of the Act dated 28 July 2022 without seeking approval of the authority specified as laid down in section 151 (ii) of the Act. Therefore, the entire reassessment proceedings are bad in law and ought to be quashed.

9. On the facts and circumstances of the case and in law, the reopening proceedings are contrary to Section 149(1) (b) 148 of the Act, as no income, which is represented in the form of an 'asset', has escaped assessment. Therefore, the entire reassessment proceedings are bad in law and ought to be quashed.

3. During the course of hearing before us, Shri Ajit Kumar Jain, Ld. AR for the assessee pleaded that the additional grounds of appeal go to the root of the matter and are required to be admitted for due dispensation of substantial justice. Ld. AR submitted that the additional grounds would not require any fresh investigations into the facts. He relied upon the judgment of Hon'ble Apex Court in the case of Jute Corporation of India [187 ITR 688(SC)] and also in the case of National Thermal Power Co. Limited [229 ITR 383 (SC)].

4. We have considered the request of the Ld. AR in relation to admission of additional grounds of appeal. The assessee has challenged the validity of order issued by the Ld. AO u/s. 148A (d) of the Act. The assessee has also challenged the reopening on the grounds that there is no escapement which is represented in the form of an asset. We are of the considered opinion that both the issues are legal issues and do not require any further investigation of the facts and therefore we admit additional grounds of appeal.
  
5. We first take up the facts pertaining to Additional Ground No. 8 as reproduced above. Succinctly put the facts of the case are that the Assessee Company filed its return of income for A.Y. 2017-18 on 28.03.2018 declaring total income of Rs. NIL. The return was processed under section 143(1) of the Act. Subsequently the Ld. AO received the information from ACIT (TP) 3(2) (1) Mumbai (TPO) vide letter dated 01.02.2022. It was communicated by the TPO of Mumbai International Airport Lounge Services P. Limited (MIALSPL) that the assessee company has subscribed to the right issue in MIALSPL at Rs. 13 per share. The TPO has, however, decided the ALP of the shares at Rs. 150 in the case of MIALSPL. Thus, the TPO of MIALSPL recommended that Section 56(2) (viiia) should be invoked in the hands of the assessee and the difference of Rs. 10, 57, 65,000/- may be brought to the tax.
  
6. On the basis of the information received, the AO recorded reasons u/s. 148 of the Act on 25.03.2021 and obtained approval of the Addl. CIT (IT) Range-2(3) Mumbai which is available at page number no. 13-16 of the paper book. Further notice u/s. 148 of the Act was issued by Ld. AO on 30.06.2021 which was handed over by Ld. AR during the courses of hearing before us. However, due to the judgment of

Hon'ble Supreme Court in the case of Ashish Agarwal in Civil Appeal No. 3005/2022 vide order dated 04.05.2022, the Ld. AO issued notice u/s. 148A(b) of the Act to the assessee on 01.06.2022. The same is available at Page No. 11 of the paper book. Subsequently Ld. AO issued an order u/s. 148A (d) of the Act dated 28.07.2022 which is available at page number 2-10 of the paper book. While issuing order u/s. 148A (d) of the Act the Ld. AO obtained approval of the Commissioner of Income Tax (IT)-2 Mumbai on 20.07.2022 which is available at page 10 of the paper book. Ld. AO in Para no. 8 on Page No. 9 of the paper book has recorded as under:

*As discussed in para 6.1 above, the instant case falls under clause (a) of section 149(1) of the Act, prior approval of Specified Authority being the Commissioner of Income Tax (International Taxation)-2 Mumbai has been taken u/s. 151(i) of the Income Tax Act, 1961 vide dated 20.07.2022 (copy of approval is attached herewith) to pass order u/s. 148A (d) of the Act.*

7. Before us Ld. AR of the assessee submitted that the provisions of section 151 of the Act provide 'specified authority' for the purpose section 148 of the Act and section 148A of the Act. The relevant extract of the section is reproduced below:

*"151. Specified authority for the purposes of section 148 and section 148A shall be —*

*(i) Principal Commissioner or Principal Director or Commissioner or Director, if three years or less than three years have elapsed from the end of the*

*relevant assessment year;*

*(ii) Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General, if more than three years have elapsed from the end of the relevant assessment year:].....”*

8. In accordance with the section, if more than three years have elapsed from the end of the relevant assessment year, then approval of Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General must be obtained as mentioned under section 151(ii) of the Act for the purpose of issuing notices or orders under section 148 or section 148A of the Act.

9. Ld. AR pointed out that the appeal of the assessee pertains to A.Y. 2017-18 and three years from the end of the assessment year elapsed on 31.03.2021. Thus, if an order/notice has to be issued u/s. 148A(d)/148 of the Act the approval of Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General must be obtained as mentioned under section 151(ii) of the Act. However, in the case of the assessee the approval was obtained from the Commissioner of Income-tax which is in violation of the provision of section 151(ii) of the Act. In support of the above proposition, Ld. AR placed reliance on the following case laws:

- A. Hon’ble Bombay High Court in case of Siemens Financial Services P. Ltd;
- B. Hon’ble Bombay High Court in case of Adil Aspi Engineer,
- C. Hon’ble Bombay High Court in case of Vodafone Idea Limited,

D. Hon'ble Delhi High Court in case of TWYLIGHT Infrastructure Pvt. Limited  
and

E. Hon'ble Bombay High Court in case of Agnello Oswin Dias

10. Ld. AR took us through the judgment in the case of Siemens Financial Services P. Limited and pointed out that on the same facts, Hon'ble Bombay High Court has quashed the notice u/s. 148 of the Act being invalid as approval was not obtained from the specified authority. Ld. AR further pointed out that while in the case of Siemens the assessment year involved is A.Y. 2016-17, however, in the case of Adil Aspi the assessment years involved are A.Y.s 2016-17 and A.Y. 2017-18. Similarly in the case of TWYLIGHT the assessment years involved are A.Y. 2016-17 and A.Y. 2017-18. Thus the Ld. AR pleaded that the issue involved in case before this bench is fully covered by the judgment of Hon'ble Bombay High Court and the approval obtained by the Ld. AO u/s. 151(i) of the Act is in violation of the Section 151(ii) of the Act. The Ld. AR further submitted that if this issue is decided in his favor then all other grounds will become academic. On the other hand, Ld. DR could not place on record any contrary judgment for our consideration.

11. We have given our thoughtful consideration to the whole issue. We would like to reproduce the relevant paragraphs of the judgment of Hon'ble Bombay High Court in the case of Siemens.

*SPECIFIED AUTHORITY:-*

17. Section 148 provides that before making the assessment, reassessment or recomputation under Section 147 and subject to provisions of Section 148A, the Assessing Officer shall serve on the assessee a notice along with a copy of the order passed, if required under clause (d) of Section 148A. It also says no notice under Section 148 shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice. No such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of Section 148 of the Act to the effect that it is a fit case to issue a notice under Section 148 of the Act.

18. Section 148A provides that the Assessing Officer shall, before issuing any notice under Section 148 ..... (d)- decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under Section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month.....". The explanation below Section 148A says – for the purposes of this Section, specified authority means the specified authority referred to in Section 151.

19. Under Section 149(1) (a) 148 of the Act, no notice under Section 148 shall be issued for the relevant assessment year if three years have elapsed

*from the end of the relevant assessment year, unless the case falls under clause (b). Clause (b) of Section 149(1), provides if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of an asset, (as relevant to this case) which has escaped assessment amounts to or is likely to amount to fifty Lakh rupees or more for that year. Explanation below 4th proviso says that for the purposes of clause (b) of this sub section, “asset” shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.*

*20. Under Section 151 “specified authority” for the purposes of Section 148 and Section 148A 148 of the Act shall be, if three years or less than three years have elapsed from the end of the relevant assessment year, Principal Commissioner or Principal Director or Commissioner or Director. If more than three years have elapsed from the end of the relevant assessment year, then Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General.*

*21 Admittedly, in this case, the approval/sanction for order under Section 148A (d) of the Act has been granted by the Principal Commissioner of Income Tax-8. The entire controversy is, therefore, (a) whether the Principal Commissioner was the specified authority, who could have granted the approval / sanction ?, (b) if not, the effect thereof ?*

22 *in our view, the approval is not valid. Hence, the impugned order passed under Section 148A (d) read with notice issued under Section 148 of the Act dated 31st July 2022 is not valid and has to be quashed and set-aside.*

23 *The first proviso to section 148 of the Act refers to the approval of the specified authority being obtained before a notice under section 148 of the Act can be issued. Explanation 3 to section 148 of the Act specifies that the meaning of the term 'specified authority' as provided for in section 151 of the Act is to apply for the purpose of section 148.*

*Section 148A (d) of the Act also requires the Assessing Officer to pass an order after considering the reply of the assessee as to whether or not it is a fit case to issue a notice under section 148 of the Act and such an order under section 148A (d) of the Act has to be passed with the prior approval of the specified authority. The Explanation to section 148A of the Act also incorporates the meaning of 'specified authority' as provided for in section 151 of the Act.*

24 *As per section 151 of the Act, the 'specified authority' who has to grant his sanction for the purposes of section 148 and section 148A is the Principal Chief Commissioner or Principal Director General or where there is no Principal Chief Commissioner or Principal Director General, the Chief Commissioner or Director General if more than three years have elapsed*

*from the end of the relevant assessment year. The present petition relates to the A.Y. 2016-17, and as the impugned order and impugned notice are issued beyond the period of three years which elapsed on 31st March, 2020 the approval as contemplated in section 151(ii) of the Act would have to be obtained which has not been done by the Assessing Officer. The impugned notice mentions that the prior approval has been taken of the 'Principal Commissioner of Income-tax – 8' ('PCIT-8') which is bad in law as the approval should have been obtained in terms of section 151(ii) and not section 151(i) of the Act and the PCIT-8 cannot be the specified authority as per section 151 of the Act. Further, even in the affidavit-in-reply, the department has accepted that the approval obtained is of the 'Principal Commissioner of Income-tax – 8' and, hence, such an approval would be Bad in law.*

25 *TOLA, enacted on 29th September 2020 and came into force on 31<sup>st</sup> March 2020. It inter alia, provided for a relaxation of certain provisions of the Income-tax Act, 1961. Where any time limit for completion or compliance of an action such as completion of any proceedings or passing of any order or issuance of any notice fell between the period 20th March 2020 to 31st December 2020, the time limit for completion of such action stood extended to 31st March 2021. Thus, TOLA only seeks to extend the period of limitation and does not affect the scope of section 151.*

26 *The Assessing Officer cannot rely on the provisions of TOLA and the notifications issued thereunder as section 151 has been amended by*

*Finance Act, 2021 and the provisions of the amended section would have to be complied with by the Assessing Officer, w.e.f., 1st April 2021. Hence, the Assessing Officer cannot seek to take the shelter of TOLA as a subordinate legislation cannot override any statute enacted by the Parliament. Further, the notification extending the dates from 31st March 2021 till 30th June 2021 cannot apply once the Finance Act, 2021 is in existence. The sanction of the specified authority has to be obtained in accordance with the law existing when the sanction is obtained and, therefore, the sanction is required to be obtained by applying the amended section 151(ii) of the Act and since the sanction has been obtained in terms of section 151(i) of the Act, the impugned order and impugned notice are bad in law and should be quashed and set aside.*

.....

*31 Notwithstanding this, the CBDT has issued instruction No.1 of 2022 contrary to what the courts have held. Even by the finding of the Apex Court in Ashish Agarwal (Supra), only the original notice issued under Section 148 of the Act was converted into a notice deemed to have been issued under Section 148A(b) of the Act. The Apex Court held that the Assessing Officer shall thereafter pass orders in terms of Section 148A (b) in respect of each of the assessee and after following the procedure as required under Section 148 of the Act. Even judgment in Ashish Agarwal (supra) does not anywhere indicate the notices that could be issued for eternity like in this case, on 31st July 2022, would be sanctioned by the authority other than sanctioning authority defined under the Act.*

32 We have to also note that the instructions dated 11th May 2022, on which revenue have relied upon, has no applicability to the facts of this case. These instructions expressly provides that it applies only to the issue of reassessment notice issued by the Assessing Officer during the period beginning 1st April 2020 and ending with 30th June 2021 within the time extended under TOLA and various notifications issued thereunder. Since the impugned notice in this case is dated 31st July 2022, certainly the instructions no.1 of 2022 dated 11th May 2022 shall have no applicability at all. Even for a moment, if we accept Mr. Suresh Kumar's arguments that Apex Court's findings in Ashish Agarwal (Supra) read with time extension provided by TOLA will allow extended reassessment notices to travel back to their original date when such notices were issued and then new Section 149 of the Act is to be applied at that time, the extended reassessment notices are defined under the instructions to be notice issued between 1st April 2021 and ending with 30th June 2021. Therefore, the instructions would not help revenue's case at all.

33 As held by this court in J. M. Financials (Supra), Sidhmicro Equities (P) Ltd. (Supra) and confirmed by the Apex Court that any notice issued without the sanction of the correct sanctioning authority will be invalid. This court in Godrej Industries Limited v. DCIT 16 has held that an assessment can be reopened under section 147 and 148 of the Act only on the jurisdictional preconditions being satisfied strictly. This Court held that sanction of a superior officer to the reasons recorded in terms of section

*151 148 of the Act should be obtained before issuing the notice under section 148 of the Act and all jurisdictional requirements are required to be satisfied cumulatively and even if one of the numerous jurisdictional requirements necessary for issuing the notice under section 148 of the Act are not satisfied, the reopening of an assessment would fail. Hence, in the present facts also since the approval of the specified authority in terms of section 151(ii) of the Act is a jurisdictional requirement and in the absence of complying with this requirement, the reopening of assessment would fail. The Calcutta High Court in K K Agarwal and Sons HUF v. ITO 17 while dealing with the reopening of the assessment for A.Y. 2016-17 held that the approval granted by the PCIT is not in accordance with section 151(ii) of the Act and such approval is not sustainable in law. Hence, the Court held that the show cause notice under section 148A (b) and all subsequent proceedings were not sustainable in law and were quashed.*

12. Let's now turn to the facts of instant case. It is a matter of fact that the Ld. AO has taken the approval of the Commissioner of Income Tax (IT)-2, Mumbai u/s. 151(i) of the Act. It is also clear from the facts of the case that the period of 3 years elapsed on 31.03.2021 and therefore as per Section 151(ii) of the Act approval of Principal Chief Commissioner of Income Tax or Chief Commissioner of Income Tax was required to be obtained. Respectfully following the judgment of Hon'ble Bombay High Court and Hon'ble Delhi High Court, we are of the considered view that there is a clear violation of Section 151(ii) of the Act and therefore the order u/s. 148A (d) of the Act dated 28.07.2022 and consequential notice u/s. 148 of the Act of the same date are not sustainable in law and are liable to be quashed.

Further, consequential draft and final assessment orders are also not sustainable in law since the very basis of the initiation of proceedings is not sustainable in law and therefore both the draft assessment order and final assessment order issued by the Ld. AO pursuant to the notice u/s. 148 of the Act are liable to be quashed.

13. Since we have decided on the issue of validity of the notice u/s. 148 of the Act in favor of the assessee, all other grounds became academic and we are not dealing with the same.

Order pronounced in the open court on 9<sup>th</sup> day of September, 2024.

Sd/-

(RAJ KUMAR CHAUHAN)  
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 09/09/2024

PS

Sd/-

(GAGAN GOYAL)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**