IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

BEFORE PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER &
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1497/Del/2018
(Assessment Year : 2011-12)

ACIT, Central Circle-18, New Delhi **PAN No. AAKCS 1029 E**	Vs.	**Shimmer Developers Pvt. Ltd.** RZ-D-5, Mahavir Enclave, New Delhi – 110 045
(APPELLANT)		(RESPONDENT)

Assessee by	Shri Parash Biswal, Adv. And Shri Deepanshu Mehta, Adv.
Revenue by	Shri Surender Pal, CIT-D.R.

Date of hearing:	03.10.2024
Date of Pronouncement:	21.10.2024

ORDER

PER PRADIP KUMAR KEDIA, AM :

The captioned appeal has been filed at the instance of the Revenue against the First Appellate Order passed by the Commissioner of Income Tax (Appeals) - 30, New Delhi ('CIT(A)' in short) dated 15.12.2017 arising from the assessment order dated 29.12.2016 passed by the Assessing Officer (AO) under Section 143(3) read with section 147 of the Income Tax Act, 1961 ('the Act') concerning A.Y. 2011-12 in question.

2. Briefly stated, the assessee a private limited company engaged in business of real estate *inter alia* holds a property located at Barakhamba Road, New Delhi. A search and seizure operations were carried out under section 132 of the Act on AEZ

Group and it was observed that the assessee company herein owns such property. It was further found by the Revenue authorities that entire shares of the assessee company were transferred at a consideration of Rs.55/share in F.Y. 2010-11 relevant to A.Y. 2011-12 in question. It was also found by the Revenue authorities that the consideration for sale of property is undervalued resulting in undisclosed consideration of about 150 crore. Based on such information made available, the Assessing Officer invoked provision of section 147 r.w.s 148 of the Act and case of the assessee was reopened for reassessment and addition of Rs.150 crore were made to the income / loss declared by the assessee. The income was finally re-assessed at Rs.1,43,46,46,123/-.

3. Aggrieved by the exorbitant additions, the assessee preferred appeal before the CIT(A).

4. The CIT(A) reversed the additions so made by the AO and adjudicated the appeal in favour of the assessee. The CIT(A) however simultaneously invoked the provision of section 150 of the Act and provided certain directions or finding, as considered appropriate in the facts of the case.

5. Aggrieved by the relief granted by the CIT(A), the Revenue is in appeal before the Tribunal.

6. The learned DR supported the action of the AO and relied upon the assessment order.

7. The learned Counsel for the assessee, on the other hand, relied upon the First Appellate Order and submitted that CIT(A) has rightly reversed the action of the AO in the peculiar facts of the case. The learned Counsel pointed out that additions have

been made in the hands of the assessee company in view of the fact that shares of the company were transferred by the existing shareholders to the new shareholders resulting in transfer of property held by the assessee company. The Assessing Officer proceeded to determine the intrinsic value of the share transferred on the basis of fair market value of the property in substitution of the book value giving rise to the whopping difference of about 1,50,00,00,000/-.

7.1 The learned Counsel submitted in the same vain that the moot question is whether the assessee company who has not transferred any property (but the shareholders have transferred the shares of the assessee resulting in transfer of property held by assessee company) can be made liable to pay taxes on the notional capital gains (or business income) on account of revaluation of property held by the assessee company. The learned Counsel submitted that where the assessee company was not engaged in any transfer of property, no income can be deemed in the hands of the assessee company. The learned Counsel pointed out that invocation of section 68 of the Act in the facts of the case is farfetched as there is no credit entry of Rs.1,50,00,00,000/- (being difference between FMV and book value of property) in the books of the assessee. The Assessing Officer had failed to take note of the overriding fact that the ownership of property in question continued remain with the assessee company even though there was transfer of shares of the assessee company and there was a substantive change in shareholding pattern of the company. The change in shareholding does not mean that there is a change in the ownership of the property held by the assessee company.

7.2 The learned Counsel thus observed that the entire thrust of exercising the jurisdiction under section 147 of the Act culminating in reassessment order is therefore, foundationally incorrect and untenable in law. The CIT(A) has rightly set

aside such unfounded action of the Assessing Officer and hence, no interference with the order of the CIT(A) is called for.

8. We have carefully considered the rival submissions and perused the material available on record. Two dominant questions arises in the present case. Firstly, whether a company can be held liable to taxation for Capital Gains/Business Income, when the ownership of shares of company holding the assets, changes hands from one group of shareholders to another, without any transfer of assets by the company *per se.* Secondly, whether the jurisdiction under section 147 of the Act can be invoked to hold assessee company liable to taxation for transfer if its shares by shareholders.

8.1 As noted, the assessee company is engaged in business of real estate. A search and survey operation was carried out in Aerens Group of cases. Certain documents were seized from the premises of the AEZ Group, which indicated to the Revenue that the entire shareholding of the assessee company stood transferred from AEZ Group to Orris Group shareholders being Individuals and Entities against a total consideration of Rs.10,04,50,075/- and that the assessee company held an immovable property located at Barakhamba Road, New Delhi. The Revenue was of the opinion that though the shares were sold for Rs.10,04,50,075/-, the market value of the property in hands of the assessee company was approximately Rs.1,50,00,00,000/-.

8.2 Armed with such information, the AO invoked section 147/148 to ascertain and assess the correct value of property in the hands of the assessee company. The assessee contends that no report from the DVO on the date of recording of reasons for reopening were available. The assessee further contends that the ingredients of section 147 are not met for assumption of jurisdiction to frame the reassessment order. The assessee thus contends that the neither the pre-requisites of section 147 are met to enable the AO to reopen the concluded assessment nor the additions under section 68

of the Act are justified in law in the hands of the assessee company in the absence of any credit entry recorded in the books and having regard to the peculiar facts of the case and having regard to the law governing the field.

8.3 It may be useful to reproduce the reasons recorded by the Assessing Officer while exercising the jurisdiction under section 147 of the Act :

"Reasons for the belief that income has escaped assessment:-

From the documents that were seized from the office of AEZ group and the documents impounded from the office of Orris group it is noticed that property located at 1, Barakhamba Road, New Delhi was owned by M/s Shimmer Developers Pvt. Ltd. The said company had paid up capital of Rs.1,82,63,650/- on 30.05.2010. Entire shares of M/s Shimmer Developers Pvt. Ltd. were transferred at a consideration of Rs.55/- per share in the F.Y. 2010-11 to the following entities as under:

S. No.	Transferor	Transferee	No. of Shares	Consideration (In Rs.)
1.	AEZ Infratech Pvt. Ltd.	Vijay Gupta	164400	9042000
2.	AEZ Infratech Pvt. Ltd.	Amit Gupta	164400	9042000
3.	AEZ Infratech Pvt. Ltd.	Sumit Gupta	146100	8035500
4.	AEZ Infratech Pvt. Ltd.	Kushum Gupta	146100	8035500
5.	AEZ Infratech Pvt. Ltd.	Mamata Gupta	146100	8035500
6.	AEZ Infratech Pvt. Ltd.	Pooja Gupta	146100	8035500
7.	AEZ Infratech Pvt. Ltd.	Amit Gupta (HUF)	164400	9042000
8.	AEZ Infratech Pvt. Ltd.	Vijay Gupta (HUF)	164400	9042000
9.	AEZ Infratech Pvt. Ltd.	Orris Buildcon Pvt. Ltd.	164400	9042000
10	AEZ Infratech Pvt. Ltd.	Orris Constructions Pvt. Ltd.	164400	9042000
11	AEZ Infratech Pvt. Ltd.	Orris Infrastructure Pvt. Ltd.	154400	8492000
12	AEZ Infratech Pvt. Ltd	Orris Towers Pvt. Ltd	91165	5014075
13	Sanjeev J Aeren	Orris Infrastructure Pvt. Ltd.	2500	137500
14	Sunita S. Aeren	Orris Infrastructure Pvt. Ltd.	5000	275000
15	Shrey S. Aeren	Orris Infrastructure Pvt. Ltd.	2500	137500
		TOTAL	1826365	100450075

By virtue of exchange of these share holding of M/s Shimmer Developers Pvt. Ltd. the transferee virtually became owner of property at 1 Barakhamba, Road New Delhi by just paying Rs. Rs. 10,04,50,075/- whereas the market value of property was approx. Rs 150 crores, hence prima facie there is undisclosed consolidation of Rs. 140 Crores (approx.) The said property has been referred to valuation cell Vide a reference dated 06.01.2014. The Valuation report with regards to, Barakhamba Road, New Delhi held by M/s Shimmer Developers Pvt. Ltd. is yet to be received.

The assessee has made a submission during the assessment proceeding of M/s Shimmer Developers Pvt. Ltd. that M/s Shimmer Developers Pvt. Ltd. has not made any transaction of sale of property's and that basically it is only a transaction being executed between the shareholders.

However it may be observed that sold shares were undervalued and should have been sold at a higher premium in view of the property held by M/s Shimmer Developers Pvt. Ltd. located at 1, Barakhamba Road, New Delhi. But the same fact has not been admitted by the assessee which might have resulted in less declared income and loss of revenue to by means of less payment of tax. The property at Barakhamba Road has been referred to Valuation cell to ascertain the market price and necessary remedial action will be taken in the in the hands of Transferor/ Transferee entities centralized with Central Circle 18 after report from DVO is received. Information is being passed on to the Assessing officers for the rest of these concerns/individuals to take remedial action. To ascertain and assess the correct value of the property in the hands of the assessee company proceedings u/s 147 are being initiated by the issuance of notice u/s 147 of the Income tax Act, 1961."

Sd/-

Asstt. Commission of Income tax
Central Circle – 18, Room No.102,
E-2, ARA Center, Jhandewalan Extn.
New Delhi – 110055

8.4 From the perusal of the reasons recorded, it is apparent that what was transferred, was the shares of the assessee company from one set of shareholders to another set of shareholders at certain agreed consideration. The transfer of shares of a company by the shareholders cannot *ipso facto* be treated as transfer of property *per se* held by the separate legal entity i.e. assessee company whose shares are under transfer. The ownership of the property continued to remain vested with the assessee company without any change in status and cannot be regarded as transfer of ownership of the property to the new set of shareholders on transfer of shares by existing shareholders. The shareholders are owners of the shares of the company and

not the owners of the property held by the company. This distinction has not been kept in mind resulting in the allegation of accrual of unreported profits to the extent of Rs.1,50,00,00,000/-.

8.5 The CIT(A) has dealt with all aspects of the matter threadbare while adjudicating the issue in favour of the assessee. The relevant operative para of the order of the CIT(A) may be useful, extracted here for ready reference :

> *"I note that the appellant company M/s Shimmer Developers Private Limited did not sell any immovable property. The appellant company M/s Shimmer Developers Private Limited itself was acquired by a new set of shareholders. As such, the AO's action in holding that M/s Shimmer Developers Private Limited sold immovable property located at 1, Barakhamba Road, New Delhi, is bad and beyond law. The AO's action is based on incorrect knowledge and wrong application of Income Tax Law. This itself makes the assessment proceedings bad. The assessment proceedings and the assessment order is null and void ab inito.*
>
> *6.2 I find that the appellant had duly raised objections to reopening of assessment u/s 147/148 of the Act. The AO noted at pages 2 & 3 of his assessment order, as follows:*
>
> > *"The case was reopened u/s 147 and the notice u/s 148 of IT Act, 1961 dated 01.04.2015. Notice u/s 142(1) cum questionnaire dated 14.12.2015 issued for the hearing 30.12.2015. The assessee has not made compliance to the notice issued u/s 148 of I.T. Act, 1961. In response to this notice the assessee filed a letter dated 17.08.2016, wherein the assessee has requested to supply the reason recorded for the issued of notice u/s 148 and also the assessee has stated:-*
> >
> > *"with request of the above, it is respectfully submitted that the return filed u/s 139 may please be treated as return filed in response to notice u/s 148 of the Income Tax Act, 1961 under protest."*
> >
> > *Notice u/s 142(1) cum questionnaire issued on 25.07.2016 date for compliance was fixed on 09.08.2016. Non attended. The copy of the reasons recorded was sent to the assessee vide letter dated 17.08.2016. On 23.08.2016 the A.R. of the assessee filed the copy of application for adjournment in the dak counter and case was adjourned to 02.09.2016. The assessee filed the detail in this office on 12.09.2016 in the dak counter wherein the assessee has objected the reopening of assessment u/s 148 of the LT. Act. In response to this, vide letter dated 13.10.2016 the assessee was asked to follow:-*
> >
> > *"In connection with the objection raised by the assessee, you are requested to follow the procedure framed by the Apex Court in the case of G.K.N. Drive Shafts India Ltd. vs. ITO (2003) 259 ITR 19. The assessee is required to first furnish the*

complete copy of ITR, profit & loss account, computation of income, balance sheet with annexures alongwith tax audit report as required under the provisions of section 44AB of the I.T. Act. as to unable this office to proceed further in the matter."

And case was adjourned to 20.10.2016 the assessee has not made any compliance." (Emphasis supplied)

I am now discussing, the impropriety of the AO's action in not disposing off the objections of the assessee.

6.3 The appellant has raised a specific challenge on this issue vide write up dated 29.11.2017, at para 1, as follows:

"1. Objections for reopening are not disposed off as per the dictum laid down by the Hon'ble Supreme Court before passing of the reassessment order: In this case, the Appellant filed its objection to the reopening of the case as per the GKN Drivershafts (India) Limited v. ITO (2003) 259 ITR 19 (SC) before passing of the assessment order. The same has not being disposed-off by the AO as per the dictum laid down by the Hon'ble Supreme Court In case of GKN Driveshafts (India) Limited. From the perusal of the said decision, it shall be clear that in the same, the Hon'ble Supreme Court has categorically observed that after supplying the reasons for reopening of the case the assessee is at liberty to file the objections for reopening. When the said objections are filed before the AO, the AO is duty bound to dispose-off the same by way of a speaking order. This is clearly stated by the Hon'ble Supreme Court GKN Driveshafts (supra). It is pertinent to state here that in this case, the appellant duly filed its objections before the AO during the assessment proceedings thereby challenging the initiation of the reassessment proceedings, but however the AO, did not consider the objections, much less disposed off the same. From the perusal of page no. 2 and 3 of the assessment order, it shall be clear that the AO has "recorded therein that in this case, the assessee has objected to the reassessment proceedings. It is needless to state that the AO has completely overlooked the dictum of the Hon'ble Supreme Court, which is binding on the AO under article 141 of the Constitution of India.

1.1 It is stated that the aforesaid principle has been reiterated by the Bombay High Court in a recent judgment dated 3.10.2016 in ITA no. 224 of 2014 in the case of KSS Petron Private Ltd. V/s. The Assistant Commissioner of Income Tax Circle 10 (2), wherein in a similar situation the Hon'ble Bombay High Court has held the entire reassessment proceedings to be invalid, as the AO did not pass an order. disposing the reasons for reopening filed by the assessee. The relevant para of the said judgement is reproduced for kind perusal:

Quote:

7. On further Appeal, the Tribunal passed the impugned order. By the impugned order it held that the Assessing Officer was not justified in finalizing the Assessment, without having first disposed of the objections of the appellant. This impugned order holds the Assessing Officer is obliged to do in terms of the Apex Court's decision in GKN Driveshafts (India) Ltd., vis. ITO 259 ITR 19. In the aforesaid circumstances, the order of the CIT(A) and the Assessing Officer were quashed and set aside. However, after having set aside the orders, it restored the Assessment to the Assessing Officer to pass fresh order after disposing of the objections to reopening notice dated 28th March, 2008, in accordance with law.

8. We note that once the impugned order finds the Assessment Order is without jurisdiction as the law laid down by the Apex Court. in GKN Driveshafts (supra) has not been followed, then there is no reason to restore the issue to the Assessing Officer to pass a further/fresh order. If this is permitted, it would give a licence to the Assessing Officer to pass orders on reopening notice, without jurisdiction (without compliance of the law in accordance with the procedure), yet the only consequence, would be that in appeal, it would be restored to the Assessing Officer for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the Assessee by reviving stale/ old matters.

[Emphasis supplied by us]

Unquote:

The aforesaid observations of the Hon'ble High Court are self explanatory."

I find that the AO has misapplied the directions of Hon'ble Supreme Court as given in the order - GKN Driveshafts (India) Ltd v s. ITO reported as 269 ITR 119 (SC).

The AO has noted in the assessment order that he was required to dispose off the objections against reopening of assessment u/s 147/148 of the Act, only after the appellant furnished complete copy of ITR etc.

I find (as noted by the AO in the assessment order itself), that the appellant had specifically requested that the return filed u/s 139 of the Act, may please be treated as return filed in response to notice u/s 148 of the Act.

6.3.1 Once the appellant submits that the return filed u/s 139 of the Act may be treated as return filed in response to notice u/s 148 of the Act, the liability shifts on the AO to dispose off the objections as have been raised by the assessee. The AO chose not to dispose off the objections on an unacceptable pretext that the appellant had not filed complete copy of ITR etc.

6.3.2 In this connection, I wish to place reliance upon order of Hon'ble Delhi High Court in the case of Haryana Acrylic Manufacturing Co. vs. CIT, reported as 308 ITR 38

(Delhi), date of order 03.11.2008. Para 8 of the aforesaid order is reproduced hereunder:

> *"8. The requirement of supplying reasons for initiating proceedings under section 14" and the requirement of passing a speaking order on objections to such reasons has been spelt out by the Supreme Court in GKN Driveshafts (India) Ltd v ITO[20031 259 ITR 19, wherein the Supreme Court directed as under:-*
>
> *"……..However, we clarify that when a notice under section 148 of the Income-tax Act is issued. the proper course of action for the notice is to file return and if he so desires. to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time On receipt of reasons, the notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years." (p. 964)*
>
> *With regard to these directions given by the Supreme Court as to the proper course of action when a notice under section 148 of the said Act is issued, two points need to be kept in mind The first point is that the notice has to file a return and the second is that, where the notice seeks reasons for the issuance of the notice, the Assessing Officer is bound to supply the reasons within a reasonable time. Thereafter, the notice is entitled to file objections and the Assessing Officer is bound to dispose of the same by a speaking order. In the present case, the notice under section 148 was issued on 29-3-2004 and the petitioner submitted its reply dated 11-5-2004 stating that the return filed earlier be treated as the return filed pursuant to the notice.*
>
> *The petitioner also sought the reasons which had been recorded. However, the reasons were supplied sometime in September 2004 and on 9-11-2004 the petitioner filed its objections Without first disposing of the objections by a speaking order as directed by the Supreme Court in GKN Driveshafts (India) Ltd's case (supra), the Assessing Officer issued a notice under section 143(2) of the said Act on 11-1-2005 fixing the hearing of the case on 19-1-2005 Thereafter, some other proceedings took place before the petitioner filed a writ petition [WP(C) 3195/2005] on 21-2-2005 challenging the very issuance of notice under section 148 of the said Act. This Court issued notice on the petition and stayed further proceedings In the meanwhile, the impugned order dated 2-3-2005 rejecting the objections of the petitioner came to be posed. By an under dated 2-3-200 the earlier writ petition (WPC) 3195/2005] permitted to be withdrawn with liberty to challenge the notice dated 29-3-2004 under section 148 of the said Act as also the impugned order dated 2-3-2005 by a separate perition. It is pursuant to the said order and liberty, that present writ petition has been filed*

Thus, once an assessee gives in writing that the return filed u/s 139 of the Act, be treated as return filed in response to notice u/s 148 of the Act, his duty is over. Thereafter, it is

the duty of the Assessing Officer to dispose off the objection raised, if any, by means of a speaking order. The AO failed (deliberately or otherwise) to dispose off the objections raised by the appellant. By failing to dispose off the objections raised (by means of a speaking order), the AO committed a fatal error. This has made the assessment proceedings bad and not curable.

6.3.3 In this connection, reliance is also placed on the order of High Court of Delhi in the case of CIT -II vs. Multiplex Trading & Industrial Company Limited. reported as 378 ITR 351 (Delhi), date of order 22.9.2015. Paras 32 and 33 of this order are relevant and are reproduced hereinafter:

> *"32. There is yet another safeguard provided to the Assessee which was sought to be side-stepped by the AO. The Supreme Court in the case of GKN Driveshafts (India) Ltd. v. IIO [2003] 259 ITR 19/[2002] 125 Taxman 963 had held that if an Assessee if so desirous, could seek reasons for issuance of notice under Section 148 of the Act and the AO would be bound to furnish the same within a reasonable time. The Court further held that that the noticee would be entitled to file objections against the issuance of the notice and the AO would be bound to dispose of the same by passing a speaking order.*
>
> *33. In the present case, the Assessee filed its objections by a letter dated 12th December, 2008 and requested the AO to drop the proceedings. The Assessee by its letter dated 18th December, 2008 sent in response to another notice, also provided its response in respect of the alleged accomodation entries, which were reported by the Investigation Wing. However, the objections filed by the Assessee were not disposed of by the AO and he proceeded to frame the assessment. This Court in Haryana Acrylic Mfg. Co. (P) Ltd. (supra) had observed that the requirements regarding recording the reasons to believe; communicating the same to the Assessee; permitting the Assessee to file the objections; and passing a speaking order disposing of the objections are all designed to ensure that the AO does not reopen assessments, which have been finalized, on his mere whim and fancy and that he does so only on the basis of lawful reasons. It was further held that a deviation from the directions issued by the Supreme Court in G.K.N Driveshafts (India) Ltd. (supra) would entail nullifying the proceedings. Although the AO is required to provide reasons, receive objections and pass a speaking order thereon, only after the notice under Section 148 of the Act has been issued, these requirements are an integral part of the safeguards which have been inbuilt for ensuring that the assessments are reopened only for lowful ful reasona transparent manner. If the said safeguards are flouted, it would invalidate the exercise of jurisdiction under Section 147 and 148 of the Act."*

6.3.4 Similar issue was before Hon'ble Delhi High Court in the case of Pr. CIT VS Tupperware India (P) Ltd., reported as 236 Taxman 494 (Delhi), date of order 10.08.2015. It has been held in paras 5 till 9, as follows:

> **5. Apparently, the Assessee did raise an objection to the order of the AG reopening the assessment. In the order dated 28th January 2011 allowing the*

Assessee's appeal, the Commissioner of Income Tax (Appeals) CIT (AI) noted that the Assessee had indeed filed objections to the reopening of the assessment by its letter dated 9th August 2006. In the remand report dated 20th December 2010, the AO quoted a paragraph from the order sheet which stated that the aforementioned letter dated 9th August 2006 had been handed over to the AO and that the AO had sought some more information which the Assessee had not filed. The CIT (A) accordingly held that by stating that no objections had been filed, the AO had "very conveniently disregarded the guidelines laid down by the Supreme Court in GKN Driveshafts (India) Ltd.. ITO [2003] 259 ITR 19//2002] 125 Taxman 963. The CIT (A), therefore, agreed with the Assessee that since the procedure laid down by the SC in the aforementioned decision was mandatory, the AO had in fact not disposed of the objections by a speaking order. Nevertheless, the CIT (A) held that the said defect does not make the assessment order illegal and hence it cannot be quashed. It is a technical mistake which is curable.

6. The Court is of the considered view that after having correctly understood the decision of the Supreme Court in GKN Driveshafts (India) Ltd. (supra) as mandatorily requiring the AO to comply with the procedure laid down therem and to dispose of the objections to the reopening order with a speaking order. the CIT (A) committed an error in not quashing the reopening order and the consequent assessment.

7. The CIT (A) in the order dated 28th January 2011 proceeded to examine on merits the challenge by the Assessee (in Ground No.4) to the order of the AO disallowing the management service fee. The CIT (A) agreed with the submissions of the Assessee and held that in view of the Nil withholding certificate issued by the DDIT Circle 1 (2) of the International Tax Division in favour of the Assessee in terms of the Double Taxation Avoidance Agreement (DTAA') between the India and the USA, there was no need for the Assessee to charge tax or withhold tax under Section 195 of the Act. Therefore, on merits the CIT (A) deleted the disallowance of the above deduction. The CIT (A) also noted that the said expenses were not disallowed in AY 2004-05 even when the assessment for the said order so completed with the disallowance of this order.

8. The above findings on merits in Ground 4 by the CIT (A) in favour of the Assessee, was not challenged by the Revenue before the ITAT in ITA No. 2140/Del/2011 for 2003-04. With the Revenue not having challenged the order of the CIT (A) deleting the disallowance made by the AO pursuant to the reopening of the assessment, the challenge by the Revenue only to that portion of the order of the ITAT holding that the reopening was not legally sustainable. renders the issue academic.

9. Consequently, for both the aforementioned reasons, viz., that there was a failure by the AO to comply with the mandatory requirement of disposing of the objections of the Assessee to the reopening in terms of the law explained by the Supreme Court in GKN Driveshafts (India) Ltd. (supra) as well as on account of

the failure of the Revenue to challenge before the ITAT the order of the CIT (A) deleting on merits the disallowance made by the AO of the management service fee consequent upon reopening of the assessment, there appears to be no need to examine the issue projected by the Revenue in this appeal viz., the justification for re-opening the assessment under Section 147/148 of the Act."

6.3.5 This issue again came up before the Hon'ble Delhi High Court in the case of SABH Infrastructure Limited vs. ACIT, reported as 398 ITR 198 (Delhi), date of order 25.09.2017. It has been held in the aforesaid order at paras 19 & 20. as follows:

"19. Before parting with the case, the Court would like to observe that on a routine basis, a large number of writ petitions are filed challenging the reopening of assessments by the Revenue under Sections 147 and 148 of the Act and despite numerous judgments on this issue, the same errors are repeated by the concerned Revenue authorities. In this background, the Court would like the Revenue to adhere to the following guidelines in matters of reopening of assessments:

(i) while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the Assessee. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided;

(ii) the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment - especially in those cases where the first proviso to Section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AD on the same and if so, the conclusions thereof.

(iii) where the reasons make a reference to another document, whether as a letter or report, such document and/ or relevant portions of such report should be enclosed along with the reasons,

(iv) the exercise of considering the Assessee's objections to the reopening of assessment is not a mechanical ritual. It is a quasi- judicial function. The order disposing of the objections should deal with each objection and give proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed.

20. The writ petition is allowed in the above terms. There will be no order as to costs."

6.4 In light of the aforesaid analysis, I adjudicate that the AO committed a fatal error by not disposing off the objection raised by the appellant against reopening of assessment u/s 147/148 of the Act, by means of a speaking order. This also makes the assumption of

jurisdiction by the AO u/s 147 of the Act, and the entire assessment proceedings as bad, illegal and void.

6.5 The appellant has challenged the reasons recorded by the AO to be bad. The appellant has pointed out that the Assessing Officer invoked section 147/148 to ascertain and assess the correct value of the property in the hands of the appellant company, though there was no report from the DVO on the date of reopening of reasons.

6.5.1 The factual aspects raised by the appellant as taken note of in para 6.5 above are correct. On the date of reopening of assessment, the AO did not have report of the DVO, or a quantified value of the property. From the reasons recorded, as reproduced earlier in this order, it cannot be inferred as to what was the basis of estimating the value of property 1, Barakhamba Road, New Delhi, at Rs. 150 crores. The Assessing Officer could have very well estimated the market value of this property at Rs. 1500 crores. This shows the AO's action to be without any justifiable basis.

I find that the reasons for reopening do not make out a case covered u/s 147 of the Act. The reasons do not demonstrate as to how (and by how much) has income chargeable to tax escaped assessment. The provisions of section 147/148 can be invoked only when income chargeable to tax has escaped assessment. Provisions of section 147/148 of the Act, cannot be taken recourse to for assessing and ascertaining the correct market value of property in the hands of the appellant. I have already noted that there has been no sale of immovable property by the appellant company. In fact it is the ownership of the appellant company which has changed hands. This shows that reasons have been recorded without application of mind. In this connection, the appellant has rightly submitted in para 3 of write up dated 29.11.2017, as follows:

> *"3. Cryptic reasons recorded by the AP/Nom application of mind by the AO while recording of the reasons for re-opening: In this case, the reasons for reopening are reproduced in the reassessment order itself. From the perusal of the same, it shall be clear that it is mentioned therein that "however it may be observed that sold shares were undervalued and should have been sold at a higher premium in view of the property held by Mis Shimmer Developers Pvt. Ltd. located at I, Barakhamba Road, New Delhi. But the same fact has not been admitted by the assessee which might have resulted in less declared income and loss of revenue to by means of less payment of tax. The property at Barakhamba Road has been referred to valuation cell to ascertain the market price and necessary remedial action will be taken in the hands of Transferor/Transferee entities centralized with Central Circle-18 after report from DVO is received. Information is being passed on to the Assessing Officers for the rest of these concerns/individuals to take remedial action. To ascertain and assess the correct value of the property in the hands of the assessee company U/s 147 are being initiated by the issuance of notice U/s 147 of the Income Tax Act, 1961. From this, it shall be clear that the reasons recorded itself are cryptic, bad in law and is recorded with a complete non-application of mind. From the reasons, it shall be clear that, at one place the AO records that the share are undervalued and corrective action is desired in the hands of the shareholder. However at the time*

of passing of the reassessment order, the AO makes the entire addition of Rs. 150 crores in the hands of the Appellant, while the reasons recorded specifically stated to take the remedial action are to be taken in the hands of the shareholder. In the reasons itself, the AO records that the matter has been referred to the DVO for ascertaining the fair market value of the property at Barakhamba Road. However this fact is undisputed that till the passing of the assessment order no valuation report was received by the AO of the said property. Further in the reasons itself, the AO has recorded that "whereas the market value of property was approx. Rs. 150 crore", there is no whisper in the entire assessment order, as to from where the said value has been derived by the AO. In this case there is a complete non-application of mind by the AO at the time of recording of the reasons and the same is therefore not sustainable in the eyes of law.

3.1 It is submitted that it is settled law that it is reasons alone which are to be looked into to justify the reopening of proceedings U/s 147 of the Income Tax Act. Reliance in this regard is being placed, among others, on the following judgments: (amna Lal Kabra Vs. ITO 69 ITR 461 (All), Equitable Investment Co. P. Ltd. Vs. ITO 174 ITR 714 (Cal), Baldev Singh Giane Vs. CIT 248 ITR 266 (P&H), Sheo Narain Jaiswal & Others Vs. ITO 176 ITR 352 (369), CIT Vs. Aggarwalla Brothers 189 ITR 786 (Pat), Girdhar Gopal Gulati Vs. UOI 182 Taxation 616 (All), Banswara Syntex Ltd. Vs. ACIT 182 Taxation 584 (Raj). In case the reasons recorded are cryptic the reassessment order passed in pursuance thereof is also bad in law."

The fact of non application of mind by the AO in recording of reasons is established, as detailed above. Non application of mind by the AO in recording of reasons makes the entire assessment proceedings bad as has been laid down in a plethora of rulings, viz.

(i) M/s Sarthak Securities Co. (P) Ltd. vs. ITO, Ward -7(3), as reported 329 ITR 110 (Delhi), date of order 18.10.2010. It has been noted in this order at paras 14 till 24, as follows:

"14. In this context, we think it apt to refer to section 147 of the Act, which reads as under "147. Income escaping assessment If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be for the assessment vear concerned thereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)

***Provided** that where an assessment under sub-section (3) of section 143 or this section has heen made for the relevant assessment vear no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year unless any incom chargeable to tax has escaped assessment for*

such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year

***Provided further** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matters of any appeal, reference or revision. which is chargeable to tax and has escaped assessment.*

Explanation 1-Production before the Assessing Officer of account hooks or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso Explanation 2. For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax:

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return:

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act: or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3 For the purpose of assessment or reassessment under this section, the Axsessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

15. On scanning of the anatomy of the aforesaid provision, it is clear as crystal that the formation of belief is a condition precedent as regards the escapement of the tax pertaining to the assessment year by the Assessing Officer. The Assessing Officer is required to form an opinion before he proceeds to issue a notice. The validity of reasons, which are supposed to sustain the formation of an opinion, is challengeable. The reasons to believe are required to he recorded by the Assessing Officer.

16. In this regard, it is apt to reproduce a passage from N.D. Bhatt, IAC v. IB.M. World Trade Corpn [1995] 216 ITR 811 (Bom.)

> *"It is also well-settled that the reasons for reopening are required to be recorded by the assessing authority before issuing any notice under section 148 by virtue of the provisions of section 148(2) at the relevant time. Only the reason so recorded can be looked at for sustaining or setting aside a notice issued under section 148. In the case of Equitable Investment Co. (P.) Ltd. v. ITO [1988] 174 ITR714, a Division Bench of the Caleratu High Court has held that where a notice issued under section 148 of the Income-tax Act, 1961, after obtaining the sanction of the Commissioner of Income-tax is challenged the only document to be looked into for determining the validity of the notice is the report on the basis of which the sanction of the Commissioner of Income-tax has been obtained. The Income-tax Department cannot rely on any other material apart from the report."*

17. In Hindustan Lever Ltd. v. R.B. Wadkar [2004] 268 ITR 332 (Bom.), a Division Bench has opined thus:-

> *"…….. the reasons are required to be read as they were recorded by the Assessing Officer No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence The reasons recorded must he based on evidence The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by*

the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot he supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the court, on the strength of affidavit or oral submissions advanced" [Emphasis supplied)

18. In Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500 (SC), it has been ruled thus

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification, If the Assessing Officer has couse or justification to know or suppose that income had escaped assessment, it can he said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd v. IITO [1991] 191 ITR 662, for initiation of action under section 147ta) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction" [Emphasis supplied)

19. In this context, we may refer with profit to a Division Bench decision of this Court in SFIL Stock Braking Ltd's case rsupra) wherein the Bench was dealing with the validity of the proceedings under section 147 of the Act. The Bench reproduced the initial issuance of notice and thereafter referred to the reasons for issue of notice under section 148 which was privided to the avessee. Thereafter, the Bench referred to the decisions in CIT Atul Jain [2008 299 ITR 383 (Delhi). Rajesh Jhaveri Stock Brokers (P) Lil's cave (supra), Jay Bharat Marat Lad v. CIT [2009] 180 Taxman 192 (Delhi) and CTT v. Batra Bhatta Co [2008] 174 Taxman 444 (Delhi) and eventually held thus:-

"9 In the present case, we find that the first sentence of the so-called reasons recorded by the Assessing Officer is mere information received from the Deputy Director of Income-tax (Investigation). The second sentence is a direction given by the very sume Deputy Director of become-tax lavestigation) to issue a notice under section 148 and the third sentence agen comprises of a direction given by the Additional Commissioner of Income-tax to initiate proceedings under section 148 in respect of cuses pertaining to the relevant wurd. These three sentences are followed by the following sentence, which is the concluding portion of the so- called reasons

"Thus, I have sufficient information in my possession to issue notice under section 148 in the case of Ms. SFIL Stock Broking Ltd. on the basis of reasons recorded as above" 10. From the above, it is clear that the Assessing Officer referred to the information and the two directions as 'reasons' on the basis of which he was proceeding to issue notice under section 148 We are afraid that these cannot be the reasons for proceeding under section 14 148 of the said Act. The first part is only an information and the second and the third pures of the beginning paragraph of the so-called reasons are mere directions. From the so-called reasons, it is not at all discernible as to whether the Assessing Officer hud applied his mind to the information and independently arrived at a belief that, on the basis of the material which he had before him, income hod escaped assessment Consequently, we find that the Tribunal has arrived at the correct conclusion on facts. The law is well-settled. There is no substantial question of law which arises for our consideration"[Emphasis supplied)

20. On a perusal of the aforesaid decisions, it is graphically clear that once the ingredients of section 14 are fulfilled, the Assessing Officer is competent in law to initiate the proceedings under section 14 To put it differently, the conditions precedent as engrafted in the sand provision are to be satisfied

21. At this juncture, it is profitable to refer to the authority in GNK Driveshafts (India) Lad. v. ITO [2002] 125 Taxman 963 (SC) wherein their Lordships of the Apex Court have held thus

"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income-tax Act is issued the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons the notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order In the instant case as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the

objections if filed by passing a speaking order, before proceeding with the assessment an respect of the above said five assessment years."

22. *In Lovely Exports (P) Lid's case (supra) the Apex Court held thus:-*

"2. Can the amount of share money be regarded as undisclosed income under section 68 of Income-tax Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged hogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment "

23. The obtaining factual matrix has to be tested on the anvil of the aforesaid pronouncement of law. In the case at hand, as is evincible, the Assessing Officer was aware of the existence of four companies with whom the assessee had entered into transaction. Both the orders clearly exposit that the Assessing Officer was made aware of the situation by the investigation wing and there is no mention that these companies are fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicate independent application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income, but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive proof is not germane at this stage but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to apply. As is manifest from the perusal of the supply of reasons and the order of rejection of objections, the names of the companies were available with the authority. Their existence is not disputed. What is mentioned is that these companies were used as conduits. In that view of the matter, the principle laid down in Lovely Exports (P.) Lid's case (supra) gets squarely attracted The same has not been referred to while passing the order of rejection. The assessee in his objections had clearly stated that the companies had bank accounts and payments were made to the assessee-company through banking channel. The identity of the companies was not disputed. Under these circumstances, it would not be appropriate to require the assessee to go through the entire gamut of proceedings. It is totally unwarranted.

24. Resultantly, the initiation of proceedings under section 147 and issuance of notice under section 148 of the Act are hereby quashed. In the facts and circumstances of the case, there shall be no order as to costs."

(ii) Pr. CIT vs. Meenakshi Overseas (P) Ltd., reported as 395 ITR 677 (Delhi), dated of order 26.05.2017. It has been noted in paras 35 till 38, as follows:

"35. In the decision of this Court dated 16th March 2016 in W.P. (C) No. 9659 of 2015 (Rajiv Agarwal) it was emphasized that even in cases where the AO comes across certain unverified information, it is necessary for him to take further steps, make inquiries and garner further material and if such material indicates that income of an Assessee has escaped assessment, form a belief that income of the Assessee has escaped assessment."

36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a borrowed satisfaction. The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.

37. For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law.

38. The question framed is answered in the negative, Le., in favour of the Assessee and against the Revenue. The appeal is, accordingly, dismissed but with no orders as to costs."

6.5.2 In light of the aforesaid analysis also, I hold that reasons recorded failed to demonstrate the reason for arriving at 'reason to believe'.

7. Based on my findings and detailed analysis as in earlier paras, ground No. 1 is adjudicated in favour of the appellant.

8. Ground No. 2 reads as follows:

"That the AO has erred in law in making the addition of Rs. 150 Crores to the income of the appellant U/s 68 of the Act, without considering that the provisions of section 68 of the Act are not satisfied in this case, as there was no credit entry of Rs.150 Crores in the books of the appellant company."

8.1 The appellant submitted at item No. 'B' of submission dated 09.06.2017, as follows:

"B. As regard ground no. 2 pertaining to the addition made U/s 68 of the Act: It is submitted that the AO has erred in law in making the addition of Rs. 150 Crores to the income of the appellant U/s 68 of the Act, without considering that the provisions of section 68 of the Act are not attracted in this case, as there was no

credit entry of Rs. 150 Crores in the books of the appellant company. For ready reference, the relevant part of the provisions of section 68 of the Act are being reproduced herein under:

Quote:

Cash credits.

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfaciorf, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:
Unquote:

From the aforesaid, there will remain no iota of any doubt the provisions of section 68 can be invoked only any sum if found" credited" in the books of the account of an assessee. In this case, there is no such sum which is being found credited in the books of the Appellant. Therefore the AO has clearly erred in making the addition of Rs. 150 crores in the hands of the Appellant as the provisions of section 68 are not attracted in this case. The AO has made the addition merely on surmises and conjectures."

Further, the appellant submitted at para 5 of write up dated 29.11.2017, as follows:

"5. At the outset the earlier submissions made in this regard is reiterated and is not repeated here for the sake of brevity. It is however submitted that the AO in this case has made the addition merely on surmises and conjectures, without any corroborative evidence or enquiry. The provisions of section 68 of the Act are not applicable in this case, as there was no credit entry of Rs. 150 Crores in the books of the appellant company. WITHOUT PREJUDICE, it is stated that in this case the AO has made the addition of Rs. 150 cror-s merely on notional basis which is not allowed as per the provisions of the Income Tax Act. The submission of the appellant is that notional income cannot be taxed and only real income is taxable. In this context it is submitted that theoretical basis for taxing national income has only been applied in cases where taxation of imputed income is expressly provided for in the ITA. On other occasions, courts have uniformly supported the stance that taxation of notional income is impermissible. As highlighted by the Supreme Court in Poona Electric Supply Co. Ltd. v. CIT, (1965) 3 SCR 818, 20, this reasoning postulates that "income-tax is a tax on the real income, ie, the profits arrived at on commercial principles subject to the provisions of the Income-tax Act. Subsequently, the Orissa High Court in CIT v. Prafulla Kumar Malik, AIR 1969 Ori 187, 10 emphasized that income tax is imposed only on "profits he actually receives and not on the profits he might have, but not received. This real accrual of income test was elaborated by the Supreme Court in Godhra Eleciricitu Co. Ltd. v. CIT, (1997) 4 SCC 530, (1997)225 ITR 746. In this

case, a government circular entitled the assessee to recover consumption charges from its customers at enhanced rates. As this order, was the subject matter of protracted litigation, the assessee was unable to recover the enhanced charges. Consequently, it challenged the inclusion of such amount within its assessable income on the ground that no real income had accrued. Reiterating its earlier decision in Morvi Industries Ltd. v. CIT and CIT v. Birla Gtoalior, (1974) 3 SCC 196: (1973) 89 ITR 266 the Court held that extra tax cannot be imposed on hypothetical accrual of income. It was observed that the question of real accrual of income must be considered by taking the probability of realization in a realistic manner. Applying the above principle, courts have consistently refrained from allowing taxation of notional profits and interest that is not expressly allowed in the ITA. This approach was adopted by the Bombay High Court in CIT v. F.L Smidth & Co., (1959) 35 ITR 183 (Born). See also Bipin Chandra Maganlal v. CIT, (1955) 28 ITR 1 (Born).

5.1 In CIT v. Asian Hotels Ltd. (2010)323 ITR 490, (Delhi), the Delhi High Court considered the issue of notional income from interest free loan received by the petitioner in respect of shops given on rent. The AO computed tax of 18 percent per annum on notional interest on the basis that they resulted in benefit to the petitioner. Rejecting this connection, the Court held that the notional income from the interest free loans is not taxable in the absence of specific provision in the ITA

5.2 A similar question of taxation of notional income from interest free loans given by the company to its managing director arose in High:ways Constructions Co. Pvt. Ltd. v. CIT, (199 ITR 702 (Gauhaii). The Gauhati High Court did not uphold the taxation of notional income, noting that, if the assessee had not bargained for interest, or had not. collected interest, we fail to see how the Income Tax authorities can fix a notional interest as due, or collected by the assessee".

Therefore, the judicial approach does not support taxation of notional income, unless provided in the ITA. On those occasions, courts have reiterated that tax can only be imposed on real income accrued to the assessee. When the legal jurisprudence developed in this connection as stated above, is applied to the facts of the instant case, it shall be clear that no real income of Rs. 150 crores has been received by the Appellant and therefore the said amount cannot be made taxable in the hands of the Appellant merely on notional basis without any support to the contrary."

8.2 I have examined the facts at hand and position of law. I find that the essential condition for invoking of section 68 is that a sum should have been found to have been credited in the books of accounts of the assessee. In this case, no amount (with regard to the issue under consideration) has been credited in the books of accounts of M/s Shimmer Developers Private Limited. When no 'sum' stands credited in the books of accounts (be it explained or unexplained), provisions of section 68 cannot be invoked. As such, this ground is adjudicated in favour of the appellant.

9. Ground Nos. 3 & 4 reads as follows:

"3. That the AO has made the addition of Rs. 150 crores merely on surmises and conjectures as there is no document etc on the basis of which the said amount can be substantiated.

4. That the AO has grossly failed to consider that the ownership of the property remained with the Appellant Company even though there was a change in shareholding. A change in shares holding pattern of the company does not mean that there is a change in the ownership of the property held by the Appellant Company. The entire thrust of passing of the reassessment order is therefore incorrect and untenable in law."

9.1 The appellant submitted vide item No. 'C' of write up dated 09.06.2017, as follows:

"C. As regards the addition of Rs. 150 (rores as per ground no. 3 and 4 of the grounds of appeal: In this regard it is submitted that:

1. The AO has grossly failed to consider that the ownership of the property remained with the Appellant Company even though there was a change in shareholding. A change in shares holding pattern of the company does not mean that there is a change in the ownership of the property held by the Appellant Company. The entire thrust of passing of the reassessment order is therefore incorrect and untenable in law. The fact of the matter is that there was no transfer of the property, the same remained with the Appellant Company only. It is submitted that the AO has made the addition of Rs. 150 crores merely on surmises and conjectures.

2. The AO had erred in adding Rs. 150 Crores to the income of the Appellant solely on the basis of surmises and conjectures as the DVO report nowhere states that the market value of the property is Rs. 150 Crores. The fact of the matter, as also evident from the assessment order is that the report was received on 29.12.2016 and the assessment order was also passed on the said date and it is categorically stated in the said report that the Appellant Company has not made any investment in the property for the F.Y 2010-11 and 2011-12. It is clearly mentioned at page no. 7 of the assessment order that "It has been noticed that the ova has not determined the valuation of the property I, Barakhamba Road, New Delhi". (Emphasis Supplied).

3. The AO has proceeded to add Rs. 150 Crores attributable to the aforesaid property on the basis of assumptions and presumptions that there has been a transfer of the property which is incorrect and the proviso of section 2(47) has been invoked by the AO is not sustainable in law. From the bare perusal of the section 2(47) read with the proviso would make in clear that it is not attracted in the nature of the transaction which has been entered by the Appellant. There is no report or any document, much less referred by the AO, which can substantiate the

value of the property of 150 crores attributable to the aforesaid property. The provision of the Act nowhere prescribes that the value on which the shares are transferred should have to be considered as the value of the property, if at all, the AO has considered the share transfer value as the value of the property.
4. It is pertinent to state that the said property has been sold by the Appellant Company in the A.Y 2012-13 for Rs. 46 crores and the same value has been accepted by the department in an order passed V/s 143(3) of the Act in case of the Appellant. The Appellant is enclosing the copy of the assessment order and the copy of the audited balance sheet of the Appellant for substantiating its contention same in the paper book.

5. It is a matter of record that the aforesaid property was purchased by the Appellant vide registered sale deed dated 30th July, 2008 from a partnership firm namely M/s Harilela of Bombay for a total consideration of Rs. 40 crores. The very same property has been sold to a company namely M/s GaursonsInfratech Private Limited vide sale deed dated 26.08.2011 for a consideration of Rs. 46 crores and the same is duly accounted in the books of the Appellant. This is a matter of record. In between, it is not understandable as to from where the AO has determined the value of the property to be Rs, 150 crores. The same is clearly arbitrary and ambiguous.

6. Without prejudice to the above, even if the matter is viewed from another angle, then also no adverse actions can be taken in the case of the Applicant. It is submitted that as per rule 110 and 11UA of the Income Tax Rules the methodology of valuing the fair market value of the shares has been prescribed. The appellant has made the valuation of its shares using the prescribed method and the value of the share after the valuation comes to Rs. 34.15 per share vis-ii-vis the share has been transferred at Rs. 55 per share of the Appellant Company. Hence even the fair market of the shares transferred as prescribed under 11 U and 11UA is less than the value of shares on which the actual transfer is made. Therefore even the AO has no case on this point also."

Further, the appellant submitted at para 6 of submission dated 29.11.2017 as follows:

"6. At the outset the earlier submissions made in this regard is reiterated and is not repeated here for the sake of brevity. It is however briefly submitted that:

6.1 The AO has grossly failed to consider that the ownership of the property remained with the appellant company even though there was a change in the shareholding. A change in shares holding pattern of the company does not mean that there is a change in shares holding pattern of the property held by the Appellant company. The entire thrust of passing of the reassessment order is therefore incorrect and untenable in law. The fact of the matter is that there was no transfer of the property, the same remained with the Appellant Company only. It is submitted that the AO has made the addition of Rs. 150 crores merely on surmises and conjectures.

6.2 The AO had erred in adding Rs. 150 Crores to the income of the Appellant solely on the basis of surmises and conjectures as the DVO report. nowhere states that the market value of the property is Rs.150 Crores. The fact of the matter, as also evident from the assessment order is that the report was received on 29.12.2016 and the assessment order was also passed on the said date and it is categorically stated in the said report that the Appellant Company has not made any investment in the property for the F.Y 2010-11 and 2011-12. It is clearly mentioned at page no. 7 of the assessment order that "It has been noticed that the DVO has not determined the valuation of the property 1, Barakhamba Road, New Delhi Supplied). (Emphasis

6.3 The AO has proceeded to add Rs. 150 Crores attributable to the aforesaid property on the basis of assumptions and presumptions that there has been a been invoked by the AO is not sustainable in law. From the bare perusal of the section 2(47) read with the proviso would make in clear that it is not attracted in the nature of the transaction which has been entered by the Appellant. There is no report or 'any document, much less referred by the AO, which can substantiate the value of the property of 150 crores attributable to the aforesaid property.

6.4 At the cost of repetition, it is stated that the very said property has been sold by the Appellant Company in the A.Y 2012-13 for Rs, 46 crores and the same value has been accepted by the department in an order passed u/s 143(3) of the Act in case of the Appellant.

6.5 The Appellant humbly reiterates the submission made in respect of the valuation report dated 30.10.2017 in respect of the property "I, Barakhamba Road, New Delhi and the same are not repeated herein for the sake of brevity."

9.2 As detailed earlier in this order, both the issues raised (vide ground Nos. 3 & 4) have been discussed in detail. In view of discussion as earlier in this order, ground Nos. 3 & 4 are adjudicated in favour of the appellant.

10. In light of analysis as aforesaid, while adjudicating grounds 1 till 4, I adjudicate the appeal in favour of the appellant. Ab initio the assessment should not have been made in the hands of the appellant M/s Shimmer Developers Private Limited, as it has not sold any immovable asset. The reasons recorded by the AO show complete non application of mind. The AO chose not to dispose off the objections against reopening of assessment u/s 147 of the Act, violating law as laid down by Hon'ble Supreme Court, and as elaborated by the jurisdictional High Court. Further, the AO invoked provisions of section 68 of the Act, even though not a rupee had been credited in the books of M/s Shimmer Developers Private Limited. In final analysis, the appeal stands adjudicated in favour of the appellant.

DIRECTIONS U/S 150 OF THE ACT:

(a) I have held as aforesaid, that the assessee appellant M/s Shimmer Developers Private Limited, did not sell any property. Therefore, on this basis and on the basis of

various other grounds, the action of the AO and the assessment order has been held by me to be bad and void ab inito.

(b) The transaction at hand is one where a set of persons have transferred the company M/s Shimmer Developers Private Limited to a set of buyers. This transaction has taken place by means of transfer of all shares of M/s Shimmer Developers Private Limited. M/s Shimmer Developers Private Limited continued to hold the immovable asset as inventory'

(c) The aforesaid situation, ideally, would trigger provisions of section 2(47)(vi) of the Act. However, the asset in question is being held in the books of M/s Shimmer Developers Private Limited as inventory (i.e. stock in trade). As such, the asset in question cannot be treated to be a capital asset. Accordingly, the transaction in hand does not constitute a transfer of immovable asset. Thus, capital gains, on this ground would not arise in the hands of old shareholders of M/s Shimmer Developers Private Limited.

(d) The transaction at hand, according to me, is one of transfer of shares of M/s Shimmer Developers Private Limited by the old shareholders of M/s Shimmer Developers Private Limited to the new shareholders.

(A) The old shareholders (i.e. members of the seller group) are-

S. No.	*Name of shareholder*	*No. of shares*	*PAN*	*Address*
1.	*Sunita S. Aeren*	*5000*	*AAHPG 0477 C*	*Aerens Estate, Kishangarh, Behind Pocket D-3, Vasant Kunj, New Delhi*
2.	*Sanjeev J.Aeren*	*2500*	*AAGPG 8854 J*	*Aerens Estate, Kishangarh, Behind Pocket D-3, Vasant Kunj, New Delhi*
3.	*Shrey S. Aeren*	*2500*	*AHMPA 6058 K*	*Aerens Estate, Kishangarh, Behind Pocket D-3, Vasant Kunj, New Delhi*
4.	*AEZ Infratech Pvt. Ltd.*	*1816365*	*AACCK 2036 M*	*Aerens Estate, Kishangarh, Behind Pocket D 3, Vasant Kunj, New Delhi 707, Chiranjiv Towers, 43,*

				Nehru Place, New Delhi
	1826365			

(b) The new shareholders (i.e. members of the buyer group) are-

S. No.	Name of Shareholder	No. of shares	PAN	Address
1.	Orris Infrastructure P. Ltd.	164400	AAACO8494P	RZ D-5, Mahavir Enclave, New Delhi - 110048
2.	Vijay Gupta	164400	AANPG8692F	C-3/260, Janakpuri, Delhi - 110048
3.	Amit Gupta	164400	AFJPG 9771 Q	C-3/260, Janakpuri, Delhi - 110048
4.	Sumit Gupta	164400	AFJPG9776K	C-3/260, Janakpuri, Delhi - 110048
5.	Kusum Gupta	164400	AEUPG6063K	C-3/260, Janakpuri, Delhi - 110048
6.	Mamta Gupta	164400	AEPPM7027J	C-3/260, Janakpuri, Delhi - 110048
7.	Pooja Gupta	164400	ACIPJ6841Q	C-3/260, Janakpuri, Delhi - 110048
8.	Amit Gupta (HUF)	164400	AAJHA2598E	C-3/260, Janakpuri, Delhi - 110048
9.	Vijay Gupta (HUF)	164400	AAEHV3208D	C-3/260, Janakpuri, Delhi - 110048
10.	Orris Buildcon P. Ltd.	164400	AABCO0019P	RZ D-5, Mahavir Enclave, New Delhi - 110048
11.	Orris Construction P. Ltd.	164400	AABCO 0016C	RZ-d-5, Mahavir Enclave, New Delhi 110048
12.	Orris Buildcon P. Ltd.	91165	AABCO0017C	RZ-d-5, Mahavir Enclave, New Delhi 110048
		1826365		

(e) Provisions of section 43CA with regard to transfer of assets other than capital assets has come in statute book with effect from 01.04.2014. As such, the same has no applicability for A.Y. 2011-12.

(f) The shares have been transferred @ Rs. 55 per share and the total consideration received by the old set of shareholders was Rs. 10,04,50,075/- (for the entire shareholding). Now, as per DVO's report dated 30.10.2017, the property has been valued at Rs. 96,20,37,500/-. On the basis of this valuation report of the DVO, the Assessing Officers of the persons in the buyer group (i.e. the new shareholders) may be informed to consider taking action u/s 147/148 of the Act, based on their independent satisfaction, after considering and following all procedural and legal requirements. Of course, they will have to arrive at their own independent satisfaction.

(g) The information regarding valuation of property by DVO at Rs. 96,20,34,500/- may be passed on to the AOs of the seller group.

Sd/-
Commissioner of Income Tax (Appeals)-30,
New Delhi"

8.6 On perusal of the facts and the circumstances of the case and also the First Appellate order, it is observed that; (i) the objections to the invocation of jurisdiction under section 147 of the Act was raised by the assessee before the AO. However, such objection were not disposed off resulting in denial of remedy at the preliminary stage to the assessee. (ii) The basis of assumption of value of property at Rs.1,50,00,00,000/- was not available at the time of recorded reasons and therefore, the quantification of alleged escapement by the AO was not possible. (iii). The reasons has not demonstrated as to how the income chargeable to tax as escaped assessment in the hands of the assessee company. In the absence of any sale of immovable property by the assessee company itself, the belief of the AO towards escapement is without any legal foundation. (iv) It is a clear cut case of a non-application of mind by the AO to the gross facts available on record. (v) Section 68 of the Act has no application in so far as assessee' s company is concerned in the absence of any credit entry towards alleged escapement in the books of the assessee company.

9. The CIT(A) has correctly appraised the position of law applicable in the factual matrix of the case and rightly held that jurisdiction assumed under section 147 of the Act in the hands of the assessee company is without legal foundation. The CIT(A) has also rightly held that additions on account of deemed income having regard to alleged higher Fair Mart Value (FMV) of the property held by the assessee company charged under Section 68 of the Act is unsustainable in law as the assessee company has neither transferred any property nor received any consideration or any credit entry in its books. The transfer of shares of the assessee company by one set of shareholders to another set of shareholders does not give rise to any taxable event in the hands of assessee company and has no tax incidence in the hands of the company whose shares were subject matter of transfer. The Hon' ble Karnataka High Court in the case of *Bhoruka Engg. Industries Ltd. vs DCIT (2013) 36 Taxmann.com 82 (Kar)* has observed that sale of company share cannot be treated as sale of immovable property held by that company.

10. We thus have no hesitation to hold in favour of assessee in both counts; firstly, jurisdiction under section 147 of the Act is not available to AO to disturb the taxable income of the assessee merely due to transfer of shares of assessee company by the transferor shareholders to the transferee shareholders and secondly, the assessee company is not susceptible to taxation for transfer of underlying assets of company by the existing shareholders to other shareholders as long as there is no transfer of assets by the holder of the assets i.e. assessee company. We thus see no error in the first appellate order which may call for our interference as pleaded on behalf of the Revenue. We thus see no merit in the appeal of the Revenue.

9. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 21.10.2024.

Sd/-	Sd/-
(ANUBHAV SHARMA)	**(PRADIP KUMAR KEDIA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 21.10.2024

*Priti Yadav, Sr. PS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	10.10.2024
Date on which the typed draft is placed before the dictating Member	11.10.2024
Date on which the approved draft comes to the Sr.PS/PS	14.10.2024
Date on which the fair order is placed before the Dictating Member for Pronouncement	14.10.2024
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	